

Chapter 8 - Schedule E - Summary of standard access agreement

KEY ASPECTS

Guidance – the Undertaking should have a schedule incorporating broad principles relating to access agreements upon which the parties can rely in the event of the QCA being called to arbitrate in a dispute.

Disputes - if a dispute arises during an access negotiation and is referred to the QCA, the Authority may appoint an external mediator so as not to jeopardise possible future arbitration.

Network blockages - Network Access should coordinate the clearance of network blockages, including retaining a right to direct any rail operator to assist in the clearance of a blockage.

Material change events – as specified in access agreements are triggers only and should be assessed on a case-by-case basis, not automatically flowed on.

Confidentiality - an access seeker should be able to bind QR contractually to comply with the confidentiality arrangements established in an approved Undertaking.

8.1 Introduction

Schedule E of QR's Draft Undertaking incorporated a summary of a standard access agreement. The summary was in the form of detailed principles. QR argued that it outlined all the major issues likely to be addressed in an access agreement. The Draft Undertaking provided that unless otherwise agreed between QR and a third-party operator, an access agreement must be consistent with the principles.

There was generally strong support from stakeholders for a flexible standard access agreement, however, there was a concern that the Schedule E principles were not commercially balanced. The QCA shared stakeholders' concerns. QR's view was that the Schedule E principles protected QR's legitimate business interests and did not impose unreasonable restrictions upon third-party operators. Following discussions with the QCA, QR made a number of revisions to Schedule E.

In an effort to find areas of common ground between QR and stakeholders, the QCA hosted a Working Group meeting on 5 April 2000 to discuss the revised version of Schedule E prepared by QR. Several stakeholders expressed the view that many of the points in the revised Schedule E were too detailed for a summary document. Given that the same level of detail was not present in other points in the summary, the document was unbalanced. Further, stakeholders expressed the view that, while more detail would be required in Schedule E to address this problem, this could preclude necessary flexibility in commercial negotiations.

At the Working Group meeting, it was agreed that QR's Undertaking should have a schedule incorporating a set of broad principles relating to access agreements upon which parties could rely in the event of the QCA being called upon to arbitrate in a dispute. This schedule would leave many of the issues covered by QR's revised Schedule E to commercial negotiation. It would also need to be broad enough to cover the different requirements of a heterogeneous set of rail operators and end-users.

FreightCorp, on behalf of a number of rail operators and end-users, subsequently prepared a paper outlining the principles that it considered should be included in a Schedule E to the Undertaking. This paper provided the basis for further discussions between QR and the various parties, the outcome of which was further revisions to QR's Schedule E.

Following more discussions between QR and the above stakeholders, the QCA was provided a version of Schedule E reflecting agreement on a large number of issues. Nevertheless, there remained a number of outstanding issues that have required the QCA to exercise its judgement in developing this Final Decision.

8.2 QCA's proposed Schedule E principles

Background

Schedule E of the Draft Undertaking incorporated a summary of a standard access agreement in the form of detailed principles. The Draft Undertaking provided that unless otherwise agreed between QR and a third-party operator, an access agreement must be consistent with the Schedule E principles.

The Draft Decision included a summary of high level principles subsequently developed by QR, in consultation with two of its stakeholders¹, that it proposed would replace the version of Schedule E in the Draft Undertaking. The revised Schedule E reflected agreement on a large

¹ FreightCorp and Toll. A wider group of stakeholders, FreightCorp, Toll, National Rail, QMC AMC, Stanwell and Ensham Resources had previously developed a paper outlining the principles they considered should be included in Schedule E.

number of issues. However, there remained a number of outstanding issues that required the QCA to exercise its judgement. The QCA subsequently re-drafted elements of the revised version of Schedule E and proposed that it be incorporated as a schedule to an approved Undertaking.

Stakeholder views

QR - our comments relate to those of the QCA's Schedule E recommendations with which it has a noteworthy concern. For those issues not specifically referred to below, QR does not object to the principles discussed by the QCA, however QR may use alternate words to those suggested by the QCA in its redrafting if it will more effectively achieve the same objective.

FreightCorp - it would helpful if the QCA could clarify what it means in its summary of Key Aspects of Chapter 8 where it states:

"Guidance - the Undertaking should have a schedule incorporating broad principles relating to access agreements upon which the parties can rely in the event of the QCA being called to arbitrate in a dispute."

What this means is unclear when read with the introduction to Chapter 8, where the QCA states, as a matter of historical fact, that:

"The Draft Undertaking provided that unless otherwise agreed between QR and a third-party operator, an access agreement must be consistent with the principles [contained in Schedule E]".

FreightCorp suggests strongly the purpose of Schedule E be stated clearly because as things stand there exists a level of ambiguity that gives rise to uncertainty. This uncertainty is emphasised by the non-exhaustive nature of many of the Principles contained in Schedule E.

QMC - while the Draft Decision would require QR's internal access agreements to conform with the standard agreement, it will not require them to be disclosed along with all other access agreements as QMC has recommended. Therefore, the standard agreement will provide the only indication of the access arrangements between Network Access and QR Above-Rail Coal that the mines will be implicitly picking up in their new bundled freight agreements.

Ideally, the standard agreement should coincide with the Final Decision. As a minimum requirement, a draft of the standard agreement should be appended to the Final Decision (that document to be based on FreightCorp's draft agreement if QR's revised standard agreement is not available) and then finalised in conjunction with the final approved Undertaking.

QCA's analysis

In response to FreightCorp's query, the QCA considers the role of Schedule E is as follows:

- prior to the establishment of a standard access agreement, to provide a basis against which an arbitrator can assess the fairness and reasonableness of an access agreement in the context of an arbitration; and
- to guide the process of establishing a standard access agreement.

Once the standard access agreement for coal and minerals' traffics has been finalised, Schedule E will no longer be relevant for coal contracts. However, its first role will persist for non-coal traffics. A Working Group meeting on 22 March 2001 discussed the development of QR's standard access agreement. There was strong support for a standard access agreement to be developed for coal services.² In light of this strong support, the QCA intends to pursue this matter once the Final Decision is released. The QCA considers that a standard access

² Both QR and FreightCorp have developed their own draft standard access agreements, which each has provided to QMC.

agreement for coal services would provide a strong basis for the subsequent development of a standard agreement for non-coal services, subject to stakeholder support.

The QCA considers the role of a standard access agreement is to form the basis of negotiations between QR and a person seeking access, as opposed to being an obligatory standard form access agreement. Failure to reach agreement would default to the standard. To clarify the status of the standard access agreement under an approved Undertaking, the QCA considers the Draft Undertaking should provide that the terms of the standard access agreement will be the terms as approved by the QCA from time to time as being consistent with the Schedule E principles. The QCA would support an Undertaking that included the following words:

- “The access agreement must, unless otherwise agreed between QR and the person seeking access, be consistent with:
 - the principles outlined in the standard access agreement which is contained in Schedule E; or
 - where the QCA has approved the terms of a standard access agreement for a particular service or services as being consistent with those principles, the terms of the standard access agreement as approved.”

FreightCorp notes that s118(1)(c) of the QCA Act, which provides that an access determination may “state the terms on which the access seeker has access to the service” allows the arbitrator to make access determinations on any terms. The QCA understands that this is not the case as the arbitrator’s power in s118 is limited in respect of services for which there is an approved undertaking or access code by s119(1), which requires that access determinations “not be inconsistent” with the undertaking or code.

In addition, FreightCorp proposes access agreements be “not inconsistent” with the Schedule E principles, rather than the term “consistent”, as it contends that the use of the term “consistent” will result in QR being inflexible in their negotiation of access agreements.

The QCA considers that the intention of Schedule E is to provide a fall-back position where the parties cannot agree otherwise. Given this, the use of the term “consistent” is appropriate. The use of the term “not inconsistent” may result in numerous disputes between parties negotiating access agreements, which is what the approval of QR’s Undertaking and specifically the inclusion of Schedule E is intended to avoid. However, as Schedule E is currently in the form of broad principles, the question of whether an agreement that purports to give detail to those principles is fair and reasonable may be determined by arbitration under the QCA Act.

The QCA believes it would be of benefit to access seekers to clarify in the Undertaking the arbitrator’s power to arbitrate with respect to disputes regarding the form of access agreements based on Schedule E. The QCA would support an Undertaking that included the following words:

- “Recognising that there will be more than one detailed form of words which would be consistent with the principles set out in Schedule E, where a dispute arises about whether an agreement which purports to give detail to the broad principles contained in Schedule E is fair and reasonable, the parties may seek arbitration under the QCA Act.”

With regard to QMC’s comments about public disclosure of access agreements for coal services, the QCA has proposed that both internal and external access agreements for coal services must be publicly disclosed. This issue is discussed in section 3.7.3 of Chapter 3.

The QCA does not consider it is feasible for the preparation of a standard access agreement to coincide with the Final Decision and consequently the respective draft standard agreements of QR and FreightCorp have not been appended to the Final Decision. Nevertheless, the QCA agrees with QMC that the development of a standard access agreement for coal services could be finalised in conjunction with the development of a final approved Undertaking.

QCA's position

The QCA considers it appropriate that the Draft Undertaking be amended such that:

- **the access agreement must, unless otherwise agreed between QR and the third party operator/access seeker, be consistent with:**
 - **the principles outlined in the standard access agreement which is contained in Schedule E; or**
 - **where the QCA has approved the terms of a standard access agreement for a particular service or services as being consistent with those principles, the terms of the standard access agreement as approved;**
- **recognising that there will be more than one detailed form of words which would be consistent with the principles set out in Schedule E, where a dispute arises about whether an agreement which purports to give detail to the broad principles contained in Schedule E is fair and reasonable, the parties may seek arbitration under the QCA Act.**

8.3 Amendments to QCA's proposed Schedule E principles

Stakeholders proposed a number of amendments to the QCA's proposed Schedule E principles. The QCA's assessment of the proposed changes is set out in the sub-sections below. If the QCA has decided to make a change, the revised principle(s) is presented in the 'QCA's position' part of the relevant sub-section. The final version of Schedule E, in full, is presented at the end of the chapter.

Where no stakeholder comments were received on a principle, the QCA has not added to the views it expressed in the Draft Decision. Where stakeholders commented on a principle reflecting a matter discussed at length elsewhere in the Final Decision, the QCA has cross-referenced the relevant chapter and section rather than repeating the previous discussion.

In considering stakeholder views, the QCA has generally rejected any proposed amendments that would result in additional detail being incorporated into the Schedule E principles. The QCA considers such proposed amendments to be inconsistent with stakeholders' preference, expressed at a Working Group meeting of 5 April 2000, for Schedule E to consist of a broad set of principles.

8.3.1 Dispute resolution process

No stakeholder comments were received on this matter. Consequently, the QCA has not added to the views it expressed on this matter in the Draft Decision.

8.3.2 Obligations on the access holder

Background

The QCA's proposed Schedule E principles included the following:

- “Train service entitlements can be varied only in accordance with agreed scheduling procedures specified in the agreement or as otherwise agreed between the parties.”

Stakeholder views

QR - advised the QCA of its concern that the QCA's proposed Schedule E principles excluded the words “long-term” (before “train service entitlement”). QR had specifically differentiated between long-term and short-term train service entitlements in its principles.

FreightCorp - given the QCA's finding it is appropriate to develop Scheduling Principles, it would seem more appropriate for Schedule E to anticipate the incorporation of the Scheduling Principles by reference.

If the Scheduling Principles are to govern scheduling it may be appropriate to consider the extent to which QR and the access seeker can agree to something different if it may impact another rail operator or afford a preference.

RTBU - considers that the QCA's determinations in regard to Schedule E favour third-party operators.

QCA's analysis

The removal of the words “long-term” from the QCA's proposed Schedule E principles was a typographical error. The QCA supported QR differentiating between long-term and short-term train service entitlements.

The QCA supports FreightCorp's suggestion that it would be appropriate for Schedule E to incorporate the Scheduling Principles by reference.

With regard to FreightCorp's concern about negotiated scheduling differences impacting on third parties, the QCA considers that an operator's capacity entitlement, including the extent to which it could vary, would be established when negotiating an access agreement. Scheduling matters are discussed in section 6.2 of Chapter 6.

QCA's position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- **“Long term train service entitlements can be varied only in accordance with agreed scheduling procedures specified in the agreement or as otherwise agreed between the parties. The Scheduling Principles should guide the performance of the scheduling function by QR”**

8.3.3 Obligations to act in good faith and in a non-discriminatory manner Background

The QCA Act provides that an access provider and access seeker must negotiate in good faith for reaching an access agreement. S104 and s125 of the QCA Act are directed at preventing an access provider engaging in conduct for the purpose of preventing or hindering access.

The QCA argued that the onus should be on stakeholders to identify cases where good faith arrangements would be appropriate.

The relevant principle was as follows:

- “Access agreements will be for a specific term and include a good faith negotiation process for renewal.”

Stakeholder views

FreightCorp - in the ordinary course, a good faith negotiation process for renewal will be unenforceable.

Further, given the access regime provided by the QCA Act, it may be appropriate to make it clear any right under the access agreement is not intended to exclude or limit any right under the QCA Act.

QCA's analysis

The QCA accepts that a good faith negotiation process for renewal of access agreements will be unenforceable. Further, it should be noted that the QCA is not proposing that access holders gain options through their access contracts.

With regard to FreightCorp's concern about the interaction between rights under an access agreement and rights under the QCA Act, the QCA considers that any right under an access agreement is not intended to exclude or limit any right under the QCA Act.

Given the above comments, the QCA does not intend to change the relevant principle.

8.3.4 Accreditation agencies and regulatory bodies – oversight role for QR

This matter has been addressed in Chapter 7.

8.3.5 Access charges

Background

The QCA expressed concerns about QR's proposed principles for payment of access charges, on the grounds that the potential exists for Network Access to exert significant commercial leverage as the provider of a monopoly service.

Stakeholders supported the use of objective criteria, such as S & Ps and Moodys' credit ratings, in relation to QR assessing the creditworthiness of third parties. In light of practical difficulties associated with the use of credit ratings for such a purpose, for example, the ratings being more appropriate for long-term debt raisings by companies, the QCA did not include such a criterion in the proposed Schedule E principles.

The relevant principles were as follows:

- “The agreement may provide for periodic review of access charges.

- In appropriate cases, QR may require lodgement of a security to secure performance by the third-party of its obligations under the agreement having regard to QR's reasonable assessment of the creditworthiness of the third-party Any required security should reflect the revenue risk that QR has taken on."

Stakeholder views

QR - sought clarification that there is no requirement for security deposits to be cash and that the type of security deposit would be subject to negotiation between QR and third parties.

QR also raised the issue of it using S & P and Moodys ratings of third party operators to assess creditworthiness, which in its view would be more thorough than its own rough valuations and/or assessment of a third party's payment record in another jurisdiction.

FreightCorp - it is appropriate to be more specific, providing for review of access charges on any variation in the Undertaking and on specified events provided for in the access agreement.

The cost of security obtained from a third-party is not a cost that QR Above-Rail has, nor is the cost of obtaining a credit rating. Accordingly, FreightCorp would add to the list of matters identified by the QCA as matters that may serve as barriers to entry, the cost to third-party operators of complying with prudential requirements.

QR should not be allowed to seek security to cover any risk other than revenue risk.

FreightCorp is concerned if more prescription is not contained in Schedule E on this issue all third-party operators will be required to incur costs that QR Above-Rail does not incur. In this regard, it would be helpful to exclude by Schedule E a blanket requirement imposed by QR on third-party operators either to obtain a credit rating or to provide security.

The exclusion could also impose on QR an obligation to consider security that is the most cost effective for third-party operators, for example a parent guarantee. This issue could be dealt with by the inclusion in Schedule E of a list of securities that if granted by an entity with an acceptable credit rating will suffice for QR's purposes.

QCA's analysis

FreightCorp argues there is a need to be more specific in providing for review of access charges. The QCA considers this is an issue to be resolved as part of the development of the standard access agreement.

The QCA agrees that the type of security deposit provided by a third-party as part of an access agreement would be subject to negotiation between QR and the third party and need not be cash. The QCA's proposed provision that a third party paying a security deposit should be credited interest on the security at a market-based rate for as long as it was held by QR, related to cash security deposits.

The QCA accepts that security arrangements should be cost effective from a user's perspective as long as QR's legitimate business interests are protected. In practice, FreightCorp's concerns regarding security could be addressed by FreightCorp making an upfront payment and being credited interest on it against its access charges.

The QCA considers that the relevant Schedule E principles proposed in the Draft Decision along with the above clarification should provide a reasonable framework for negotiations between QR and third parties regarding the establishment of security deposits.

8.3.6 Train service entitlements

The QCA has proposed the following Schedule E principle:

- “Train service entitlements can be reduced by QR upon reasonable notice to prevent the hoarding of capacity and appropriate adjustments will be made to the access charges payable.”

Stakeholder views

FreightCorp - given the findings of the QCA on resumption and capacity, it may be appropriate to develop the principle such that it reflects the QCA’s findings.

QCA’s analysis

The QCA agrees with FreightCorp that this principle needs to be re-drafted to reflect the QCA’s position on capacity resumption matters in section 6.7 of Chapter 6.

QCA’s position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- **“The agreement will contain provisions regarding the resumption of capacity by QR. Unless otherwise agreed by the parties, the provisions will include objective criteria to assess consistently under-utilised capacity, a test for alternative demand and a tailored dispute resolution process conducted by an independent expert. Appropriate adjustments will be made to the access charges payable following a reduction in train service entitlements.”**

8.3.7 Day-to-day train movements

Background

The QCA discussed in detail the scheduling and train control framework that it considered should be established by QR’s Undertaking in Chapter 6 (Capacity Management) of the Draft Decision.

QR’s Schedule E principles proposed that QR and third parties should use all reasonable endeavours to ensure that the operation of train services is in accordance with the train timetable. The QCA argued that a reasonable endeavours commitment by QR to deliver the daily train plan provides third parties, whose access rights are reflected in the master and daily train plans, with insufficient certainty that QR will deliver on its contractual commitments.

Reflecting this concern, the QCA proposed the following principle:

- “QR shall ensure that the operation of train services is in accordance with the relevant daily train plan, which may be varied in the circumstances specified in the agreement (which normally include safety considerations, force majeure, incidents or emergencies, track possessions in accordance with the agreement or as otherwise agreed between the parties, such agreement not to be unreasonably withheld).”

Stakeholder views

QR - considers an absolute obligation as opposed to a reasonable endeavours obligation would mean that any poor performance on QR's part in relation to the day-to-day operation of train services would constitute a breach of the access agreement. On the other hand, an operator would appear to have no obligations whatsoever in relation to the day-to-day operation of its train services. This seems illogical and contrary to commercial reality, particularly when QR's performance of its obligations to one operator can be greatly influenced by the actions of another operator on its network.

In addition, QR considers these QCA recommendations may represent a misunderstanding of how QR proposes to deal with its obligations to a party on a short-term and long-term basis. The following explains how QR envisages the standard access agreement dealing with obligations of the parties.

QR has an absolute obligation to comply with an operator's train service or capacity entitlement subject only to agreed scheduling procedures or the agreement of the relevant operator. The consequences for it failing to meet this obligation will be specified in the access agreement itself. QR currently proposes that specific consequences for breach will be defined in the access agreement, as will any circumstances under which the consequences might not be applicable.

The following dot points outline in more detail QR's proposed approach in relation to day-to-day train movements (clause 4 of Schedule E):

- both parties to the agreement would have a 'reasonable endeavours' obligation to ensure that train services run in accordance with the daily train plan;
- in addition, a key performance indicator/s (KPI) regime would be incorporated in the agreement addressing performance issues, including the running of train services in accordance with the daily train plan; and
- in the event of poor performance (for instance, QR not providing scheduled paths, or an operator failing to present its trains at the time scheduled in the daily train plan), the relevant consequences would be specified as part of the KPI regime and incorporated in the access agreement; and
- in relation to the running of the daily train plan, unless a party has not used 'reasonable endeavours' to meet the required performance standard, the poor performance would not be treated as a breach of the agreement. As a result, an operator would not necessarily have a claim for damages for breach of contract if QR failed to deliver train services in accordance with the daily train plan, despite using reasonable endeavours to do so. Similarly, if an operator failed to perform its obligations in relation to the running of the daily train plan, despite using reasonable endeavours to do so, its poor performance would not be treated as a breach of contract. Rather, the consequences, in both circumstances, would be specified in the KPI regime as part of the access agreement.

QR considers its approach not only places an appropriate incentive upon the parties to run the daily train plan as scheduled, it also clarifies the consequences of poor performance, and ensures that parties do not have 'two bites of the cherry' in respect of their performance under an access agreement. As the consequence of particular conduct is spelt out in the agreement through the performance regime, QR considers there should not also be a remedy in contract for damages.

In other areas of the Draft Decision, the QCA has indicated it expects the consequences of poor performance to be identified in the access agreement, however, the QCA has not specified what it considers to be an appropriate consequence of QR failing to follow the daily train plan. QR maintains the above approach presents a solution to this problem.

ARTC - is concerned with the principle that requires QR to ensure the operation of train services is in accordance with the relevant daily train plan, which may be varied in the circumstances specified in the agreement. It considers this principle fails to recognise the fact that adherence to a daily train plan is a function of the performance of both Network Access and the third party operator (or QR Above-Rail Business Group).

The proposed principle seems more appropriate as a commitment to a user by an operator or a vertically integrated railway. The proposed performance measures specifically seek to separate these respective responsibilities, and measure only that performance over which each party has control and can manage. ARTC is of the view that any commitment to be made by QR to an operator in this regard should be based along similar lines. Those commitments that ARTC makes to its customers have been detailed previously.

It is assumed the proposed principle refers to adherence to a relevant daily train plan, being measured on outcome. ARTC's entitlement incorporates entry and exit locations and times only (unless otherwise agreed). Performance against commitments made to the operator should be measured with respect to these specifications only, rather than the minute-by-minute variation of a train against its path.

FreightCorp - in terms of the performance regime for train control in the access agreement, there is a lack of certainty given the lack of any clear basis upon which QR might be liable for not providing that which it contracted to provide and the 'reasonable endeavours' obligation to have the nominated network available such that train services are able to achieve their scheduled times.

FreightCorp strongly supports the QCA findings that the parties must agree specific performance levels and measurement criteria. Performance levels are not enough to give comfort to third-party operators that they will be provided with that which QR has agreed. Therefore, FreightCorp seeks a clear statement as to the "role for a centrally determined performance regime" and whether it is intended that it form part of the base case for access seekers in Schedule E.

FreightCorp considers it is appropriate to anticipate the development of specific performance levels that will also become industry standards. In the absence of a process to formulate specific performance levels at an industry level, the specific performance standards agreed on, if agreed on, will tend to be less effective as a means of encouraging performance by QR.

Given Train Control Principles are to be developed, it may be more appropriate for Schedule E to provide that train control and train services must be exercised in accordance with the Train Control Principles. The commitment regarding delivery of train service may be excused where because of safety considerations a lesser service only may be provided. Non-performance will lead to payment under a regime that monitors performance by reference to specific performance levels.

It may be more appropriate to anticipate the Scheduling Principles and Train Control Principles as being the documents that will determine when variations to the daily train plan may occur.

QCA's analysis

QR is concerned that an absolute obligation, as opposed to a reasonable endeavours obligation, does not give it the flexibility to manage necessary changes to the daily train plan and also that the QCA's proposed amendment results in a third-party operator having no obligations in regard to that plan.

The QCA's relevant principle recognises that as network manager, QR will need to make changes to the daily train plan from time to time. However, the QCA remains of the view that a reasonable endeavours commitment does not provide third-party operators with sufficient certainty that QR will deliver its contractual entitlement.

The QCA's proposed principle provides greater certainty to the third-party operator regarding the grounds on which the daily train plan can be changed. Nevertheless, the fact that QR is able to negotiate such changes with the third-party operator as part of the access agreement enables it to protect its legitimate business interests. To the extent that there is lack of agreement about the circumstances in which the daily train plan can be changed, there would be recourse to dispute resolution.

Nevertheless, the QCA agrees with ARTC that QR's performance against its commitment to the third-party operator should be measured with respect to entry and exit times only, rather than the minute-by-minute variation of a train against its path specified in the daily train plan.

The QCA disagrees with QR's view that an operator has no obligations in relation to the day-to-day operation of its train services. For example, in many instances, poor operator performance will result in substantial delays to its train. When poor performance does not result in delays to a train, it is likely to result in penalties applying under the terms of the performance regime. For example, where train delays arise from poor operator performance, but the requirement to maintain in-line running means that the train retains its priority.

The QCA focussed on QR's obligations regarding the daily train plan because of its role as network manager (and access provider) and the damage that could be caused to third-party operators as a result of it only being required to meet a weak performance commitment. Nevertheless, the QCA recognises that a reasonable endeavours commitment by third-party operators to perform in accordance with the daily train plan is insufficient because it does not provide QR with sufficient certainty with respect to the management of traffic flow on its network.

The QCA considers that the obligations of third-party operators regarding scheduling matters will be addressed as part of the development of the standard access agreement.

QR is concerned that an absolute, as opposed to a reasonable endeavours, obligation to deliver train services in accordance with the daily train plan will expose QR to penalties under both the performance regime and also to legal action for breach of an access agreement. The QCA understands that if the key performance indicator regime is introduced as a contractual provision whereby QR commits to adhere to the relevant regime there will be breach of the agreement if QR does not achieve the required performance standards. However, QR does not indicate that this will be the case, rather it states that the consequences of non-performance would be specified in the key performance indicator regime as part of the access agreement. In other words, the access seeker may not have a right to sue for breach of contract for QR's failure to achieve a key performance indicator.

The QCA considers that QR and the third party operator should agree upon the consequence of a breach of a particular performance standard that is reasonable in the circumstances, including whether there should be financial implications. The parties may negotiate an alternative mechanism to going to court to resolve a dispute.

It should be noted, to the extent that QR becomes exposed to financial penalties as a consequence of not meeting agreed performance levels, then consideration would need to be given as to an appropriate allowance in reference tariffs. The exact mechanism to achieve this will depend on the incentive regulation arrangements. For example, if a revenue cap is adopted, then the allowance could be taken off the 'overs and unders' account. The situations in which penalties will apply in the regime will need to be assessed in conjunction with the development of the standard access agreement.

The QCA agrees with FreightCorp's suggestion that the Scheduling Principles and Train Control Principles (the Network Management Principles) be recognised in Schedule E as being the documents that will determine when variations to the daily train plan may occur.

QCA's position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- “QR and third parties shall ensure that the operation of train services is in accordance with entry and exit times on the relevant daily train plan, which may be varied in the circumstances specified in the agreement (which normally include safety considerations, force majeure, incidents or emergencies, track possessions in accordance with the agreement or as otherwise agreed between the parties, such agreement not to be unreasonably withheld).
- The Network Management Principles establish the procedures QR must follow in varying the daily train plan.”

8.3.8 Train operations

Background

The QCA argued that a central aspect of any access agreement is likely to concern the adherence of both parties to specific performance levels and management criteria. To this end, the QCA proposed the following principle:

- “The parties should agree specific performance levels and measurement criteria as a basis for creating effective performance management and incentives. This may involve financially-based incentives and sanctions”.

Stakeholder views

ARTC - in regard to key performance indicators, ARTC recognises, given the current early stage in their development, a number of indicators relating to both ARTC and operator performance have been detailed in our standard access agreement. The performance of each party against these measures, as well as the performance of the measures themselves, is to be monitored and used as a basis for consultation between the parties for a period of twelve months. At that time, the parties would jointly determine the appropriateness of the measures for the purpose of reward or penalty. ARTC proposes that the same approach should be recognised in the proposed performance indicators for QR.

FreightCorp - it would be appropriate for the Final Decision to state whether or not the QCA considers that safeworking procedures and safety standards should be regarded as industry standard documents. If so, as with other industry standard documents, they should be developed on a consultative basis with all stakeholders.

If not, FreightCorp remains concerned that QR may vary the procedures and standards in a manner that is optimal for QR, but not rail operators. FreightCorp considers it may be appropriate for the QCA to have a role to ensure that QR does not use variations of the safeworking procedures and standards in this way.

Given the QCA's findings, FreightCorp considers it is appropriate for Schedule E to state expressly that each access seeker is entitled to the inclusion of a contractual right to proceed against QR if it acts in any way to hinder or to restrict access.

QCA's analysis

The QCA considers that FreightCorp's suggestion that safeworking procedures and safety standards should be regarded as industry standard documents is a level of detail not appropriate for Schedule E. The matter of system-wide changes to safety standards was discussed in section 7.2 of Chapter 7.

FreightCorp proposes Schedule E should state expressly that each access seeker is entitled to the inclusion of a contractual right to proceed against QR if it acts in any way to hinder or to restrict access. S104 and s125 of the QCA Act, which provide that a party must not prevent or hinder a user's access, are only relevant once an access agreement or access determination is in place. Consequently, QR, as an access provider, can only breach s104 and s125 once an access agreement comes into effect. S153 of the QCA Act already allows an aggrieved party to go to court for damages. As a result, the QCA does not intend to amend Schedule E along the lines proposed by FreightCorp.

The QCA considers ARTC's proposal of a 'paper trial' of 12 months for the performance measures seems reasonable. This matter should be discussed further in the context of the development of the standard access agreement.

8.3.9 Infrastructure management

Background

QR's proposed Schedule E principle provided caveats to QR's commitment to deliver a third-party operator's train service entitlement in the face of maintenance work on its network. The QCA argued that such caveats would weaken QR's obligation to deliver a third-party operator's contracted train service entitlements by providing QR with a reasonably wide discretion to depart from this entitlement.

Beyond a force majeure event, the QCA considered any failure on QR's part to deliver train service entitlements should be addressed through the performance regime. To address this concern, the QCA proposed the following Schedule E principles:

- "QR will carry out maintenance work on the nominated network such that, subject to any agreed criteria, the infrastructure is consistent with the agreed rollingstock interface standards ...
- In carrying out such [maintenance] work, QR will use its reasonable endeavours to minimise disruption to train services so that the third-party can operate train services in accordance with its train service entitlements.
- QR will not be liable for claims in relation to, or arising out of, the standard of the infrastructure except where QR fails to maintain the infrastructure such that, subject to agreed criteria, it is consistent with the agreed rollingstock interface standards ..."

Stakeholder views

QR - with regard to the second dot point in clause 6 of Schedule E, the QCA has recommended the deletion of the reference to 'applicable operational constraints'. In doing so, the QCA is effectively saying that QR should, subject only to any 'agreed criteria', have an absolute obligation to maintain the network to ensure that it is consistent with agreed rollingstock interface standards and to ensure third parties can operate their train services in accordance with their train service entitlements. A failure to do so will constitute a breach of the access agreement.

QR's position remains that it will need to be able to impose operational constraints, from time to time, to ensure the integrity of the system for all users and it cannot agree to an absolute obligation that it will need to default on in order to properly maintain the network.

QR considers the critical point is that ultimately, it has an absolute obligation, as specified in clause 1 of Schedule E, to provide a party with its capacity entitlement. If it fails to do this, the agreement will specify the consequences. In addition, QR has a reasonable endeavours obligation to run services to meet a daily train plan. A failure to do so will be dealt with as specified in the agreement. As a result of these obligations, QR does not believe that the current drafting of clause 6 provides QR with an unrestricted right to impose operational constraints.

Furthermore, QR considers the QCA's recommendation for the second dot point of clause 6 is potentially inconsistent with the third dot point in clause 6. This provision recognises QR's right to impose operational constraints for the protection of persons or property or to facilitate maintenance work or enhancements and QR's reasonable entitlements to take possession of the track for the purpose of maintenance work, emergency repairs and enhancements. The QCA has not recommended the amendment of this provision.

FreightCorp - it is appropriate for the owner/operator and users of the infrastructure to act in good faith to secure the most optimal manner in which planned maintenance of the infrastructure should occur. If the planned Network Maintenance Principles (NMP) were to be developed and incorporated by reference in each access agreement, FreightCorp considers third-party operators would cooperate to deliver a maintenance program that is the most efficient having regard to the needs of the owner/operator and users. The NMP would be able to give certainty in all cases other than unplanned maintenance to address safety issues.

FreightCorp considers it would be appropriate for Schedule E to state the consequences of the inspection of the nominated network, and the consequence of it not being inspected.

QCA's analysis

The QCA's main concern with QR's proposed Schedule E principle was that in the face of maintenance work on its network, QR committed to "substantially" deliver a third-party's train service entitlement and also provided a caveat that its commitment was subject to "applicable operational constraints". In practice, these caveats would weaken QR's contractual commitment to deliver a third-party's access rights and correspondingly provide insufficient certainty to the third party as to the level of service it would receive from QR.

This matter is closely related to QR's obligation to deliver the daily train plan (discussed in section 8.2.7).

Again, the QCA considers that this matter should be addressed as part of the negotiations between QR and a third-party operator regarding its capacity entitlement, including the flexibility built into the entitlement. The QCA does not accept QR's argument that it would be inhibited in performing maintenance work on its network. Rather, the QCA's proposal provides for QR and the operator to negotiate and agree on the circumstances in which maintenance work can be performed on the network (eg planned and unplanned maintenance) and the management of the effects of that maintenance work on the third-party operator's proposed train services. The consequences of a failure to deliver train services according to the agreed capacity entitlement, defined as an entry and exit time on the network, will be established under the performance regime. As discussed in 8.2.7, only one claim for not meeting the agreed entitlement would apply as QR would not be liable for penalties under both the KPI regime and separately for breach of contract.

If either QR or the third-party operator make unreasonable demands as far as allowances for maintenance work on train services is concerned, either party can seek arbitration. In this regard, the QCA has supported FreightCorp's suggestion that Network Maintenance Principles be developed and incorporated by reference in each access agreement (see section 6.4 of Chapter 6).

QR has raised concerns that the QCA's proposed amendments for the second dot point of clause 6 and the third dot point are potentially inconsistent. The QCA does not accept that there is any inconsistency here. The key point is that QR still has an obligation to deliver in accordance with the capacity entitlement. The QCA believes that, as network manager, QR should bear the risk of maintaining its rail infrastructure to an agreed standard.

QCA's position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- **“Once developed, Network Maintenance Principles should be incorporated by reference in the agreement.”**

8.3.10 Incident management

Background

There was disagreement between QR and stakeholders regarding the roles and responsibilities of Network Access and rail operators regarding rescue and recovery of broken-down rollingstock on QR's network.

The QCA argued that it is important to differentiate between two types of rollingstock rescue and recovery service. First, rescue and recovery of rollingstock that is causing a network blockage. Second, recovery of rollingstock from a breakdown siding.

The QCA argued that there are sound operational and safety reasons for Network Access to coordinate the clearance of network blockages, for example, as a result of an incident. It would be open for QR to require that access agreements contain a requirement that access seekers make rollingstock available for the purposes of clearing blockages. The QCA accepted it is the responsibility of rail operators to put in place arrangements to effect the second type of rescue and recovery service.

The incident management principles proposed by the QCA were as follows:

- “Prior to the commencement of train services the third-party is required to develop an emergency response plan containing procedures for dealing with incidents which must not be inconsistent with QR's emergency procedures.
- In the event of an incident, QR is responsible for the overall coordination and management of incident responses and may, subject to using reasonable efforts to consult with the third-party, take any action it considers reasonably necessary to recommence services as soon as possible. The third-party is to cooperate and assist with the restoration of train movements in accordance with directions from train controllers seeking to coordinate the clearance of network blockages. Any third-party so directed should be adequately compensated for doing so and is entitled to expect that all rail operators are subject to the same obligation.
- Once a third-party's train has been moved off the mainline and is no longer causing a blockage, it is responsible for implementing its recovery plan for the broken-down rollingstock, including effecting the recovery within a reasonable period.

- Investigations into incidents are to be commenced as soon as practicable after an incident and carried out in accordance with the process specified in the agreement. The parties must cooperate in any investigation and consult in good faith in relation to the implementation of any recommendations.”

Stakeholders views

QR - accepts its responsibility as railway manager, to facilitate the clearance of the mainline in the event of an incident involving an operator’s rollingstock. However, the QCA’s differentiation between recovery for the purpose of clearing a network blockage, and recovery of rollingstock from a breakdown siding, once it is no longer causing a network blockage, is simplistic. In very few instances will rollingstock be able to be moved from the mainline to a ‘breakdown siding’ that is sufficient in size to accommodate an entire train. In fact, only passing loops can accommodate a full train and these are part of the operational network. As a result, if a wagon is faulty it may be removed and left in a breakdown siding, but if a locomotive has broken down, the option of moving the consist to a siding until it can be recovered by the operator may not be realistic. As a result, it is not sufficient to state a third party must only have an obligation to put in place arrangements to effect the second type of rescue and recovery service.

The QCA recommendation also assumes another locomotive can remove the rollingstock and trains that are blocking the mainline. This fails to address a derailment situation, where cranes or other equipment may be required.

In addition, QR would dispute any inclusion of principles in Schedule E that might have the effect of allowing an operator to avoid the implementation of processes necessary for recovery of their rollingstock in all derailment and breakdown situations. For instance, a smaller operator may determine that another, larger operator will always be able to provide recovery faster than it can because of the greater number of locomotives and other equipment that are available to the larger operator. This would place an unfair burden on a larger operator. QR considers the QCA’s recommendations could be interpreted to have this effect.

As a result, QR considers it is essential that all operators have the ability to recover their rollingstock in the event of breakdown or derailment. In effect, this means third party and QR operators should develop Emergency Response Plans that are appropriate in the context of their operations. Not only would the type and extent of their operations be relevant (for instance, two trains per week over a corridor that is heavily used by several other operators on a cyclic basis, as opposed to two trains per week over a corridor that is rarely or never used by other operators) but also the location (for instance, in the suburban network, the impact of a train breaking down or derailling and blocking commuter passenger trains will necessitate an Emergency Response Plan that accommodates a fast response time).

As suggested by the QCA, QR agrees it should reserve the right to require operators to assist in clearing a breakdown or derailment situation, notwithstanding that operator’s rollingstock is not involved in the breakdown. However, this option should be exercisable at QR’s discretion, and should only be relevant where it would result in a more rapid and efficient removal of the network blockage than would otherwise be the case if the responsible operator were to clear its own rollingstock from the track. QR considers its approach is consistent with that taken by other rail infrastructure managers in other jurisdictions in Australia.

QR acknowledges the QCA’s concern that QR could insist on a third party’s recovery arrangements incorporating the provision of spare locomotives, when the third party might be able to demonstrate a satisfactory alternative means of recovering its rollingstock. QR does not consider its approach could lead to this result, bearing in mind QR’s requirement that an operator’s Emergency Response Plan reasonably reflect its operations. QR considers every operator must have recovery abilities, however, it may choose to provide for these abilities by dedicating its own resources or coming to an arrangement with another operator for the provision of services.

A subsidiary point in relation to the QCA’s recommended changes to the second dot point in clause 7 of Schedule E, relates to the compensation of third parties for assisting in the restoration of train movements by the provision of recovery services. Although QR understands the QCA is only intending for parties whose rollingstock is not involved in the blockage to be compensated, the amendments do not clarify this point. The recommendation

also needs to ensure QR has a right to pass through the cost to the party that has broken down. Both of these points will be clarified in QR's redraft of Schedule E in the revised undertaking.

ARTC - the proposed principles require a third party's planned procedures for dealing with incidents must *not* be inconsistent with QR's emergency procedures on the basis that this is more straightforward than a consistency test. ARTC supports QR's assertion that as it is responsible for safety on the network, the third party's response plan must be consistent with QR's emergency procedures. ARTC believes this represents reasonable protection of legitimate business interests in this regard, and outweighs any benefit from having a more straightforward test as proposed. ARTC has proposed a consistency test in its standard access agreement.

FreightCorp - supports strongly the QCA's finding that a third-party's emergency response plan should "not be inconsistent" with the QR emergency procedures.

Acknowledging the parties must consult in good faith if they agree to implement a recommendation, the wording leaves open whether the parties must consult to implement irrespective of whether or not they agree to implement a recommendation.

QCA's analysis

The QCA's proposed principles recognise the fact that, as network manager, it is Network Access' responsibility to clear the mainline in the event of an incident involving an operator's rollingstock. QR's submission accepts its responsibility in this regard.

As such, Network Access is responsible for the overall coordination of the response to an incident. Third-party operators have an obligation to cooperate and assist with the restoration of train movements. In addition, the QCA accepts there needs to be an Emergency Response Plan (ERP) agreed between Network Access and each rail operator for the recovery of its rollingstock off the mainline.

The QCA hopes this clarification addresses QR's concern that the QCA's proposed principles might have the effect of allowing a rail operator to avoid the implementation of processes necessary for recovery of its rollingstock in all derailment and breakdown situations. To further remove any confusion, the QCA has removed the principle commencing "Once a third-party's train has been moved off the mainline...."

Nevertheless, the key issue from the QCA's perspective is to ensure that QR does not place unreasonable requirements on a third-party operator with respect to its ERP. This could be a requirement to have spare locomotives to help clear the network in the event of an incident, notwithstanding the operator can demonstrate an alternative means of effecting timely recovery of its rollingstock. The QCA considers a third-party operator's ERP should reflect its operations and the risks it poses to the network.

The QCA notes that Network Access should not allow a QR above-rail group to refuse to provide assistance to a third-party operator to clear a network blockage. There will be circumstances, for example, on a single line, where the train belonging to the QR above-rail group is the only one capable of providing assistance. The reverse situation could well apply for a QR above-rail group causing a blockage. The QCA considers that the compensation arrangements would ensure that neither party is unfairly disadvantaged in the event of an incident. These compensation arrangements need to be developed as part of the standard access agreement.

The QCA accepts QR's point that the second dot point in clause 7 of Schedule E needs to be clarified to specify that only parties whose rollingstock is not involved in the blockage are to be compensated. Further, it seems reasonable that the principles should state that QR has a right to pass through the cost to the party that has broken down.

With regard to ARTC's point that the third party's response plan must be consistent with QR's emergency procedures (rather than 'not inconsistent with'), the QCA considers that the important issue is that the plans are compatible. The QCA has amended the relevant principle to reflect this.

QCA's position

The QCA would support an Undertaking that:

- **"Prior to the commencement of train services the third-party is required to develop an emergency response plan containing procedures for dealing with incidents which must be compatible with QR's emergency procedures.**
- **In the event of an incident, QR is responsible for the overall coordination and management of incident responses and may, subject to using reasonable efforts to consult with the third-party, take any action it considers reasonably necessary to recommence services as soon as possible. The third-party is to cooperate and assist with the restoration of train movements in accordance with directions from train controllers seeking to coordinate the clearance of network blockages. Any third-party so directed and not involved in the blockage, should be adequately compensated for doing so and is entitled to expect that all rail operators are subject to the same obligation. QR has the right to pass through the cost of clearing the blockage to the party that has broken down."**

8.3.11 Environmental protection and other issues

Background

The Draft Decision proposed a number of amendments to the environmental provisions of the Draft Undertaking.

QR's submission in response to the Draft Decision proposes some changes to the QCA's position on the environmental provisions of the Draft Undertaking. These proposed changes are discussed in section 7.9 of Chapter 7. To ensure consistency with these proposed changes, QR proposes some re-drafting of the relevant Schedule E principles.

Stakeholders views

QR - the effect of QR's comments regarding Chapter 7 is as follows (QR's proposed amendment to the QCA's suggested principles are shown in italics):

"Environmental management must be approached on a risk identification and risk management basis with respect to operations on the nominated network. Auditing requirements should be linked to the environmental risks posed by a third party's operations and be established in that party's *Environmental Investigation and Risk Management Report (EIRMR)*, which should be amended as necessary from time to time to address ongoing risk and compliance issues.

The third party is required to inform QR of non-compliance with its *Environmental Investigation and Risk Management Report (EIRMR)* and provide details of how it intends to address the non-compliance. The third party is required to rectify the *non-compliance* as soon

as practicable having regard to the nature of the *non-compliance, the reasonable interests of QR* and any action required by the EPA.”

FreightCorp - is concerned that if this provision is included, Schedule E should make clear any suspension will be subject to the contractual frustration of access remedy and that the remedy will allow recovery of damages in accordance with the common law remoteness of damage test.

QCA’s analysis

QR’s proposed re-drafting of the environmental protection principles is consistent with the changes in the QCA’s position discussed in section 7.9 of Chapter 7 and consequently has been accepted. The QCA also discussed and developed in that chapter, environmental termination and suspension principles to be incorporated in Schedule E.

QCA’s position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- “Environmental management must be approached on a risk identification and risk management basis with respect to operations on the nominated network. Auditing requirements should be linked to the environmental risks posed by a third party’s operations and be established in that party’s Environmental Investigation and Risk Management Report (EIRMR), which should be amended as necessary from time to time to address ongoing risk and compliance issues.
- The third party is required to inform QR of non-compliance with its Environmental Investigation and Risk Management Report (EIRMR) and provide details of how it intends to address the non-compliance. The third party is required to rectify the non-compliance as soon as practicable having regard to the nature of the non-compliance, the reasonable interests of QR and any action required by the EPA.”
- A third-party operator should comply with its obligations under the EPA Act, including any notices or directions it received from the EPA. Failure to comply with such an obligation and for that failure to cause or threaten serious environmental harm establishes grounds for a material event of default.
- QR reserves the right to temporarily suspend the right of a third-party operator to operate on the relevant network section in the event that, in QR’s reasonable opinion, the operator’s train services cause or threaten material or serious environmental harm. QR will not exercise this suspension power in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 or s125 of the QCA Act.
- A third-party operator could reserve the right that if its train services are suspended on environmental grounds without reasonable justification, then QR would be liable for the loss

thereby caused.”

8.3.12 Third-party’s staff

This matter has been addressed in section 7.5 of Chapter 7.

8.3.13 Inspection and audit rights

Background

The relevant principle proposed by the QCA was as follows:

- “Rights of inspection and audit in relation to the third-party’s compliance with the agreement and inspection of trains and rollingstock shall be included in the agreement. The agreement will specify the terms and conditions on which QR can carry out such inspections and audits. Except in emergencies, QR will, in carrying out any inspection or audit, give the third-party reasonable notice and use reasonable endeavours to minimise disruption to the third-party’s train services.”

Stakeholders views

QR - see Chapter 7.

FreightCorp - given the QCA’s findings in respect of inspection and audit, there is an issue as to whether this Principle accords with those findings or whether an ambiguity arises. Is the principle intended to allow QR to conduct inspections in the case of emergencies? If so, the principle does not sit on all fours with other findings of the QCA.

The Principle could be read to exclude the right to inspect or audit in the case of emergencies. Alternatively, it could be read to exclude the notice and minimum disruption obligations for an inspection or audit conducted in the case of an emergency. As it is not appropriate for QR to have a right to inspect or audit in the case of emergency, on this basis the first construction is the correct one.

QCA’s analysis

The QCA agrees with FreightCorp that it is not appropriate for QR to have a right to inspect or audit in the case of emergency. This position is consistent with the position taken by the QR regarding safety audits in section 7.7 of Chapter 7. Moreover, QR has a suspension right for emergency situations.

To remove any ambiguity, the QCA has amended the principle by removing the words “except in emergencies” from the start of the sentence beginning “Except in emergencies, QR will, in carrying out any inspection or audit, give the third-party reasonable notice.....”.

QCA’s position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- **rights of inspection and audit in relation to the third-party’s compliance with the agreement and inspection of trains and rollingstock shall be included in the agreement. The agreement will specify the terms and conditions on which QR can carry out**

such inspections and audits. QR will, in carrying out any inspection or audit, give the third-party reasonable notice and use reasonable endeavours to minimise disruption to the third-party's train services.

8.3.14 Indemnities and liabilities

Background

The QCA argued that a third-party operator should assume responsibility for damage to property or injury to persons being transported by its train services and QR should be indemnified against such outcomes by the operator. However, standard commercial practice is that the indemnity should not cover a situation where an act or omission by QR caused or contributed to the damage or harm.

The relevant principle proposed by the QCA was as follows:

- “The third-party is solely liable for and is required to release and indemnify QR for any damage to property or personal injury or death of any person being transported on train services, except to the extent that an act or omission by QR, its servants or agents, caused or contributed to the damage or harm.”

Stakeholder views

QR - the QCA's recommended amendment to clause 14 of Schedule E excludes third party liability for damage to goods and injury to passengers being transported by its train services to the extent that QR's negligence contributes to the damage or injury. QR maintains its original position on this point, and believes this amendment is inappropriate because:

- the third party or its customer, and not QR, will be in the best position to know what is being carried and how it has been loaded, and therefore the third party or its customer is in the best position to manage the risk and insure for damage to the goods or injury to passengers; and
- while QR will have a good understanding of these details for some products, eg coal, for other products such as containerised goods, QR will not know the above details, and therefore is not in a position to manage or charge appropriately for the relevant risk.

FreightCorp - in negotiation with QR, FreightCorp made the point that a provision of this type is more appropriate in the context of a third-party operator running passenger rather than freight services. Further, FreightCorp has agreed that it is prepared to assume risk of damage to property.

QCA's analysis

QR has maintained its position that the third party or its customer is in the best position to manage the risk of potential damage to goods and injury to passengers.

The QCA accepts QR's argument that the third party or its customer, and not QR, will be in the best position to know what is being carried and how it has been loaded. Therefore, the third party or its customer is in the best position to manage the risk and insure for damage to the goods or injury to passengers. The QCA considers that the current drafting of the principle is consistent with this argument.

However, the QCA does not accept that a third-party should be liable where QR's acts or omissions contribute to the damage or harm because the third-party cannot manage such a risk.

The QCA maintains its view that standard industry practice should apply in respect of indemnities and liabilities.

8.3.15 Limitation of liability

Background

The QCA's proposed principles included the following:

- “The liabilities of the parties for default shall be limited as agreed in the agreement.
- Neither party has any liability for consequential loss or damage or loss of profits in any circumstance.
- Claims by either party must be lodged within twelve months of the occurrence of the event or circumstance giving rise to the claim.”

Stakeholder views

FreightCorp – seeks clarification regarding:

First, is this Principle intended to represent the base case for access seekers? If so, what QR has been seeking should be revised, because it goes far beyond a strict construction of the wording of the Principle. A strict construction would give the true legal meaning to “consequential loss or damage” (*British Sugar plc v NEI Power Project Limited*) and that loss of profit means just that, not loss of revenue, loss of capital and so on and so forth.

Second, the QCA suggests remedies for rail operators, for example for frustration of access and breach of confidentiality. If QR's liability for breach of those remedies is subject to limitation of liability of the kind sought by QR, the remedies suggested by the QCA will be illusory.

Schedule E should contain a clear statement on which provisions in an access agreement may not be subject to the limitation of liability provisions.

QCA's analysis

The QCA recognises the limitation of liability principles are broadly defined. The QCA understands that the extent to which an access seeker's rights will be affected by the limitation of liability clause will ultimately depend on the wording of the clause that is inserted in the access agreement.

FreightCorp also raises concerns about remedies for rail operators, for example, for frustration of access and breach of confidentiality. It argues that if QR's liability for breach of those remedies is subject to limitation of liability of the kind sought by QR, the remedies suggested by the QCA will be illusory.

In terms of recovery of liquidated damages for a breach of confidentiality, the QCA envisages a confidentiality deed will be entered into by the parties at the start of the negotiations for the access agreement and therefore will be a separate document to the access agreement. The deed may specify that the confidentiality obligations under the deed will continue after the parties have entered into the access agreement. Consequently, as the confidentiality deed will be a separate document with its own liability provisions, the limitation of liability provisions provided in Schedule E should have no application to a breach of confidentiality actionable under the deed.

Alternatively, the confidentiality deed could be expressed to ‘fall away’ after the access agreement has been entered into and the confidentiality obligations provided for in the deed

restated in the access agreement. In this case, all confidentiality obligations assumed by the parties in negotiation in accordance with the deed should continue to be observed by the parties after the access agreement has been entered into.

FreightCorp's concerns relate to the QCA's request that the Undertaking be amended to expressly provide that QR's powers of suspension (regarding a third party operator's rolling stock or trains services) cannot be used in a manner which would contravene s104 or s125 of the QCA Act. This is to prevent QR claiming that these powers override its obligations under s104 and s125. Accordingly, should a third-party operator consider that QR's powers under an access agreement are being used in a way which contravenes either s104 or s125 then an action for frustration of access could be brought under the QCA Act, not the agreement. Therefore, the action would not be subject to any limitation of liability clause.

Further, with regards to remedies for frustration of access, s153 of the QCA Act provides that an affected party could apply for a number of remedies, including compensation for any loss or damage suffered by an applicant. There is no limitation on the amount of damages that may be recovered. S167 of the QCA Act provides that if a provision of the Act is inconsistent with a term of an access agreement, the provision prevails and the term becomes void to the extent of the inconsistency.

There is a strong argument that an attempt to limit an aggrieved party's right to consequential damages for contravention of s104 and s125 would be inconsistent with the unlimited right to damages provided for in s153. Consequently, the parties could not agree to limit the remedies provided for in the QCA Act by making them subject to the limitation of liability clause.

8.3.16 Material change

Background

The QCA argued it would only be possible to assess the actual effect of material changes on a case-by-case basis, the key point being that the material changes are triggers only and hence there should be no assumption of automatic flow-on effects.

The QCA's proposed Schedule E principles included the following:

- "A material change shall be limited to changes in taxes, laws or funding from QR's infrastructure payments. The effects of material changes should be assessed on a case-by-case basis and in consultation with the third-party. There should be no assumption of automatic flow-on effects of material changes.
- Any dispute regarding the impact on access charges as a result of material change will be determined by an independent expert."

Stakeholder views

FreightCorp - it should not be assumed that all material change events be passed on to access seekers. Schedule E should state that this is the case and form part of access seekers' base case.

If a material change is to trigger a discussion between the parties only, it is appropriate to include in Schedule E a statement that unless the access seeker and QR agree otherwise a material change will be determined by the QCA on review.

QCA's analysis

The QCA considers its proposed principles clearly establish what is considered a material change and a process to resolve disputes about the impact on access charges as a result of the

occurrence of a material change. In particular, it establishes a role for an independent expert if the effect of a material change is not agreed between the parties. As such, the QCA believes its proposals on this issue address FreightCorp's concerns.

8.3.17 Default, suspension and termination

Stakeholder comments were received on suspension and termination rights with respect to safety and environmental matters. These matters were discussed in Chapter 7.

8.3.18 QR's Access Undertaking - confidentiality and ring-fencing

Background

The QCA argued that it was reasonable for QR to be bound contractually to comply with the confidentiality arrangements established in its Undertaking. This would also provide protection for third parties if there were to be any future period when a QR undertaking was not in force, such as between the expiry of an approved undertaking and its replacement by another approved undertaking.

In light of these arguments, the QCA proposed the following principles:

- “The agreement will contain provisions which require information provided to Network Access by third-party operators to only be used for the purposes of the agreement and to be kept confidential, in that it not be provided to any other person – including other employees or agents of QR – without the consent of third party operator. Consent need not be sought where the transfer of a third party operator's confidential information is for the purpose of processing an access application and QCA-approved procedures govern the flow of that information are in place.
- The obligation to keep such information confidential will continue to bind the parties for a reasonable period of time following the expiry of the agreement.”

Stakeholder views

QR - argued prior to the release of the Draft Decision that ring-fencing will be dealt with in the Undertaking, which is itself enforceable under the QCA Act. Moreover, our proposed principles contained a commitment by QR to comply with all applicable laws and the terms of the Undertaking in effect from time to time.

The additional principles proposed by the QCA confuse QR's obligations regarding its protection of third parties' confidential information.

FreightCorp - the QCA's findings in respect of confidentiality should be captured in Schedule E.

QCA's analysis

The QCA recognises the importance of confidentiality to third-party operators and, as such, the primary consideration is that the confidentiality obligations of both parties in an access agreement are enforceable. In particular, it is important that the standard access agreement provides for confidential information exchanged during the course of an access agreement to remain confidential.

In this regard, the QCA supports FreightCorp's suggestion that the QCA's provisions with regard to the protection of confidential information should be captured in Schedule E. However, the highly detailed arrangements proposed in Chapter 3 that aim to protect confidential information cannot be fully reflected in the broad Schedule E principles. As noted

in that chapter, the QCA considers the detail of confidentiality provisions will be addressed in the development of the standard access agreement.

Finally, the QCA accepts that its inclusion of additional text regarding confidential information flows that would occur during the processing of an access agreement was inappropriate for inclusion in Schedule E, which relates to principles regarding an access agreement. This text has been removed.

QCA's position

The QCA would support an Undertaking that incorporated the following principle regarding the development of a standard access agreement:

- **The agreement will contain provisions which require information provided to Network Access by third-party operators to only be used for the purposes of the Agreement and to be kept confidential, in that it not be provided to any other person - including other employees or agents of QR - without the consent of the third-party operator.**

8.3.19 Force majeure event

Background

The QCA proposed to accept QR's force majeure principles, which included the following:

- “In the event that infrastructure on specified lightly trafficked corridors of the nominated network is damaged by a force majeure event and in QR's reasonable opinion the cost of repairing the damage is not economic, QR may elect not to proceed with repairs or replacement unless the parties agree as to the funding of the cost of that work.”

Stakeholder views

FreightCorp - in negotiation with QR, FreightCorp was told that a provision of this kind is only relevant if the operation of that part of the network is dependent on financial support from government and the access agreement reflects this by referring to that part of the network in a schedule to the access agreement. If that part of the schedule of the agreement does not include reference to any part of the nominated network that provision will not apply.

QCA's analysis

The QCA considers QR's position to be reasonable. The QCA does not intend to change the force majeure principles presented in the Draft Decision.

8.3.20 Assignment

Background

The QCA proposed to accept QR's assignment principles, which were as follows:

- “The third-party may assign the whole of its rights and obligations under the agreement to a related body corporate, provided that the assignor remains liable for the performance of

obligations under the agreement or to a non-related body corporate, with the prior written consent of QR. Such consent not to be unreasonably withheld.

- A change in control of a third-party not a publicly listed corporation will be deemed to be an assignment of the agreement.”

Stakeholder views

FreightCorp -it is appropriate to include the substance of mutual assignment provisions (outlined in the FreightCorp Mark-Up) in Schedule E to form part of the base case.

Further, QR has sought complete flexibility to assign rights and transfer obligations to whoever it wants. This is an example of QR seeking something unreasonable, and something that Schedule E should state QR must not seek in negotiations.

QCA's analysis

FreightCorp proposes the substance of mutual assignment provisions should form part of Schedule E. The QCA rejects this proposal because it is inconsistent with the broad nature of the Schedule E principles.

FreightCorp also makes the point that QR has sought "complete flexibility to assign rights and transfer obligations to whoever it wants".

The QCA understands that the assignment provisions of an access agreement would relate to the whole of the agreement not parts of it. Consequently, the QCA cannot envisage many circumstances where QR, as track manager, should need to assign the whole of its rights and obligations under an access agreement to another party.

The only circumstances the QCA can envisage would likely involve QR being required to sell or mothball parts of its network, or alternatively QR's ownership could change. In these circumstances, it is likely that any assignment will be governed by the relevant legislation.

The QCA considers that the Schedule E assignment principles it proposed in the Draft Decision should remain.

8.4 QCA's Final Version of Schedule E

QCA's position

The QCA would favourably consider an Undertaking that incorporated the following principles regarding the development of a standard access agreement in lieu of the Draft Undertaking's Schedule E:

1. Access Rights

- **The agreement will provide for non-exclusive train service entitlements for the operation of train services in terms of agreed service levels over the nominated network. Long-term train service entitlements can be varied only in accordance with agreed scheduling procedures specified in the agreement or as otherwise agreed between the parties. The Scheduling Principles should guide the performance of the scheduling function by QR.**

- **It is the responsibility of the third-party entering into an access agreement with QR to ensure that the operator of train services utilising the access rights is accredited.**
- **Access agreements will be for a specified term and include a good faith negotiation process for renewal.**

2. Access Charges

- **Access charges are to be agreed between the parties and payable in accordance with reasonable payment terms set out in the agreement. Late payments or credits by either party will bear interest at an agreed default rate.**
- **The Agreement will provide for a fair and reasonable mechanism for dealing with bona fide disputed invoices.**
- **The agreement may provide for periodic review of access charges.**
- **Unless otherwise stated, all amounts payable under the agreement are exclusive of GST.**
- **In appropriate cases, QR may require lodgement of a security to secure performance by the third-party of its obligations under the agreement having regard to QR's reasonable assessment of the creditworthiness of the third-party. An established rail entity's ability to demonstrate a track record of timely payment of similar obligations in other rail jurisdictions should be a relevant factor in assessing creditworthiness. Any required security should reflect the revenue risk that QR has taken on.**
- **Where there are no security arrangements in place and a user defaults on its payments, QR is entitled to require some form of security equivalent to its financial exposure, where the default was not attributable to a legitimate dispute.**
- **A third-party paying a security deposit should be credited with interest on the security at a market-based rate for as long as it is held by QR.**

3. Train Service Entitlements

- **The third-party shall not be entitled to commence train services unless and until all provisions of the agreement required to be completed or complied with prior to the commencement of train services have been completed or complied with by the due date specified in the agreement. QR will use all reasonable endeavours to cooperate with the third-party to facilitate the third-party's completion or compliance with such requirements.**
- **The third-party must only operate trains of the nominated specification for the transport of the nominated product type**

over the nominated network.

- The agreement will contain provisions regarding the resumption of capacity by QR. Unless otherwise agreed by the parties, the provisions will include objective criteria to assess consistently under-utilised capacity, a test for alternative demand and a tailored dispute resolution process conducted by an independent expert. Appropriate adjustments will be made to the access charges payable following a reduction in train service entitlements.

4. Day-to-Day Train Movements

- QR is to have responsibility for train control and shall exercise train control having regard to the safe conduct of rail operations on the nominated network.
- QR and third parties shall ensure that the operation of train services is in accordance with entry and exit times on the relevant daily train plan, which may be varied in the circumstances specified in the agreement (which normally include safety considerations, force majeure, incidents or emergencies, track possessions in accordance with the agreement or as otherwise agreed between the parties, such agreement not to be unreasonably withheld).
- The Network Management Principles establish the procedures QR must follow in varying the daily train plan.
- The third-party is required to comply with all QR train control directions and ensure all trains and rollingstock are equipped with appropriate communication systems to comply with the agreed rollingstock interface standards.

5. Train Operations

- The agreement will specify all reasonable operational, communication and procedural requirements for train services.
- The third-party is to comply with all laws, safeworking procedures and safety standards and all other train operations requirements in the agreement. QR will comply with its safeworking procedures and safety standards and may, acting reasonably, vary the safeworking procedures and safety standards at any time following consultation with, and reasonable notice to, the third-party. Subject to such variations being on safety grounds, each party is responsible for its costs - including the costs of additional or modified equipment - in complying with the safeworking procedures and safety standards. Safeworking procedures and safety standards will as far as practicable be consistent for all railway operators on the nominated network.
- The parties should agree specific performance levels and measurement criteria as a basis for creating effective

performance management and incentives. This may involve financially-based incentives and sanctions. The performance levels may also be reviewed periodically.

- The agreement will specify relevant rollingstock interface standards. QR and the third-party must agree upon a party competent to provide certification for the third party's rollingstock and rollingstock configurations. QR has a right to view a certificate of compliance and associated test results from a third party in order to confirm that the rollingstock and rollingstock configurations are as agreed by the two parties in the interface risk management plan. QR has a right to provide input to the safety regulator regarding the authorisation of the third party's rolling stock. Rollingstock and rolling stock configurations that are certified will be included in the rollingstock specification as being authorised to operate on the nominated network subject to continuing compliance with the rollingstock interface standards and rollingstock specification.
- The third-party is responsible for the safe operation of its rollingstock on the nominated network and must ensure that at all times its rollingstock and rollingstock configurations comply with all applicable laws, the rollingstock specification and the rollingstock interface standards specified in the agreement.
- QR may suspend the operation of rollingstock and trains for demonstrated non-compliance that has safety implications until such non-compliance is rectified. If the source of non-compliance does not have safety implications, the third-party should be required to rectify the non-compliance within a reasonable period of time, but not be suspended. If the non-compliance is not rectified within a reasonable period, QR may suspend the operation of the affected rollingstock and trains.
- The third-party must ensure all loadings of rollingstock are secure.
- QR may, acting reasonably, vary the agreed rollingstock interface standards at any time on safety grounds, after consultation with the third-party. Otherwise, QR may, acting reasonably, negotiate any other changes with the third-party. Where any changes in the standards necessitate modification of the third-party's rollingstock, the costs of such modifications are to be borne in the manner agreed by the parties or, failing agreement, as determined by an expert.
- QR will not exercise its suspension power in relation to a third-party's rollingstock and trains in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.
- A third-party operator could reserve the right that if its rollingstock is suspended without reasonable justification, then QR would be liable for the loss thereby caused.

6. Infrastructure Management

- **QR is responsible for the management and control of the nominated network.**
- **QR will carry out maintenance work on the nominated network such that, subject to any agreed criteria, the infrastructure is consistent with the agreed rollingstock interface standards and the third-party can operate train services in accordance with its train service entitlements.**
- **QR may impose operational constraints - such as speed or load restrictions - for the protection of persons or property or to facilitate maintenance work or enhancements and has reasonable entitlements to take possession of the track for the purpose of maintenance work, emergency repairs and enhancements. In carrying out such work, QR will use its reasonable endeavours to minimise disruption to train services so that the third-party can operate train services in accordance with its train service entitlements.**
- **The agreement will contain principles for consultation with the third-party regarding maintenance that will impact on the third-party's schedule.**
- **The agreement will contain provisions requiring the parties to provide advice to each other in relation to factors that could affect the third-party's operation of train services or the integrity of the nominated network.**
- **The third-party may inspect the nominated network for the purposes of assessing the operational, environmental and safety risks with respect to the infrastructure, as well as the standard of the infrastructure comprising the nominated network including, but not limited to, fencing and at-grade crossing protection. QR will not be liable for claims in relation to, or arising out of, the standard of the infrastructure except where QR fails to maintain the infrastructure such that, subject to any agreed criteria, it is consistent with the agreed rollingstock interface standards and the third-party can operate train services in accordance with its train service entitlements.**
- **The agreement will specify the reasonable terms and conditions on which the third-party will have access to the nominated network for the purpose of inspecting the standard of the infrastructure comprising the nominated network.**
- **Once developed, Network Maintenance Principles should be incorporated by reference in the agreement.**

7. Incident Management

- **Prior to the commencement of train services the third-party is required to develop an emergency response plan containing procedures for dealing with incidents which must be compatible**

with QR's emergency procedures.

- In the event of an incident, QR is responsible for the overall coordination and management of incident responses and may, subject to using reasonable efforts to consult with the third-party, take any action it considers reasonably necessary to recommence services as soon as possible. The third-party is to cooperate and assist with the restoration of train movements in accordance with directions from train controllers seeking to coordinate the clearance of network blockages. Any third-party so directed should be adequately compensated for doing so and is entitled to expect that all rail operators are subject to the same obligation. QR has the right to pass through the cost of clearing the blockage to the party that has broken down.
- Investigations into incidents are to be commenced as soon as practicable after an incident and carried out in accordance with the process specified in the agreement. The parties must cooperate in any investigation and consult in good faith in relation to the implementation of any recommendations.

8. Environmental Protection and Other Issues

- All environmental laws, regulations and relevant guidelines must be complied with.
- Environmental management must be approached on a risk identification and risk management basis with respect to operations on the nominated network. Auditing requirements should be linked to the environmental risks posed by a third party's operations and be established in that party's Environmental Investigation and Risk Management Report (EIRMR), which should be amended as necessary from time to time to address ongoing risk and compliance issues.
- The third party is required to inform QR of non-compliance with its Environmental Investigation and Risk Management Report (EIRMR) and provide details of how it intends to address the non-compliance. The third party is required to rectify the non-compliance as soon as practicable having regard to the nature of the non-compliance, the reasonable interests of QR and any action required by the EPA.
- A third-party operator should comply with its obligations under the EPA Act, including any notices or directions it received from the EPA. Failure to comply with such an obligation and for that failure to cause or threaten serious environmental harm establishes grounds for a material event of default.
- QR reserves the right to temporarily suspend the right of a third-party operator to operate on the relevant network section in the event that, in QR's reasonable opinion, the operator's train services cause or threaten material or serious environmental harm. QR will not exercise this suspension power in such a manner as to hinder or restrict access to the

declared service in any way contrary to s104 or s125 of the QCA Act.

- **A third-party operator could reserve the right that if its train services are suspended on environmental grounds without reasonable justification, then QR would be liable for the loss thereby caused.”**

9. Accreditation

- **QR must have and maintain accreditation as a railway manager under the Transport Infrastructure Act 1994 to the extent required to perform its obligations under the Agreement.**
- **An operator accredited as a railway operator under the Transport Infrastructure Act 1994 must operate train services and the operator must maintain such accreditation to the extent required to perform its obligations under the Agreement.**

10. Third-party’s staff and associated train services

- **The third-party is responsible for demonstrating to the Rail Safety Accreditation Unit through the joint safety risk assessment process, the competence of its staff performing safety-related work.**
- **QR reserves the right to temporarily suspend the right of the third-party’s train service to operate on the nominated network in the event of breach or likely breach of any laws relating to rail safety, QR train control directions, safeworking procedures or safety standards.**
- **QR will not exercise its suspension power in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.**
- **A third-party operator could reserve the right that if its train service is suspended without reasonable justification, then QR would be liable for the loss thereby caused.**

11. Safety Risk Management

- **Safety risk management must be addressed by risk identification through an interface risk management process and the formulation of an interface risk management plan. The parties will be required to comply with the interface risk management plan.**

12. Inspection and Audit Rights

- **Rights of inspection and audit in relation to the third-party’s compliance with the agreement and inspection of trains and rollingstock shall be included in the agreement. The agreement will specify the terms and conditions on which QR can carry out such inspections and audits. QR will, in carrying out any**

inspection or audit, give the third-party reasonable notice and use reasonable endeavours to minimise disruption to the third-party's train services.

13. Insurance

- **The agreement will provide for insurances to be effected by the parties to appropriately provide for the relevant insurance risks.**

14. Indemnities and Liabilities

- **Each party is liable for, and is required to release and indemnify each other for, all claims in respect of personal injury, death or property damage caused or contributed to - to the extent of the contribution - by the wilful default or negligent act or omission of that party or its staff.**
- **The third-party is solely liable for, and is required to release and indemnify QR for, any damage to property or personal injury or death of any person being transported on train services, except to the extent that an act or omission by QR, its servants or agents, caused or contributed to the damage or harm.**

15. Limitation of Liability

- **The liabilities of the parties for default shall be limited as agreed in the agreement.**
- **Neither party has any liability for consequential loss or damage or loss of profits in any circumstances.**
- **Claims by either party must be lodged within twelve months of the occurrence of the event or circumstance giving rise to the claim.**

16. Material Change

- **Access charges will be adjusted to reflect the net impact of any material change where such material change results in a variation to the net cost to QR of performing its obligations under the agreement.**
- **A material change shall be limited to changes in taxes, laws or funding from QR's government infrastructure payments. The effect of material changes should be assessed on a case-by-case basis and in consultation with the third-party. There should be no assumption of automatic flow-on effects of material changes.**
- **Any dispute regarding the impact on access charges as a result of a material change will be determined by an independent expert.**

17. Disputes

- Any dispute between the parties is to be firstly referred in writing to the respective chief executives for resolution. If the dispute is not resolved, then the parties may agree to refer the dispute for resolution by an expert or arbitration. If there is no agreement to resolve the dispute in this manner then the dispute is to be determined by a court.

18. Default, Suspension and Termination

- The agreement will specify reasonable events of default and mutual rights of suspension and termination having regard to the commercial interests of both parties.

19. Force Majeure Event

- The obligations of either party - other than an obligation to pay monies due - will be suspended where by reason of a force majeure event, that party is delayed in, or prevented from, carrying out its obligations under the agreement. The agreement will provide for relief in respect of the payment of access charges to the extent that QR is unable to provide access rights because of a force majeure event affecting QR.
- In the event that infrastructure on specified lightly trafficked corridors of the nominated network is damaged by a force majeure event and in QR's reasonable opinion the cost of repairing the damage is not economic, QR may elect not to proceed with repairs or replacement unless the parties agree as to the funding of the cost of that work.
- The access agreement will provide for a process that might result in termination of the agreement in the event that circumstances of prolonged force majeure prevent the performance by a party of its obligations.

20. Assignment

- The third-party may assign the whole of its rights and obligations under the Agreement to a related body corporate, provided that the assignor remains liable for the performance of obligations under the agreement or to a non-related body corporate, with the prior written consent of QR, such consent not to be unreasonably withheld.
- A change in control of a third-party not a publicly listed corporation will be deemed to be an assignment of the agreement.

21. QR's Undertaking

- QR will comply with all applicable laws and the terms of QR's Access Undertaking in effect from time-to-time.

- **The agreement will contain provisions which require information provided to Network Access by third-party operators to only be used for the purposes of the Agreement and to be kept confidential, in that it not be provided to any other person - including other employees or agents of QR - without the consent of the third-party operator.**
- **The obligation to keep such information confidential will continue to bind the parties for a reasonable period of time following the expiry of the agreement.**