



**Position Paper**

**QR Network's 2008 Draft Access  
Undertaking**

**May 2008**

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## SUBMISSIONS

The Queensland Competition Authority considers public involvement to be an important element of its decision making processes. It therefore invites submissions from interested parties on any aspect of this preliminary draft of QR Network's proposed 2008 draft access undertaking.

To facilitate the publication of submissions on the Authority's website, it is preferred if submissions are provided electronically by disk or email. Where this is not possible, written submissions are acceptable and should be sent to the address below. **Submissions, comments or inquiries regarding this paper should be directed to:**

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Submissions are due by no later than **5.30 pm on 3 June 2008**. The Authority advises that it will NOT take any material received after that date, irrespective of the identity of the author of the submission or the circumstances of its lodgement.

### Confidentiality

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another, excising confidential information) could be provided. Again, it would be appreciated if each version could be provided on disk. Where it is unclear why a submission has been marked "confidential", the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt documents (within the meaning of the *Freedom of Information (FOI) Act 1989*), it cannot guarantee that submissions will not be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997* (the QCA Act), the Authority must take all reasonable steps to ensure the information is not disclosed without the person's consent, provided the Authority is satisfied that the person's belief is justified and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of an FOI request.

### Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at [www.qca.org.au](http://www.qca.org.au). If you experience any difficulty gaining access to documents, please contact the office (07) 3222 0555.

Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on the Authority's website.

**PREAMBLE**

As part of a proposed corporate restructure, QR Ltd is to transfer ownership of its network assets to a new subsidiary (yet to be created) QR Network Pty Ltd (QR Network) from 1 July 2008. As a result, it is appropriate that the access obligations currently placed on QR Ltd be replaced by similar obligation on QR Network.

In this context, QR Ltd recently advised that it intended to submit a request to withdraw its 2006 access undertaking. At the same time, QR Ltd provided to the Authority a copy of the draft access undertaking (DAU) that it is proposed QR Network will submit once it is incorporated (preliminary 2008 DAU).

The preliminary 2008 DAU seeks to revise aspects of the 2006 access undertaking and standard access agreements to provide for QR's new corporate structure, including the creation of QR Network Pty Ltd (QR Network) as an independent subsidiary of QR Ltd. As QR Network has not been incorporated as a subsidiary of QR Ltd, it can not formally submit the 2008 DAU for the Authority's approval.

The Authority is seeking public comments on QR Ltd's proposed withdrawal application and the preliminary 2008 DAU to facilitate their timely consideration. Stakeholders are invited to prepare a single submission addressing issues relating to both matters. With a view to assisting stakeholders to prepare their submissions, the Authority has prepared this Position Paper setting out its initial views on QR Ltd's 'preliminary' 2008 DAU.

Subject to the comments of stakeholders, the Authority is currently minded to accept a draft access undertaking submitted by QR Network in the same form as the preliminary 2008 DAU submitted by QR Ltd and the concurrent withdrawal of QR Ltd's 2006 access undertaking.

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## **1. INTRODUCTION**

### **1.1 QR Ltd's Proposed Restructure**

QR Ltd has advised that it is undergoing a corporate restructure involving the creation of five independent subsidiaries wholly owned by QR Ltd. Separate "corporations law" subsidiaries will be established for QR's Network, Passenger, Freight, Services and Coal businesses. All of the subsidiaries will:

- be accountable for their financial performance;
- be wholly-owned and guaranteed by QR Ltd; and
- have their own customers, legally binding commercial contracts and staff.

The network subsidiary will change its name from QR Network Access to QR Network Pty Ltd (QR Network). QR Ltd has advised that QR Network will hold all assets that it currently manages and that all internal access agreements with QR National will be formalised as legally enforceable contracts. Ownership of below rail assets will be transferred from QR Ltd to QR Network from 1 July 2008.

### **1.2 Access Implications of the Proposed Restructuring**

Rail transport infrastructure in Queensland has been declared for third party access under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act). That declaration is defined in terms of rail transport infrastructure where QR Ltd, or a subsidiary of QR Ltd, is the railway manager.

As this declaration anticipates the possibility of a corporate restructuring, the scope and affect of the existing declaration is not impacted by QR Ltd's proposed restructure.

To date, the undertaking has been submitted by QR Ltd as the access obligations have rested with QR Ltd as the relevant corporate entity. In practice, however, these obligations have generally been met by one of its internal business groups, QR Network Access (QRNA) as the majority, but not all, of the management responsibility for the assets covered by the declaration rests with QRNA.

The QCA Act requires the undertaking to be provided by the 'owner or operator' of a declared service. The QCA Act is, however, silent on what occurs when an entity ceases to be the owner or operator of a declared service such as in the current case where QR Ltd anticipates that it will not be the owner or operator of the majority of its rail transport infrastructure from 1 July 2008.

It would, nevertheless, seem prudent for QR Ltd to seek to withdraw the current undertaking and for QR Network to submit a replacement undertaking reflecting the change in the ownership of the declared rail transport infrastructure.

### **1.3 Outline of the Proposed Amendments to QR's Access Undertaking**

QR Ltd has advised the Authority that it is adopting a two stage process to revising its access undertaking to reflect its proposed corporate restructuring, namely:

- withdraw the current undertaking and submit a new undertaking:
  - to give effect to changes in the ownership of assets;

- to resolve the easiest of the amendments to the undertaking; and
- to address the more complex issues through an interim set of transitional provisions;
- use the 2009 access undertaking, due to take effect from 1 July 2009, to resolve any outstanding, more complex issues.

The majority of changes between the 2006 access undertaking and the preliminary 2008 DAU are typographical in nature involving a name change to reflect the transfer of obligations from QR Ltd to QR Network. Some other amendments are not so straight forward but are amenable to relatively simple solutions while other amendments are more complex as they involve services by QR entities other than QR Network. These amendments are explained in detail in section two and include the following:

- control and management of yard services;
- financial reporting;
- ring-fencing;
- provision of access to land and electricity;
- standard access agreements; and
- capacity transfers.

In considering these matters, the Authority is seeking to ensure that the new undertaking does not result in a dilution of QR Ltd's current obligations while adequately reflecting the changes in its corporate structure.

#### **1.4 The Authority's Assessment Process**

The QCA Act provides for QR Ltd to seek to withdraw its approved 2006 access undertaking. However, this can only occur with the Authority's written approval (s 148 QCA Act). The QCA Act does not stipulate a process or assessment criteria for considering a withdrawal application. Nevertheless, the Authority is obliged to follow the requirements of natural justice when considering such an application.

In relation to QR Network's proposed submission of a 2008 DAU, section 136 (4) of the QCA Act requires the Authority to consider and to approve or refuse to approve that draft access undertaking. The Authority can only approve a draft access undertaking if it has published the undertaking, invited persons to make a submission and considered submissions received (s138(3)). In approving an undertaking, the Authority can have regard to the interests of stakeholders (i.e. the owner of the service, access seekers and the public) and any other issues the Authority considers relevant.

At this time QR Network has not been incorporated as a subsidiary of QR Ltd and, therefore, can not submit the 2008 DAU for the Authority's approval.

Following receipt of QR Network's 2008 DAU application, the Authority will formally commence its consultation. Provided that QR Network makes no substantial changes to QR Ltd's preliminary 2008 DAU, the Authority anticipates a very short consultation period at that

time. For that reason, the Authority encourages stakeholders to prepare written submissions in advance of QR Network's formal submission.

The Authority has prepared this position paper to provide stakeholders with its preliminary assessment of QR Network's proposed 2008 DAU in order to assist them in making submissions. Depending on the issues raised in those submissions and given the short time to the anticipated transfer of the assets to QR Network, the Authority may not release a draft decision.

This position paper seeks to identify the key relevant issues while indicating the Authority's preliminary view on these issues. Although this paper highlights matters on which the Authority particularly seeks input from interested parties, stakeholders are welcome to comment on any other aspect of the preliminary 2008 DAU or any related matter.

Importantly, this paper does not seek to address comprehensively each of the proposed changes to the undertaking. Hence, stakeholders should rely on their own analysis of the preliminary 2008 DAU to determine whether there are additional matters on which they wish to comment.

In the event the Authority does not approve a 2008 DAU by 30 June 2008, QR Ltd's 2006 undertaking will continue to be enforceable by the Authority against QR Ltd (s 158A of the QCA Act as the Authority is currently minded not to approve the withdrawal of the 2006 undertaking until the 2008 DAU has commenced). In turn, QR Ltd would need to ensure that QR Network or, where relevant, one of the other QR subsidiaries provides the below rail services pursuant to the terms of the existing undertaking.



## 2. QR NETWORK'S DRAFT ACCESS UNDERTAKING (2008 DAU)

The majority of the changes in the proposed 2008 DAU are designed to give effect to the changes in QR Ltd's corporate structure. However, the proposed submission of the 2008 DAU also provides an opportunity for QR Ltd to clarify a number of matters that are currently incorrect or could be misinterpreted. These latter changes relate to yard control services, treatment of multiple train services in a single agreement and limitations of liability in the operator standard access agreement.

### 2.1 QR Ltd Restructure Interpretive Provisions (clause 2.5.2)

The 2008 DAU seeks to preserve the regulatory principles contained in the approved 2006 access undertaking (to be withdrawn) in its proposed 2008 DAU until 30 June 2009; that is, for a term equivalent to the remainder of the 2006 undertaking.

To give effect to this objective, a number of interpretive provisions (cl. 2.5.2) are proposed. These interpretive provisions cover a number of matters including: seeking to ensure a smooth transition from the 2006 undertaking to the 2008 undertaking and converting existing internal access agreements into formal access agreements with the newly created separate corporate entities of QR Ltd.

In particular, the proposed cl. 2.5.2(h) would allow QR Network to recover the likely difference between any proposed backdated reference tariffs, and the access charges QR Ltd has been charging prior to 1 July 2008. For example, the Minerva coal train service has been operating on the Blackwater system since the December quarter 2005. While the Minerva service has been levied an access charge, this has not been an approved reference tariff. This amendment to the undertaking would provide scope for QR Network to seek to backdate a reference tariff, once submitted and approved to the commencement date of the Minerva train service in late 2005.

#### *Authority's Current Position*

The Authority has reviewed the proposed interpretive provisions and considers that they seek to preserve the principles from the 2006 undertaking in the proposed 2008 undertaking.

In considering this, the Authority particularly notes that cl. 2.5.2(f) provides for QR Network to convert its existing internal access agreements into access agreements and that the only amendments to those agreements will be those necessary to give affect to this conversion and to reflect the restructure of QR Ltd.

The Authority believes that these limitations are necessary because, in seeking to roll-over the existing internal access agreements, QR is seeking to preserve the access rights that were in place at the time the internal agreements were settled. In doing so, QR Ltd is not seeking to introduce into the new agreements any of the rights or obligations that have been subsequently introduced into, say, the 2001 or 2006 undertakings or standard access agreements (e.g. revised take-or-pay obligations).

The Authority would be particularly concerned if QR Ltd used this opportunity to pick and choose which rights or obligations (from either the 2006 or 2001 undertakings or earlier) it wanted to include in this replacement access agreements.

To be satisfied that this is not occurring, the Authority will need to see copies of QR Network's new access agreements to be satisfied that it has complied with these provisions of the proposed 2008 undertaking.

Accordingly, subject to the comments of stakeholders, the Authority is currently minded to accept QR Network's proposed provisions.

## **2.2 Ring-fencing and Complaints Handling (clause 3.3 (d) (ii), clause 3.5.1 & Schedule B clauses 2.1 (xi), 3.1, 4 and 5))**

QR Ltd's access undertaking establishes a set of obligations and procedures governing QR Ltd's treatment and disclosure of an access seeker's/ access holder's confidential information. These arrangements go beyond normal arrangements for the treatment of commercially confidential information as their primary purpose is to ensure that QR Ltd's above-rail groups do not get access to any information in relation to an access seeker/ access holder from QR Network except under the circumstances provided for in the 2006 access undertaking.

The current access undertaking places the information ring-fencing obligations on QR Ltd. Consequently, actions to remedy a breach of the ring-fencing obligations can be taken against QR Ltd, including the non-QRNA business units. This will no longer be the case when the access undertaking is the responsibility of QR Network.

To address this matter, it is proposed that QR Network will enforce obligations on other QR entities by way of confidentiality provisions contained in the relevant governance agreements, management agreements and service agreements between QR Network, QR Ltd and other QR Ltd entities.

The proposed amendments to clause 3.3 (d) (ii) of the 2008 DAU provides for an enforcement mechanism against QR Network if QR Network is in breach of the access undertaking while providing for the enforcement of a breach of confidentiality deed by any other QR related party. Amendments to clause 3.1 (b) and (f) and clauses 4 and 5 under schedule B further ensure that QR Network will be responsible for enforcement of a breach by a QR related party and, where appropriate, be liable for any liquidated damages.

Amendments to clause 3.5.1(a) enable third party access holders to lodge a written complaint with QR Network if it considers that QR Network, QR Ltd or a related party of QR has breached the confidentiality deed with QR Network pursuant to which the confidential information was disclosed.

### *Authority's Current Position*

The Authority is of the view that the effectiveness of information ring-fencing arrangements should not be diluted by the changes in QR's corporate structure.

The amendments in the 2008 DAU ensure that the current ring-fencing and confidentiality arrangements adequately deal with any unauthorised disclosure of information by QR Network or other QR entities. In the event of a breach of confidentiality deed by QR Network or another related party of QR Network, QR Network will be:

- accountable for its compliance with ring-fencing provisions;
- liable to enforce these obligations on other QR Ltd entities by way of confidentiality provisions;
- subject to complaints mechanism by an access holder;
- liable to access seekers/holders for liquidated damages, or claims for loss or damage;
- in breach of the undertaking; and

- liable to inform QCA of any breach of these provisions (including by other QR entities) and the actions taken to remedy the breach.

However, the effectiveness of these arrangements rely not only on the terms of the proposed 2008 DAU but also on the terms of the agreements between QR Network and its related parties. To date, the Authority has not been provided with drafts of these agreements.

The Authority will need to see these agreements and be satisfied that they provide effective enforcement mechanisms in the event of a breach of the undertaking.

Accordingly, subject to the comments of stakeholders, the Authority is currently minded to accept the proposed amendments to QR Ltd's ring-fencing obligations provided the Authority is satisfied on the content of the agreements between QR Network and its related parties.

### **2.3 Provision of Yard Control Services (clauses 3.1(b) (vii), 3.1(c) (iv), 3.1 (f) & clause 10.1 definition of major yards)**

Marshalling yards are part of the declared service. However, marshalling yards are often co-located with other facilities that are not part of the declared service (e.g. rolling-stock maintenance and freight terminals). While the management responsibility for operating the marshalling yards is a QRNA responsibility, control of train movements around these co-located facilities can be performed by QR Ltd entities other than QRNA.

The argument has often been that, at many of the yards, activity levels have been insufficient to justify the separate provision of yard control services for the declared and non-declared parts of the co-located facilities. As a result, yard control services have generally been provided on behalf of QRNA by other QR Ltd entities pursuant to yard management agreements.

QR Ltd's 2006 access undertaking indicates that yard control services are only provided by QRNA at Callemondah (Gladstone), with the services being provided by non-QRNA entities at the remainder of the yards.

Since the 2006 undertaking was prepared, QRNA (to be succeeded by QR Network) has gained responsibility for providing yard control services at a number of other marshalling yards in Queensland, namely: Acacia Ridge, Fisherman Islands, Rockhampton, Jilalan, Coppabella, Paget (Mackay), Townsville and Portsmith (Cairns).

Amendments are therefore proposed to clauses 3.1(b)(vii) and 3.1(c)(iv) to reflect the changes to responsibility for managing yard control services.

#### *Authority's Current Position*

The proposed new drafting for yard control services replicates the existing provisions in the 2006 undertaking except that it now expands the number of yards under the direct operational responsibility of QR Network.

There are of course a number of other yards in Queensland where yard control services will not be provided by QR Network. For example, Mt Isa and Pring (near the Abbot Point coal terminal). While the Pring yard is currently a relatively small facility, it could be expected to expand significantly in line with the development of the northern missing link and the expansion of the Abbot Point coal terminal.

Given the dynamic nature of the future development of rail activities in Queensland, the Authority believes it is important that mechanisms be available to transfer the responsibility for providing yard control to QR Network where the circumstances justify such a move. This is

even more important where the yard control services are being provided by a separate corporate entity and not just a separate business unit of QR Ltd.

In this respect, yard management agreements are currently twelve month rolling agreements with a six month notice period on termination and where there are responsibilities on both parties to ensure that any transfer of control is managed smoothly, particularly with respect to safe working.

Accordingly, subject to the comments of stakeholders, the Authority is currently minded to accept the proposed amendments relating to the management of yard control services.

## **2.4 Access to Infrastructure, Land and Supply of Electricity (clause 2.1 (c) (f) (h) and clause 2.2)**

The 2006 undertaking requires QR Ltd to provide access to declared services managed by QRNA. It also provides for QR Ltd to provide access to services essential to the use of the declared services such as the supply of electricity to electric locomotives and the entry to land, walkways and crew change over points.

The 2006 undertaking also recognises that most but not all of the declared services are managed by QRNA. In some circumstances, the declared services not provided by QRNA are relatively obvious (e.g. stations and platforms).

However, it may be less clear whether other services provided by a non-QR network entity are part of the declared infrastructure. In particular, infrastructure of interest to an access seeker may be co-located with infrastructure that is clearly not part of the declared service (e.g. freight centres and maintenance facilities). In these circumstances, it may not be clear whether the services of the infrastructure in question are part of the declared service.

Reflecting this, the undertaking provides a mechanism for the management of the infrastructure in question to be transferred to QRNA. Failing agreement on this matter the undertaking also provides for binding dispute resolution.

These arrangements are effective in the 2006 undertaking as the obligations are on QR Ltd, which has the ability to transfer infrastructure from one of its business units to another.

However, in the future the undertaking will be from QR Network and it will not bind other QR parties.

To address these matters, the proposed 2008 DAU includes:

- a right for third parties to access land, walkways and crew change-over points essential for the operation of rail services, even if the land is held by other QR Ltd related entities;
- an obligation on QR Network to acquire the transfer of assets that are the subject of the declaration but are managed by a non-QR Network entity;
- arranging for the supply of electricity to other access seekers to an equivalent extent as is provided to QR National (or other QR operational business groups) in connection with access, irrespective of whether that supply occurs by QR Network or another QR entity.

It is also proposed that QR Network will enter into agreements with related QR Ltd entities to give effect to these obligations.

The standard access agreements has also been amended to give effect to these provisions.

### *Authority's Current Position*

The effectiveness of the provision of access to the declared service will be enhanced if it is managed by an entity that is not a commercial rival of access seekers. It is also important that access to the declared service is not diminished by a lack of access to land, electricity or ancillary services essential for the use of rail transport infrastructure.

However, these matters are not definitive given the uncertainties surrounding the scope of the declaration and the allocation of management responsibilities amongst the various QR Ltd entities.

The Authority is satisfied that the 2006 undertaking dealt with these matters in a reasonable manner. It is also satisfied that the preliminary 2008 DAU seeks to deal with these matters in a similar fashion.

However, the effectiveness of these arrangements rely not only on the terms of the preliminary 2008 DAU but also on the terms of the agreements between QR Network and other QR entities. To date, the Authority has not been provided with drafts of these agreements.

The Authority will need to see these agreements and be satisfied that they provide effective enforcement mechanisms in the event of a breach of the undertaking.

Accordingly, subject to the comments of stakeholders, the Authority is currently minded to accept the amendments to clauses 2.1 and 2.2 of the undertaking provided the Authority is satisfied on the content of the agreements between QR Network and other QR Ltd entities.

## **2.5 Financial Reporting (clause 3.2.1, clause 9.2.1 & clause 10.1 definition of Costing Manual)**

QR Ltd's 2006 access undertaking requires QR Ltd to produce regulatory financial statements each year, using the methodology and format set out in a costing manual approved by the Authority. The purpose of the costing manual is to establish the methodology by which QR's below rail costs will be separated from its other costs and published in financial statements separately for central Queensland coal region and the rest of the network.

QR Ltd's costing manual was first approved by the Authority in 2002 and upon its expiry; a replacement costing manual was approved in July 2006 for the period 2006-07 to 2008-09.

Currently, it is unclear whether it is proposed that QR Network will publish its own financial statements or whether QR Ltd will publish consolidated statements.

QR Network's relationship with other QR entities will be governed by a deed of cross guarantee. Accordingly, the subsidiaries will apply for a class order relieving them of an obligation to prepare and lodge audited financial statements under Chapter 2M of the *Corporations Act*.

If the order is not granted, QR Network will be required to develop on an annual basis general purpose financial statements for its below rail services. QR Ltd has advised that these financial statements will separately identify the central Queensland coal region from the rest of the network.

If the order is granted, the existing arrangements will continue to apply.

It is proposed to amend the relevant clause of the undertaking (cl.3.2.1), such that QR Network will prepare financial statements of the type currently produced, irrespective of whether QR Ltd prepares consolidated statements or whether QR Network prepares its own financial statements.

#### *Authority's Current Position*

In the absence of any certainty regarding whether or not QR Network will prepare financial statements, the proposed amendments in the 2008 DAU appear reasonable. The undertaking will continue to impose obligations on QR Network to separately report on the central Queensland coal region and the rest of the network.

It is evident that the costing manual will need to be amended to reflect the changes in QR Ltd's corporate structure. In particular, it can be anticipated that overheads and service costs are no longer attributed or allocated to QR Network but are accrued on the basis of a supply contract. Changes to the costing manual will take some time to develop and are not the subject of this application. Nevertheless, the Authority is satisfied that the changes to the costing manual can be considered in a separate process at a later date.

To the extent that the financial statements contain existing defined cost categories with appropriate split between the central Queensland coal region and rest to the network, the proposed amendments seem appropriate.

Accordingly, subject to the comments of stakeholders, the Authority is currently minded to accept the proposed amendments to the obligations to prepare financial statements for regulatory purposes.

## **2.6 Standard Access Arrangements (clause 14, clause 15, clause 22.18 and clause 1 definition of infrastructure and land)**

While access agreements can be negotiated on a case-by-case basis, the 2006 undertaking includes two standard access agreements for coal carrying train services, namely:

- *operator agreement* – where the operator of a train contracts directly with QRNA to acquire access rights;
- *access holder agreement* – where the end customer (i.e. coal mine) contracts directly with QRNA to acquire access rights, and then sub-contracts with a train operator to haul their coal.

The purpose of the standard access agreements is twofold. First, by establishing a template agreement, it seeks to facilitate the timely negotiation access agreements by limiting the number of areas of dispute. Second, in the event of a dispute, it provides a fall back position to the arbitrator.

Both of the standard access agreements seek to limit QR Ltd's liability for negligence and default to direct costs and exclude liability for consequential losses. The access holder agreement specifically limits QRNA's liability from any claims for consequential loss from either the end customer or the train operator. The operator agreement specifically limits QRNA's liability from any claims for consequential loss from the train operator but does not include clauses that specifically refer to the end customer.

To date, QRNA has been protected from any claims for consequential loss from end customers under the operator agreement as similar limitations of liability have been included in QR National's haulage agreements with the end customer. QRNA has had the benefit of this

limitation of liability in the haulage agreement as it has been part of the same legal entity as QR National, i.e. QR Ltd.

However, QR Network will not get the benefit of the limitations of liability in QR National's haulage agreements following the restructure as QR Network Pty Ltd and QR National Pty Ltd will be separate legal entities.

As a result, it is proposed to amend the operator agreement to bring it into line with the access holder agreement. This amendment will not apply to pre-existing contractual obligations and will be effective 1 July 2008.

Specifically, it is proposed to amend the operator agreement (clause 14.3 and 14.10), to ensure that:

- (a) if there is a limitation of liability between QR Network and the operator, then operator must extend this limitation to its customer so that the customer cannot take common law action against QR Network in those cases; and
- (b) if there is a limitation of liability between the operator and its customer, then the operator must extend this to QR Network.

The proposed amendments to the operator standard agreement seek to mirror the arrangements that already exist in the access holder agreement.

Further, it is proposed to amend the definition of infrastructure and land in the definitions clause and to amend clause 22.18 in the standard access agreements to maintain consistency between the provisions of the undertaking and the standard access agreement.

#### *Authority's Current Position*

The underlying premise of the existing standard access agreements is that QR Ltd is liable for direct loss, but not consequential loss, in respect of contracted parties. It is proposed to amend the operator standard access agreement to ensure that QR Network is not liable for any consequential loss suffered by the end customer where they are not a contracted party. However, QR Network would remain liable for the customer's direct loss in circumstances where QR Network would be liable to the operator had the loss been suffered by the operator instead of the customer. The Authority is satisfied that the proposed 2008 DAU does not limit QR Network's liability for breach or negligence to direct costs. Further QR Network will also be liable to non-contracted third parties for its negligence.

This position is specifically provided for in the access holder agreement and it is proposed to replicate this.

Amendment to clause 22.18 seeks to extend the reference from 'QR' to 'QR or a Related Body Corporate of QR'. This change will reflect the existing provisions of the undertaking where it has been agreed that QR will arrange access to certain assets held by its related parties. This amendment to the standard access agreements is reasonable as it is consistent with the amended provisions of the undertaking and is necessary given that clause 1.2(e) of the standard access agreements provides that the terms of the agreement prevail over the undertaking to the extent of any inconsistency.

The amendment to the definition of infrastructure seeks to extend the definition so that it covers all rail transport infrastructure as defined in the Transport Infrastructure Act for which QR Network is the Accredited Railway Manager and infrastructure which QR Network can be required to obtain responsibility for pursuant to the undertaking. The amendment to the

definition of land has a similar purpose, extending the definition to land which QR Network does not own but is required to provide entry to pursuant to the undertaking.

These amendments to the standard access agreements seem reasonable as they seek to ensure that the agreements are consistent with the amendments to the undertaking.

Subject to the comments of stakeholders, the Authority is currently minded to accept the proposed amendments to the standard access agreements.

## **2.7 Multiple Train Services Within a Single Access Agreement (clause 10.1 definition of access agreement)**

The 2006 access undertaking includes a number of provisions that are enlivened by the expiry date in an access agreement. In the time since the 2006 undertaking was finalised, it has become apparent that many of these provisions will not operate as intended as a single access agreement can cover a number of different train services (i.e. origin-destination pairings).

For example, a customer or an access holder can seek to renew an access agreement within two years of an access agreement's expiry date. If that agreement covers a number of different train services, the expiry date for individual train services are likely to vary with some concluding earlier than others. As a result, relevant parties may not be able to use the undertaking's provisions to seek to renew the access rights upon the imminent expiry of an individual train service. Rather, the undertaking's provisions may only be enlivened in relation to the train service whose expiry date is furthest into the future.

The 2008 DAU addresses this matter by including words to the effect that the rights or obligations associated with the cessation of an access agreement will be enlivened by the cessation of an individual train service. This amendment has been made to cl. 10.1 in the definition of 'Access Agreement'. The specific clauses in the undertaking to which this amendment refers to are:

- cl. 5.1(h) – execution of an access agreement two years prior to the start of the train service;
- cl. 7.4.1(g) – QR Ltd can re-order a queue of access applications on the basis that one access application is for a term of at least ten years and other access agreements are for terms of less than ten years;
- cl. 7.4.2 – capacity resumption where an access holder has not utilised their access rights to the extent required;
- cl. 7.5.1 – renewing of access rights in an existing access agreement; and
- cl. 10.1 – definition of 'Evaluation Period'.

It has also been specifically identified that this amendment does not apply to the assessment of any deduction to the revenue cap due to the non-provision of access due to QR Network's default or negligence beyond a threshold defined as 10% of train services in an access agreement (i.e. the definition of System Allowable Revenue under subparagraph (iii) of the definition in cl 5.2 of part A, schedule F).

A process has also been included to add to the clauses to which this amendment refers if the Authority deems it necessary.



*Authority's Current Position*

The proposed new drafting seeks to clarify the interpretation of provisions in the current undertaking to ensure that they work as intended. While these amendments have not been made as a result of the restructure of QR Ltd, it does however seem an appropriate time to amend these provisions.

Accordingly, subject to the comments of stakeholders, the Authority is currently minded to accept the proposed amendments to the undertaking in the circumstances where an access agreement provides access rights to a number of train services.