



12 May 2010

Mr John Hall
Chief Executive Officer
Queensland Competition Authority
Level 19, 12 Creek Street
Brisbane QLD 4001

Dear John

Re: QR Network Pty Ltd 2010 Draft Access Undertaking

Xstrata Coal Queensland Pty Ltd (XCO) does not support the QR Network 2010 Draft Access Undertaking (2010 UT3). QR Network has fundamentally failed to satisfactorily address the major concerns raised in industry's response to the QCA Draft Decision in 2009.

Considered in the context of the proposed privatisation of the QR above and below rail coal business, QR Network's 2010 UT3, represents the most significant change since the introduction of regulation. Added to this is the speed of the regulatory reform process being dictated by the Queensland Government in order to fit the privatisation schedule which has the impact of limiting any discussion and consideration of the significant new regulatory changes to a target deadline of 30 June 2010. Considering QR Network did not submit the new UT3 documentation until 14 April 2010 this has left industry with a truncated and unsatisfactory consultation process. Industry is now heavily dependent on the intervention of the QCA to ensure a workable access undertaking is developed.

The four major areas of concern for XCO are:

1. **Expansion delays.** Track expansions are, in Xstrata's view, running up to two years behind expansions in port capacity at the three major export supply chains in Queensland of Abbot Point, Dalrymple Bay and Gladstone. The 2010 UT3 must establish a commercial framework to ensure a coordinated approach to investment planning across the coal chain, and encourage timely expansion of infrastructure to ensure these delays are not repeated.
2. **Excessive returns.** A primary objective of the regulatory framework is to provide QR Network with a return on capital commensurate with its risk. The 2010 UT3 must not allow QR Network to make investments at returns exceeding the regulated rate. In scenarios where QR Network is unable to invest at the regulated rate due to financing reasons, then the 2010 UT3 must provide a clearly defined process through which QR Network or industry can apply to the QCA to impose access conditions for future infrastructure expansions. This approach enables full accountability of any pricing terms and conditions and enables all users of expanded infrastructure to share in the cost of the expansion via a reference tariff set by the QCA at the beginning of the investment cycle.
3. **Lack of Coal Chain coordination.** Misalignment of coal chain contracts is a major cause of vessel queuing and associated demurrage costs which has a significant adverse affect on the Queensland economy, which can be addressed by ensuring coordination of master-planning and associated coal chain contracts. The industry has put significant work into addressing contractual alignment issues by developing a Long Term Solution (LTS) for the Dalrymple Bay Coal Chain, to which QR Network and all other service providers are a signatory. The 2010 UT3 must bind QR Network to the principles of the LTS to ensure the coal chain misalignment and resulting costs of the current arrangements are not carried forward into future contracts.



4. **Foreclosure of competition.** Commercial arrangements must support a competitive above rail market and deliver mining companies efficient, reliable and timely access to export coal chain infrastructure. Given the propensity for QR Network to push the regulatory boundaries, the 2010 UT3 must deliver clear and defined mechanisms to allow third-party investors to develop competitive alternatives for infrastructure expansion so as to avoid timely and costly negotiation processes with a monopolistic provider seeking to exercise its market power.

As currently drafted, the 2010 UT3 represents a material threat to the bankability of future mining projects which are heavily reliant on continued investment in below rail infrastructure. Specifically, QR Network's 2010 UT3 would allow a privately controlled QR Network to:

- Manage any investment in future network capacity outside of the regulatory framework, effectively removing the existing protections afforded to users of the network by the OCA regulatory regime;
- Frustrate the efforts of third-party investors seeking to install rail capacity where QR Network is not willing to do so;
- Discriminate in its treatment of the above rail operators in favour of DRNational over other rail operators and act to foreclose competition; and/or
- Refuse to participate in critical coal chain reforms being pursued to align track capacity with the capacity of the rest of the supply chain, and providing exporters with certainty of access to supply chain capacity.

These issues are not new to QR Network, industry or the OCA. They have been at the forefront of OCA's consultation with industry for the past two years since QR Network first commenced consultation with industry on its UT3 draft. Over this time industry has continued to suffer significant delays in the provision of expansion infrastructure and a general unwillingness on the part of QR Network to invest in the expansion of its network assets without first taking the negotiation of any proposed new assets outside the regulatory regime.

Decisive action by the OCA is now required to address the concerns of industry. XCO is concerned the OCA's proposal to split its consideration on the 2010 UT3 along the lines of pricing and non-pricing issues will undermine the integrity of its decision making process. There is an inextricable link between the level of return and the risk profile associated with access to, and expansion of, the network assets. Accordingly, XCO recommends the OCA undertake a full investigation of all the issues raised by industry and allow industry an opportunity to concurrently consider recommendations made by the OCA in relation to a total commercial package. Only in this way will the OCA be able to deliver an outcome consistent with a defensible regulatory decision making framework.

Attached is a detailed submission which identifies XCO's key concerns with the 2010 UT3. In appreciation of time pressures XCO has also prepared a full mark up of the 2010 UT3 documentation which can be used to expedite resolution of these issues. Given the truncated consultation timeframes, XCO reserves its rights to make supplementary submissions in the coming weeks on this submission and any other issues (as they arise) associated with the 2010 UT3.

Please do not hesitate to contact my office in relation to this letter.

Sincerely



Neilanda Schmidt
Chief Operating Officer



XCQ Submission to the QCA re QR Network's 2010 UT3 Draft

1. Executive Summary

XCQ does not support the 2010 UT3 in its current form. XCQ recommends the QCA does not approve QR Network's 2010 UT3. XCQ requests the QCA to undertake a full investigation into all of the issues raised by industry and to allow industry an opportunity to consider in detail any recommendations made by the QCA through a subsequent Draft Decision consultation process. Only in this way will the QCA be able to deliver an outcome consistent with a defensible regulatory decision-making framework.

The undertaking proposed by QR Network, particularly when considered in the context of the proposed privatisation of the QR above and below rail coal business, represents the most significant change since the introduction of regulation in 1997. Added to this, is the fact that this process of regulatory reform is occurring at a speed dictated by the Queensland Government to fit into its privatisation schedule. This means any discussion and consideration of the significant new regulatory changes has been limited by a target deadline of 30 June 2010. Considering QR Network did not submit the new UT3 documentation until 14 April 2010 this has left industry with a truncated and unsatisfactory consultation process. Effectively the QCA has provided only 14 business days for industry to respond to the issues raised in QR Network's 1700 page submission. To this extent, XCQ reserves its rights to make supplementary comment in the coming weeks on the issues associated with the 2010 UT3.

Of fundamental concern to XCQ is the failure of QR Network in its 2010 UT3 draft to satisfactorily address the major concerns raised in industry's response to the QCA Draft Decision in 2009. Industry is therefore now heavily dependent on the intervention of the QCA to ensure a workable access undertaking is developed.

The XCQ submission focuses on 6 core concerns arising from the 2010 UT3 as follows. XCQ notes that these concerns are applicable regardless of the final ownership structure of QR Network, including in the event that an industry acquisition of the below rail business was to proceed:

1. The Obligation to Invest, Capacity Expansion and Investment Framework:
 - XCQ is concerned at QR Network's ability under the draft UT3 to effectively invest outside of the regulatory framework to command a monopoly rent, or to otherwise frustrate and limit access to vital infrastructure. It is XCQ's view that QR Network should have an obligation to invest at the regulated WACC. Only in the circumstance that QR Network is unable to raise finance should it be alleviated of its obligation to invest, and it must never be able to prevent a coal producer(s) from reasonably undertaking to fund or directly invest in track infrastructure in its own right.
2. Coal Chain Capacity Management:
 - XCQ is concerned that the proposed UT3 mechanisms do not create reasonable certainty that either existing users of infrastructure or future access seekers will be able to access coal chain capacity with a high degree of commercial certainty. QR Network must embed a set of coal chain principles into the regulatory framework to ensure a robust contracting and capacity management protocol is established to deliver this certainty to users of the network.
3. Revenue Cap Incentive Mechanism:
 - XCQ believes QR Network must be incentivised to deliver on its contracted obligations to provide capacity and to operate the network efficiently. The existing revenue cap methodology keeps QR Network immune from any financial consequences attributable to how it manages capacity throughput in the day to day operations.



4. Standard Access Agreement:
 - The regulatory arrangements cannot be fully considered without reference to the standard access agreement. XCC has several concerns on the limitations in the current SAA and seeks to deliver a balancing of the rights of all the contracting parties.
5. Split Access Agreements:
 - Despite repeated requests, the format of new access agreements has not been provided by QR Network to date. XCC has therefore developed draft access holder and train operator agreements to recommend to the QCA as the basis for further consultation between QR Network and industry. These draft agreements are a fundamental and missing element of the new regulatory regime and they will enable producers to (a) effectively contract to hold access rights directly with QR Network; and (b) enable the conversion of existing access agreements into the new split access agreements which are aligned to industry needs.
6. Segregation Arrangements:
 - XCC remains concerned that issues previously raised in relation to foreclosure of competition and effective ring-fencing of the above and below rail businesses within QR remain unaddressed. In particular, in the context of the privatisation of QR Network, XCC believes that key elements of the regulatory arrangements must be embedded in stronger legislative arrangements such that they cannot be varied or watered down via the access undertaking process over time.

XCC has focused on the above key concerns and has endeavored to both explain why the concern is reasonable, as well as to offer suggested solutions and possible drafting amendments. XCC is also currently developing a full set of UT3 documents marked up with XCC's recommended position on all issues for consideration by the QCA. Given the timing constraints these marked up documents are still in a working draft format and are still to be finalised. It is expected that a full set of working documents will be provided to the QCA by 21 May 2010 to enable time for the QCA to consider the full suite of issues as part of its Draft Decision process. Key documents to be provided include:

- A new Customer Expansion Deed ;
- A new Customer Access Agreement and Train Operator Access Agreement; and
- A marked up 2010 Access Undertaking (Appendix 5).

XCC also endorses the views expressed by the following participants in the consultation process:

- XCC supports the QCA's December 2009 Draft Decision and asks the QCA to ensure that the intent of the Draft Decision will not be compromised during consideration of QR Network's redrafted 2010 UT3.
- XCC supports the QRC's (Queensland Resources Council's) submission on UT3 with respect to pricing matters. Moreover, as a member of the Rail Working Group, XCC has participated in industry's discussions on the 2010 UT3 and these discussions have highlighted industry unity around the main problems with QR Network's 2010 UT3. Importantly, the Rail Working Group is concerned regarding QR Network's ability to stand outside the regulatory framework and demand above regulatory returns for future expansion in rail infrastructure, particularly where the regulated rate of return has been determined by the QCA as being a reasonable commercial rate of return commensurate with the risk profile reflected in both the Access Undertaking and relevant Access Agreements. XCC is working closely with the QRC to identify legislative and regulatory reforms required to counterbalance QR Network's ability to extract monopoly rent from its industry customers.
- XCC is also supportive of Asciano's submission to UT3, and requests the QCA to address all the issues raised by Asciano in order to protect industry and third party providers from QR Network's ability to exercise its monopoly power and discriminate in favour of its own related companies.



2. Obligation to Invest, Capacity Expansion and Investment Framework

XCQ does not support QR Network's proposed Obligation to Invest, Capacity Expansion and Investment Framework because it provides significant scope for QR Network to frustrate and stifle industry's ability to expand the network infrastructure without having to first give in to QR Network's demands for above regulatory returns. For XCQ, this raises a fundamental regulatory question:

Does the 2010 UT3 effectively protect industry from QR Network exercising its monopoly power to deliver monopoly rent?

It is a question that sits at the heart of the Commonwealth Government's National Competition Principles (NCP) Agreement and has not previously been addressed by either the QCA or the ACCC because until now, no Australian regulated business has sought to directly challenge the underlying NCP principles by identifying a monetary threshold on any obligation to invest at the regulatory WACC (Weighted Average Cost of Capital). Effectively, QR Network has placed itself at odds with all the economic regulators across Australia by declaring the regulatory WACC is not sufficient to incentivise it to invest in its own business. Accordingly, QR Network's position raises legislative concerns with the ability of either the QCA Act (*Queensland Competition Authority Act 1997*) or Part IIIA of the TPA (*Trade Practices Act*) to protect customers from monopoly providers of a service intent on exercising monopoly power to obtain above regulatory returns. This flaw in the legislative process has been effectively demonstrated by QR Network's current threat to:

1. withdraw any future investment capital costing greater than \$300 million from any enhancement to its network;
2. require industry to pay an above regulatory WACC for the privilege of having QR Network invest in growing its business but only enable industry to recover a rebate based on the regulated WACC, leading to an explicit wealth transfer from industry to QR Network with the leakage representing a direct efficiency loss to industry and State economic development;
3. require industry to provide the funding for any capital investment where industry believes the WACC uplift is not acceptable, but at the same time require that any such investment be designed, procured, constructed, owned and operated by QR Network in accordance with its legitimate business interests. Whilst at the same time, require industry to pay a 3% margin to QR Network to manage the industry funded infrastructure and again not enable the cost to be recovered through any future rebate model.

XCQ requests the QCA to consider the legislative issues necessary to provide an effective counterbalancing of QR Network's monopoly power and neutralise QR Network's ability to exercise any monopoly power through the regulatory framework which was designed to protect industry from such behavior. XCQ further requests the QCA consult with the ACCC and NCC to consider whether legislative reform of both the QCA Act and Part IIIA of the TPA is required to effectively remove QR Network's ability to make good on its threat in the 2010 UT3. Should the QCA, ACCC or NCC consider legislative reform necessary then XCQ requests all parties provide advice to both the Queensland and Commonwealth Governments for their detailed consideration.

In considering the issues raised by QR Network's proposed Obligation to Invest, Capacity Expansion and Investment Framework, XCQ has outlined below each of the three tiers to the Framework, documented the fundamental concerns with each Framework tier and provided a recommended course of action for consideration by the QCA. This approach is supported by the accompanying marked up UT3 documentation.



2.1 QR Network's \$300 million Obligation to Invest Threshold

XCQ does not believe a monetary threshold is an appropriate threshold test as the determining factor of QR Network's Obligation to Invest because it simply incentivises QR Network to overcome the monetary limit by combining infrastructure projects to ensure the range of projects will collectively always exceed the monetary threshold. The setting of the threshold at such a low level also risks capturing vital refurbishment capital, particularly where network assets reach the end of their useful life. For example, the electric assets in Blackwater and Goonyella are near the end of their economic lives and their replacement will require significant capital investment.

XCQ Recommended Approach

XCQ is of the view that a qualitative threshold needs to be applied to identify assets for which an obligation to invest at the regulated WACC should be undisputed. This qualitative threshold must include all investment capital which expands the network, including:

- Age replacement capital investment;
- Sustaining capital investment (e.g. formation strengthening, passing loops and duplications to facilitate operational improvements);
- Expansion investment (capital to increase the capacity of the coal rail network in order to deliver to new port terminal developments);
- Operationally "enmeshed" capital investment (e.g. capital to strengthen the integrity and robustness of the operational service to current and new customers utilising the service);
- Any capital where it is practically impossible to differentiate usage amongst customers by applying a differential pricing approach between existing customers, new customers and future customers;
- Circumstances where it is not practical to have a third party construct the rail infrastructure.

The only caveat to the above obligation to invest criteria is where QR Network is unable to raise finance for the project at the regulated WACC.

This proposed approach mirrors the approach taken by the privately owned DBCT Holdings in its proposed 2010 Access Undertaking (currently being considered by the QCA). Under this proposed solution, where finance cannot be raised at the regulated WACC, then QR Network or industry could seek a binding ruling from the QCA to endorse the financing terms and conditions required to fund the expansion. The outcome of the QCA binding ruling process could then be applied as the basis for setting of the reference tariff to be established for pricing the new asset within the regulatory asset base. Such an approach will enable the reference tariffs and QR Network's revenue cap model to fully reflect the different financing arrangements or risk mitigation measures required to support the expansion process. It will also enable QR Network to recover the full cost of the market tested finance and associated risk mitigation terms and conditions underpinning the provision of access to the expansion infrastructure.

Case Study 1 – Untangling QR Network's link to a \$300 million obligation to invest

QR Network recently identified the NCL triplication as one of a number of infrastructure projects which requires industry to agree to a rate of return uplift before which QR Network will consider undertaking the investment (refer QR Network's recent Request for Proposals to potential WICET customers (WICET RFP)). QR Network has indicated the construction of a triplicated NCL will deliver an incremental minimum of 50mtpa to the greater Gladstone region. QR Network's most recent cost estimate for the NCL Triplication is approximately \$400 million so it exceeds the \$300 million obligation to invest criteria. Moreover, by defining the project as "required to deliver a significant infrastructure enhancement to a new coal unloading facility", QR Network has justified its ability to seek a rate of return above the regulated Weighted Average Cost of Capital (WACC). Accordingly, QR Network has asked industry to agree to a 15% pre tax WACC rate of return in order to motivate QR Network to



invest in its business. This level of return equates to a nominal post tax vanilla WACC of approximately 13.5% which is around 4% higher than the QCA recommended nominal post tax vanilla WACC of 9.41%.

In contrast to QR Network's position, XCO believes the NCL Triplication represents an example of an "enmeshed" piece of infrastructure investment which the qualitative Obligation To Invest Criteria. Importantly, the NCL services a number of different commodities in a number of different markets and the investment is required to underpin system integrity for all customers (both current and future) utilising the NCL into and out of Gladstone. For this reason, the NCL Triplication is in fact required infrastructure designed to:

- Deliver incremental coal chain capacity to Stage I of the proposed Wiggins Island Coal Export Terminal (WICET);
- Deliver incremental coal chain capacity to the proposed expanded RGTCT (from 68mtpa to 75mtpa);
- Deliver incremental coal chain capacity to the proposed Stage Ib of the proposed WICET;
- Strengthen the delivery of existing coal chain capacity to the RGT Coal terminal (RGTCT);
- Strengthen existing service delivery to non-coal services, namely containerised freight services, bulk non coal freight services (grain and livestock) and long distance passenger services (eg Tilt Train).

Stage I of WICET will only deliver approximately 25mtpa of coal chain capacity. With the WICET RFP, QR Network is effectively requiring the WICET Stage I customers to fund infrastructure which will also be beneficial to existing Blackwater and Moura coal customers, to future coal customers (after the initial investment has been made), and also to existing customers outside the coal industry, including containerised freight traffic, non-coal bulk freight and long distance passenger services. As the majority of these non-coal services are currently operated by QR Network's related companies (i.e. QR Passenger Services, QR Freight and QRNational Coal) it becomes difficult to reconcile QR Network's investment rationale for including those projects in the WICET RFP list of projects requiring an uplift to WACC before which QR Network will invest. It also appears at odds with the Government's claims that a vertically integrated "QRNational" will deliver optimised investment decisions at a cost lower than that possible if QR Network was horizontally separated from its related QR companies.

Operationally, the NCL investment demonstrates the fundamental principle of "enmeshment" whereby the delivery of train control to manage all rail services across the constrained infrastructure requires QR Network to retain the operational flexibility to utilise all elements of the infrastructure in order to maximise the throughput of all rail services. Under this approach QR Network may choose to use the triplicated line to service existing Blackwater coal contracts as well as new coal contracts, thereby leaving the duplicated track free for use by only non-coal train services (thereby largely benefiting its own related companies). QR Network may also choose to delay any future upgrade to the existing duplicated track by sending only empty coal trains on the duplicated track and loaded coal trains along the new triplicated track¹

In this way, it can be seen that QR Network's current investment criteria of a \$300 million cap when combined with its wide customer base and operational role in train control management can be used to its own financial benefit by enabling QR Network greater operational flexibility to defray the costs of its existing asset base as well as favour its own related businesses by lowering their infrastructure costs. Such an outcome is not only at the direct expense of a small number of coal users who are unfortunate enough to require access at the point of the constrained expansion, but it is also at the direct expense of the fundamental tenants of the National Competition Principles Agreement.

2.2 QR Network's definition of significant infrastructure enhancement as the justification for obtaining an above regulatory rate of return

The Central Queensland Coal Chain is at the point of constraint at all export coal terminals, QR Network's definition of significant infrastructure enhancement has the effect of splitting the regulatory asset base between those assets built prior to 2010 and

¹ Currently, the only regulatory protection to which industry can effectively appeal is via cl. 6.3.1 of the AUT. Under this scenario, WICET customers could decline to invest in the triplication and seek access to the constrained section of NCL infrastructure. QR Network would then be obliged to consider the merits of all mutually exclusive access requests on expiry of any of the non-coal freight and passenger services across the NCL. In considering the access requests, QR Network would be obliged to either allocate the available capacity according to the coal queuing framework or to access seekers who will pay the maximum stand alone access charges. Should QR Network choose to allocate capacity to an access seeker who will pay less than the maximum access charge then QR Network must accept a reduced Maximum Revenue Limit for its coal business. Only by taking this approach can the coal industry derive any certainty that QR Network's coal access charges are not being used to subsidise non coal access to the NCL section of the Queensland coal network. The only caveat for industry in seeking to test the pricing framework in this manner is the real risk that QR Network has already foreclosed this option by executing long term non-coal and passenger access agreements to manage its transition to a vertically integrated privatised entity



those assets built after 2010. XCO is not comfortable with the lack of predictability, transparency or accountability on the level of return required by QR Network to invest in post 2010 infrastructure. As indicated earlier, XCO does not believe QR Network's proposal is in accordance with the legislative principles underpinning the QCA Act and the TPA or consistent with the requirements of the AUT (Access Undertaking).

Fundamentally, XCO believes QR Network is in breach of the current AUT with this proposal (as demonstrated by the WICET RFP 4% uplift on the regulatory WACC) and consequently will result in a myriad of untenable economic outcomes, including:

- The level of return required to motivate QR Network to expand the network may change over time. The GAPE investment is rumoured to have required a 13-14% pre tax WACC on all capital to motivate QR Network to invest. In the WICET RFP, QR Network now nominates a 15% pre tax WACC as the level which motivates QR Network to invest. What evidence is there to reassure industry that in 2011 QR Network will not demand a 17% pre tax WACC to motivate it to invest in its business?
- The ability for both existing and subsequent users of the coal network to access the network at prices well below access charges paid by those customers seeking access at the point of constraint. This is because the financial burden of the higher level of return sought by QR Network falls disproportionately on those customers entering at the point of the infrastructure constraint.
 - For example, those customers expanding under WICET Stage 1 will be required to accept QR Network's margin uplift or seek to expand via a user funded agreement (discussed further down). In relation to the margin uplift required to enter the market, the WICET customers will only receive a rebate based on the regulated WACC regardless of the fact they had to pay a margin uplift to QR Network in order to guarantee that the investment be made. Under this approach, there is no ability for the expanding customers to be compensated for the additional costs imposed by QR Network because subsequent users will be able to access the capacity at the regulated WACC.
 - Moreover, under the WICET RFP, any expanding customers to RGCT (incremental 7mtpa) simply has to wait until the WICET Stage 1 expansion has been contracted and/or constructed before they submit access applications for an additional 7mtpa of capacity. Under this scenario the RGCT customers will receive access to capacity at the regulated WACC, WICET Stage 1 users will only receive a rebate based on the regulated WACC and QR Network will pocket a revenue uplift which represents a wealth transfer from a small number of coal customers direct to QR Network.
- QR Network has not given adequate consideration to the level of pricing complexity created by its proposal. Specifically, when questioned how the pricing framework will operate with a WACC uplift, QR Network's response was:
 - It is indifferent to the pricing issues because it has obtained the required WACC uplift sufficient to meet its commercial business objectives.
 - It did not believe there was any need to change the current regulatory pricing framework because all access charges would be determined by reference tariffs set at the regulatory WACC. Any additional revenue attributable to any of the investments would simply sit outside the regulatory framework and reflect a "negotiated commercial outcome" for the business.
 - It did not believe the revenue uplift breaches any of the pricing limits outlined in Part 6 of the AUT. In contrast, XCO is of the view the revenue uplift does in fact breach the pricing limits. For example:
 - Clause 6.1.1 - QR Network will not differentiate between access seekers within the same market (same commodity and same geographic location) except where it reflects differences in the cost and risk to QR providing Access as a result of differences in the type of train services proposed by the relevant access seeker. However, the revenue



uplift proposal differentiates between access seekers in the same market relative to the timing of their entry and whether it coincides with an infrastructure constraint.

- Cl. 6.2.1 - QR Network will not establish access charges for the purpose of preventing or hindering access by a third party access seeker into any market in competition with a QR Network related company. However, the revenue uplift proposal covers infrastructure used by a number of commodities for which a QR Network related company will be the beneficiary via keeping their access charges for non-coal traffic at a minimum.
 - Cl. 6.2.2 - QR network will not set access charges at a level which would otherwise exceed the level that will recover the expected Stand Alone cost of providing access for the train service or the combination of train services over the regulatory period (and after giving consideration to the level of contribution provided by any Government Transport Service Payments towards the relevant rail infrastructure). However, the revenue uplift proposal effectively enables QR Network to recover above stand alone cost. For example, Cl 6.2.4 defines stand alone cost revenue limit and defines the return on assets as "the maximum allowable rate of return expressed in nominal post tax terms as agreed by QR and the QCA or, failing such agreement, as determined by the QCA".
- It did not believe the additional revenue uplift generated by any WACC uplift would constitute an Access Condition under clause 6.5.2 of the AUT because any agreement to the revenue uplift would be the result of commercial negotiation and so would sit outside the regulatory framework. Accordingly, QR Network did not believe that it had any obligation to comply with Clause 6.5.2 for the benefit of any expansion investing customer.

Cl. 6.5.2 stipulates that where access conditions are applied to a First Party(s) and subsequent customers (Subsequent Party(s)) obtain access to that capacity, then the terms of the First Party(s) access conditions must get re-negotiated so that the First Party and the Subsequent Party share the responsibility that was originally borne by the First Party.

Ultimately, QR Network did not believe it had any obligation to make the sharing of the financial burden incurred by the First Party a condition for access to the network by the Subsequent Party and so the First Party is effectively required to bear the full financial risk and cost of the investment. QR Network had not given thought to the pricing anomaly generated by its proposal, specifically, that any Subsequent Party will be able to access the infrastructure at a price lower than that paid by the First Party. Finally, QR Network was indifferent to the pricing anomaly because it occurs between industry customers and is an "industry issue".

- QR Network has hidden behind its "commercial negotiation" framework to legitimise its position of requiring a WACC uplift, thereby making it difficult for industry to unravel the risk reward relationship underpinning any proposed WACC uplift proposal. Quite clearly, the GAPE process and the WICET RFP both demonstrate that QR Network will not provide the full commercial arrangements and risk allocations underpinning a proposed WACC uplift until customers have agreed to accept the commercial principle that a margin uplift is justified. The current secrecy surrounding these commercial negotiations via customer confidentiality agreements serves only to enhance QR Network's monopolistic position in the market and leaves industry exposed to suspicion and gaming amongst different industry users at the risk of compromising the efficient delivery of network and coal chain capacity.

XCC Recommended Approach

Fundamentally, XCC does not support QR Network's WACC uplift proposal because it fails to deliver a simplified and accountable pricing, risk and optimised coal chain investment framework for industry. The QCA must guard against the potential for cross subsidisation between different coal customers where subsequent customers of an infrastructure asset can obtain access to the infrastructure or trigger further enhancements to the asset at a lower access charge than that paid by the original investing customers. Moreover, inter-generational equity amongst industry customers must also form a key element of the QCA's



consideration of an equitable pricing policy to enable the financial risks of any infrastructure investment to be shared by all industry customers across a number of time periods².

XCO does not concede that QR Network's approach is justified whether on the basis of the current access undertaking or on the basis of the revised undertaking which is proposed by QR Network. However, given the views which have been expressed by QR Network, and the fact that these matters have not been resolved to date, XCO considers that the QCA should take steps to ensure that the matter is put beyond doubt through the current access undertaking process.

XCO believes the QCA should address this issue by simply amending clause 6.5.2 to ensure that any approach by QR Network to impose a WACC uplift on any new infrastructure projects can only be progressed through Part 6 of the AUT. The QCA could then insert a new clause 6.5.2 (g) to provide a QCA determination process to enable QR Network or industry to apply to the QCA seeking endorsement of the specific access conditions required to make a project "financeable". The definition of access conditions could then include consideration of a number of financial risk access conditions, including accelerated depreciation, front-ending returns, long term Access Agreements, increased financing charges etc. The new clause 6.5.2(g) would then enable QCA to consider the merits and requirements underpinning the provision of finance and include the outcome of this process in the development of a reference tariff to apply to the infrastructure to be financed. The QCA ruling would be treated as final and binding and would enable QR Network to proceed with the project investment on financing terms which are commercially acceptable.

In developing the QCA arbitration process under clause 6.5.2(g), the QCA will need to consider the confidentiality requirements of QR Network and industry associated with the financing requirements to underpin the development of new infrastructure projects. Potentially any determination process will need to be subject to a "closed hearing" or "classified" arbitration process. However, all parties (potentially subject to confidentiality deeds) must be given the opportunity to provide a submission to the process and receive a copy of the binding ruling. Only in this way can industry be comfortable that any access conditions approved by the QCA directly related to the financing risks associated with the investment.

2.3 QR Network's proposal for customers to fund infrastructure enhancements on "more favourable terms than those proposed by QR Network (having regard to the commercial and regulatory risks)".

QR Network has fundamentally failed to deliver a credible and competitively robust industry alternative to its WACC uplift proposal. Of most concern is the fact that the user funded approach provides significant opportunity for QR Network to frustrate and stifle any attempt by industry to self fund its own expansion pathway. Specific concerns for XCO are:

1. QR Network has created two tiers of investment with priority in queuing and timing being given to those users who accept QR Network's WACC uplift proposal.
2. Coal customers who choose to self-fund are relegated to a different investment path which remains subject to QR Network's willingness to assist based on QR Network's view of requiring "a reasonable balance between QR Network's legitimate business interests and those of the access seeker". Such commercial interests dictate that:
 - QR Network must not be commercially disadvantaged as a consequence of the user-funded infrastructure enhancement. It is not clear if this test relates to a "no worse off economic test" or whether it relates to QR Network remaining in a position where it still obtains the benefit of an uplift WACC margin as a result of being user-funded.

² Interestingly, in 2009 QR Network released a draft pricing principles paper which addresses the pricing issues underpinning the application of common pricing and differential pricing models in the expansion of network infrastructure. XCO wonders why such an informed consideration of the fundamental pricing principles has not been mentioned in QR Network's 2010 UT3.



- User funded infrastructure must attract a margin to compensate QR Network for (a) the costs of managing the piece of infrastructure (including the use of train control) as part of QR Network's Central Queensland coal network; and (b) the risks imposed simply because a user has funded the infrastructure. Interestingly, QR Network estimates the cost of such risks to be in the range of a 3% margin which brings the cost of user funding up to the level of the approximately equivalent to the WACC uplift margin in QR Network's WICET RFP (QR Network's railway manager risk margin effectively recovers the forgone net profit opportunity which would have accrued to QR Network if the user had selected its WACC uplift option).
3. QR Network has not provided a Template User Funding Deed which sets out the standard terms and conditions for adoption of the User Funding Approach. Instead QR Network identifies a number of caveats to its own involvement in the facilitation of a user funded investment, including:
- Provision of security on such terms as QR Network requires;
 - Requirement that QR Network will own and operate any user funded infrastructure;
 - Requirement that QR Network will design, procure and build the user funded infrastructure enhancement.
 - Requirement that the user negotiate with QR Network regarding the nature and extent of the user's involvement in the design, procurement and construction of the user funded infrastructure. Importantly, QR Network only recognises the user's business interests as being construction timeframes and prudency of costs, whilst QR Network identifies its business interests as comprising (a) the design, construction and procurements aspects of the expansion, (b) the safe and reliable operation of the rail expansion, (c) as the ultimate owner and operator of the expansion; and (d) as responsible for the integration of the expansion into the wider network. The careful identification of QR Network's business interests identifies the myriad levels of negotiation required by coal customers prior to even having QR Network consent to undertake a user funded expansion.
 - A rebate arrangement which will only recover the regulated reference tariff for the user funded infrastructure. This is despite the fact that the user may have funded the infrastructure at a higher cost of capital plus paid the 3% margin uplift for QR Network to be the railway manager. Such costs do not appear to be reflected in QR Network's pricing solution based on a regulated WACC.
 - A capacity ownership option which only extends to the contracting of the initial tranche of capacity which means if the user funding the expansion can only use (and/or transfer or on-sell) a portion of the capacity generated from the expansion then the remaining capacity gets "gifted" to QR Network to subsequently sell at the regulated rate. Such an outcome has an adverse impact on the investing customers as they are prevented from ever being able to fully recover the costs incurred in initiating a user funded expansion.
 - The expansion could also create latent capacity which may be unleashed with simple operational improvements at the port or mine load out. Investing customers should be able to retain the full benefit of any latent capacity created by the user expansion to enable it to fully recover the costs and benefits of the investment made, or at least the right to recover its full investment from such users.
 - The expansion will have an economic life in excess of 20 years. There is no discussion of what happens in a future scenario where a user funded expansion is fully contracted but existing demand drops away, who bears the asset stranding risk – QR Network with respect to the older assets, or the user funded expansion because it was the last installment of capacity?



4. QR Network does not provide an easy avenue to facilitate or manage a user funded negotiation process. QR Network places no obligation on itself to:
- Assist and facilitate user funded expansions on or adjacent to its rail infrastructure, including providing access rights to the existing rail corridor;
 - Enable users to manage and control project execution of user funded expansions, including giving industry the ability to appoint its own "owner's engineer" and the right to manage its own feasibility studies, undertake its own competitive procurement tender process for the design and construction of the user funded expansion (in which QR Network could be one of a number of potential tenderers);
 - Outline terms and conditions for capacity rights generated by the user funded expansion, including ownership rights to any capacity generated;
 - Facilitate and participate in different financing models; and
 - Provide a rebate or revenue model for industry investors to ensure subsequent users of the infrastructure contribute to the recovery and return on investment of the cost borne by the funding investor when making the investment decision.

XCCQ Recommended Approach

XCCQ's preference is to require QR Network to undertake all capital projects at the regulated WACC. This represents the optimum outcome for industry because it delivers the lowest net cost expansion path for the industry. However, given QR Network's stated intention of being free to seek a WACC uplift for all significant infrastructure enhancements, XCCQ needs to consider competitive mechanisms to offset QR Network's ability to remove future infrastructure projects from the regulatory process.

Accordingly, XCCQ fully supports the Capacity Expansion and Investment Framework set out by the QRC in its submission to the QCA and the consequential legislative amendments required to the QCA Act to give effect to the process (refer to the QRC 2010 Submission to the QCA). The following flow charts illustrates how the QRC Framework is to be applied.

Figure 1 – QRC Flow Chart on the Industry Preferred Investment Path.

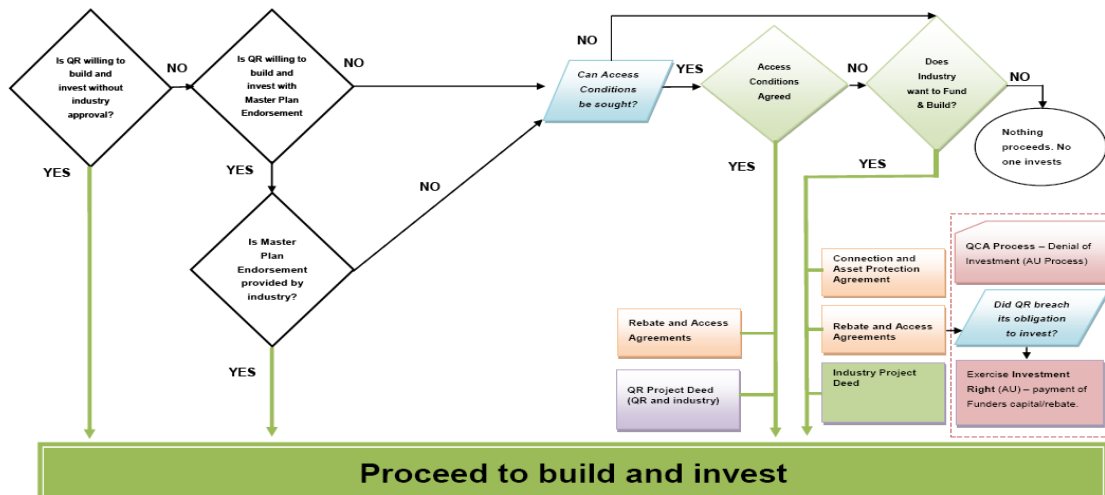
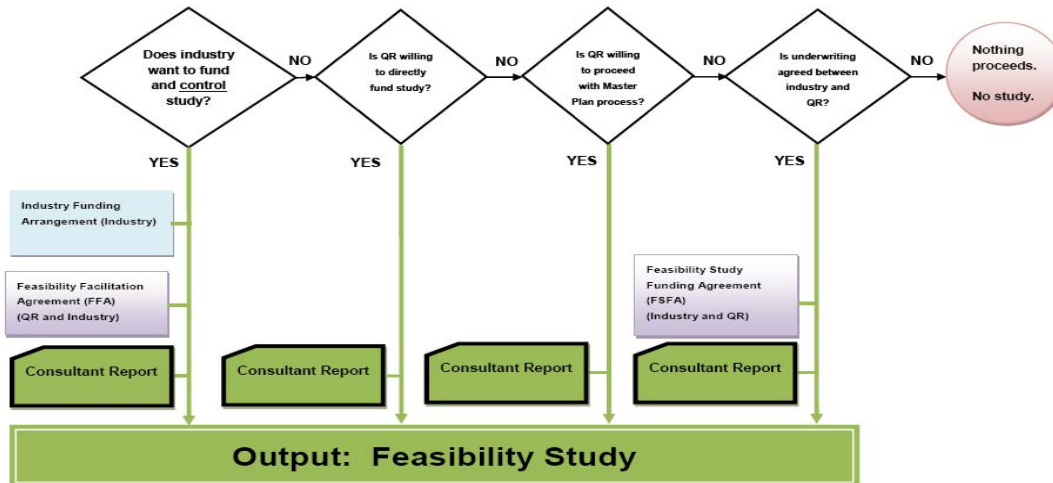


Figure 2 – QRC Flow Chart on the Industry Preferred Feasibility Study Path.



The QCA must ensure that, if it is inclined to accept the QR Network proposal, then industry must be given the opportunity to (a) self fund, (b) design, (c) procure, (d) construct and (e) own the project where it is practically feasible (e.g. infrastructure extensions which connect on to the coal network). To give effect to this proposal, QR Network must develop a Standard Expansion Deed which makes it clear what the terms and conditions are for industry to go down this path and what are the obligations on QR Network to facilitate and assist in this process. Such a Deed should

1. Identify the commercial arrangements and risk allocations which are embedded in an industry funded access agreement and QR Network's obligations to facilitate a coal customer's investment process.
2. Provide industry with the option to control and manage the design, procurement, construction and potentially the ownership of the investment to ensure it is delivered consistent with industry's design specifications, procurement process, construction timeframes and budget allocation. This means QR Network must have clearly defined rights regarding what its "legitimate business interests". This is to ensure QR Network cannot discriminate between its own investment proposal and industry's investment proposal.
3. Provide full and open access to all feasibility studies approved under the CRIMP (Coal Rail Infrastructure Master Plan) process and undertaken to date to support the infrastructure investment for which industry has agreed to, among other things, fund.
4. Provide full and open access to any feasibility study underwritten by industry via a Funding Agreement should industry elect to fund.
5. Clearly set out the QR Network pricing and industry funding mechanisms will be made available to industry, taking into account
 - The tax effectiveness of the mechanisms;
 - How such mechanisms will work in the context of multiple access seekers participating in the process;
 - How QR proposes to avoid the potential for cross subsidisation where subsequent users of the infrastructure can obtain access to the infrastructure or trigger further enhancements at a lower access charge based on the regulated WACC; and



- terms and conditions of capacity rights generated by private expansion projects, including ownership rights to the capacity generated.

In recognition of all of the above issues, XCQ has developed a standard Expansion Protocol Deed for the QCA to consider endorsing as the template for all customer initiated investment projects going forward. A working draft of this Deed will be provided by 21 May 2010 for consideration by the QCA in consultation with industry.

The Expansion Protocol Deed sets out the basic framework under which industry can fund, manage, build and potentially own rail infrastructure projects within the Queensland coal rail network. Specifically, the Deed supports the industry investment process. Key elements include:

- The customer initiating the investment must be allowed access to QR Network information and studies in order to plan the proposed expansion.
- QR Network would be involved in the planning process, but in the event QR Network refuses to approve customer initiated designs, the matter would have to be subject to an independent dispute resolution mechanism to ensure that QR Network is not able to frustrate any such expansions.
- Following the finalisation of the design stage, the deed also recognises that during the process of construction, QR Network will need to have a close involvement in the expansion process as network owner and operator. It would also have to allow the relevant contractor access to its property, staff and certain services which only it is able to provide. Detailed procedures would have to be put in place to ensure that the work undertaken is done so safely and with the minimum impact on the network. Any such work would have to be carried out by a suitably qualified contractor and in accordance with the appropriate QR Network policies.

XCQ recognises that the Expansion Protocol Deed would have to be subject to further development with the involvement of QR Network, but has put this forward as a basis for QCA to use as the draft to be finalised before the current access undertaking is approved, subject to further amendment if necessary on a case by case basis as agreed by the parties, or determined through an independent dispute resolution process.

Case Study 2 – Simplifying industry’s ability to invest in extensions to the Central Queensland coal network

A number of greenfields coal investments are planned to occur in Queensland over the next five years. Such investments involve substantial capital expenditure over a number of years to construct operations that will not only generate economic benefits for coal companies, but will also generate economic benefits for the State and Commonwealth governments through taxation, mining royalties, employment, regional and community development and State economic growth. Accordingly it is important that the regulatory environment within which these projects are developed facilitates this investment process.

Examples of such projects include:

1. The further expansion of the Bowen Basin through to a proposed new export coal terminal at Wiggins Island (WICET) in Gladstone.
2. The further expansion of the central Bowen Basin through to a proposed new coal facility at the Abbott Point Coal Terminal.
3. The opening up of the Galilee Basin in central Queensland via the development of a standard gauge heavy haul railway from the Galilee Basin to a proposed new coal facility at the Abbott Point Coal Terminal.
4. The opening up of the Surat Basin in South West Queensland via the development of a narrow gauge heavy haul railway from the Surat Basin to the proposed WICET and to future coal export terminals potentially developed by industry at different port locations (e.g. XCQ is undertaking feasibility studies on an export coal terminal at Port Alma).
5. The development of the Iron Boomerang project linking (via a standard gauge heavy haul railway) the iron ore coal



deposits in Western Australia to the coal deposits in central Queensland to enable the two way development of steel mill hubs in each State. In Queensland the Iron Boomerang will potentially link in to Moranbah North through to a new coal facility at the Abbott Point Coal Terminal.

All these projects will have inter-facing points with QR Network's rail network, including requirements to connect directly to rail network, criss-cross the rail network (via grade separation or potentially the construction of dual gauge track where feasible), access land owned or leased by QR Network in order to develop the independent rail infrastructure and be given the right to build on QR Network's corridor land where it is the most efficient infrastructure solution either economically or from a land use planning and State Government approval process perspective. For example, as rail infrastructure approaches the east coast and near major population zones (i.e. Gladstone, Rockhampton, Bowen and Mackay) there may be land use planning restrictions on the development of new corridor land.

To facilitate this process the QCA must ensure that QR Network has an obligation (and defined process to manage the implementation of the obligation) to:

1. co-ordinate its responsibility to assist and facilitate private expansion projects on or adjacent to its rail infrastructure, including access rights to the existing rail corridor
2. ensure access to corridor land will be provided wherever reasonably possible, with safety being the only criteria to justify refusal to provide access;
3. take all reasonable steps to facilitate the connection of third party railway infrastructure with the rail network within a reasonable timeframe;
4. facilitate and enable the utilisation of QR Network's corridor land in order to address scarcity of land and any government land use planning requirements when approaching large population zones
5. ensure QR Network has an obligation to not discriminate in any dealings with a third party railway infrastructure provider wanting to connect to the rail network (compared to its dealings with itself regarding the expansion of the rail infrastructure);
6. provide access to QR Network's train control management system to enable the blending of services in the day of operations environment. Such access must be provided on efficient terms with a dispute resolution process; and
7. provide for QR Network to be nominated as the "Railway Manager of Last Resort" to recognise the provision of such a service must be provided on efficient terms and conditions with a dispute resolution process.

The XCO Expansion Deed addresses all the above issues. XCO believes its Deed represents a positive step to enabling industry to fully pursue the feasibility of large scale below rail investment projects over the next 5 years.

2.4 Streamlined Capacity Expansion Pricing Test for Industry

XCO believes that consistent with its streamlined pricing solution to any QR Network proposal to introduce access conditions on different infrastructure assets, the QCA must also provide a similar avenue for industry in situations where:

- The funding of greenfields new rail infrastructure connecting in to the QR Network rail infrastructure requires special consideration to address the unique financial risks faced by industry in investing in the new infrastructure;
- Industry wishes to fund the expansion of QR Network's rail infrastructure after considering the access conditions approved by the QCA through the QCA determination process under clause 6.5.2(g).

Given XCO's preference for pursuing all investment within the bounds of the regulatory process, XCO recommends the QCA adopt the following four step pricing and investment approach to counterbalance QR Network's current and future ability to take all new infrastructure investments outside the regulatory process.

1. Where QR Network seeks an access condition on an infrastructure expansion, then QR Network applies through clause 6.5.2(g) to have the access conditions endorsed by the QCA as the base for the establishment of the reference tariff



underpinning access to that infrastructure. This reference tariff will then form the basis for the calculation of the rebate for any investment to enable the investor to fully recover all financial costs incurred as a result of that investment over time.

2. The QCA will allow industry a first right to undertake the investment via either a user funded expansion or a user owned expansion process at the QCA endorsed reference tariff.
3. If industry is comfortable with allowing QR Network to undertake the investment, then industry will waive its right under (2).
4. As customers subsequently seek to enter the market and access the infrastructure funded by industry, these customers will be given the opportunity to choose their entry strategy and either:
 - a. Pay the reference tariff set at the QCA endorsed reference tariff, with the rebate to be distributed to the original investors; or
 - b. Buy into the contributed asset at the Written Down Value (WDV) of the asset in proportion to the capacity required. This equity is then distributed to the original investors in proportion to their capital and/or tonnage proportion. Purchasing customers then obtain the benefit of the rebate mechanism should other customers elect to pay the reference tariff.

Only with this approach can QR Network be subjected to any competitive discipline in setting its preferred access conditions for any future infrastructure expansion. This approach also results in a blended approach to infrastructure expansion, enables full transparency of pricing terms and conditions and enables all users of expanded infrastructure to share in the cost of the expansion via either an industry funded contribution or a reference tariff set by the QCA at the beginning of the investment cycle.

2.5 Related Provisions

QCA's Criteria for Assessing the Access Conditions proposed by QR Network for an Investment Project

The only caveat to industry's proposed obligation to invest criteria is where QR Network is unable to raise finance for the project at the regulated WACC. However, it is important that when the QCA assesses the potential access conditions required to make an investment project financeable, that QCA consider QR Network on a stand-alone basis and should not take into account financial difficulties elsewhere in the QR group. XCO's understanding is that currently the financing for the QR group is undertaken at the QR Limited level. Therefore, the ability of QR Network to finance a project may be affected by the financial condition of other parts of the business. Where the QR Network business would be able to raise financing as a stand-alone entity, it should remain obliged to undertake expansions, notwithstanding any issues elsewhere in the QR group.

Capacity Resumption Provisions

In the Draft Decision, the QCA specified that with the introduction of 100% Take or Pay (ToP) obligations, QR Network has a right to resume Train Paths contracted by an access holder only under limited circumstances. This is because the financial penalty for not utilising contracted capacity lies with the access holder and not QR Network. The financial penalty incentivises access holders to fully utilise contracted capacity, trade capacity rights where they cannot be used in the short term and relinquish where capacity rights cannot be utilised in the short to long term.

To manage the resumption process, the QCA proposed two qualifying circumstances be applied to underpin any attempt by QR to initiate a resumption process:

1. Where an access holder's train path "is utilised less than 90% over a year"; and
2. Where QR Network can demonstrate that it has "sustained alternative demand for the train path and a contractual expectation of commercial benefit to QR Network from the resumption of the under utilised train paths".



QR Network has changed its drafting of this clause so that (1) and (2) are not necessary pre-conditions to the resumption process. Rather QR Network has drafted the second criteria to read that resumption can be triggered where QR Network can demonstrate a reasonable expectation of sustained alternative demand or an ability to receive a commercial benefit sufficiently material to justify the resumption of the capacity used by the access rights in question.

XCC is concerned the amended wording leaves industry exposed to the risk of resumption, particularly at a time when QR Network is seeking a WACC uplift for the investment or have industry fully fund the cost of the infrastructure expansion. Under both scenarios, an industry customer who has paid an above regulatory return will remain at risk of having subsequent access seekers resume their capacity at the regulatory reference tariff and QR Network does not outline how it will manage the discrepancies when a customer's capacity rights based on the WACC uplift are resumed in favour of a customer who pays only the reference tariff. Will QR Network waive any further right to a WACC uplift for the capacity rights resumed? Will QR Network continue to rebate the customer who funded the infrastructure for so long as those access rights are being utilised by another customer. Will QR Network compensate the customer who funded the infrastructure for all the financial costs incurred in investing in an asset for which its access rights were resumed or partly resumed?

XCC requests the QCA to consider how the resumption clause will be applied equitably in situations where access conditions or a user funding agreement applies such that the resumption triggering customer cannot obtain access at an access charge less than the cost being incurred by the existing access holder.

Railway Manager and Train Control Services

XCC is concerned QR Network will use its role as the Railway Manager and the operational provider of Train Control services to further 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 or "enmeshed" Queensland coal network. It is clear that QR Network believes these services are "competitive" and will set rates determined by commercial negotiation. However, XCC asks the QCA to consider whether these activities satisfy the declaration criteria in the *Queensland Competition Authority Act 1997*, particularly given industry is now being required to fund rail infrastructure adjacent to or in connection with QR Network's infrastructure.

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

XCC requests the QCA consider all areas of the 2010 UT3 where QR Network seeks to obtain a margin for undertaking its core business activities. XCC is concerned that QR Network is compartmentalising individual elements of its business activities and requiring a margin in order to complete tasks for which it is already compensated through System Wide and Regional cost base.

3. Coal Chain Capacity Management

As XCC highlighted earlier, the issue of capacity management is the most important challenge facing industry and it is important that all capacity management processes outlined in the AUT are fully transparent and accountable to provide industry with comfort that such processes are not being misused to the advantage of one individual party. This issue is of fundamental importance to XCC and the QCA must ensure that the AUT adopts the right commercial framework to enable all Queensland coal producers to secure reliable and certain access to whole-of-coal chain capacity.

XCC refers the QCA to the Long-Term Solution Implementation Memorandum, signed in [March] 2010 by all service providers, including QR Network, and all producers involved in the Dalrymple Bay Coal Chain. This LTS agreement establishes a set of principles to be adopted into the commercial and regulatory framework governing future growth and access to coal chain infrastructure in the Goonyella System. Importantly, these principles were recognised by all parties as giving producers and service providers improved certainty of access to supply chain capacity with the objective of improving the ability for the coal



industry to plan and manage investment in mining infrastructure. It is unfortunate that QR Network's proposed drafting of these principles into the AUT is only a minimalist and non-binding effort to progress the reforms that are otherwise widely agreed by the rest of the industry involved in the process.

XCQ also encourages the QCA to obtain a first-hand insight into the reform process in NSW in the Hunter Valley Coal Chain. Here a similar set of supply chain principles has been formally endorsed by the ACCC and is currently being refined and adopted into the commercial agreements governing access to port and track infrastructure. Significant improvements in transparency, coal chain throughput and certainty of access are already being observed in NSW, and this contrasts starkly with the Queensland coal chains.

The following expands on XCQ's views in relation to management of coal chain capacity.

3.1 Network Capacity and Contract Management Principles

The following capacity and contract management principles should be embedded in the AUT Framework.

1. Access to network capacity is based on contracts for coal chain capacity
 - QR Network must undertake capacity analysis and contract for the provision of deliverable system capacity (not standalone capacity) on their network.
 - QR Network must, in cooperation with all infrastructure providers in each supply chain, develop a standardised set of underlying system assumptions that allows for contracting parties to understand all the coal chain assumptions underpinning the purchase of access rights to the network.
 - Each coal producer's access to network capacity is based on contractual entitlements to track and port system capacity components
 - Where a service provider or coal producer's access performance varies from the agreed system assumptions so as to measurably increase or decrease overall coal chain capacity, then the deviation must be borne by those service providers and their customers or by the coal producer directly, adjusted in accordance with fair and equitable principles to avoid disproportionate penalties applying for non-performance in respect of isolated events beyond any party's reasonable control.
 - Contracts for access to capacity will include Access Protocols which provide that:
 - Contracted customers have surety of ongoing access to contracted system capacity
 - New users have a defined process/path by which to gain access to system capacity
 - No new/expanding producer will gain access to system capacity at the expense of contracted existing users, and service providers invest to fulfill contracted obligations.
 - Contracts for access to capacity will provide a mutual obligation:
 - To use or pay for capacity on a long-term basis; and
 - To make system capacity available consistent with contracted volumes based on the common system assumptions.
2. Investment in network infrastructure will be guided by a Coal Supply Chain Master Plan (where established) or the CRIMP (Coal Rail Infrastructure Master Plan)
 - QR Network will proactively manage and develop comprehensive pre-feasibility projects within CRIMP to anticipate the potential expansion and extension options available to meet industry's growing demand needs. This process must be managed such that new/growing producers can access capacity with reasonable notice to QR Network
 - The CRIMP and any Coal Chain Master Plan will evaluate and identify the most efficient investment options (from mine loadpoints to port) for increasing coal chain capacity from a cost and risk perspective
 - A Coal Chain Master Plan (where established) will be the master plan for all system assumptions applying to the coal chain. Where differences exist with CRIMP system assumptions then QR Network must seek to reconcile the differences



and if they are not reconciled then must seek a QCA determination on the system assumption to apply to the CRIMP process.

3. Capital investments in new infrastructure:
 - Must be guided by the Coal Chain Master Plan (where established) or CRIMP; and
 - In the case of track and port infrastructure, must be compulsory where a commercial level of underwriting is offered via long-term take or pay contracts and agreed investment triggers are satisfied.
4. QR Network's rail contracts must provide commercial incentives for efficient planning, execution and consumption of coal chain capacity. The commercial framework must:
 - Ensure each producer and service provider is held accountable for their consumption of coal chain capacity (with reference to the system assumptions); and
 - Provide for capacity to be traded and swapped between participants within the physical constraints of the system and without affecting any organisation not party to the trade.
5. QR Network must plan and operate the network as an integrated link to the coal chain system.
 - QR Network must participate in an independent coal chain planning and live run coordinating body if it has been established any each Coal Chain.
6. Transitions arrangements from current contracting and planning processes must be fair and equitable to all producers.
 - Transition during implementation of the above principles will include equitable treatment of all producers subject to contractual entitlements to capacity and consistent with the above principles.

3.2 Coal Supply Chain Coordination

In Part II of QR Network's 2010 UT3, QR Network has attempted to partially address the need to develop coal supply chain coordination principles for the central Queensland coal region. The process QR Network has proposed does not meet all of XCO's key capacity and contract management principles, and is, however, fundamentally flawed because it does not provide an absolute obligation for QR Network to actually co-ordinate or align contracts for access rights where QR Network deems it to not be in its commercial interests.

XCO's specific concerns with Part II include:

- Part II is non-binding in nature and does not prevent QR Network from contracting capacity based on its own assumptions. Effectively, cl. 11.4 only provides a best endeavours guarantee to the extent QR Network believes it is (a) consistent with its commercial objectives; or (b) does not inhibit, restrict or fetter its ability to exercise to exercise discretion in accordance with the AUT. Such an overarching caveat effectively leaves industry in a position where it has to "hope" that coal supply chain coordination will be consistent with QR Network's commercial objectives.
 - Given QR Network's position on capacity expansion and investment, Part II exposes industry to the future risk that QR Network may identify supply chain coordination as not being consistent with its commercial objectives and seek an above regulatory return or margin in return for its involvement in any coal supply chain coordination process.
- Clause 11.3 provides no incentives to efficiently manage capacity generated through expansion projects. Where an expansion does not practically deliver its stated capacity level it simply results in a pro rata reduction of capacity for those customers who triggered the expansion and no consequential investment obligations or financial consequences for QR Network in having miscalculated the capacity expansion. If QR Network miscalculates the consequential capacity derived from a capacity expansion then it must immediately:



- Initiate the infrastructure projects required to deliver the capacity shortfall as soon as possible. This project is to be given absolute priority by QR Network and expansion customers are to be given project control rights to ensure the project is delivered in a timely manner.
- Adjust its reference tariffs assuming all the capacity had been delivered and receive a reduction in their Revenue Cap threshold proportionate to the capacity not delivered. This reduction in the Maximum Allowable Revenue would continue until QR Network has delivered infrastructure enhancements to correct its capacity shortfall.
- Clause 11.3 also needs to clarify the processes by which QR Network will undertake capacity analysis in support of Conditional Access Holders contract negotiations and provide incentives to guard against the worst case capacity loss position.
 - XCCQ supports the QRC submission which outlines a transparent and accountable process for 'scaling back' which protects the interests of existing access holders and potential Conditional Access Holders (noting that these provisions would only apply to access applications going forward).
- Clause 11.3 could be strengthened to provide more clarity around QR Network's basis for contracting with coal producers to deliver expansion capacity arising out of an investment. The scaling back process outlined by the QRC is fully supported by XCCQ.
- Clause 11.2 needs to strengthen QR Network's obligations to align its CRIMP with a System Master Plan (where established) and to ensure it will coordinate and develop the CRIMP process aligned with any system master plan to optimise investment decisions and ensure any investment creates deliverable system capacity;

XCCQ also recommends the QCA require QR Network to participate in coal chain planning groups in respect of each of the coal chains. A planning group is currently being set up in respect of the Dalrymple Bay Coal Chain, but other coal chains would also benefit from co-ordinated planning. The role of these coal chain planning groups should be to bring all participants in the coal chain together to undertake coal chain planning activities such as:

- agreement of system assumptions to be used as the basis for contracting of coal chain capacity by each of the infrastructure providers;
- advance planning and assessment of capacity;
- co-ordination of coal chain expansions, with a view to aligning capacity expansions in all elements of the coal chain so far as possible;
- co-ordination of coal chain maintenance, with a view to aligning maintenance periods for all coal chain infrastructure and minimise periods of unavailability;
- tracking and monitoring performance, and assigning all losses of coal chain capacity to a root cause, so far as it is possible to do so; and
- ensuring that the daily planning process is carried out in accordance with the contracted entitlements of all access holders within the system.

3.3 Capacity Performance and Accountability Mechanism

XCCQ believes the Capacity Management provisions in the 2010 UT3 need to include a mechanism through which system capacity can be managed and the performance and consumption of system capacity be reported, with any adjustments to contracted access rights being made. In the Hunter Valley, these issues have been considered in some detail and the outcome has largely



been accepted by ARTC. Accordingly, XCQ has marked up the 2010 UT3 to reflect the capacity performance accountability regime being considered in the Hunter Valley. XCQ asks the QCA to use this framework as the basis for further consultation with industry.

Whilst not dictating what that process should look like, the following elements must be included in the development of an operational performance regime:

1. Performance measurement criteria to extract efficient capacity utilisation from the existing infrastructure;
2. A measurement and performance reporting framework;
3. Incentives and penalties for over and under performance, which would be recognised through the revenue cap to provide QR Network with a genuine incentive to over-perform;
4. Capacity segregation into two tranches (a) what the network can deliver in isolation of the coal chain; and (b) what the network can deliver taking into account the coal chain system assumptions. Key outcome being that network capacity must be sold only on a deliverable coal chain capacity basis;
5. Obligations with respect to availability and provision of train paths on an origin destination basis, and for access holders to receive a rebate if paths are not made available in accordance with their contracted entitlement; and
6. Protections to ensure QR Network considers optimised rail based solutions based on coal chain performance criteria.

XCQ advocates that the performance measurement process must apply both in respect of access holders (whether operators or coal producers) and QR Network as the rail provider. In respect of access holders, XCQ believes the proposed Access Holder Agreement should contain details of the expected performance of the train services which are to be operated in accordance with the Agreement. The expected performance criteria should be based on, and consistent with, the agreed system assumptions which apply in respect of the relevant coal chain. These details would include sectional running times. Where there is a persistent non-compliance with these requirements, it must be within the power of QR Network to adjust the access rights which are held by a particular access holder to reflect adverse impacts on coal chain performance.

Moreover, where under performance by an access holder or its appointed operator impacts on other users through cancellations or other losses of coal chain capacity, XCQ's view is that there should be some measure of accountability for the responsible access holder. While XCQ is of the view that this should be limited to a capped impact in respect of each incident or event which occurs (for example, an access holder could be exposed to the possibility of losing up to two train paths per individual incident) so as to avoid having catastrophic effects on individual access holders in the event of major incidents, XCQ believes that some level of accountability is necessary in order to incentivise best practice from access holders and rail operators.

Where QR Network does not deliver the contracted paths which it has committed to make available, XCQ's view is that this should result in a rebate against the Take or Pay charges which would otherwise be due. The level of capacity that QR Network provides must be assessed on the basis of the number of rail paths which are actually available to run coal trains which comply with the performance levels assumed as part of the agreed system assumptions in respect of the relevant coal network. For example, QR Network's performance should not be assessed on the basis of the theoretical provision of paths which are only 3 minutes apart when the system assumptions recognise coal trains require a greater headway in order for the system to be able to function. QR Network should also be held accountable for providing a sufficient level of paths to take account of the planned level of maintenance, resumptions occurring in respect of capacity expansions and unplanned losses in the relevant coal chain, as determined by the agreed system assumptions in respect of the coal chain, and also taking account of all non-coal traffic on the network.



3.4 QR Network's Obligations regarding Capacity Analysis and Contract Negotiation

Currently QR Network is not accountable for the development of its capacity analysis in order to determine (a) whether capacity can be provided for an access application; (b) whether new access contracts can be executed based on planned infrastructure enhancements; (c) whether the execution of new contracts will impact on existing contracted capacity rights; and (d) whether the capacity planned to be derived from an expansion is actually delivered. These are significant risk issues for industry and it is not clear if QR Network gives appropriate consideration to the financial risks borne by industry in the event there are flaws in the capacity analysis feeding into its contract decision making process. This significant risk exposure underpins XCC's push for the implementation of XCC's capacity and contract management principles.

To address these risk issues, XCC would like QR Network to have specific obligations to:

- Undertake comprehensive capacity analysis when considering access applications and ensure the capacity analysis is based on clearly identified system assumptions (and use the agreed system assumptions where they have been established) and the expected closure requirements to deliver planned rail maintenance services (e.g. required ballast cleaning works) and infrastructure investment projects.
- Allow access seekers and existing access holder to obtain the results of this capacity analysis in order to understand the robustness of the analysis and the risk issues for industry underpinning this analysis.
- Enable access seekers and access holders have the ability to audit the capacity analysis and provide, where necessary, advice to QR Network in respect of their specific concerns.
- Require QR Network to consider any issues raised by access seekers and access holders, and address those issues in a formal response back to those customers.
- Allow an access seeker and/or existing access holder to trigger the dispute mechanisms within the AUT where it considers QR Network has failed to address or remedy its concerns.
- Allow for expert determination with respect to any disputes on the capacity analysis between existing access holders and access seekers.
- Ensure the sale of any new access rights subject to expansion projects are explicitly conditional on the expansion project delivering capacity to the level contracted by the Conditional Access Holders.

Given the existing contractual obligations on QR Network to deliver contracted tonnes, XCC believes it is beholden on QR Network to ensure that the sale of new access rights will not adversely impact on the access rights currently contracted.

3.5 The CRIMP Process

XCC has reservations on the effectiveness of the CRIMP process to manage and implement industry's expectations for coordinated and timely coal chain investment processes. Such reservations have been exacerbated by the ability for QR Network to simply remove approved projects from the CRIMP process and re-badge them as significant infrastructure enhancements requiring a WACC uplift. Two examples stand out for XCC:

- In late 2009 QR Network removed a number of Blackwater duplications from its UT3 list of infrastructure projects. These projects had previously been approved by industry under the CRIMP voting process on the basis they were required to



deliver system robustness to the Blackwater System. As part of the April WICET RFP QR Network has now nominated those same projects as being required to deliver tonnes through to WICET.

- The status of feasibility studies associated with the \$68 million approval (2008 Master plan approval) for Moura Link, NCL upgrade and WICT loop have proven difficult to understand because the scope is unclear and QR are not bound by any timeframes. Whilst approved in 2008, none of these projects have progressed to the feasibility stage of QR Network's investment cycle.

XCQ would like the QCA to require QR Network to clearly outline in the CRIMP process the investment stage gate process it follows to develop a project from pre-feasibility through to delivery. Currently the CRIMP is silent on these staged processes and this has left industry with no recourse to ensure QR Network manages these processes in a timely and efficient manner. Accordingly, XCQ would like the QCA to provide greater detail around QR Network's responsibility for delivery to the CRIMP, including mechanisms to require QR Network to:

1. Provide greater detail and clarity on the investment projects proposed for customer vote, the project's alignment (both infrastructure and timing) with other coal chain investments and the level of sustainable coal chain capacity that will be created through the investment.
2. Adhere to clear timeframes and deliverables when undertaking CRIMP feasibility studies.
3. Establish an industry control group (comprising those parties eligible to vote in the CRIMP) which QR Network must report to at each stage of the project, including
 - giving industry a joint decision making role throughout the critical value add stages of a feasibility study, design, procurement process and construction program.
 - Actively engaging with industry regarding project timing and the commercial terms and conditions to enable industry to accelerate the investment when it is required to align to other coal chain and mine investments.
 - Provide greater clarity on QR Network's investment stage gate process and the associated timeframes reasonably required to take a project from a feasibility study through to project execution.
4. Provide an opportunity for industry to contract out key elements of the CRIMP process where QR Network has indicated it is unwilling to undertake the CRIMP approved expansion project within the standard regulatory process.
5. Where the CRIMP process does not proceed in respect of a capacity expansion, this would trigger the right for industry to undertake the project. If this is the case, the QR Network must be obliged to provide the benefit of feasibility studies and other planning work which has already been produced as part of the planning process by QR Network.

4. Reference Tariffs

XCQ supports the positions put by the QRC in respect of its Reference Tariff submission.

1. QR Network's arguments for an increase to its regulated WACC must be opposed. Clearly, QR Network's regulatory framework has insulated QR Network from any market risk volatility since the introduction of regulation and has enabled QR Network to have relatively stable earnings despite wide swings in coal prices over this time. This risk position has been further strengthened in the 2010 UT3 by QR Network's acceptance of the additional regulatory protections proposed by the QCA (e.g. accelerated depreciation).



2. QR Network's opening asset value should be written down to the extent that the network's condition is found to be adversely impacted due to past maintenance or operational practices that have resulted in significant deterioration of the network assets over a sustained period of time.
3. QR Network's allowable revenues must provide for the reasonable costs of undertaking the required maintenance over the regulatory period and must be structured to provide appropriate incentives to ensure maintenance of the network is undertaken at an efficient cost and in a manner which is sustainable over time.
4. The identification of capital in QR Network's allowable revenues must be informed by the voting outcome of the CRIMP process over the last two years. Accordingly, XCCQ requests that the QCA put back into the capital indicator the value of the Blackwater duplications which industry has previously endorsed. XCCQ also requests that the QCA undertake a full reconciliation of the capital projects put forward by QR Network. The explanations put forward by QR Network in the 2010 UT3 do not appear consistent with the actual movements in the capital indicator between the 2007 and 2010 submissions.

5. Revenue Cap Incentive Mechanisms

QR Network's failure to deliver to its contractual obligations is XCCQ's number one concern. XCCQ cannot wait 12 months to design and develop an effective incentive mechanism. XCCQ believes any incentive mechanism must be simple to implement and direct in its impact so that QR Network can be immediately incentivised to align its commercial business incentives with the commercial objectives of industry. XCCQ also believes any incentive mechanism must be flexible enough to change over time (and potentially with each regulatory process) to reflect key issues of concern to industry within that regulatory period.

XCCQ suggests the following incentive mechanism to incentivise QR Network to deliver on its contractual commitments within the UT3 regulatory period:

Where failure to deliver contract capacity is due to a QR Network Cause then a coal customer is relieved of its obligations to pay Take or Pay and the Maximum Allowable Revenue is proportionally reduced so there is no ability for QR Network to recover from industry any under-recovery of Take or Pay attributable to a QR Network Cause.

Under the Standard Access Agreement, failure to deliver due to a QR Network Cause is an excusal from Take or Pay. However, this provision does not serve as a financial incentive on QR Network to operationally perform against its contract as QR Network can effectively apply via the revenue cap provisions to recover any under-recovery of revenue due to a QR Network Cause (not attributable to breach or negligence) from all of industry via a socialised cost adjustment. This has the following adverse impacts on industry:

- It means QR Network does not bear any financial penalty through continual under-performance against contract
- It means that QR Network is not incentivised to ensure capacity analysis undertaken prior to contract is robust enough to guarantee delivery against contract;
- It means QR Network is not incentivised to invest in the network to guarantee delivery against contract where shortfalls occur between capacity contracted and capacity delivered; and
- It encourages the current positions put by QR Network (eg WICET RFP) that it has to be financially incentivised above the regulated WACC (via a margin uplift) in order to be motivated to invest in its own business.

XCCQ believes QR Network's complacency about whether or not to invest in its business and the constant pushing of the regulatory boundaries has, to a large extent, been encouraged by the revenue cap mechanism wherein QR Network is insulated from any market risk volatility and guaranteed its maximum allowable revenue regardless of operational performance.



Accordingly, XCQ rejects both the existing 10% system test revenue cap provision in the current AUT and QR Network's proposal to adjust the system test to 4% on the basis that it does not financially incentivise QR Network to deliver to its contracted tonnes. XCQ recommends amending Schedule F, Clause 3.3.1(a)(ii) to read QR Network Cause (instead of QR Network's breach or negligence) in recognition that QR Network must have a strict financial incentive to turn around the existing and historical performance of not delivering to its contractual obligations.

This need to financially incentivise QR Network to perform to contract within the Revenue Cap Mechanism has not been questioned in the Hunter Valley where ARTC is required to rebate to its customer's any take or pay payments made for which services were not delivered due to an ARTC Cause. Under the ARTC AUT, the Revenue Cap is the ceiling threshold of the maximum allowable revenue but it is not guaranteed to be delivered if ARTC fail to perform over the period. This ensures that when ARTC contracts with its customers it ensures sufficient capacity exists to deliver against contract.

XCQ is not averse to an incentive arrangement which encourages QR Network to over-deliver against contract via the provision of ad hoc services to manage any excess demand which exists in the market. However, XCQ does not believe QR Network's operations and systems are sophisticated enough to manage capacity within a coal chain framework with effective contractual alignment and coal chain capacity management principles. Any future consideration of an incentive regime must have as a precondition an industry accepted, reliable and accurate coal chain capacity management and accountability framework (similar to that being put in place in the Hunter Valley).

Given the stage of the current AUT negotiations combined with the industry discussions on whole-of-coal chain performance and accountability mechanisms, XCQ believes the QCA needs to focus first on QR Network's delivery against contract tonnes. Once this outcome has been achieved then XCQ will support the industry and QCA turning their minds to an incentive framework which rewards QR Network over and above the revenue cap. Whether this outcome is 12 months away or a UT4 issue will be dependent on QR Network being able to demonstrate to industry and the QCA that it has been able to consistently deliver on its contractual obligations.

6. Standard Access Agreement

XCQ has given detailed consideration to the Standard Access Agreement (SAA). This is because in any consultation XCQ has with QR Network (e.g. in relation to both the coal network and the Mt Isa network), QR Network has tended to resist all issues on the basis that the SAA is a QCA endorsed document. Accordingly, XCQ believes it needs to highlight for the QCA the key concerns it has with the SAA to ensure they are considered and updated. Only in this way can future negotiation for access reflect a balancing of the rights of access seekers with those of QR Network.

6.1 Cl. 3 of the SAA (Consequential Loss, Access Interface Deed, section 55 Property Law Act)

QR NETWORK has included a new clause 3 in the SAA, which is essentially aimed at covering off any risk that QR Network might be liable to a Customer for "Consequential Loss". The SAA already governs the exclusion of consequential loss, but only between the rail operator and QR Network, as the customer is not privy to the SAA. However, as between the rail operator and QR Network, all losses that might be suffered by a mine customer would be regarded as consequential losses of the rail operator (as Third Party losses) and not be claimable by the rail operator against QR Network under the SAA. QR Network's motivation for seeking these amendments is presumably based on a concern that a customer with no direct contractual relationship with QR Network might make a claim in tort for consequential losses suffered by that customer which arise from a breach of the SAA by QR Network.

The proposed amendments seek to exclude liability to the Customer for consequential loss by making the agreement subject to and conditional upon the rail operator notifying QR Network that it has elected to proceed with either the AID Option or the Section 55 Option under the Property Law Act 1974 (Qld). The AID Option requires the rail operator to procure the customer to execute and deliver an AID in the form of the Schedule to the SAA so as to ensure that neither party is liable to the other for Consequential



Loss. If the Operator has elected for the AID Option and the AID has not been returned to QR Network within 1 month after execution of the Access Agreement, the Access Agreement will terminate. The Section 55 Option requires that the Rail Haulage Agreement (which the Operator and Customer sign) includes provisions relating to non-liability of the Railway Manager to the Customer for Consequential Loss. The clause goes on to state that the exclusion of liability for Consequential Loss of the Railway Manager is for the purposes of section 55(B) and is capable of being accepted by the Railway Manager such that it is able to enforce this limitation in a court of law.

XCC Recommended Position

The pro forma AID is stated to be for the purposes of recording that neither party will be liable to the other for Consequential Loss. It is noted that only QR Network and the customer are to be parties to this document. In XCC's experience, an AID is a tripartite agreement which also has the rail operator as a party. QR Network's draft AID scheduled to the SAA is extremely brief and deals only with Consequential Loss.

The AID is a new concept in the SAA, but as a matter of practice is something XCC has put in place for some recent agreements to provide a contractual relationship between QR Network and XCC. To date, entry into an AID has been for the benefit of both XCC and QR Network, as it has enabled:

- XCC to directly take action, under contract, against QR Network for breaches and negligence relating to Access. This approach overcame the problem of the previous SAA which prevented the Operator from claiming against QR Network the Customer's losses for breach as part of the Operator's loss (and then passing those damages on to the Customer), as all such losses were regarded as excluded consequential losses of the Operator under the SAA; and
- QR Network to place limits on its liability, that otherwise under a potential claim in tort would remain uncapped.

Under such arrangements, a customer is still prevented from recovering its own "consequential losses" (e.g. lost profits from a sale of coal), but can claim its direct losses – most likely to consist of any increased costs the customer incurs in sourcing alternate transport of the coal. (Note that in some cases, there will be no practically available alternate transport if rail access is unavailable, meaning the ability for the customer to recover direct losses may in fact be illusory).

If QR Network was to expose itself to liability for the Customer's consequential losses, XCC expects QR Network to argue this is a significant additional risk exposure and would need to be reflected in an increased access charge. However, in both options QR Network proposed under the new clause 3, QR Network is getting the benefit of the contractual exclusion of any possible claim a customer could make for its consequential loss. This is without the customer obtaining any benefit – i.e. an ability to at least claim its direct losses against QR Network under contract.

XCC is of the view that if QCA is minded to accept the proposal as put by QR Network, it must be combined with QR Network also (through the AID or otherwise), providing the customer with a contractual right to recover damages from QR Network for at least the Customer's direct losses caused by QR Network's breach of the Access Agreement. Under this approach, it is then reasonable that any such liability of QR Network to the customer, when combined with any claims the Operator might make, would be subject to the SAA specified caps on the liability of QR Network, with the rationale being that if these caps were to increase, QR Network would argue for an increased price based on an increased risk exposure.

6.2 More Detailed Comments on the SAA

XCC has summarised its comments on the SAA and provided them at **Appendix 1**. The important element XCC is seeking to introduce into the SAA is the establishment of reciprocal rights for industry and a balancing of the risk profile between all parties.



7. Split Access Agreements – Access Holder and Train Operator Agreements

Rather than wait for QR Network to develop draft template split agreements for industry consideration, XCQ has developed its preferred model for QCA and industry consultation. Given industry first requested these documents in early 2008, XCQ is not prepared to wait any longer for this new form of contract process to commence. Accordingly, XCQ requests that the QCA amend the provisions in the 2010 UT3 and recommend that the process for developing the new form of contract be coordinated by the QCA according to a 3-6 month consultation process based on the XCQ draft documents. A working draft of the template split agreements will be provided by 21 May 2010 for consideration by the QCA in consultation with industry.

In the current AUT, QR Network has a Standard AHA (Access Holder Agreement) which allows the access rights in relation to coal haulage train services to be held by the owner of the relevant coal mine. To date, no coal producer has entered into such an arrangement. This is in contrast to the situation in New South Wales, where the industry is fully engaged in the development of a form of ARTC access agreement which will allow the coal industry to hold access rights directly.

One important reason for the coal industry not utilising this ability to hold access rights directly results from the structure which QR Network has utilised for its AHA. This structure diverges substantially from that envisaged by ARTC. Under the terms of QR Network's AHA, there is no direct contractual relationship between QR Network as network owner and the rail operators which will actually operate trains on the network, leaving aside any AID which QR Network may require as an attempt to overcome this fundamental difficulty with its own proposed contract structure. Instead, QR Network places all operating obligations on to the access holder, in this case the mine owner, which is unlikely to be undertaking the operation of trains in its own right. It would then be up to the mine operator to enter into "back to back" arrangements with the train operator it engages to actually operate the trains in an attempt to pass through these obligations.

QR Network's AHA structure creates legal difficulties both for the access holder and for QR Network. It is impossible to create a perfect "back to back" structure which places QR Network, the mine owner and the rail operator in the same position as they would have been in the case of a direct contracting structure. For example, there are legal difficulties in ensuring that each party is entitled to claim the same value of damages, or is entitled to the same limitation of liability, as it would have been in the event of a breach of the arrangements. It is undesirable that, in order to seek a remedy for a railway operational issue, either QR Network or the rail operator would have to proceed against the mine operator as the party with which it held a contractual relationship, notwithstanding that the mine operator would have no direct involvement in the railway operational issue, and would not necessarily have the knowledge or experience to deal with such an issue. In addition, both QR Network and the rail operator are exposed to the risk of insolvency of the mine owner in this situation, as the mine owner is exposed to a solvency risk in relation to the rail operator where QR Network seeks a remedy against the mine operator and where the mine operator must make a claim against the rail operator, and the mine operator is also exposed to the risk of insolvency of QR Network, for the same reasons.

In contrast the ARTC approach is to separate out the rights and obligations of the access holder and the rail operator, and for each of them to enter into a direct contractual relationship with ARTC as the track owner. XCQ favours this approach because of the clear delineation of roles and responsibilities for all parties to the coal chain.

- The mine operator's access holder agreement deals with the level of access which the mine operator is entitled to access through the use of that track capacity by its accredited rail operator or operators, and related matters such as the payment for the access, and provisions in relation to dealing with that capacity; and
- The rail operator agreement deals with operational issues, including issues relating to liability for on-track incidents, which are more appropriately dealt with directly between the rail operator and the track owner.



XCO is submitting to the QCA two draft agreements which set out its view of what rights and obligations are relevant for each agreement. These drafts are based on the draft agreements which QR Network provided as part of the UT2 undertakings, but have been updated to reflect the split between the access holder and the rail operator. XCO has proposed only one difference from the ARTC arrangements where ARTC envisages each rail operator entering into a different operator agreement in relation to each separate mine operator access holder. XCO's preference is to there being a single rail operator agreement entered into between ARTC and each rail operator (the so-called "driver's licence" model). This would be administratively simpler than the ARTC proposal. Provisions which related specifically to an individual access holder would be dealt with in separate schedules to a single agreement.

8. Segregation Arrangements

XCO supports Asciano's submission to the 2010 UT3 which includes an obligation to deliver strict segregation arrangements to:

- Maintain separate entities with separate cost allocation and accounting frameworks.
- Provide for the Board of QR Network to have a majority of independent Directors with separate fiduciary duties under the *Corporations Act 2001*.
- Protect access seeker and access holder confidential information.
- Avoid conflict of interests, particularly in the decision making surrounding investment in rail infrastructure.
- Incorporate a duty to act fairly and equitably.
- Ensure compliance with anti-hindering and restrictive trade practices provisions.
- protect access seekers and access holders from a privatised "QR National" allowing its individual rail businesses receive preferential treatment by cross subsidising, margin squeezing and cost shifting between their operations and QR Network.
- Outlines a complaints handling process to manage its compliance with its obligations in relation to segregation arrangements.

XCO considers it is completely inappropriate that QR Network should share the same board as QR National. It is also inappropriate that the board members should receive information in relation to QR Network which they are not under a duty to keep confidential and may use when taking decisions in respect of the wider QR group. At the very least XCO would require that the QR Network board must have a majority of independent directors. XCO is also of the view that the only information which should be disclosed by QR Network to QR as its shareholder is information which QR is legally entitled as a shareholder in that company. The QR Network directors should also be under an obligation not to use QR Network information other than in their capacities as the directors of that company. QR Network's constitutional arrangements must also be addressed to ensure that the QR Network directors only take into account their duties to QR Network when making decisions, and do not have regard to the interests of the wider QR group.

XCO also considers that it is appropriate to regulate the incentives which are provided to QR Network staff such that these are not related to the performance of any QR party other than QR Network. Ideally, the incentive structures which QR Network provides to staff must only take into account the performance of its network assets as well as QR Network's financial performance.

XCO is concerned that at present the only remedy against a QR party other than QR Network breaching any confidentiality requirements is for QR Network to take court action against the other QR party. Clearly, XCO is concerned that such a remedy is unlikely to be utilised and does not provide a sufficient remedy for the affected access holder. XCO would suggest that any QR party receiving information from QR Network should provide a direct undertaking to the relevant access holder or access holders that the information will remain subject to the confidentiality arrangements as set out in the undertaking.

XCO would also like to reinforce Asciano's position that the QCA must review a limited number of sites which are held by QR Ltd that should be moved to QR Network to allow effective competition for all providers of above rail operations. The request relates to freight yard operations into and out of the QR Network. All of the yard facilities identified by Asciano are close to the export



port terminals along the east Coast and include both coal and bulk freight export terminals. Given the proximity of these terminals to highly urbanised centers, access to land has now become a competitive obstacle to third party entry into the above rail market in Queensland. Accordingly, XCO requests the QCA give detailed consideration to whether some access roads within QR Ltd's control also meet the criteria for declaration and whether they need to be transferred over to QR Network for management in accordance with the AUT.

- Given the significant infrastructure constraints particularly occurring along the central Queensland coal mainlines through to the export coal terminals, access to yards at Jilalan, Callemondah and Pring are becoming critical factors in the mainline running of trains from origin to destination (including before and after loading of a train and any train queuing and staging required to facilitate mainline running) and so they now fit within the scope of QR Network's AUT.

XCO also requests QCA to consider the issues of the provision of electricity and the potential for QR Network to cost differentiate between the provision of electricity for its own related parties and third party rail operators. XCO asks whether the QCA should consider the merits of having the provision of that service also satisfies the declaration criteria in the QCA Act.

8.1 Privatisation of QR Network

The impending privatisation of QR Network raises the need for industry to fundamentally reconsider the regulatory framework governing QR Network's operations. Other regulatory regimes elsewhere in Australia provide regulatory protections embedded in legislation or lease agreements rather than simply rely on an AUT to deal with issues pertaining to market conduct, segregation arrangements and market power prohibitions (e.g. prohibiting any discrimination in the provision of services, cross subsidisation and margin squeezing).

The main question raised by XCO is whether the current AUT processes provides sufficient certainty regarding the rights, obligations and market conduct of QR Network under a privatised model. Given, the AUT process is open to amendment and change over time, many of the rights and obligations industry considers sacrosanct may be at risk if QR Network continues to push regulatory boundaries in future regulatory processes. Accordingly, XCO has considered a number of core AUT conditions which must be "locked in" so no future AUT process may seek to unwind these protections. Where such protections in the AUT can't be provided by the QCA, XCO requests that QCA discuss the issues with the ACCC and NCC in the context of their review of the QCA Act and the TPA. **Appendix 2** outlines XCO's list of core conditions.



APPENDIX 1

XCQ COMMENTS ON STANDARD ACCESS AGREEMENT



XCQ Comments of the Standard Access Agreement

XCQ has given detailed consideration to the Standard Access Agreement (SAA). This is because in any consultation XCQ has with QR Network (e.g. in relation to both the coal network and the Mt Isa network), QR Network has tended to dig in on all issues on the basis that the SAA is a QCA endorsed document. Accordingly, XCQ believes it needs to highlight for the QCA the key concerns it has with the SAA to ensure they are considered and updated. Only in this way can future negotiation for access reflect a balancing of the rights of access seekers with those of Network. XCQ's comments are provided at Appendix 3.

1. Cl. 3 of the SAA (Consequential Loss, Access Interface Deed, section 55 Property Law Act)

QR Network has included a new clause 3 in the SAA, which is essentially aimed at covering off any risk that QR Network might be liable to a Customer for "Consequential Loss". The SAA already governs the exclusion of consequential loss, but only between the Operator and QR Network, as the Customer is not privy to the SAA. However, as between the Operator and QR Network, all losses that might be suffered by a mine Customer would be regarded as consequential losses of the Operator (as Third Party losses) and not be claimable by the Operator against QR Network under the SAA. QR Network's motivation for seeking these amendments is presumably based on a concern that a Customer with no direct contractual relationship with QR Network might make a claim in tort for consequential losses suffered by that Customer which arise from a breach of the SAA by QR Network.

The proposed amendments seek to exclude liability to the Customer for consequential loss by making the agreement subject to and conditional upon the Operator notifying QR Network that it has elected to proceed with either the AID Option or the Section 55 Option.

The AID Option requires the Operator to procure the Customer to execute and deliver an "Access Interface Deed" in the form of the Schedule to the SAA so as to ensure that neither party is liable to the other for Consequential Loss. If the Operator has elected for the AID Option and the Access Interface Deed has not been returned to QR Network within 1 month after execution of the Access Agreement, the Access Agreement will terminate. The Section 55 Option requires that the Rail Haulage Agreement (which the Operator and Customer sign) includes provisions relating to non-liability of the Railway Manager to the Customer for Consequential Loss. The clause goes on to state that the exclusion of liability for Consequential Loss of the Railway Manager is for the purposes of section 55(B) of the Property Law Act 1974 (Qld) and is capable of being accepted by the Railway Manager such that it is able to enforce this limitation in a court of law.

XCQ Recommended Position

The pro forma AID is stated to be for the purposes of recording that neither party will be liable to the other for Consequential Loss. It is noted that only QR Network and the Customer are to be parties to this document. In XCQ's experience, an AID is a tripartite agreement which also has the Operator as a party. The AID scheduled to the SAA is extremely brief and deals only with Consequential Loss.

The AID is a new concept in the SAA, but as a matter of practice is something XCQ has put in place for some recent agreements to provide a contractual relationship between QR Network and XCQ. To date, entry into an AID has been for the benefit of both XCQ and QR Network, as it has enabled:

- XCQ to directly take action, under contract, against QR Network for breaches and negligence relating to Access. This approach overcame the problem of the previous SAA which prevented the Operator from claiming against QR Network the Customer's losses for breach as part of the Operator's loss (and then passing those damages on to the Customer), as all such losses were regarded as excluded consequential losses of the Operator under the SAA; and
- QR Network to place limits on its liability, that otherwise under a potential claim in tort would remain uncapped.



Under such arrangements, a Customer is still prevented from recovering its own "consequential losses" (e.g. lost profits from a sale of coal), but can claim its direct losses – most likely to consist of any increased costs the Customer incurs in sourcing alternate transport of the coal. (Note that in some cases, there will be no practically available alternate transport if rail access is unavailable, meaning the ability for the Customer to recover direct losses may in fact be illusory).

If QR Network was to expose itself to liability for the Customer's consequential losses, XCCQ expects QR Network to argue this is a significant additional risk exposure and would need to be reflected in an increased access charge. However, in both the options QR Network has proposing under the new clause 3, QR Network is getting the benefit of the contractual exclusion of any possible claim the Customer could make for its consequential loss. This is without the Customer obtaining any benefit – i.e. an ability to at least claim its direct losses against QR Network under contract.

XCCQ is of the view that if QCA is minded to accept the proposal as put by QR Network, it must be combined with QR Network also (through the AID or otherwise), providing the Customer with a contractual right to recover damages from QR Network for at least the Customer's direct losses caused by QR Network's breach of the Access Agreement. Under this approach, it is then reasonable that any such liability of QR Network to the Customer, when combined with any claims the Operator might make, would be subject to the SAA specified caps on the liability of QR Network, with the rationale being that if these caps were to increase, QR Network would argue for an increased price based on an increased risk exposure.

2. The definition of Allowable Threshold and Cl. 15.3

The definition of Allowable Threshold gives QR Network an ability to breach the access agreement without consequence in respect of a given percentage of the access capacity it has contracted to provide. Although the SAA does not specify a percentage (it states it is a "percentage to be agreed by the parties"), QR Network proposes an Allowable Threshold of 10% of train services and XCCQ experience has revealed that QR Network will not accept any variance to this percentage threshold.

XCCQ Recommended Position

The effect of this definition of Allowable Threshold is that QR Network is only agreeing to the provision of 90% of the Access Rights contracted, because QR Network is not liable as long as it meets this lower threshold. XCCQ believes QR Network should have liability for any breach that will cause the Operator and/or the Customer loss. There is no rationale as to why QR Network should be excused from liability in such circumstances given:

- The liability would only attach to a QR Network breach – a legitimate force majeure event would excuse QR Network of its obligation to provide access and so the Allowable Threshold is not required in that regard;
- QR Network's liability is capped elsewhere under the SAA, therefore limiting its exposure.

XCCQ recommends the QCA tighten the Allowable Threshold to 98% to ensure QR Network is appropriately incentivised to perform against its contractual obligations and maintain contractual alignment between the capacity contracted and the capacity delivered.

3. The definition of QR Network Cause

The QR Network Cause is limited to situations in which the inability of QR Network to make the infrastructure available is not "in any way attributable to a Railway Operator" (not necessarily THE operator). The definition is important, especially in the context that "Take or Pay" payments will not be triggered in respect of tonnes not transported where the reason was a "QR Network Cause".



XCQ Recommended Position

The QR Network position means that where the inability be attributable even somewhat to a railway operator, it will not be a QR Network Cause. For example, the failure could be 99% QR Network's fault and only 1% the fault of a railway operator, however, QR Network would not be liable. This seems inequitable, not only that any contribution by an operator renders QR Network not liable, but also that the Operator carries the risk of the actions of other operators.

XCQ also believes the definition of QR Network Cause needs to be tightened to ensure that where the cause for infrastructure to not be provided is predominately attributable to QR Network then QR Network must wear the consequences under the SAA. Where access was lost/delayed due to the actions of a different rail operator, arguably this should be an FM event for the purpose of other access agreements, excusing QR Network from non-performance, but not subjecting the other "innocent" rail operators to potential take-or-pay liabilities where they are not at fault.

4. Cl. 3.2 of the SAA (Reduction of Access Rights)

The threshold trigger for the reduction of access rights by QR Network has been amended such that the trigger is now the failure to operate "over any four consecutive Quarters at least 90% of Train Services allowed for that period" (other than due to force majeure or a QR Network Cause).

XCQ Recommended Position

QR Network's drafting represents a positive move away from the existing position which allows for reductions to be triggered where there is a failure to operate all weekly services for any 7 out of 12 weeks. However, XCQ's recommends that the resumption trigger be further reduced to 85% over a 12 month period as the 90% trigger may be too easily triggered.

5. Cl. 14.4 of the SAA (Exclusion of Liability for infrastructure standard)

This clause in the existing SAA excludes liability to the Operator for the existing standard of the rail infrastructure (QR Network only being liable for failure to maintain it at that standard). The amendments in the draft SAA attempt to extend this to exclude liability to Customers.

XCQ Recommended Position

XCQ does not agree to this amendment. Legally, it is not effective as QR Network cannot exclude this liability without the Customer being a party to the agreement. In order for this to be incorporated in the SAA, there would need to be a contractual nexus with the Customer. Whilst the AID could serve this purpose it would need to be addressed within this framework (see XCQ comments above).

6. Cl. 14.10 of the SAA (Relationship with Customer)

This is a new clause which seeks to regulate QR Network's relationship to the Customer, and essentially seeks to provide that the operator is not liable to the Customer.

XCQ Recommended Position

As with XCQ's previous comment, this new clause seems misconceived. The Customer is not a party to the SAA and so any clause limiting QR Network's liability to the Customer contained in the SAA is not effective at law. Whilst the AID could serve this purpose it would need to be addressed within this framework (see XCQ comments above).



7. CI 15.1 of the SAA (No Liability For Consequential Loss)

Under this Clause, neither the Operator nor QR Network is liable for "Consequential Loss". Whilst the clause is reciprocal, due to the broad definition of "Consequential Loss", all third party losses are excluded.

Currently the mine owner, which will effectively be paying for the access rights even though it does not have the direct contractual relationship with QR Network (the Access Agreement being held by the Operator), will be a third party, and the losses the mine owner suffers (e.g. the increased cost of alternate transport) cannot be claimed against QR Network by the Operator as they would be regarded as consequential. The Operator will generally be reluctant to carry the risk of liability to the mine owner for breaches of QR Network where the Operator has no claim against QR Network – i.e. it cannot enter into "back to back" arrangements from QR Network's Access Agreement breaches. Therefore, under the SAA the mine owner is left without a contractual remedy, even though it will normally suffer the greatest loss and has effectively paid for the service.

XCO Recommended Position

XCO believes this anomaly could be addressed by either:

- excluding the mine owner's losses from unclaimable "Consequential Loss"; or
- create a separate contractual relationship with the mine owner via a tri-partite contract such as an AID.

As QR Network is clearly contemplating a form of AID, this could be the vehicle to address this issue. XCO recommends the current proposed AID be expanded from its present form, which merely seeks to protect QR Network from exposure to Customer consequential losses to include a new clause which positively states that QR Network is liable to the Customer for losses the Customer suffers due to QR Network's breach of the Access Agreement.

8. Schedule 3 (Access and Other Charges)

1. The SAA provides that the methodology of calculation of the Take or Pay charges can vary from time to time in accordance with any changes to the Take or Pay methodology under the Access Undertaking. The ability to review the Take or Pay methodology is similar to the way in which access charges can be reviewed from time to time when there is a change in the Reference Tariffs. Accordingly, the Take or Pay arrangements could be significantly altered and a different regime imposed on the Operator (and potentially passed through to the Customer) during the life of the Access Agreement. This dilutes price certainty for Operator and potentially its Customers (if there is a pass through of access pricing).
2. At clause 1.2 it is stated that the First Escalation Date is the first date that is 12 months after the most recent Review Date and each subsequent Escalation Date shall be 12 months after the previous Escalation Date when no Review Date has occurred in the 12 month period.
3. Overload Charges are not specified but are references to the Load Variation Table published by QR Network from time to time.

XCO Recommended Position

1. XCO understands that the logic for this proposed change is that if and when reference tariffs change in the future, they are in part based upon an understanding of what take or pay methodology will operate in combination with those tariffs. Therefore, having a take or pay regime "locked in" under the access agreement but allowing scope for access charge adjustments to accommodate future reference tariff reviews produces a potential disconnect.



2. There seems to be an assumption underpinning this drafting that there will be a Review Date within the first 12 months of the life of the access agreement. This will not necessarily be the case. XCO's assumption is that if there is no review date within the first 12 months, the access charges would escalate on the first anniversary of the agreement, but the drafting does not seem to provide for this.
3. XCO's concerns relate to the issue of price certainty. XCO believes QR Network should specify what the overload charges are in the Access Agreement and not subject to some "table" that is independently published by QR Network from time to time.

9. XCO Recommendations on minor changes to the SAA

1. Definition of Agreement - To allow for circumstances in which a train service commences but does not arrive at its destination prior to the expiry of the term, the provision outlined below should be inserted into clause 4:

Agreement continues to apply to certain Train Services notwithstanding expiry

Where Access Rights are provided in respect of a Train Service which commenced operation before the expiry of this Agreement, until the Train Service has actually completed its operation, this Agreement will continue to apply to that Train Service and the Access Rights provided in respect of that Train Service as if the expiry does not occur until after that Train Service has actually completed its operation.

2. Definition of Discount Rate - A new definition of Discount Rate has been inserted. It is an allowable rate of return utilised in Reference Tariff calculations. This Discount Rate is used in the determination of the "Reduction Factor" and "Relinquishment Fee". Each of the Relinquishment Fee and Reduction Factor are stated to be calculated at the Discount Rate. Presumably this means that the relevant net present value amounts are calculating using the Discount Rate, but this could be expressed more clearly.
3. Definition of Relinquishment Fee - The calculation of the Relinquishment Fee states that should QR Network need to make assumptions about future events so as to calculate the maximum aggregate annual Take or Pay that QR Network may make such assumptions. XCO believes that there should be a requirement for:

*these assumptions to be reasonable; and
QR Network to have to give reasons for arriving at any assumptions made, if requested.*

The definition of Relinquishment Fee also states that there is no Relinquishment Fee payable if the Access Rights are to be transferred to a new Operator for less than 2 years. This seems an odd provision - the result of this provision is that if the Access Rights are transferred for more than 2 years (which one would have thought more desirable for QR Network) then there is still potentially a relinquishment fee payable.

4. Cl. 2.1(d) (Default Interest) - There is a requirement to pay a default interest rate on any dispute amount not paid that is determined to be payable. There is also an obligation on QR Network to pay default interest on any dispute amounts paid that are to be refunded. XCO questions whether this should just be just the standard interest rate where the dispute is bona fide so parties are kept whole, but not penalised.
5. Cl. 2.4 (Security) - An ability to review the amount of security at any time has been inserted into the SAA. The review can take into consideration the anticipated annual take or pay charges notwithstanding that those charges may not yet be payable. QR Network may determine that the amount of security is to be increased or decreased, subject to the following limitations:



- a. the security amount can only be increased if the anticipated take or pay is greater than 66% of the security amount currently maintained;
- b. the security amount can only be decreased if the anticipated take or pay amount is less than 25% of the initial security amount.

XCQ would like to understand how QR Network derived the 66% trigger for additional security

6. Cl. 3.3 (Relinquishment and Transfer of Access Rights) - There was previously an ability to transfer Access Rights even if the rights were not exactly equivalent (i.e. access rights with a different origin/destination but with the same format of train service description as the Access Rights. It is now stated that the access rights must be for the same type of Train Service Entitlement. This term is not defined in the agreement proper, but the term is defined in schedule 10 for the purpose of the Interface Coordination Plan as

the entitlement under an access agreement to operate a specified number and type of Train services over the Infrastructure within a specified period and in accordance with specified scheduling constraints for the purpose of either carrying a specified commodity or providing a specified transport service

It is not clear if QR Network is intending this to be a more restrictive approach as to the type of access rights that can be transferred. XCQ would like QR Network to clarify its intentions with respect to this amendment.

7. Cl 7.4 (Incidents) - This provision states that the Operator is responsible for recovery in relation to an Incident. There have been no recent changes to this clause in the latest SAA, but XCQ has the following comment on the clause.
 - a. The definition of Incident is such that it is a derailment (or other event effecting the Rollingstock) that involves the activities of the Operator.
 - b. QR Network may perform the recovery activities but can then recover the costs of same from the Operator.

The definition of "Incident" does not distinguish on the basis of the responsibility for the "cause" of the Incident, but is merely related to the activities of the Operator. If a derailment of a train operated by the Operator is caused by QR Network (e.g. lack of track maintenance), it should not be for the Operator to pay for the costs of recovery. It may be that the clause just needs to link the responsibility of payment for the performance of the recovery with the responsibility for the Incident, or at least be clear that the Operator can reclaim these costs if it was QR Network at fault.

8. 13.3, 13.4 and 13.5 (Insurance) - Certificates of currency should be sufficient evidence. Insurance policies are confidential documents and generally relate to more than the one access arrangement, and often insurers are reluctant to disclose copies of the actual policy to contractual counterparties. Clause 13.5 refers to the requirement to note the interests of "any contractor". XCQ queries what this is intended to cover or why it is necessary.
9. Cl. 15.2 (Liability threshold) - The previous version of the SAA required that a claim be at least \$50,000. This has been increased to \$100,000. XCQ questions the appropriateness of doubling this limitation. \$50,000 is still a significant claim and the restriction is more likely to impact on claims by the Operator, rather than QR Network (which has the benefit of a take or pay provision).
10. Cl 16.2(a) (Adjustment for Material Change) - This clause effectively allows QR Network to only pass on price increases from "material changes", as it relies upon QR Network giving notice of the change to effect the price adjustment, and only states



QR Network 'may' notify the changes. XCO believes the clause should be structured so that cost reductions from material changes are also passed through – i.e this could be done by simply stating that QR Network must notify any change.

11. Cl. 19.1(Suspension) - Under (a)(vii) it states that QR Network can suspend the right of the Operator to operate some or all of the Train Services if the Operator fails to provide information reasonably required by QR Network in relation to a Train Service prior to its departure. XCO suggests this provision should be amended to be clear that such a suspension is only in relation to the specific train service for which the information was not provided.
12. Schedule 7 (Insurance) – QR Network has increased required Public Liability Insurance from \$250m to \$350m and Carrier liability insurance from \$1m to \$10m. XCO queries the reasoning for QR Network's amendment.



APPENDIX 2

CORE PROTECTIONS FOR INDUSTRY IN ANY AUT



Core Protections Required to be Locked into all Future AUTs

Core Protections	
Essential Service	<p>QR Network recognises the QR Network's railway infrastructure meets the access criteria under Part IIIA of the TPA and Part 5 of the QCA Act, including that QR Network's railway infrastructure:</p> <ul style="list-style-type: none"> • is an essential service for provision of coal and freight haulage services; • promotes a material increase in competition in both upstream and downstream markets • is uneconomic to duplicate to provide the service.; • is of national significance, having regard to the size of QR Network's railway infrastructure and the importance of the infrastructure to constitutional trade, commerce; and the national economy; • can be provided safely and is in the public interest. <p>QR Network will act in accordance with Part 5 of the QCA Act and recognises that QR Network's railway infrastructure is subject to the QR Network Access Undertaking and will continue to act in accordance with that undertaking and in compliance with the QCA Act. QR Network will ensure compliance with the TPA and the QCA Act, particularly with regard to the anti-hindering provisions and the prohibitions against restrictive trade practices.</p>
Segregation Arrangements	<p>QR Network acknowledges it will maintain its railway infrastructure within its own corporate structure and keep its business activities separate to the other elements of its rail business. The separate corporate structure will provide for strict segregation arrangements which:</p> <ul style="list-style-type: none"> • protects access seeker and access holder confidential information; • avoids conflict of interests; • incorporate a duty to act fairly and equitably; • ensures compliance with anti-hindering, non discriminatory and restrictive trade practices provisions; • outlines a complaints handling process to manage its compliance with its obligations in relation to this Segregation Framework.
Performance Obligation	<p>QR Network has an obligation to provide commercial, reliable and secure access to services on its railway. As an essential service, QR Network acknowledges the role of the QCA in determining the test for commercial feasibility under Part 5 of the QCA Act and that this is reflected in the terms and conditions of the relevant QCA approved access undertaking.</p>
Performance Incentives	<p>QR Network must provide access to services based on performance criteria. QR Network will maintain:</p> <ul style="list-style-type: none"> • performance measurement criteria to extract efficient capacity utilisation from the existing infrastructure; • a measurement and performance reporting framework; • incentives and penalties for performance to contract; • compliance with contractual alignment principles; • protections to ensure QR Network considers optimised rail based solutions based on coal chain performance criteria
Regulated Asset Base	<p>QR Network's railway infrastructure has the value of the Regulatory Asset Base in the QCA approved rail access undertaking at the time of the privatisation of QR Network (Sale RAB). QR Network will not seek to revalue the asset values in the Sale RAB (with the exception of an annual CPI adjustment) for pricing purposes within the term of the Lease Agreement.</p>
Obligation to Invest	<p>QR Network has an obligation to invest in all necessary works to upgrade, replace or add to QR</p>



	Network's railway infrastructure to meet future demand projections in a commercial and efficient manner, and in accordance with the requirements of the relevant rail access undertaking endorsed by the QCA.
Independent Rail Infrastructure Works	Where a Third Party undertakes Independent Rail Infrastructure Works, then QR Network must: <ul style="list-style-type: none"> • Provide the opportunity for third parties to fund and execute an expansion project for the necessary railway infrastructure works to facilitate the raling of the additional tonnage demand. • Provide to third parties clear entitlements arising from third party funded expansions of QR Network's rail network in accordance with the Access Undertaking
Right to Connect	Third parties may construct independent rail infrastructure works which need to connect or interface with QR Network's railway infrastructure. Under these circumstances QR Network agrees to take all reasonable and timely steps to facilitate the connection of such rail infrastructure to the QR Network Railway.
Maintenance Obligation	QR Network has an obligation to maintain, replace, repair and upgrade all leased railway infrastructure so that it meets QR Network's obligations under the relevant QCA approved access undertaking. QR Network must submit to the QCA a maintenance plan for each regulatory period. QR Network must take into account any QCA recommendations on amendments to the maintenance plan
Granting Third Party Interests	QR Network will grant rights to third parties in a timely manner to use or occupy QR Network's corridor land or railway infrastructure in accordance with the relevant QCA approved access undertaking.