

Chapter 6 - Capacity Management

KEY ASPECTS

Transparent procedures - QR's vertical integration raises a potential conflict in that it must allocate train paths for its own train services and those of third-party operators. To protect the integrity of the above-rail market, transparent capacity management procedures and clarification of the rights and obligations of QR and third-party operators are necessary.

Scheduling & train control - principles to guide the performance of the scheduling and train control functions should replace the Scheduling and Train Control Protocols and be incorporated as a schedule to the Undertaking.

Capacity information - the Undertaking should commit QR to make information available to facilitate independent capacity assessments.

Capacity allocation - the Undertaking should establish transparent capacity allocation procedures, in particular, for situations where two or more access seekers are either competing concurrently for the same capacity, or alternatively competing for the traffic of a particular end-user.

Resumption - QR's right to resume capacity should be subject to an objective test established in the Undertaking, with disputes subject to resolution by expert determination in accordance with a process to be established in the Undertaking.

Relinquishment - the Undertaking should allow relinquishment of access rights, subject to QR's legitimate business interests being protected. For coal traffics, the fee for relinquishment will be equivalent to two years payment of the take-or-pay component of the operator's access charge. For non-coal traffics, the relinquishment fee will be the amount that would be achieved over two years from the contribution the traffic makes to the fixed costs of operating the rail infrastructure.

Secondary trading - the Undertaking should provide for full secondary trades within each system on the Central Queensland coal network, subject to the establishment of adequate notification procedures between QR and capacity holders.

6.1 Introduction

The allocation of a rail network's capacity is achieved through the development of train schedules/timetables. A train schedule for a particular section of the rail network can be considered as a series of train paths with a time and distance dimension. Each train path has a departure, transit and arrival time between origin and destination points. The train paths reflect the priorities established in the schedule for different types of traffic. In theory, decisions with respect to priority should reflect an estimation and comparison of the flow-on effects on the train schedule of delaying each train, and the respective costs incurred as a result of the delay. The efficient allocation of capacity also requires account be taken of the railway operator's willingness to pay for priority.

The constraints on the capacity (and hence available train paths) of a rail network reflect a range of factors including:

- the condition of the track and the associated infrastructure. For example, the size and spacing of sleepers and depth of ballast under the track affect axle load and train speeds, the length of passing loops affects train length;
- the type of train services operating on the network. For example, passenger trains generally travel faster than freight trains; and
- the need to observe safe-working procedures on and around the track. For example, trains must travel at safe distances from each other.

Available capacity could be expected to vary quite significantly across different parts of QR's network. Demand for train paths on certain parts of QR's network may be relatively uniform throughout each day, for example, Goonyella and Blackwater coal systems. In contrast other parts of the network are characterised by significant variations in train path demand depending on the time of day, for example, peak and off-peak demands on the Brisbane metropolitan system. During peak times, the existing capacity of a particular system may be fully utilised.

6.2 Scheduling and train control framework

Background

The QCA argued that at the operational level, QR's proposed scheduling and train control framework lacks clarity. To address this concern, the Authority proposed that the Undertaking requires QR to provide a third-party operator with any document train controllers are supplied with to assist in the performance of their duties.

In addition, the QCA proposed that QR's Protocols should be replaced in the Undertaking by Network Management Principles for each phase in the scheduling and train control process. These principles are discussed in sections 6.3 and 6.4.

Stakeholder views

QR - understands that the Access Co-ordination Plan (simply consisting of the relevant schedules from the operator's access agreement) reflects the key elements of information that the QCA wishes to be made available to third-party operators. However, QR considers that the width of the QCA's recommendation may have unintended results.

For instance, arguably all operators' Access Co-ordination Plans might be required to be provided to all operators. This would be inappropriate in terms of confidentiality. Additionally, 'any document' could extend to non-relevant documentation, such as the terms of train controllers' employment.

FreightCorp - supports strongly the QCA's findings that QR's proposed scheduling and train control framework lacks clarity and that the Interface Plan and the Protocols lacks transparency. FreightCorp supports strongly the finding that specifying principles for the scheduling and train control functions in the Undertaking is a superior approach and the Protocols should be replaced by a set of broad Network Management Principles for each phase in the scheduling and train control process.

It is essential that documents supplied to train controllers are supplied to the operators to (a) ensure a common set of documents to assist communication between train controllers and operators; (b) comfort to operators as to the even-handed treatment of all operators; and (c) the ability to review documents referring to the operator and its operations and correct any errors.

PCQ - the introduction of a third-party rail service provider is likely to impose new demands on the existing communications systems that are operated by both QR and the port terminal operators. From time to time the existing systems have experienced difficulty in locating trains and matching information between QR and port terminal operator's systems. It is not clear whether or not the existing communications systems operated by QR are capable of delivering efficient services when there is more than one rail service operator on a system.

Also, if a new service operator has its own communications system there is likely to be an impact on the port terminal operator to either modify its existing systems or install a new system.

QCA's analysis

The QCA agrees with QR that the Access Co-ordination Plan was the main document it considered should be provided to third-party operators. To address QR's concerns that the QCA's proposed amendment was broader than this and so may have unintended results, the QCA has re-drafted the words more narrowly. Nevertheless, the QCA considers that the Undertaking should foreshadow the provision of documentation beyond the Access Co-ordination Plan to the extent it is relevant to a third-party operator's train services.

In response to Ports Corporation of Queensland's concerns about the demands on existing communications systems, the QCA notes that, as part of gaining safety accreditation, a third-party operator's communications system must be consistent with that of QR. This would allow QR to track a third-party operator's trains the same as its own. The question of whether QR's existing communication system is capable of delivering efficient train services when there is more than one operator on the system is a matter for Network Access.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **a clause is inserted requiring QR to provide a third-party operator with a copy of its Access Co-ordination Plan and any related relevant documentation that train controllers are supplied with to assist in the performance of their duties; and**
2. **references to the Scheduling and Train Control Protocols are removed.**

6.3 Train scheduling practice

Background

The Draft Undertaking provides that the capacity entitlements of a third-party operator are to be defined in terms of a number of trains services that can be operated in a given time period subject to constraints agreed with the third-party operator. The capacity entitlements will be used to develop an initial timetable. The timetable could be varied in accordance with the operator's capacity entitlement and the Protocols.

The QCA argued that the process of converting a capacity entitlement into a specific train path on a timetable was not adequately addressed in the Draft Undertaking nor the Protocols. Consequently, the QCA proposed the Undertaking should incorporate Scheduling Principles to guide this process by clarifying the roles and responsibilities of Network Access and third-party operators and defining transparent processes for the development of, and changes to, the master and daily train plans. The proposed Scheduling Principles were as follows:

Capacity entitlement principles

- (a) All railway operators' capacity entitlements will use consistent terminology incorporated in a single glossary.
- (b) Capacity entitlements will be expressed in terms that can be interpreted for the development of a master train plan and a daily train plan.
- (c) Where objectives of either party cannot be met, the parties could, in accepting the capacity entitlements, document the areas where the objectives are not being met with a view to modifying the capacity entitlements at another opportunity.

Master train plan principles

- (a) The master train plan will need to define all of the railway operators' capacity entitlements and Network Access' requirements in a form that indicates the time/distance (location) relationship of the train services.
- (b) The master train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service, for example, explanations of underlying capacity entitlements.
- (c) The master train plan may be modified:
 - (i) from time to time according to new capacity entitlements, changes to existing capacity entitlements, or their underlying objectives, and any actual train data;
 - (ii) at any time following a request by an railway operator to make such a change on terms established by their capacity entitlements;
 - (iii) where actual train running indicates a consistent variation to that planned of greater than 10%; and
 - (iv) following a review by railway operators at least every 3 months.
- (d) Network Access will invite all railway operators to contribute to the modification of the master train plan. Each operator will be provided with a copy of any proposed changes 48 hours prior to a meeting between all parties. An operator will have the power of veto

over changes to the master train plan if their capacity entitlements can no longer be satisfied.

- (e) The master train plan will be in a form that is readily convertible to a daily train plan, which is the principal reference document to be used by the train controllers in carrying out their duties.

Daily train plan principles

- (a) The daily train plan will express the relevant railway operator's capacity entitlements and Network Access' requirements in a form that indicates the time/distance (location) relationship of the train services. It will reflect the information contained in the master train plan.
- (b) The daily train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service.
- (c) Network Access will invite all railway operators to contribute to the formulation of the daily train plan. This will normally occur each week, for the coming week or fortnight. Unless otherwise agreed by all parties, Network Access will make available a draft on its understanding of operators' requirements 24 hours before a weekly meeting of all parties to finalise the plan.
- (d) The daily train plan may be modified:
 - (i) periodically during the course of its currency, in accordance with the railway operators' capacity entitlements or Network Access' needs;
 - (ii) at any time following a request by a railway operator to make such a change on terms established by their capacity entitlements; and
 - (iii) where actual train running indicates a consistent variation to that established in the access agreement and formulated in the daily train plan.
- (e) Network Access will invite all railway operators to contribute to the modification of the daily train plan. Each operator will be provided with a copy of any proposed changes.
- (f) The daily train plan will be the principal reference document from which train controllers will carry out their normal duties of train routing and dispatch, as well as incident management where trains run differently from their expected paths.
- (g) The daily train plan will express the expected train operation performance target over its period and will be used as the base information for the means of performance monitoring in reference to the underlying capacity entitlements.
- (h) Modifications to the daily train plan may occur during the course of its duration in the event of out-of-course running. Those modifications will occur according to the train control principles.

Stakeholder views

QR - accepts the QCA's recommendation to remove all references to the Protocols from the Undertaking, and insert an obligation upon QR to instead comply with the Scheduling Principles. QR also accepts an obligation to include the principles in a schedule to the Undertaking.

QR does not object to the level of detail specified in the QCA's Scheduling Principles, however, QR does have some concerns with the accuracy and applicability of some of the proposed principles. QR proposes to address its concerns with the drafting of the principles in redrafting its Undertaking and not in this submission. However, by way of example, comments on selected principles are provided below.

Capacity entitlement principles

QR - in relation to the principle that states consistent terminology will be used for operators' capacity entitlements, QR notes that this principle will need to be subject to an acknowledgment that different traffic types may require different terminology to be used in the expression of capacity entitlements. For example, timetabled traffics may be defined in terms of a path between certain locations, on particular days, and at particular times. Cyclic traffics may be defined in terms of a number of train paths per specified period of time.

QR has a number of concerns with the principle that where the objectives of either party cannot be met in a capacity entitlement, the parties can document the relevant areas with a view to modifying the capacity entitlement at another opportunity. Firstly, QR queries where the QCA sees the unmet objectives being documented, and secondly, queries whether the QCA is envisaging this process conveying priority on an operator, over other parties seeking the same capacity. QR considers that its Interested Parties Register (referred to in clause 6.3.1 of the Draft Undertaking) could be used to record a party's ongoing interest in particular capacity after the signing of an access agreement. QR does not, however, believe that an operator in the circumstances described by the QCA should have priority over any other access seeker, and considers that the process associated with the Interested Parties Register will provide the most appropriate process for the allocation of capacity.

ARTC - agrees with the QCA that the development of short and long term capacity entitlements should be a result of a consultative process. Given the third-party access regime that applies in Queensland and that the type of business warrants the production of plans on a daily basis, a more formalised approach is warranted, but may also end up being unmanageable. ARTC would not consider this formality is warranted on non-coal lines.

Capacity entitlements and train paths - master train plan

QR - notes that the master train plan may not define the entirety of all operators' capacity entitlements. For cyclic traffics, such as coal, the master train plan will not reflect the capacity entitlements of all operators as they will not be defined in terms of a specified train path per day or week. As a result, in the coal system, the master train plan will only indicate the timetabled traffics. Even in relation to timetabled traffic, QR does not consider the inclusion of the entirety of each operator's capacity entitlement in the master train plan to be practical or appropriate. Capacity entitlements may be substantial in size and difficult to reduce to a reproducible format. Primarily, however, QR considers capacity entitlements contain information confidential to the operator in question.

In relation to the principles governing the modification of the master train plan, QR considers the QCA has attempted to provide an all-encompassing statement of when the master train plan may be modified in sub-paragraph (i) and then to state specific instances in sub-paragraphs (ii), (iii) and (iv). QR suggests it would be clearer to provide that the master train plan may, subject to the terms of relevant access agreements, be modified:

- where QR and an operator agree to a change to the operator's train services in accordance with their capacity entitlement;
- where new capacity entitlements or maintenance possessions are created; and
- where actual train running indicates that any particular train service/s is consistently (over a 3 month period) varying from its scheduled path by greater than 10%; or
- following a review of the master train plan undertaken every 3 months, unless otherwise agreed, by Network Access, operators, and infrastructure service providers.

The QCA has stated the master train plan will be in a form readily convertible to a daily train plan, which is the principle document used by train controllers. It will not necessarily be the case that the master train plan will be readily convertible to the daily train plan. In the coal

system, for instance, there will be additional scheduling steps involved in progressing from the master train plan to the daily train plan. A weekly train plan will be scheduled, using the master train plan, but also using each operator's capacity entitlement and train orders for a particular week. The weekly train plan will then be reduced to the daily train plan.

Dalrymple Bay Coal Terminal - other infrastructure providers (including the port) will need to contribute to all plans. An operator should not be able to veto changes to a master plan under threat of lost entitlement. Rail entitlement does not necessitate capacity or throughput at the port. The prime requirement should be to rail to meet shipping demand - anything else is counter to the efficient utilisation of the corridor.

DBCT suggested that paragraph (d) (p 265 of the Draft Decision) be amended as follows:

"Network Access will invite all railway operators and, where appropriate other relevant parties to contribute to the modification of the master plan. Each party will be provided with a copy of any proposed changes 48 hours prior to a meeting between all parties. An operator will have the ability to challenge changes to the master train plan if their capacity entitlements can no longer be satisfied."

FreightCorp – supports strongly the QCA's findings that the Undertaking should contain Scheduling Principles and the master train plan should be common to all rail operators, expressing the train services over a longer term planning horizon. Schedule E should state the Scheduling Principles once developed must be incorporated by reference and complied with. This must be part of the base case for each access seeker.

As part of the Network Planning Principles, Network Maintenance Principles should be developed. Schedule E should state that these Principles must be incorporated by reference and complied with. This must form part of the base case for each access seeker.

FreightCorp agrees with the assessment of the QCA that the master train plan indicates all of the train services to be operated for a lengthy period, say 6 months to a year into the future. This approach would dovetail with the Planned Network Maintenance Program suggested by FreightCorp below.

QCA should clarify what is the most appropriate way for trains of an irregular timetable/origin-destination (eg mineral or grain trains) to be represented in the master train plan.

FreightCorp would strongly support an approach that provided for the QCA to facilitate a stakeholder working group to formulate these principles. The QCA's nominated high level principles will need to be translated into lower level, more detailed principles that can be applied in practice. This group should, at a minimum, include representation from end use customers, Network Access, train operators (both QR and third-party), ports and the QCA. There may need to be several different working groups with membership tailored to specific interests.

FreightCorp considers that modifications to the master train plans relate to longer term events and therefore parties should have the opportunity to conduct more in-depth analysis than a 2 day period would allow. Operators are unlikely to be able to formulate alternative plans that might allow them to accept modifications required by other parties. FreightCorp therefore recommends that the QCA modify the notice period required before changes to the master train plan to 7 days.

Capacity entitlements and train paths - Daily Train Plan

QR - considers the process for formulating the daily train plan needs to recognise the differences between timetabled and cyclic traffics. The principles need to accept that a weekly meeting may not be appropriate in relation to all daily train plans. For instance, timetabled traffics will be scheduled in the daily train plan as they are scheduled in the master train plan, unless Network Access and an operator agree to a change in accordance with the operator's capacity entitlement, or the parties otherwise agree to a change. Cyclic traffics, however, will have additional scheduling steps, as discussed above. In the coal system, this will involve the scheduling of a weekly train plan, in the week prior to operation, and then a daily train plan, 48 hours out from actual operation. QR considers that the processes for these

different types of traffics are sufficiently different to warrant dealing with them separately in prescribing the applicable scheduling principles.

QR considers the suggested principles for ‘modifying’ the daily train plan require clarification. QR considers once the daily train plan is scheduled, there is limited scope for variations to be made prior to the day of running. An operator’s capacity entitlement will outline their ability to make these changes. QR’s ability to alter an operator’s scheduled path will also be defined in the operator’s access agreement. Once train running has commenced on a daily train plan any changes to the plan will be reflected as deviations from the daily train plan, not variations to the scheduled daily train plan.

Dalrymple Bay Coal Terminal - the current practice of manually drawn ‘line diagrams’ (hard copies) is inappropriate for distribution.

DBCT proposes that paragraph (b) (p 265 of the Draft Decision) be amended as follows:

“The daily train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service. An electronic medium should be used for the conveying of this information.”

The port plays a role as centralised rail coordinator and it is appropriate that DBCT be involved in the development of the daily train plan. It proposes that paragraph (c) (p 265 of the Draft Decision) be amended as follows:

“Network Access will invite all railway operators and, where appropriate, other relevant parties to contribute to the formulation of the daily train plan....”

DBCT notes that currently the port is the bottleneck within the supply chain. DBCT needs to be able to influence the sequence and quantity of coal arriving at the port. It proposes that paragraph (d) (i) (p 265 of Draft Decision) be amended as follows:

“Periodically during the course of its currency, in accordance with railway operators’ capacity entitlements or Network Access’ needs or the needs of other infrastructure providers.”

DBCT proposes the following amendment to paragraph (e) (p 265 of the Draft Decision):

“Network Access will invite all railway operators and, where appropriate other relevant parties to contribute to the modification of the daily train plan. Each party will be provided with a copy of any proposed changes.”

Ports Corporation of Queensland - current rail operations on the Goonyella Coal Chain provide for optimised allocation of rail consists from a port operations perspective. Because all nine mines that export coal through DBCT use the same rail service provider, the allocation of rail consists can be optimised.

Optimisation occurs where, for example, a mine may have production problems or rail maintenance work is required and coal cannot be provided to the allocated consists. Under existing arrangements these consists can then be diverted to the mine where product will be required to load the next ships. DBCT has limited stockpile capacity and, in recent months, has been receiving coal on a just in time basis for most shipping.

If coal is railed by a third-party operator, the ability to allocate rail consist resources to the highest priority needs will be compromised with a resultant less than optimal outcome for the port operations and capacity.

QCA’s analysis

QR provides examples of its concern with the accuracy and applicability of some of the proposed Scheduling Principles. However, it proposes to address its concerns with the content of the principles in redrafting its Undertaking. From the QCA’s perspective of developing its Final Decision, this is impractical. Nevertheless, the QCA has made a number of changes to the principles where QR has provided examples of its concern that the Authority considers reasonable (discussed in the relevant sections below).

FreightCorp proposes that Schedule E should state that the Scheduling Principles, once developed, must be incorporated by reference into the standard access agreement and complied with. QR accepts an obligation to comply with the principles and include them as a schedule to the Undertaking. The QCA considers it reasonable for QR to provide a contractual commitment to comply with the Scheduling Principles and so has amended Schedule E accordingly.

Capacity entitlement principles

QR notes the principle that states consistent terminology will be used for operators' capacity entitlements will need to be subject to an acknowledgment that different traffic types may require different terminology. Cyclical and timetabled traffic would be an example. The QCA accepts this is a reasonable point and has amended the relevant principle accordingly (the QCA's new text is italicised):

- “All railway operators' capacity entitlements will use consistent terminology, *recognising that different traffic types may require different terminology*, incorporated in a single glossary.”

QR is concerned with the principle that where the objectives of either party cannot be met in a capacity entitlement, the parties can document the relevant areas with a view to modifying the capacity entitlement at another opportunity. QR considers that its Register of Interested Parties (referred to in clause 6.3.1 of the Draft Undertaking) is a better mechanism to record a party's ongoing interest in particular capacity after the signing of an access agreement. The QCA agrees that the appropriate place for parties to document their intentions regarding capacity is on this register. The QCA did not intend that the Scheduling Principles should provide a mechanism for operators to gain 'options' over capacity. The relevant principle has been amended and now reads (the QCA's new text is italicised):

- “Where a rail operator's required capacity cannot be met fully, it could, in accepting the capacity entitlement, use the Register of Interested Parties to identify the additional capacity it is interested in acquiring at another opportunity.”

Master Train Plan principles

The QCA accepts Dalrymple Bay Coal Terminal's (DBCT) argument that other infrastructure providers (including the port) will need to contribute to the development of the master and daily train plans. Given the importance of the port's role in the transportation coal chain (from mine to ship), the QCA has amended the relevant principle as proposed by DBCT. However, the QCA does not accept DBCT's proposal that capacity entitlements of rail operators should be overridden on the grounds that the prime requirement should be for rail to meet shipping demands. This matter relates to the specification of the capacity entitlement and will be addressed as part of the development of the standard access agreement for coal and minerals services.

FreightCorp proposes that the QCA clarify the scheduling arrangements for coal trains. The QCA considers this is another matter relating to the specification of the capacity entitlement. FreightCorp also proposes that to allow rail operators to conduct more in-depth analysis of longer term planning matters, the notice period before changes to the master train plan are made should be increased from 2 to 7 days. The QCA considers this to be reasonable and has amended the relevant principle to now read (the QCA's new text is italicised):

- “Network Access will invite all railway operators *and, where appropriate, other relevant parties*, to contribute to the modification of the master train plan. Each party will be provided with a copy of any proposed changes *7 (seven) days* prior to a meeting between

all parties. An operator will have the power of veto over changes to the master train plan if its capacity entitlement can no longer be satisfied.”

QR indicates that the master train plan may not define the entirety of all operators’ capacity entitlements. Primarily, QR considers capacity entitlements contain information confidential to the operator in question. The key issue from the QCA’s perspective is the extent to which capacity entitlements are confidential. This is another matter that relates to the specification of the capacity entitlement and will be addressed as part of the development of the standard access agreement. However, for coal services, the public disclosure of access agreements (discussed in Chapter 3) means that capacity entitlements will not be confidential.

QR proposes changes to the principles governing the modification of the master train plan. The QCA considers that the majority of the proposed changes clarify and/or provide additional detail with respect to the existing principles and consequently should be modified.

The QCA accepts its principle that the master train plan may be modified “where actual train running indicates a consistent variation to that planned of greater than 10%” lacked clarity. The QCA intended that if greater than 10% of the total train services on a particular system varied from their scheduled train path, the master train could be modified.

However, the QCA has not accepted QR’s proposal to insert the caveat “unless otherwise agreed” with respect to the three monthly review of the master train plan. The QCA intends that each of the parties (Network Access, operators, other infrastructure providers) should not be restricted from seeking a review of the master train plan before the three-month period expires. QR’s proposed caveat could conceivably allow such an outcome to eventuate. The QCA has added additional text to clarify its intentions regarding this part of the principles. The relevant section of the master train plan principles now reads (the QCA’s additional text is italicised):

- “The master train plan may, subject to the terms of relevant access agreements, be modified:
 - where QR and an operator agree to a change to the operator’s train services in accordance with their capacity entitlement;
 - where new capacity entitlements or maintenance possessions are created; and
 - where actual train running indicates that *greater than 10%* of train services *on a particular system are* consistently (over a 3-month period) varying from *their* scheduled paths; or
 - following a review of the master train plan undertaken every 3 months by Network Access, operators, and infrastructure service providers. *Any one of these parties may seek a review before the 3-month period expires.*”

QR argues it will not necessarily be the case that the master train plan will be readily convertible to the daily train plan, as proposed in the QCA’s relevant principle. In the coal system, for instance, there will be an additional scheduling step - the weekly train plan - involved in progressing from the master to daily train plan. The QCA recognises QR’s argument, however, the Authority does not consider that the relevant principle needs to be amended. The fact that QR needs to go through an additional scheduling step remains consistent with the underlying aim of the principle, which is that the master train plan is readily convertible to the daily train plan. The QCA considers that one additional scheduling step would not be inconsistent with the ‘readily convertible’ objective.

FreightCorp makes a number of suggestions regarding the further development of the master train plan principles, including:

- the high level principles should be translated into lower level principles applicable in practice;
- network maintenance principles should be developed and Schedule E should provide for their incorporation by reference in access agreements; and
- the QCA should clarify what is the most appropriate way for trains of an irregular timetable/origin-destination (for example, mineral or grain trains) to be represented in the master train plan.

The QCA supports the development of network maintenance principles and considers that Schedule E should provide for their incorporation by reference in access agreements. The development of such principles would complement the master and daily train plans principles and should assist in minimising disagreements between QR and third-party operators regarding the scheduling of maintenance windows.

The QCA also supports the clarification of the most appropriate way for trains of an irregular timetable/origin-destination to be represented in the master train plan. The QCA considers that there should be a textual description of capacity entitlements on the coal systems in the relevant master train plans.

It has become apparent to the QCA from stakeholder submissions that there is a considerable amount of work still to be done regarding the development of scheduling arrangements for QR's network that properly reflects the interests of all affected parties. This includes the matters raised by FreightCorp above, QR's concerns about the different scheduling requirements of cyclic and timetabled traffics and DBCT's and PCQ's comments regarding the rail interface with the port. A number of these matters relate to a level of detail inappropriate to incorporate in the Undertaking.

The QCA agrees with FreightCorp that the best forum to progress these matters is through a working group, chaired by the QCA, including representation from end-use customers, Network Access, train operators (both QR and third-party) and the ports. The QCA considers that this process should run parallel to the development of QR's standard access agreement, given the importance of scheduling and capacity entitlement matters to the development of that agreement.

Nevertheless, the QCA considers that the amended Scheduling and Train Control Principles presented in the Final Decision provide a sound basis for the performance of the scheduling function by QR.

Capacity entitlements and train paths - Daily Train Plan

As with the development of the master train plan, Dalrymple Bay Coal Terminal (DBCT) proposes a number of amendments to recognise the role of 'other infrastructure providers' and 'other relevant parties' in the formulation of, and modifications to, the daily train plans. The QCA accepts these proposed amendments and the relevant principles now read as follows (DBCT's proposed words are italicised):

- "Network Access will invite all railway operators *and, where appropriate, other relevant parties*, to contribute to the formulation of the daily train plan."

- Network Access will invite all railway operators *and, where appropriate, other relevant parties*, to contribute to the modification of the daily train plan. Each party will be provided with a copy of any proposed changes.”
- “The daily train plan may be modified:
 - Periodically during the course of its currency, in accordance with the railway operators’ capacity entitlements or Network Access’ needs *or the needs of other infrastructure service providers*.”

Similarly, QR considers the process for formulating the daily train plan needs to recognise the differences between timetabled and cyclical traffics. For example, the principles need to accept that a weekly meeting may not be appropriate in relation to all daily train plans. The QCA recognises QR’s argument, however, the relevant principle is sufficiently broad to accommodate less frequent meetings (“This will normally occur each week, for the coming week or fortnight.”) The QCA’s aim regarding this principle is that interested parties would meet to discuss the daily train plan on a sufficiently regular basis for the planning purposes of those parties. In practice, this may be weekly or less frequently. Ultimately, the needs of the various interested parties would determine the frequency of meetings.

DBCT argues that an electronic medium should be used for the conveying of the daily train plans. The QCA considers that it is possible to construct simple excel spreadsheets that would fulfil DBCT’s proposal. The construction of such spreadsheets would not impose an unreasonable burden on QR. The QCA has amended the relevant principle as follows (DBCT’s proposed words are italicised):

- “The daily train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service. *An electronic medium is to be used for the conveying of this information.*”

QCA’s position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **cl 6.1 of the Draft Undertaking committed QR to perform the scheduling function in accordance with the Scheduling Principles; and**
2. **the following Scheduling Principles are incorporated as a schedule to the Undertaking:**

Capacity Entitlement Principles

1. **All railway operators’ capacity entitlements will use consistent terminology, recognising that different traffic types may require different terminology, incorporated in a single glossary.**
2. **Capacity entitlements will be expressed in terms that can be interpreted for the development of a master train plan and a daily train plan.**
3. **Where a rail operator’s required capacity cannot be met fully, it could, in accepting the capacity entitlement, use the Register of Interested Parties to identify the additional capacity it is**

interested in acquiring at another opportunity.

Master Train Plan Principles

1. The master train plan will need to define all of the railway operators' capacity entitlements and Network Access' requirements in a form that indicates the time/distance (location) relationship of the train services.
2. The master train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service (eg. explanations of underlying capacity entitlements).
3. The master train plan may, subject to the terms of relevant access agreements, be modified:
 - where QR and an operator agree to a change to the operator's train services in accordance with their capacity entitlement;
 - where new capacity entitlements or maintenance possessions are created; and
 - where actual train running indicates that greater than 10% of train services on a particular system are consistently (over a 3-month period) varying from their scheduled paths; or
 - following a review of the master train plan undertaken every 3 months, by Network Access, operators, and infrastructure service providers. Any one of these parties may seek a review before the 3-month period expires.
4. Network Access will invite all railway operators and, where appropriate, other relevant parties, to contribute to the modification of the master train plan. Each party will be provided with a copy of any proposed changes 7 days prior to a meeting between all parties. An operator will have the power of veto over changes to the master train plan if its capacity entitlement can no longer be satisfied.
5. The master train plan will be in a form that is readily convertible to a daily train plan, which is the principal reference document to be used by the train controllers in carrying out their duties.

Daily Train Plan Principles

1. The daily train plan will express the relevant railway operator's capacity entitlement and Network Access' requirements in a form that indicates the time/distance (location) relationship of the train services. It will reflect the information contained in the master train plan.

2. **The daily train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service. An electronic medium is to be used for the conveying of this information.**
3. **Network Access will invite all railway operators and, where appropriate, other relevant parties, to contribute to the formulation of the daily train plan. This will normally occur each week, for the coming week or fortnight. Alternative arrangements may be necessary for timetabled traffics. Unless otherwise agreed by all parties, Network Access will make available a draft of its understanding of operators' requirements 24 hours before a weekly meeting of all parties to finalise the plan.**
4. **The daily train plan may be modified:**
 - **Periodically during the course of its currency, in accordance with the railway operators' capacity entitlements or Network Access' needs or the needs of other infrastructure providers.**
 - **At any time following a request by a railway operator to make such a change on terms established by its capacity entitlement.**
 - **Where actual train running indicates a consistent variation to that established in the access agreement and formulated in the daily train plan.**
5. **Network Access will invite all railway operators and, where appropriate, other relevant parties, to contribute to the modification of the daily train plan. Each party will be provided with a copy of any proposed changes.**
6. **The daily train plan will be the principal reference document from which train controllers will carry out their normal duties of train routing and dispatch, as well as incident management where trains run differently from their expected paths.**
7. **The daily train plan will express the expected train operation performance target over its period and will be used as the base information for the performance monitoring in reference to the underlying capacity entitlement.**
8. **Modifications to the daily train plan may occur during the course of its duration in the event of out-of-course running. Those modifications will occur according to the train control principles.**

6.4 Train priority

Background

The QCA had a number of concerns about the proposed framework for the performance of train control established in the Protocols, including a potential lack of transparency in train control decisions. QR subsequently developed outcome-based Train Control Principles. Subject to a change regarding priority in train running (see below), the QCA supported QR's principles and proposed they be incorporated in the Undertaking. The proposed Train Control Principles were as follows:

- (a) All parties will ensure that operational safety is maintained through compliance with safeworking rules, safety management systems, applicable safety risk management and rollingstock interface requirements and environmental management systems.
- (b) Railway operators will ensure operating integrity, including train crewing, locomotives, wagons and loading so that the daily train plan can be met.
- (c) QR will manage the network on behalf of railway operators based on agreed entry/exit times as specified in the daily train plan with the objectives of managing trains according to their schedule for on-time exit, not contributing to late running and, if a train is running late, making up time and holding the gain where reasonably possible.
- (d) All things being equal, the primary objective is to keep trains healthy.

Out-of-course running is dependent on the particular circumstances of a rail corridor, including the traffic-type using the corridor. In the event of out-of-course running:

- (a) Except as provided in a railway operator's access agreement, train control will adhere to the contracted capacity entitlement of each railway operator, expressed in terms of the daily train plan.
- (b) Where train control fails to adhere to a railway operator's contracted capacity entitlement, the terms of that operator's access agreement will govern the consequences.
- (c) The identity of a railway operator will, of itself, play no part in a decision by train control to alter that operator's scheduled train service.
- (d) Train control will resolve conflicts that arise with reference to the following critical objectives of the different traffic types operating on the network:
 - (i) passenger – to arrive and depart from all stops in accordance with a published timetable;
 - (ii) livestock and freight – to achieve scheduled network entry and exit times and to arrive and depart from any other service delivery locations as scheduled; and
 - (iii) coal and bulk commodities – to achieve cycle times (incorporating in-line running to key common destinations) that enable them to run a specified number of train services within a nominated period of time as provided in their capacity entitlement, having regard to external factors affecting throughput such as loading and unloading limitations.
- (e) The Matrix will be provided to train control to assist train controllers in the resolution of disputes in accordance with the above principles.

- (f) QR will provide operators with real time train control information and copies of train control diagrams to assist operators understand how train control decisions are made.

Stakeholder views

Train control principles

QR -accepts the QCA's recommendation to insert an obligation in the Undertaking upon QR to comply with the Train Control Principles, and to schedule those principles to the Undertaking. QR is comfortable with the level of detail specified in the Train Control Principles proposed by the QCA in its Draft Decision, however, as with the Scheduling Principles, QR does have some concerns with the accuracy and applicability of some of the principles suggested by the QCA. QR proposes to address its concerns with the drafting of the principles in redrafting its Undertaking and not in this submission. However, by way of example, the following comments are offered.

In relation to the stated primary objective of train control, being to keep healthy trains healthy, QR notes that this may not be the case in the coal system, where preferred order at port, or another protocol, may take precedence over scheduled pathing on the day. In this regard, as well as for the Scheduling Principles, QR considers that separate principles may need to be specified for the different types of traffics and the different circumstances in which they operate on QR's network.

Another point on the 'healthy train' concept relates to the proposed definition. Under the QCA's definition an operator's train could be out-of-course due to the fault of the operator, yet still be considered a 'healthy train'. This is counter to the definition used by ARTC. ARTC designates a train unhealthy if the operator delays it. In this circumstance, QR does not believe it can accept an obligation to keep that train 'healthy' as it will be running contrary to its scheduled path due to no fault of QR's. In any case, however, the concept of 'healthy' and 'unhealthy' trains is based on attributing responsibility for all delays to either above or below-rail reasons. The actions of operators, particularly on capacity constrained parts of the network, will have a direct impact on the actions of QR as railway manager. For instance, an operator may have above-rail problems that result in its service being delayed 'x' minutes. Train controllers may elect to amend a number of service schedules and perform unscheduled service crossings in an attempt to maximise the efficiency of the network (within the limitations of applicable access agreements) and where possible assist the delayed service return to its original schedule. The above-rail delayed service could result in many consequential unscheduled service crossings throughout the network. The decision to perform unscheduled crossings is the train controllers, however, in this example, the unscheduled crossings would be a direct result of a service delayed for above-rail reasons. This makes it difficult to attribute responsibility for the unscheduled crossings, particularly where many consequential crossings occur.

In relation to out-of-course running, the QCA provides that except as provided in an operator's access agreement, train control will adhere to the contracted capacity entitlement of each operator, expressed in terms of the daily train plan. As QR has noted above in relation to the master train plan, the daily train plan will not contain the entirety of every operator's capacity entitlement. However, train controllers will have each operator's Access Co-ordination Plan, and may refer to that as necessary.

ARTC - believes our approach has been used as a benchmark by the QCA. However, we think there has been some confusion.

DBCT - believes train paths should not be prioritised as suggested. Providing priority on train paths is effectively under-utilising the QR infrastructure and providing sub-optimal performance for every train path. DBCT would suggest Network Access should be providing transparent clear pathways at optimal network performance for every scheduled train. If they are unable to provide a clear path then a 'discounted' pathway should be offered taking into consideration the restrictions. It then becomes an economic decision as to whether capital should be invested in the appropriate bottleneck (ie. passing loops etc) to further optimise the network.

DBCT notes current operating practice would suggest that varying levels of priority are beyond the capability of QR. QR has been unable to consistently achieve greater than 20% of trains arriving on time at the port (within a one-hour arrival window).

PCQ - the terminal operators and current rail service providers need to communicate closely to advise of train arrivals and cargo coal types. Trains arriving at the port out of sequence can have a significant impact on port capacity due to the incorrect set-up of coal stockyard machines or the pre-allocation of stockyard machines to load ships off-shore. Further, where a certain consist is needed to complete vessel loading any arrival out of order could delay a vessel beyond a high tide, tying up valuable berth space for 24 hours and incurring demurrage costs on any vessels waiting to load. Demurrage on a cape size vessel is typically US\$15,000 per day.

Clearly, control of consist's arrival order and time can have a big impact on the coal terminal's capacity and costs incurred by port users.

FreightCorp - the QCA's findings on this issue states clearly what FreightCorp seeks and is strongly supported. FreightCorp agrees that the Train Control Principles outlined by QR appear to deliver appropriate outcomes. However, FreightCorp would be concerned if QR unilaterally imposed its own interpretation in the specific instructions (the Matrix) given to train controllers to manage the network. Our premise remains that all stakeholders should have the opportunity to contribute to these detailed operating instructions.

Queensland Government - The Government supports the development of a master train plan and an associated matrix of train priority, but believes a fundamental principle to be embedded in such a plan or matrix is passenger trains have priority over freight trains, particularly in peak times through the Brisbane metropolitan area.

QCA's analysis

QR provides examples of its concern with the accuracy and applicability of some of the proposed Train Control Principles, notwithstanding its own role in their development in consultation with the QCA and stakeholders. QR notes that the stated primary objective of train control, being to keep healthy trains healthy, may not be the case in the coal system, where preferred order at port, or another protocol, may take precedence over scheduled pathing on the day. Ports Corporation of Queensland and Dalrymple Bay Coal Terminal raise a similar point.

The QCA considers that the proposed Train Control Principles provide a useful, high-level, outcome-based guide to the performance of the train control function. Consequently, the QCA is concerned about QR's suggestion that separate principles may need to be specified for the different types of traffics and the different circumstances in which they operate on its network. The underlying aim of having one set of principles for all traffics was to have train controllers applying just one set of principles, not one set for coal traffics and one for non-coal traffics, or other specified traffics. The QCA considers that on most parts of QR's network there will be mixed traffics operating, therefore, there is a benefit to rail operators in train controllers applying the same set of principles across those traffics.

In response to the concerns of QR and the port organisations, the QCA notes the Train Control Principles provide that the train control will resolve conflicts that arise with reference to the critical objective for coal and minerals traffics. That critical objective is to achieve cycle times, incorporating in-line running to key common destinations. Nevertheless, the QCA recognises that the scheduling/train control requirements for coal services will need to be addressed through capacity entitlements in the standard access agreement.

The QCA considers FreightCorp's proposal that detailed operating instructions should be resolved through a working group process should be incorporated into the process for development of the standard access agreement. The key point from the QCA's perspective is that the Train Control Principles incorporated in an approved Undertaking should provide the basis for the development of more detailed principles/operating protocols and/or separate principles for different traffics.

The concerns of ARTC and QR about the QCA's definition of a healthy train have been addressed in section 5.6 of Chapter 5 in the context of performance reporting. Nevertheless, the

change the QCA has made to the healthy train concept necessitates a change to the principle that “the primary objective is to keep trains healthy”. The QCA has amended this principle to read “the primary objective is to ensure a train that enters the network within the agreed tolerance exits the network within the agreed tolerance, except to the extent that the above-rail operator causes delays”.

QCA’s position

The QCA considers it appropriate to amend the Draft Undertaking such that:

- 1. cl 6.1 of the Draft Undertaking committed QR to perform the train control function in accordance with the Train Control Principles;**
- 2. the following Train Control Principles are incorporated as a schedule to the Undertaking:**

Principles

The fundamental objective of train control will be to facilitate the running of train services and the commencement and closures of track possessions as scheduled in the daily train plan.

- 1. The following general principles apply to train operations and train control:**
 - all parties will ensure that operational safety is maintained through compliance with safeworking rules, safety management systems, applicable safety risk management and rollingstock interface requirements and environmental management systems;**
 - railway operators will ensure operating integrity, including train crewing, locomotives, wagons and loading so that the daily train plan can be met;**
 - QR will manage the network on behalf of railway operators based on agreed entry/exit times as specified in the daily train plan with the objectives of managing trains according to their schedule for on time exit, not contributing to late running and, if a train is running late, making up time and holding the gain where reasonably possible; and**
 - the primary objective is to ensure a train that enters the network within the agreed tolerance exits the network within the agreed tolerance, except to the extent that the above-rail operator causes delays.**
- 2. Out-of-course running is dependent on the particular circumstances of a rail corridor, including the traffic type using the corridor. In the event of out-of-course running:**
 - except as provided in a railway operator’s access**

- agreement, train control will adhere to the contracted capacity entitlement of each railway operator, expressed in terms of the daily train plan. The capacity entitlement will reflect a level of priority on the network;
- where train control fails to adhere to a railway operator’s contracted capacity entitlement, the terms of that operator’s access agreement will govern the consequences;
 - the identity of a railway operator will, of itself, play no part in a decision by train control to alter that operator’s scheduled train service; and
 - train control will resolve conflicts in accordance with the primary goal of ensuring a train that enters the network within the agreed tolerance exits the network within the agreed tolerance, except to the extent that the above-rail operator causes delays.
3. The Matrix, approved by the QCA, will be provided to assist train controllers in the resolution of disputes in accordance with the above principles.
 4. For the purposes of the Matrix, a ‘healthy’ train is defined as one that has experienced no delay, within agreed tolerances, attributable to the above-rail operator, either on entry or whilst on the network. Out-of-course running refers to the circumstances in which the actual running of a train service differs, by more than an agreed tolerance, from the path provided in the daily train plan.
 5. QR will provide railway operators with the current version of the Matrix, real time train control information and copies of train control diagrams to assist operators understand how train control decisions are made.

6.5 Public availability of capacity information

Background

The Draft Undertaking provided no right for a prospective third-party operator to be provided with information it needs to test QR’s capacity assessment. QR subsequently indicated a preparedness to provide such operators with copies of the parts of the master and daily train plans relevant to their operations.

The QCA argued that information relating to use of the network should be publicly available and not considered commercial-in-confidence to be ‘owned’ by Network Access. Consequently, the Authority proposed that Network Access should provide sufficient information to allow access seekers to conduct their own capacity analysis. Such information would include:

- master train plans;

- relevant daily train plans;
- train control diagrams;
- maintenance requirements; and
- historical delay and system disruption data.

Stakeholder views

QR - it is worth distinguishing this recommendation from the first recommendation made by the QCA in Chapter 6 of its Draft Decision. Unlike that first recommendation, this recommendation relates to QR's obligation to provide capacity information to parties who are yet to negotiate an access agreement - parties who are at the stage of applying for access, as well as parties who have applied for access and are in the process of negotiating with QR for that access.

In response to the QCA's and stakeholders' comments, QR intends to alter its obligation in relation to the capacity information included within the relevant Information Packs. QR proposes instead to include a master train plan for the relevant infrastructure within the Information Packs. As a result, QR accepts an obligation to provide the following capacity data in relevant Information Packs:

- a master train plan;
- details of committed capacity upgrades; and
- a general description of known capacity constraints.

As specified above, QR will provide the master train plan subject to the following caveats:

- the identity of other operators will not be detailed;
- the terms and conditions of other operators' capacity entitlements will not be detailed; and
- the master train plan will not show all parts of the network, and as such may not show all train services that may impact upon the capacity of the infrastructure detailed.

QR's position in relation to the other capacity information nominated by the QCA for provision to access seekers is as detailed below.

QR will accept an obligation to disclose daily train plans to access seekers only in the following circumstances:

- an access seeker has made an access application;
- QR's initial capacity analysis reveals that QR is unable to provide the capacity sought; and
- the capacity is sought in an area of QR's network where the daily train plan provides further information than the master train plan does concerning capacity availability.

By way of further explanation, in most areas of the QR network the daily train plan will not assist an access seeker 'assess' capacity availability any further than the master train plan will. The exceptions to this rule are those parts of the QR network in which traffic is cyclic. For instance, in the coal system, coal train service operators' capacity entitlements will not be individually identifiable on the master train plan; however, the daily train plan will indicate both the timetabled traffics and the paths allocated to coal train services. It is worth noting that in the coal system, even the daily train plan may prove to be misleading as an indication of available capacity, as variations on the day of running are plentiful.

In relation to the QCA's recommendation concerning maintenance windows, QR advises planned maintenance requirements will be indicated on the master train plan. Emergency possessions may need to be scheduled in addition to those indicated on the master train plan, but for the purposes of analysing the availability of capacity for an access application, those indicated on the master train plan will be the critical determinants.

In relation to what the QCA refers to as 'train control diagrams' (which QR has taken to mean diagrams indicating actual train running on a particular day), QR does not consider it necessary for it to have an obligation to provide this information to access seekers. Any information contained in these diagrams relevant to the analysis of capacity for the purposes of an access enquiry will be reflected in the master train plan as a result of the on-going review of the master train plan against the daily train plan and the daily train plan against actual performance data. The Scheduling Principles suggested by the QCA reflect this on-going monitoring and review of capacity allocations at both the master train plan and daily train plan scheduling stages. As a result, QR considers that the provision of 'train control diagrams' will not assist an access seeker analyse available capacity to any greater degree than will the provision of a master train plan and/or daily train plan in the above circumstances. In this regard, it is worth noting that a request for contracted capacity will take priority over any trains that might run on a particular day, but that are not contracted capacity and as a result not reflected on the master train plan.

On a related, but separate issue, QR acknowledges the QCA has expressed the opinion that 'train control diagrams' need to be provided to operators and/or access seekers to enable them to analyse whether an incumbent operator has triggered the capacity resumption test specified in clause 6.4 of the undertaking.

In relation to the QCA's requirement that QR provide historical delay and system disruption data, QR considers that this information is likely to become more important as the parties enter access negotiations, and an access seeker looks to determine its above-rail requirements to run a particular service. In this regard, QR considers that its obligations under s100 and s101 of the QCA Act will require it to provide a third-party with that information, reasonably available to it, and reasonably requested by the third-party for the purposes of reaching an access agreement. This information is likely to include delay and disruption allowance data (where available) and a 'below-rail transit time' for the operator's service that will take account of the operator's proposed sectional run times and below-rail delays. QR considers that the level of information relating to historical delay and system disruption, required by an access seeker prior to entering access negotiations, can be found in the relevant Information Pack.

ARTC - in many instances, operators may not have the expertise, nor knowledge of wider issues beyond their immediate requirements and would prefer a more consultative approach using provided information as a basis for ARTC analysis. ARTC understands that a 'separated' approach may be warranted in a third-party access environment.

FreightCorp - welcomes the nomination by the QCA of the information to be provided to operators in order to allow them to make a capacity assessment. This information, coupled with Schedule D, would substantially provide the information that an operator would require to make an assessment of the available capacity. FreightCorp considers it essential that this be mandated in the Undertaking as its experience in negotiating with QR over the last 12 months is that they have been either unable or unwilling to provide this type of information, despite agreeing to do so. FreightCorp would therefore expect the QCA to impose a timing obligation on QR to provide this information, similar to that nominated for Schedule D (ie. 14 days if the information is available or 30 days if it has to be specially prepared).

QCA's analysis

The QCA considers the key principle underlying the public availability of capacity information is that QR makes sufficient information available to access seekers for them to conduct their own capacity analysis if they choose. To make this obligation clear, the QCA considers the Undertaking should commit QR in this regard. In addition, the QCA considers the transparency of scheduling and train control processes is critical to confidence in the above-rail market and the ability of rail operators and other parties, such as the ports, to interact effectively.

As a result of stakeholder views, the QCA considers it helpful to distinguish between capacity information disclosed in the Information Packs following an initial access inquiry and the capacity information disclosed once an access seeker has commenced a negotiation process with QR (cl 4.7.1 of the Draft Undertaking).

The QCA accepts QR's proposal that the Information Packs would include the following capacity information:

- a master train plan;
- details of committed capacity upgrades; and
- a general description of known capacity constraints.

The QCA accepts that QR's planned maintenance requirements will be indicated on the master train plan.

QR states that it will provide the master train plan subject to the following caveats:

- the identity of other operators will not be detailed;
- the terms and conditions of other operators' capacity entitlements will not be detailed; and
- the master train plan will not show all parts of the network, and as such may not show all train services that may impact upon the capacity of the infrastructure detailed.

The QCA accepts QR's caveats as reasonable given that the capacity information is being provided to an access seeker at the initial inquiry stage of an access negotiation.

QR states that it will accept an obligation to disclose daily train plans to access seekers only in the following circumstances:

- an access seeker has made an access application;
- QR's initial capacity analysis reveals that QR is unable to provide the capacity sought; and
- the capacity is sought in an area of QR's network where the daily train plan provides further information than the master train plan does concerning capacity availability.

The QCA accepts the first criterion considering it reasonable that an access seeker should have progressed beyond an initial access inquiry and actually submitted an access application before receiving daily train plan information.

However, the QCA has concerns about the second and third criteria. The QCA considers that an access seeker requires a daily train plan to undertake the detailed feasibility/planning work regarding its proposed train services, including deriving sectional running times. The QCA considers that it would be very difficult for a third-party operator to undertake this planning without a daily train plan.

Consequently, the QCA does not accept that the daily train plan should be provided only if QR's initial capacity analysis reveals that it is unable to provide the capacity sought. In addition, the QCA considers that at the more advanced stage of the access negotiation process,

the daily train plan will always provide more information than the master train plan concerning capacity availability.

In light of this, the QCA considers that the Undertaking should commit QR to provide the relevant current daily train plan - this might include a week of daily train plans in order to fully understand the available capacity - once an access seeker has lodged an access application.

The QCA does not accept that the train control diagrams need not be provided to access seekers. The QCA considers that the provision of such diagrams has two key roles:

- the train control diagrams show the difference between scheduled paths and actual train running and so supplements the capacity information in the daily train plan - it assists an understanding of how the daily train plan operates in practice. This will be particularly important on the systems, such as coal, where train running regularly departs from the daily train plan.
- the integrity of the train control decision-making process is facilitated through its transparency to third-party operators.

The QCA considers the provision of the train control diagrams to access seekers is of the nature of additional information and so QR should be allowed to recover the reasonable costs of its provision.

QR considers that the level of information relating to historical delay and system disruption, required by an access seeker prior to entering access negotiations, can be found in the relevant Information Pack. The QCA accepts QR's position.

However, QR also argues that historical delay and system disruption data is likely to become more important as the parties enter access negotiations, and an access seeker looks to determine its above-rail requirements to run a particular service. This information is likely to include a 'below-rail transit time' for the operator's service taking into account the operator's proposed sectional run times and below-rail delays. Consequently, the QCA considers that QR should provide such below-rail transit time data as part of the additional information provided during the negotiation period (sub-para 4.7.2(a)(i) of the Draft Undertaking).

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **QR is committed to make sufficient information available to access seekers for them to conduct their own capacity analysis;**
2. **the following capacity information is included in the Information Packs:**
 - **a master train plan;**
 - **details of committed capacity upgrades;**
 - **a general description of known capacity constraints; and**
 - **historical delay and system disruption data.**
3. **QR is committed to provide an access seeker who has made an**

access application with the relevant current daily train plan(s);

4. **QR is committed to provide an access seeker who has made an access application with the relevant train control diagrams. QR should be able to recover the reasonable costs associated with the provision of these diagrams; and**
5. **QR is committed to provide below-rail transit times as part of the additional information (sub-para 4.7.2(a)(i) of the Draft Undertaking), once the formal negotiation period commences (sub-cl 4.7.1 of the Draft Undertaking).**

6.6 Capacity allocation process

Background

The Draft Undertaking provided that access rights will be allocated to the first rail operator with whom QR can negotiate and execute an acceptable access agreement. If at any time two or more operators are seeking access with respect to mutually exclusive access rights, QR would be entitled to finalise an access agreement with the operator with whom it can agree the most favourable terms and conditions from a below-rail perspective.

For mutually exclusive traffics, the QCA proposed that access rights should be contingent on the winning of a contract with an end-user by a specified date. This approach would allow Network Access to execute contingent access contracts, consisting of prices and conditions for the operator's train and operating characteristics, and deal with multiple operators initially. In addition, the QCA proposed that the 'most favourable test' should be removed as it would be difficult to apply in a transparent way and could potentially allow Network Access to favour one rail operator over another.

Para 4.7.1(c)(iii) provided that where two or more operators seek access to mutually exclusive access rights, once QR has signed an agreement with one operator it will cease to negotiate with the other operators. QR subsequently advised it would re-draft this provision to reflect its intent that the negotiation process would not be recommenced from the start but rather revisited to reflect the impact of the changed circumstances. Consequently, the QCA proposed that para 4.7.1(c)(iii) should not form part of the Undertaking.

The QCA argued that the use of auctions as a means of allocating capacity was a commercial decision for QR, however, the Authority proposed safeguards that should be included as part of an auction mechanism to address potential regulatory issues.

Stakeholder views

QR - where more than one operator is seeking access to mutually exclusive traffic, QR will commence negotiations with all interested parties and progress negotiations to the farthest point possible given the information able to be provided by the operators regarding their proposed operations. QR did not foresee its negotiations in these circumstances proceeding to the consideration of detailed drafting of agreement terms and conditions. It was thought more likely that a price would be provided by QR, based on the operational information provided by the operator and an acceptance of the standard terms and conditions outlined in Schedule E to the Undertaking. The establishment of a standard access agreement, and reference tariffs for certain traffics, would simplify this process further.

QR favours its proposed approach over an approach that requires QR to negotiate and execute access agreements with each of the operators seeking access to the mutually exclusive traffics, those agreements being contingent upon that operator ultimately securing the business of the

relevant end-user. QR considers such an approach to be unduly burdensome upon QR in terms of the resources required to negotiate numerous access agreements where it is clear from the outset that only one of those agreements will ever go ahead. The negotiation, drafting and finalisation of an access agreement will impose significant costs upon QR, both in terms of internal management time and outlays for legal fees and other costs. Given that QR only has certain resources, such a process could also be expected to substantially increase the time taken to assess and negotiate access applications.

The only way QR could accept the QCA's proposition is if operators seeking access for mutually exclusive traffics were required to provide undertakings to QR that:

- in the event they are not ultimately the operator selected by the end-user to provide the relevant haulage services, and as a result the access agreement they negotiate with QR does not proceed, they would be required to reimburse QR for QR's internal and external costs associated with negotiating, drafting and concluding an access agreement with the unsuccessful operator; and
- given that the financial capacity of an unsuccessful operator to meet QR's costs may be questionable, QR should be entitled to insist, in appropriate cases, on an appropriate security to QR for the costs discussed above. Arguably, Network Access would also need a higher allowance for business development costs to be incorporated in the assessed reference tariffs, in order that it can pay for surplus resources required facilitating such a process.

Given the potential for these measures to discourage parties from seeking access, QR suggests that the approach proposed by it previously still offers the best solution to this issue.

QR accepts the QCA's suggestion in relation to other instances where access is sought to mutually exclusive capacity, with the observation that any reference to section 104 of the QCA Act should accurately reflect that provision. For instance, in deciding which party to finalise an access agreement with, where multiple parties are seeking access to mutually exclusive capacity, QR must not finalise an agreement with a party for the purpose of preventing or hindering access by another party, in accordance with section 104 of the QCA Act.

In relation to the QCA's recommendation that prescribed rules be included in the Undertaking to detail how capacity auctions are to be conducted, QR considers that auctions are unlikely to prove an effective means of allocating capacity in most instances. However, subject to the observation that the process envisaged by the QCA's principles appears to be more like a tender process, QR undertakes to develop, in its revisions to the Draft Undertaking, safeguards for auctions where QR determines that an auction would be the best way to allocate capacity.

ARTC - in a third-party regime and where a QR above-rail group was involved, it would be necessary for Network Access to demonstrate to the QCA that any decision regarding the most favourable terms was based on competitively neutral grounds. ARTC does not view the ring-fencing provisions as being sufficient to allay third-party concerns in this regard.

In addition, ARTC would not seek to develop an auctioning mechanism until all potential bidders were operating on a competitively neutral framework. Capacity auctioning without close regulation could not work under a third-party access regime.

RTBU - the QCA's stance on train scheduling and capacity management focuses on seeking ways to prevent QR from 'distorting competition' rather than on exploring what was the optimal set of arrangements to provide win-win solutions for both QR and access seekers.

Regarding the QCA's proposal on contingent access agreements and situations where more than one access seeker is competing for the same capacity, RTBU is of the view that, had the QCA taken the stance that QR, as a business, would be seeking to maximise its own revenues from access charges in light of available capacity, then the imposition of such complex and onerous requirements on QR's commercial negotiations would be seen as unwarranted.

QCA's analysis

QR argues that it should not be required to negotiate to the point of detailed drafting of an access agreement's terms and conditions when more than one operator is competing for an end-customer's business, because of the significant costs such a process would impose on QR. However, QR acknowledges the development of a standard access agreement and reference tariffs in the context of coal and minerals' traffics will simplify such a process.

The QCA agrees the establishment of a standard access agreement for coal and minerals' traffics, approved by the Authority, is the key to reducing the transaction costs associated with access negotiations where multiple operators are competing for the right to haul the same end-customer's business. Once an approved standard access agreement is in place, the need for QR to negotiate contingent access agreements is superseded or at least substantially ameliorated. The QCA considers that it is reasonable to expect that a standard access agreement will be in place for the term of an approved Undertaking.

As a result, the QCA does not consider that the Undertaking should provide for QR to be compensated for the transaction costs associated with negotiating contingent access contracts. This is because the transaction costs QR refers to are likely to exist only to the extent there is no standard access agreement in place.

The QCA recognises that while a standard access agreement for coal and minerals' traffics will be developed in the second half of 2001, there remains a question about a standard access agreement(s) for other traffics. The QCA considers that with the exception of capacity management matters, a standard access agreement for coal and minerals' traffics would likely form the basis of the standard access agreement for non-coal traffics. If stakeholders favoured the development of such a standard agreement, the QCA considers that this could be progressed relatively quickly once the coal and minerals' agreement is in place.

ARTC argues that capacity auctioning without close regulation could not work under a third-party access regime. The QCA endorses the proposed competitive safeguards regarding QR's use of capacity auctioning outlined in the Draft Decision. However, given the use of capacity auctions in the Australian rail sector is in its infancy and in light of ARTC's concerns, the QCA considers that it should have the ability to ensure fair dealing by QR in the conduct of capacity auctions. Consequently, the QCA considers the Undertaking should reserve the QCA's right to approve the rules when QR chooses to auction capacity.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **where two or more railway operators are seeking access with respect to mutually exclusive access rights, prior to the development of a QCA-approved standard access agreement, access rights are contingent on the winning of a contract with an end-user by a specified date. In this instance, reference to 'the most favourable commercial outcome for the below-rail service provider' should be deleted;**
2. **paragraph 4.7.1(c)(iii) is removed and where two or more railway operators are seeking access with respect to mutually exclusive paths, if available capacity is reduced because one operator concludes an access agreement with QR, negotiations would continue with the other operator(s) on the basis of a**

revised access proposal taking into account the reduction in available capacity; and

- 3. the QCA is reserved a right to approve the rules of a capacity auction prior to it being held.**

6.7 Resumption of capacity rights

Background

Objective criteria to assess ‘consistently under-utilised’ capacity – ‘the triggers’

The Draft Undertaking reserved QR’s right to reduce a third-party operator’s access rights where it consistently under-utilised its rights under an access agreement for a 6-month period and could not reasonably demonstrate a future requirement for those access rights. QR subsequently advised it would reduce the time period to 3 months.

In response to the QCA’s concerns about the lack of objective criteria against which the ‘consistently under-utilised’ test could be assessed, QR and the Authority developed the following objective resumption triggers, presented in the Draft Decision. A rail operator does not operate:

- a train service on a scheduled train path 7 or more (not necessarily consecutive) times out of any 12 consecutive occasions on which that particular scheduled train path exists; or
- all of its nominated weekly train service for 7 or more weeks out of 12 consecutive weeks.

Alternative demand for capacity

Given the sensitivity of capacity resumption, the QCA proposed the resumption test should make reference to the reasonably expected existence of alternative demand for the capacity that is subject to the resumption process.

The QCA argued that the threshold for a reasonable expectation of alternative demand would be related to the expected length of delays in the resumption process, including the length of the dispute resolution process. Given the QCA understood a properly constructed dispute resolution process via expert determination should normally reach a conclusion within four to six weeks, there was not a strong case for a low threshold to be set.

The QCA envisaged the resumption process being instigated by Network Access or an access seeker. The Authority proposed that access seekers have a right to apply to Network Access for resumption of an incumbent rail operator’s capacity.

The resolution of disputes

The QCA proposed that the Undertaking should define a quick, clear dispute-resolution process for capacity resumption. The key elements of the process would be:

- the QCA being notified of the dispute and appointing an expert after substantiating the relevant information provided by the parties;

- the incumbent rail operator bearing the onus of demonstrating it satisfies the test for a sustained requirement for the access right;
- Network Access (or an access seeker) bearing the onus of demonstrating the test of a reasonable expectation of alternative demand is met; and
- the process being finalised within one month of the QCA appointing the expert to make a binding decision with immediate effect.

Life of trigger

The QCA proposed that once a trigger was activated, it should remain ‘live’ for one month, in the sense that QR or access seekers could instigate the resumption process within that period.

End-user’s change of rail operator

The QCA proposed an end-user should have the right to change its rail operator subject to the satisfaction of capacity transfer conditions and regardless of whether or not access agreements are ‘unbundled’.

The QCA envisaged a situation where a rail operator could demonstrate that it has an unconditional contractual commitment with an end-user for paths in preference to an incumbent rail operator. The end-user nominated in the access agreement would serve notice on Network Access indicating its commitment to change operator from a given date and consequently the incumbent’s capacity entitlement would be reassigned from that date.

Stakeholder views

The interests to be balanced

ARTC - in general, ARTC supports QCA’s proposed provisions with respect to the resumption of capacity.

FreightCorp – generally supports the findings of the QCA. FreightCorp has maintained in its negotiations with QR that where the non-use of capacity is at the request of the end-user (in the context of mutually exclusive traffics in particular) there is an issue as to whether capacity may be resumed (discussed below).

Also, the Final Decision should state how Network Access resumes capacity rights from QR Above-Rail. A possible approach may be to require Network Access to report to the QCA on the circumstances of each resumption of capacity and for each rail operator to receive a copy of each report. The record so created will provide comfort to third-party operators that they are not being treated differently as between themselves and as between QR itself. The Undertaking should require QR to notify the QCA and rail operators when the resumption test is satisfied.

In regard to explicitly noting the probability of a ramp-up in operations over time in access agreements, the Final Decision should make it clear that QR must agree to ramp-up unless it can demonstrate constraints that prevent it. This position should be reflected in Schedule E.

There is a tension between addressing two issues – preventing hoarding and the commercial imperative of receiving access charges – with the same mechanism. There may be grounds for removing from this approach the regulatory element (ie. prevention of hoarding). FreightCorp has not reached a firm view on this, but there may be merit in treating hoarding in a less defined way allowing QR or any rail operator to notify the QCA of any practices that may be regarded as hoarding of capacity. The QCA would then have a right, through the access agreement, to modify an operator’s access rights.

RTBU - the QCA's proposals introduce complexities that would damage QR's revenue streams because the proposed pricing arrangements incorporate fixed and variable elements: the lower the usage, the less the access charges paid to QR.

The effect of the QCA's amendments is to only permit QR to resume access rights if an operator's utilisation is only 7/12 (approximately 58%) of its entitlements over a period of three months, or the usage of a particular train path for seven or more times out of twelve scheduled occasions. Having already 'lost' from the agreement, QR would not be entitled to maintain its fixed charges for access but would have to reduce those charges proportionately to a new level.

Objective criteria to assess "consistently under-utilised" capacity – the 'triggers'

FreightCorp - considers QCA's findings in this respect provide a fine balance in protecting the interests of QR and preventing hoarding by rail operators. However, the QR test is as stringent as any of which it is aware and, as such, an objective on-looker might assume that the test was designed to hinder the ability of new entrants to stay in the market. Whilst the requirement for an alternative demand for capacity has provided a further test, this risk remains. The nature of the risk will depend on how alternative demand for capacity is defined. Also, the definition of a 'sustained requirement' (an element of the alternative demand for capacity test) is important in this regard. The Final Decision should state clearly what constitutes sustained requirements.

There remains an issue as to whether the first limb of the resumption test should be so stringent. FreightCorp considers that, where capacity is not used or is under-utilised for a period of time at the request of the end-user (ie. no hoarding by the operator), there is an issue as to whether that capacity may be resumed.

FreightCorp considers where a rail operator gives QR notice that for a specified period of time it will not be using specified capacity because its customer - the end-user - does not require the train services in respect of which the rail operator has contracted capacity, QR may use that capacity. This would operate as a clearing arrangement, allowing QR to realise revenue if there is alternative demand for all or part of the capacity, and for the period, specified in the notice.

On the expiry of the period specified in the notice, train services must recommence in respect of the capacity specified in the notice. If the train services do not so recommence, the capacity relating to train services not so recommenced will be subject to the resumption test. In practice, what this is likely to mean is that capacity relating to train services not so recommenced may be resumed if there is alternative demand for it, and the rail operator is not able to demonstrate a sustained requirement for the capacity.

Clause 3.3 (of the General Conditions of Contract) of the FreightCorp Mark-up provides drafting that allows this clearing system approach to work. This clearing system approach would not impact the application of the charging regime, in particular any obligation of any rail operator to pay any use-or-pay charge.

Consequently, the Final Decision should consider the clearing system mechanism suggested. If Schedule E is amended to state that ramp-up must be afforded to access seekers unless QR demonstrates constraints preventing it, it should also state clearly the context of the right to surrender with clearing. This should form part of the base case.

Alternative demand for capacity

QR - the need for QR to establish alternative demand in order to justify resuming capacity creates a number of problems. First, there is the difficulty of defining 'alternative demand'. Would, for instance, maintenance requirements for the capacity in question qualify as alternative demand for the purposes of enabling QR to resume capacity? To offer another example, could QR resume capacity in circumstances where, in the particular part of the network, capacity was restricted and QR's market research indicated that future interest in capacity was likely; notwithstanding no access inquiry or application had been received? These are two circumstances in which QR considers it would have legitimate grounds for resuming capacity, yet the QCA's suggested prerequisite to resumption is unclear on such circumstances.

The difficulty surrounding the definition of ‘alternative demand’ is related to the question of timing. For example, would QR have to wait until it received an access application before it could trigger a capacity resumption? If this were the case it could result in a lengthy delay for the party seeking the access, as QR may have to proceed through a dispute resolution process with the incumbent to ensure that its rights were protected before being able to start negotiations with the access seeker.

QR acknowledges the QCA has attempted to address this issue by inserting a rapid dispute resolution process into the capacity resumption clause. However, QR questions whether in practice, the proposed mechanism will be effective. If the time frames set are not met, what will be the consequence? Until the dispute is resolved, it is unlikely that QR can resume the capacity, yet it would be clearly inappropriate in such circumstances for a party to retain capacity that it did not genuinely require. In any event, QR considers that it should be able to resume capacity, prior to the receipt of an access inquiry, where the capacity in question is in a capacity constrained part of QR’s network.

In addition to the above issues, in combination with the take-or-pay measures and the reference tariff review trigger issues, the QCA’s proposed mechanisms could produce a perverse situation in those areas of QR’s network covered by a reference tariff. For instance, they could encourage an operator to overstate its capacity requirement in order to support a lower reference tariff, and subsequently prevent QR from taking that capacity back off the operator notwithstanding it is not being used and QR is unable to recover its fixed costs of providing access from the tonnages likely to be railed. Even under QR’s proposed take or pay provision, take or pay will only mitigate against any revenue shortfall to a very limited extent. In other words, the combination of QCA recommendations removes an important volume management control from QR. Furthermore, it seems to be illogical for QR to be able to review reference tariffs because of volume variations, but not be able to reduce an operator’s capacity entitlement simply because QR cannot demonstrate an alternative demand for the capacity in question.

Bearing in mind these concerns, particularly in the coal system, QR does not support the need for a requirement that it demonstrate alternative demand for capacity that it seeks to resume.

In areas of QR’s network outside of the coal system, where the issue of being able to demonstrate alternative demand is not necessarily clear cut, QR would prefer to have the option of being able to satisfy the QCA’s apparent desire for an extra check on the use of the capacity resumption power by restricting the use of the resumption power for the ‘purpose of preventing or hindering access’ in line with sections 104 and 125 of the QCA Act.

As a result, QR proposes the following approach in relation to the resumption of capacity:

- QR may resume capacity, accepting other prerequisites set out by the QCA in its Draft Decision, where:
 - the capacity entitlement in question relates to coal train services in the Blackwater, Goonyella, Moura or Newlands systems (including each of the reference tariff clusters within those systems); or
 - it can demonstrate that it has a reasonable expectation of alternative demand for the capacity (see below); or
 - QR has any other purpose in resuming the capacity, other than to prevent or hinder access as provided in sections 104 and 125 of the QCA Act.
- QR will have a reasonable expectation of alternative demand sufficient to justify resumption where it has:
 - infrastructure maintenance or enhancement requirements for the capacity in question or any part of it;
 - received an access enquiry or application for the capacity in question or any part of it; or
 - a reasonable belief that alternative demand exists or will exist within the foreseeable future for the capacity in question or any part of it.

QR does not object in principle to the QCA's recommendation that access seekers be given a right, through the Undertaking, to require QR to consider the capacity resumption process in respect of an incumbent party's capacity entitlement. However, QR considers there is justification for dealing with such a right in a cautious manner. In effect, the recommendation means that a party, potentially with no genuine aspirations to acquire the capacity in question, can require QR to expend time, effort and money in considering whether or not the triggers for a capacity resumption exist. Potentially QR could be required to incur significant costs (in terms of both time and money) in considering a resumption and participating in a dispute resolution process where QR neither wished to initiate the process, nor potentially stands to make any commercial gain from the outcome.

Furthermore, the process creates a potential for conflicts of confidentiality to arise. For instance, in providing an access seeker with justification for its decision not to resume capacity, QR may risk revealing information that is confidential to the incumbent operator, such as their plans for future business. This is clearly an inappropriate outcome. A similar conflict may arise during the dispute resolution process, in which arguably, the incumbent party is going to present information to justify its on-going need for the capacity. Again, this information may be confidential to that party. However, the QCA process appears to envisage the access seeker participating in the dispute resolution process, and thereby being in a position to acquire such confidential information.

For these reasons, QR has a number of suggestions concerning the creation of this right.

First, QR would prefer to minimise the need for it to get involved where two parties might potentially be able to negotiate an arrangement between themselves. As a result, QR would suggest, as a first step, facilitating an incumbent party and an access seeker negotiating an arrangement in respect of the capacity between themselves, via the capacity relinquishment mechanism discussed further below.

As a result, only in a situation where the incumbent party did not wish to divest the capacity, would QR need to get involved. QR would seek confirmation that discussions between the two parties have taken place to this end. In addition, in the event of a dispute regarding QR's decision in response to an access seeker's application under the clause proposed by the QCA, QR considers that the access seeker should be required to provide certain guarantees to QR. For instance, it should agree to pay all of QR's costs associated with seeking the resumption, including the costs of participating in the dispute resolution process. In addition, it should provide QR with a commitment concerning its intention to take up the capacity if resumed from the incumbent party and in fact the timing for the resumption and commencement of the new arrangements should correspond. Furthermore, QR should not incur a net cost as a result of such a process.

QR would prefer that the QCA's recommendations in relation to the right of a party wishing to acquire capacity via the capacity resumption process operate as follows:

- a party could submit a request with QR for the consideration of the capacity resumption trigger where it is interested in acquiring the capacity in question (notwithstanding it does not know whether or not the operator has triggered the objective test specified in clause 6.4);
- QR would consider the pre-conditions to resumption at that point in time, and determine whether or not they were met, and could attempt to resume the capacity if those pre-conditions were met;
- if, after considering the resumption test, QR determined that it couldn't take back the capacity at that point in time, QR could undertake, if required by the party seeking access, to continue to consider resumption for the next 3 months. This might be achieved, for instance, by the access seeker registering their details on the Interested Parties Register for the defined period. This would not be an open-ended right however. Such a process would preclude the need for QR to provide parties with potentially sensitive information relating to the performance of operators on the network, whilst still enabling those parties to require QR to consider the resumption of capacity from incumbent operators.

FreightCorp - whilst FreightCorp acknowledges that the specific wording of the alternative demand for capacity test may remain to be finalised it is important that its meaning is clearly stated. The wording for the test as drawn gives rise to a number of points for clarification:

- the temporal extent of the words “expected existence” is not clear, nor is it clear what level of certainty will satisfy the test “reasonably expected existence”;
- whilst the right to resume only arises on a proportionate basis, it is not clear whether the alternative demand must exist or be expected to exist for all or part of the capacity that is the subject of the resumption process;
- it is not clear what the alternative demand relates to; is it demand from the same, or a different end-user, of the train services that relate to the capacity the subject of the resumption process? As foreshadowed above, understanding this is important. If alternative demand includes demand of the same end-user in respect of like train services being provided by a new entrant train operator the incumbent will have to demonstrate a sustained requirement for the access rights;
- following on from the preceding point, does “a sustained requirement of the access rights” mean all of the access rights the subject of the resumption process, or some of them? Given that the right to resume arises on a proportionate basis it seems likely that the rail operator must demonstrate a sustained requirement for all of the access rights the subject of the resumption process. FreightCorp suggests that this element of the alternative demand for capacity test be sufficiently flexible for the rail operator to maintain access rights in relation to train services for which it can demonstrate a sustained requirement. This approach would then allow QR to resume capacity to satisfy alternative demand for only some of the capacity that is subject to resumption.

The resolution of disputes

FreightCorp – in regard to the QCA’s concerns about delays in resolving disputes over resumption, FreightCorp’s Mark-up includes (at clause 3.2(c)) a form of wording that is consistent with the expedited dispute resolution process suggested by the QCA. FreightCorp notes given the expedited dispute resolution process it is important that the resumption test is clear.

Life of the trigger

FreightCorp – supports the finding of the QCA that if the elements of the resumption test are satisfied the resumption process must be commenced within a month after the test being so satisfied. This gives rise to an issue of detail.

It may be that before the resumption process has commenced the rail operator recommences provision of train services using the access rights that are the subject of a resumption process commenced later. FreightCorp sees no problem with this, noting that recommencement of use of the access rights helps satisfy the burden of proof borne by the rail operator to demonstrate a sustained requirement for the access rights.

FreightCorp notes, however, that unless QR takes a sensible approach to instigating the resumption process, disputes may arise needlessly. To discourage this occurring it may be that the expedited dispute resolution process should allow the expert to award costs to the rail operator if it is clear to the expert that QR has acted unreasonably in not accepting evidence of a sustained requirement for the access rights.

FreightCorp notes the QCA anticipates that QR or access seekers may instigate the resumption process. A point of clarification arises from this finding.

For an access seeker to instigate the resumption process, the access seeker would have to know the elements of the resumption test are satisfied. FreightCorp considers the sharing of this information with all rail operators is consistent with transparency and its suggestion QR be required to report to the QCA on each occasion the resumption test is satisfied. FreightCorp notes, however, the QCA refers to access seekers being able to instigate the resumption process. This implies publication to a wider audience than to all rail operators.

FreightCorp therefore requests the following clarification:

- Does the QCA intend for the fact that the elements of the resumption test are satisfied be made known generally?

- How does the QCA envisage the dissemination of this information to potential access seekers?

End-user's change of rail operator

QR - the QCA recommends that an end-user (for instance, a mine in the coal system) have a right to direct QR to change its applicable rail operator. This, in effect, is a forced trading process - an end-user is able to change its rail operator and this gives rise to a trigger for QR to require the original operator to relinquish the capacity rights, and QR to assign them to the new operator. QR does not object in principle to such a process.

To be effective, it will need to be specified in a party's access agreement, and it will need to permit the end-user to change the operator under the access agreement. Such a process might provide, for instance, that QR may terminate the capacity under the access agreement when it receives written instructions from the end-user, serviced by the access agreement, indicating its intention to cease using the incumbent operator. QR would then negotiate another access agreement with the end-user's new, preferred operator.

However, such a mechanism involves a number of complexities, including those same complexities that a voluntary trade will involve. For instance, QR would seek to ensure any termination of an existing access agreement and negotiation of a new access agreement would be at no net cost to QR. Amongst other things, QR would wish to ensure the timing of the termination of the existing access agreement, and the commencement of the new access agreement correspond, otherwise, the end-user would lose railings, and QR would lose access revenue.

The relevant end-user and the new operator must be required to indemnify QR in respect of any associated costs or losses. Such an assurance is necessary to deal with different operations with potentially different cost implications. In the absence of such an assurance, the creation of this process could provide the opportunity for existing railway operators and end-users to collude to manipulate the system by enabling the existing railway operator to get out of an existing unfavourable access agreement, and for an associate of the existing operator to enter into a new, more favourable access agreement.

In addition, existing rail haulage agreements will need to be grandfathered, as existing operators will not have had the opportunity to negotiate appropriate provisions into their rail haulage agreements to deal with the consequence of their end-user utilising the proposed forced relinquishment mechanism. Without grandfathering, existing operators would be exposed to the possibility of having their access rights removed from them at the instruction of their customers, but having no recourse against their customer as the risk of such happening was not considered in the context of their negotiations and contractual arrangements. Such an outcome is clearly inappropriate.

FreightCorp - in relation to the QCA's findings on this issue, a number of issues of clarification arise. In particular, in regard to (a) the meaning of "unconditional contractual entitlement with an end-user for paths..." and (b) the application of "...given date...".

On the first point:

- ... *unconditional* ...; a contract with the end-user may be conditional as to a right to operate train services under an access agreement, thereby giving rise to circularity in the interconditionality. This circularity could be avoided by providing that "unconditional other than as to resumption of any incumbent's capacity entitlements (if any) necessary to allow the operator to operate train services under its contract with the end-user on notice from the end-user to QR pursuant to Clause."

(Clause 3 of the General Conditions of the Contract of the FreightCorp Mark-up takes a different approach that leaves the issue as between QR and the customer); and

- ... *contractual entitlement with the end-user for paths* ...; we assume this means that the entrant operator has a contract to provide train services to the end-user in respect of capacity provided by the incumbent;
- the reference to *for paths* may be read to restrict the extent of the QCA's finding, that is, the QCA's finding as to resumption of capacity relates only to incumbents to the extent

that they hold capacity or, more particularly, paths necessary to allow the entrant to provide the service it is currently providing to the end-user.

On the second point with regard to “given date”, FreightCorp notes that clause 3.1(e) of the General Conditions of the QR Mark-up provide for not less than a month.

QCA’s analysis

The interests to be balanced

FreightCorp argues that the Final Decision should identify how Network Access would resume capacity from QR’s above-rail groups. In addition, it proposes the Undertaking should require QR to notify the QCA and rail operators when the resumption test is triggered to provide reassurance to third-party operators that they are being treated the same as QR’s above-rail groups.

The QCA would prefer not to become involved in day-to-day rail operations. A more desirable option would be to provide for transparent capacity utilisation on QR’s network such that Network Access, incumbent rail operators and access seekers are able to handle capacity resumption matters within a decentralised framework. As proposed in the Draft Decision, an independent expert would provide protection for all parties through the resolution of capacity resumption disputes.

To allay FreightCorp’s concerns about unequal treatment of third-party operators compared to QR’s above-rail groups with respect to capacity resumption, the QCA considers that the Undertaking should require Network Access to notify all relevant parties on the Register of Interested Parties when a resumption test is triggered. A relevant party would be one who has an interest in the capacity rights on the system affected by the triggering of the resumption test. The QCA has defined relevant party broadly to avoid confusion on Network Access’ part as to whether the access rights triggering the resumption test are of interest to a party on the Register of Interested Parties.

By placing the onus on Network Access to inform relevant parties on the Register of Interested Parties, it would not be possible for the resumption test to be triggered and not brought to the attention of an interested party without QR breaching its Undertaking. This enhances Network Access’ accountability for its capacity resumption decisions, both with respect to QR’s above-rail groups, third-party operators and access seekers.

FreightCorp also argues that Schedule E should make it clear that QR must agree to ‘ramp-up’ in a third-party operator’s train service unless QR can demonstrate constraints that prevent it. The QCA considers that ‘ramp-up’ is a commercial matter between QR and the third-party operator that will depend on the price that is charged. Consequently, the QCA does not consider it appropriate that Schedule E should force ‘ramp-up’ on QR.

Objective criteria to assess ‘consistently under-utilised’ capacity – ‘the triggers’

FreightCorp queries whether the first limb of the resumption test should be so stringent. The QCA acknowledges this concern, however, the proposed alternative demand test supplemented by the expert dispute resolution process should protect third-party operators’ interests.

FreightCorp argues where a rail operator gives QR notice that for a specified period of time it will not be using specified capacity because its customer - the end-user - does not require the train services in respect of which the rail operator has contracted capacity, Network Access may use that capacity if there is alternative demand. The QCA considers that this proposal is inappropriate on the basis that it would open the door to considerable gaming on the part of end-customers and rail operators. The key issue for a rail operator should be that its contract with its

customer addresses the risk that is created through that customer not requiring the contracted train service for a period.

Alternative demand for capacity

QR argues the proposed need for it to establish alternative demand to justify resuming capacity creates a number of problems, including defining an alternative demand and the speed with which it would be able to resume under-utilised capacity.

To provide greater certainty regarding resumption, QR proposes a 3-pronged test such that it can resume capacity:

- where the capacity entitlement in question relates to coal train services in the Central Queensland coal system; or
- QR can demonstrate that it has a reasonable expectation of alternative demand for the capacity; or
- QR has any other purpose in resuming the capacity, other than to prevent or hinder access as provided in s104 and s125 of the QCA Act.

QR proposes it will have a reasonable expectation of alternative demand sufficient to justify resumption where it has:

- infrastructure maintenance or enhancement requirements for the capacity in question or any part of it;
- received an access enquiry or application for the capacity in question or any part of it; or
- a reasonable belief that alternative demand exists or will exist within the foreseeable future for the capacity in question or any part of it.

QR argues that maintenance requirements and its market research would be sufficient grounds to resume capacity, however, the QCA's proposed alternative demand test is unclear as to whether resumption could be effected in these circumstances. The QCA considers that QR's examples illustrate the sensitivity of capacity resumption for Network Access, incumbent rail operators and access seekers and why there needs to be adequate protection of all parties' interests through an alternative demand test.

QR may well feel strongly that its market research is sufficiently reliable that resumption could be effected where no access inquiry or application had been received. However, it would not be unreasonable for a third-party operator subject to resumption on such grounds to have its doubts. In contrast, maintenance requirements may provide a sounder basis to trigger the alternative demand test, for example, because excess track wear/damage is directly observable. Nevertheless, the key point in matters of judgement such as these is the strength of the respective arguments.

While QR argues that the alternative demand test lacks clarity, the QCA considers there will always be a need to exercise judgement in a decision to resume, which would not be removed in the absence of an alternative demand test. In the QCA's view, QR's 3-pronged test does not satisfactorily minimise the degree of judgement required for it to resume capacity and consequently, insufficiently protects incumbent rail operators' interests.

Given the sensitivities associated with resumption, the QCA maintains the view that an independent expert is best placed to assess the alternative arguments and make a binding decision.

To provide guidance to the expert in capacity resumption disputes, the QCA considers that a test for alternative demand should be incorporated in the Undertaking. The test would be that the expert must decide who is more likely to utilise the capacity subject to resumption, the incumbent rail operator or the alternate rail operator or Network Access (that is, which party has the greater likelihood of use of the capacity subject to dispute).

The following examples, in the context of a capacity resumption dispute, illustrate the QCA's view about the strength of an argument regarding the likely use of capacity:

- an alternate rail operator with a contractual commitment from an end-customer to purchase train services would carry more weight than its reasonable expectation that there would be a demand for its services; and
- for Network Access, the demonstration of excess wear and tear or structural problems on the track necessitating infrastructure maintenance work would carry more weight than an assertion that infrastructure maintenance was required because heavier wagons were running on the track.

The QCA considers that the 'greater likelihood of use' test would not mean that QR must wait until it received an access application before it could trigger a capacity resumption. Rather, the strength of QR's argument as to its need to resume capacity compared to the incumbent operator's argument for retaining its capacity would be the key consideration, assuming the matter went to dispute resolution.

QR argues the proposed resumption process creates a potential for conflicts of confidentiality to arise. For instance, in providing an access seeker with justification for its decision not to resume capacity, QR may risk revealing information that is confidential to the incumbent operator, such as their plans for future business. A similar conflict may arise during the dispute resolution process. It is not clear to the QCA why the application of the resumption test needs to result in confidential information being provided to an access seeker because that information could be confidential to the expert. The QCA has made provision to this effect in the dispute resolution process.

In response to FreightCorp's query that it is not clear whether the alternative demand must exist or be expected to exist for all or part of the capacity that is the subject of the resumption process, the QCA considers that the expected demand would be required to be demonstrated for the capacity that is proposed to be resumed.

QR's concerns about potentially lengthy delays in effecting resumption would only occur if the proposed dispute resolution process was not completed within the space of approximately four to six weeks as foreshadowed in the Draft Decision. Moreover, QR's access negotiation process would take much longer than this. Consequently, the QCA disagrees with QR that it should be able to resume capacity, prior to the receipt of an access inquiry, where the capacity in question is in a capacity constrained part of QR's network. Moreover, the greater likelihood of secondary trading in a capacity-constrained part of the network is a further argument against pre-emptive resumption of capacity by QR.

The resolution of disputes

FreightCorp argues the dispute resolution process should allow the expert to award costs to the rail operator if it is clear to the expert that QR has acted unreasonably in resuming capacity

through not accepting evidence of a strong likelihood of use of the access rights. The QCA accepts this is reasonable. Similarly, the QCA considers that the expert should be able to award costs to QR if it is clear to the expert that the rail operator has acted unreasonably in disputing the resumption of capacity through denying there is a weak likelihood of use of the access rights.

End-user's change of rail operator

QR does not object in principle to a process whereby an access agreement permits an end-user to change its rail operator and upon receipt of written instructions from the end-user, QR terminates the capacity under the agreement. However, QR would seek to ensure any termination of an existing access agreement and negotiation of a new access agreement would be at no net cost to QR. The relevant end-user and the new operator must be required to indemnify QR in respect of any associated costs or losses.

The QCA considers QR's proposal that the access seeker should provide QR with a commitment regarding its intention to take up capacity if capacity is resumed is appropriate and any failure to do so would become a significant issue in the context of the expert's assessment of QR's cost of resuming capacity.

In addition, QR argues that existing rail haulage agreements will need to be grandfathered, as existing operators will not have had the opportunity to negotiate appropriate provisions into their rail haulage agreements to deal with the consequence of their end-user utilising the proposed forced relinquishment mechanism. Clearly, regard will need to be had to the specific terms of existing contracts. However, the QCA considers it is important to make clear that where an operator will not utilise capacity under its contract then the existence of the contract and the capacity conferred under it should not become a barrier to switching.

QR subsequently advised the QCA that after finalising its submission, it had further discussions with QR Coal & Freight Services Group, which had concerns with the proposed termination provision. QR argued that from the operator's perspective, the provision would significantly weaken the certainty afforded to it through a contract with an end-user, as the end-user could effectively prevent it from providing the service simply through serving a notice on Network Access.

In light of this argument, QR proposed to make it clear that the rail haulage agreement will incorporate termination provisions as agreed between the operator and the end-user. If, within that agreement, the parties agree the access agreement will terminate upon termination of the haulage agreement, Network Access would be prepared to include back-to-back provisions in the access agreement. This would ensure that the access agreement did not prevent mines from changing operator, but it would do so in a way that protected the commercial position of the operator.

FreightCorp advised the QCA that the concerns raised by QR were unjustified. FreightCorp argued its concern on this issue has always been that QR is not able to tie up capacity against the legitimate wishes of an end-user to change operator. Any issues associated with the relationship between the customer and operator are appropriately managed via the contractual relationship between the two parties.

The QCA agrees with FreightCorp that operators and end-users should manage their contractual relationships without the involvement of a third-party, Network Access. This matter is best resolved in the above-rail market. Consequently, the QCA does not accept QR incorporating its proposed approach in the Undertaking.

FreightCorp sought clarification in regard to (a) the meaning of “unconditional contractual entitlement with an end-user for paths...” and (b) the application of “...given date....”.

FreightCorp notes that a contract with the end-user may be conditional as to a right for the rail operator to operate train services under an access agreement, thereby an unconditional contractual entitlement with an end-user would not be possible. The QCA recognises this circularity problem and agrees with FreightCorp that it could be addressed by inclusion of the following words in the Undertaking:

- “unconditional other than as to resumption of any incumbent’s capacity entitlements (if any) necessary to allow the operator to operate train services under its contract with the end-user on notice from the end-user to QR.”

The QCA agrees with FreightCorp that the reference in the Draft Decision to “... contractual entitlement with the end-user for paths ...” means that the entrant operator has a contract to provide train services to the end-user in respect of capacity provided by the incumbent. In response to FreightCorp’s concern that the reference to resumption of ‘paths’ may be interpreted narrowly to prevent the new operator entering the market, the QCA has changed the reference to ‘capacity entitlements’. The QCA does not have a strong view about the ‘given date’ from which the end-user serves notice on Network Access that it intends to change its rail operator. FreightCorp’s proposal for one month appears reasonable.

QCA’s position

The QCA considers it appropriate to amend the Draft Undertaking such that:

Threshold triggers

1. **a threshold trigger for resumption of access rights is established where a railway operator, for any reason other than the occurrence of a force majeure event or the failure of QR to make the railway operator’s access rights available, does not operate:**
 - a train service on a scheduled train path seven (7) or more (not necessarily consecutive) times out of any twelve (12) consecutive occasions on which that particular scheduled train path exists; or
 - all of its nominated weekly train services for seven (7) or more (not necessarily consecutive) weeks out of any twelve (12) consecutive weeks;
2. **QR is allowed to issue a notice in writing which reduces the railway operator’s access rights, either by:**
 - deleting the relevant scheduled train path from the railway operator’s access agreement; or
 - reducing the railway operator’s relevant nominated weekly train services, provided that the number of remaining nominated weekly train services is no less than the railway operator’s average weekly usage

during the relevant twelve (12) week period;

once the threshold trigger has been satisfied and provided:

- the railway operator is not able to demonstrate, to QR's reasonable satisfaction, a sustained requirement for the access rights; and
 - QR is satisfied that it can demonstrate that it has a reasonable expectation of alternative demand to justify a resumption of capacity;
3. Network Access is required to notify all relevant parties on the Register of Interested Parties when a resumption test is triggered;
 4. the life of a particular transgression of the capacity resumption trigger is one month;
 5. where QR reduces a railway operator's access rights, the access charge payable by the railway operator will be varied in accordance with the terms of its access agreement;

Resumption disputes

6. where QR makes a decision to reduce a railway operator's access rights in accordance with the stated procedure, and the railway operator believes that QR's decision is not justified in the circumstances, the railway operator may challenge the decision through the dispute resolution procedure for capacity resumption disputes;
7. QR will not implement the reduction, unless and until the dispute resolution procedure has been exhausted in favour of its decision, provided it is not otherwise required to do so by law;
8. the following procedure to apply with respect to capacity resumption disputes are incorporated. A party (either QR, a railway operator or an access seeker) instigates the process by giving notice to the QCA and the other relevant parties indicating the capacity sought and detailing the circumstances which have led to the satisfaction of the trigger. The QCA would then substantiate the information and appoint an expert to hear the matter:
 - the expert must decide which party is more likely to utilise the capacity subject to resumption. Once an expert has been appointed, parties would be allowed 10 business days to make submissions. Sensitive commercial information could be provided to the expert in-confidence;
 - the expert could award costs if any party to a

resumption dispute is found to have acted unreasonably.

The expert would be allowed 10 business days in which to deliver a decision, which would become effective at the expert's discretion.

9. **an end-user is permitted to change its rail operator by serving notice on Network Access where a rail operator can demonstrate that it has an unconditional contractual entitlement with an end-user for capacity entitlements in preference to an incumbent rail operator. The contractual commitment would be unconditional other than as to resumption of any incumbent's capacity entitlements (if any) necessary to allow the operator to operate train services under its contract with the end-user on notice from the end-user to QR;**
 - **this right would be subject to the satisfaction of capacity transfer conditions;**
10. **the threshold triggers, resumption dispute process and an end-user's right to change its rail operator, as outlined above, are also included in access agreements;**

Instigation of capacity resumption

11. **Network Access has a right to resume capacity; and**
12. **access seekers have the right to apply for a resumption of an incumbent's capacity, subject to providing Network Access with a commitment to use the capacity subject to resumption. Any failure to do so would be relevant in the context of the expert's assessment of QR's cost of resuming capacity.**

6.8 Capacity transfer procedures

Background

Surrendering access rights to Network Access

The Draft Undertaking imposed significant restrictions on the reassignment of capacity, while providing a key role for QR in the process.

The QCA argued a right to surrender access rights should form an important part of the capacity transfer framework established in the Undertaking, complementing the establishment of a secondary market in access rights.

The QCA proposed a relinquishment right for QR's non-coal freight and passenger traffics, whose access charges make only a moderate, if any, contribution beyond the incremental costs of their usage. The proposed right was that a third-party operator carrying such a traffic could surrender its access rights subject to it continuing to pay the difference between its contracted access charge and the maintenance costs saved for the relevant line/corridor for the remainder of the contract term, or until QR re-sells the capacity.

QR would be obliged to assign surrendered access rights to the next access seeker that seeks rights consistent with those that have been surrendered. If QR could not have supplied a train path to the next access seeker without using some part of the surrendered capacity, then the access rights should be considered consistent and the surrendered party's obligation to QR terminated.

Secondary market in access rights

The Draft Undertaking constrained a rail operator that wants to transfer access rights to another non-related body corporate (or operator) to the whole of its respective rights and obligations (in its access agreement), and only with the prior written consent of QR, which shall not be unreasonably withheld. No test to assess when consent might be unreasonably withheld was provided.

The QCA argued secondary trading mechanisms are likely to increase the efficiency of capacity allocation, however, the cost of establishing a formal secondary market would be likely to outweigh the benefits at this stage of the development of a contestable above-rail market. Consequently, the QCA proposed that capacity holders should be allowed to transfer unwanted capacity rights, including partial transfer, by bilateral negotiation, subject to the establishment of adequate notification procedures between QR and capacity holders. Subject to a commerciality test protecting QR's exposure to unacceptable financial risk, QR should not be able to unreasonably withhold consent for the transfer of capacity and the assignor's liability to QR should cease once the assignment is effected.

Stakeholder views

FreightCorp - generally supports the findings of the QCA in relation to the surrender of access rights to Network Access and the secondary market in access rights. Further, it agrees with the assessment of the QCA that potentially there are two forms of capacity transfer – surrender to QR or transfer to an access seeker or to a rail operator. FreightCorp suggests that the Final Decision should state how capacity transfer may be effected by QR Above-Rail.

Surrendering access rights to Network Access

QR - does not object to the QCA's recommendations in principle. In fact, QR considers that similar principles can be applied to coal traffics as well as non-coal traffics. As a result, QR proposes that, unless otherwise agreed in an access agreement, reasonably consistent relinquishment rights be applied for all traffics as follows:

- in the event that an operator cannot 'trade' its capacity entitlement in accordance with the secondary trading mechanism described below, the operator has a right to relinquish (at a fee);
- for coal traffics, the fee for relinquishment will be equivalent to two years payment of the take or pay component of the operator's access charge;
- for non-coal traffics, the relinquishment fee would be the amount that would be achieved over two years from the contribution the traffic makes to the fixed costs of operating the rail infrastructure;

This fee will be reduced in the following circumstances:

- if, at the time the capacity entitlement is relinquished, QR reassigns part or all of the capacity entitlement to another operator, that proportion of the fee relative to the reassigned part of the capacity entitlement (based on common corridor distance and the relevant number of train paths) will be reduced in proportion to the relative contribution to fixed costs achieved from the new operation;

- for coal services, such reduction will only apply to the extent the new operation was not included in the forecast traffic (i.e. is additional to such forecast) upon which the reference tariffs were based;
- for non-coal services, it will be assumed that QR has reassigned a part of a capacity entitlement if QR could not have provided capacity to another operator without using that part of the original operator's capacity entitlement;
- where there is more than one party seeking to relinquish capacity and only one party seeking capacity, the party with the capacity entitlement closest to that being sought by the new party will have priority over the other party for reduction in the relinquishment fee. It follows from this point that if a *consistent capacity entitlement*, as described in the discussion below on secondary trading, exists then the priority will be given to secondary trade rather than voluntary relinquishment.

QR considers its approach is preferable to that suggested by the QCA because it enables a third-party/operator to sever its ties with QR immediately, and not be required to make on-going payments to QR for their contribution to fixed costs for the remainder of the contract term or until QR has reassigned the capacity.

With respect to QR's proposed requirement that the capacity entitlement be reassigned at the same time that it is relinquished in order for the incumbent party's relinquishment fee to be mitigated, QR considers that this is reasonable bearing in mind the two year limitation that it is prepared to accept for the calculation of the relinquishment fee – regardless of the remaining life of the access agreement in question.

In addition, if the incumbent party believes there is alternative demand for its path, there is nothing to stop the party maintaining the capacity entitlement, and paying take or pay, until such time as that alternative demand materialises. This option is very similar from a financial viewpoint to the QCA's proposal, whereby the operator continues to pay until such time that QR can reassign the capacity entitlement.

FreightCorp - taken with the findings of the QCA on use-or-pay, FreightCorp considers that the QCA's findings provide a fine balance in protecting the interests of QR and third-party rail operators.

FreightCorp notes the QCA finds that commercial negotiation will normally resolve the extent of the rights of the rail operator to surrender access rights. This again raises the issue of the benchmark from which the parties make seek to negotiate.

FreightCorp is seeking the ability to surrender capacity that relates to train services provided by it to an end-user where that end-user ceases to contract with a mine within a cluster but contracts with a second mine within the cluster and contracts with FreightCorp for the provision of train services in respect of the second mine.

In addition, FreightCorp is seeking a right to surrender capacity in relation to one mine (whether the customer of FreightCorp is a mine or a person that takes supply from a mine) within a cluster where it commences train services in relation to another mine in that cluster.

Clause 3.5 of the General Conditions of Contract of the FreightCorp Mark-up provides the drafting to achieve these outcomes. It will be noted that Clause 3.5 provides that FreightCorp may have to pay increased access charges.

Although QR, in negotiation with FreightCorp, has resisted providing such flexibility, it is notable that QR in fact provides this flexibility, at least to some extent, to itself. We are therefore asking for no more than the current system provides yet this appears to be problematical for Network Access.

Therefore, FreightCorp recommends that the Final Decision considers this provision (clause 3.5) of the FreightCorp Mark-up and, if accepted, the substance of it be stated in Schedule E and, as such, form part of the base case for each access seeker.

With regard to the QCA finding that QR should be obliged to assign surrendered capacity to the next access seeker that seeks rights consistent with those that have been surrendered and the test suggested by the QCA, FreightCorp's view is that in practice this is the only way in

which relinquishment can work. However it would be most useful for the QCA to magnify its intention in this test. FreightCorp has been consistently confounded by the narrowness of QR's interpretations when it suits them. For example, two interpretations of this test might be:

- additional capacity is required that uses some part of the precise train path for a material part of its journey (narrow interpretation); or
- additional capacity is required for a train servicing the same coalfield to port route but will not run on the specific path ie the exact timetable and origin-destination, but will use perhaps a path of reasonably similar characteristics (wide interpretation).

Both interpretations are possible under the test as it is currently stated. It would be most helpful if the QCA could clarify its intentions more clearly.

Queensland Government – There are two issues the Government would like to highlight with respect to the QCA's proposed capacity transfer framework. Firstly, a caveat be placed on the reassignment of access rights so Network Access cannot be made any worse off for the reassignment and must be compensated for any additional costs involved in reassignment. Secondly, the capacity transfer framework allow for the partial reassignment of capacity rights with a commensurate partial reduction in the liability of the incumbent rail operator.

Secondary market in access rights

QR - on the basis that the purpose of secondary trading is to enable transferability of capacity entitlements, whilst discouraging arbitrage, QR accepts secondary trading in capacity entitlements, provided a *consistent capacity entitlement* is being transferred.

The following are prerequisites to a *consistent capacity entitlement*:

- the same description of capacity entitlement (that is, either defined by way of a number of trains per week or nominated timetabled path (with scheduling constraints)); and
- the same origin/destination.

It is proposed that the manner in which this 'trade' would be effected is a reduction in the capacity entitlement of the party wishing to divest itself of its capacity entitlement, conditional upon the capacity entitlement being included in a new or varied access agreement with the second party, and that agreement being unconditional and having commenced operation. This timing is critical to ensuring a relevant end-user does not lose railings, and QR does not lose access revenue. QR would also need an assurance that any transfer of capacity entitlements would be at no net cost to QR, and that the relevant parties will indemnify QR in respect of any associated costs or losses. In the absence of such an assurance, this process could be manipulated to QR's disadvantage.

As a result, the arrangements must ensure that changes in relation to the following factors are adequately recognised and reflected:

- product carried and the nature of other arrangements;
- rollingstock used; and
- safety and environmental controls adopted.

In addition, a transfer fee may be payable by the party divesting its capacity entitlement to reflect the fixed costs that QR can no longer recover because, for instance a different price is to be charged or other variations are to be made in respect of the transferred capacity entitlement.

QR recognises that, in certain circumstances, operators may wish to 'trade' inconsistent capacity entitlements. For instance, parties may wish to deal with capacity entitlements that have different origin/destination combinations. QR is of the view that changing origin/destination combinations is outside the scope of secondary trading, as it is effectively a different service that is being traded, and a party cannot trade something that it does not have.

In any event, QR considers that its proposed approach to capacity relinquishment goes some way to accommodating the desire of parties to trade different origin-destination capacity entitlements.

FreightCorp - supports strongly the QCA's findings that a rail operator may transfer capacity and notes this is consistent with S106 of the QCA Act.

In principle, FreightCorp considers that access agreements should provide the apparatus to allow rail operators to transfer all or some of their access rights whether for a specified period of time or for the unexpired term of the access agreement. FreightCorp acknowledges in practice transfers will tend to be for specified periods of time.

With regard to the QCA finding that, subject to a commerciality test, the assignor's liability should be reduced under the contract once the assignment has been effected, FreightCorp thinks a number of issues of clarification arise from this:

- Is the commerciality test referred to at the start of the first sentence the unacceptable financial risk referred to in the second sentence?
- Does the assignor's liability include the payment obligation. Given the form of the second sentence one may assume that it does. In this case, if the credit rating of the assignee is an acceptable credit rating, QR's consent may not be withheld.
- Is it the intention that each access agreement provides a means by which a contract will come into existence between QR and the assignee whereby QR may proceed against the assignee and the assignee against QR?

The restrictions that QR wishes to place on secondary trading are such that it is most unlikely trades would ever occur. The most restrictive of the conditions is that the asset traded must be a path that is:

- from the same origin to the same destination, and
- by a train specification that is substantially the same as the original train.

Conditions of this nature will almost certainly ensure that no effective secondary market arises. This is of great concern to FreightCorp, and it is typical of the manner in which QR seeks to 'close down' aspects of open access that it would prefer did not exist. We would therefore seek the QCA to provide greater detail as to the manner in which it intends for secondary trading to proceed.

It is FreightCorp's view trading should be allowed for access rights that are defined much more broadly. For example, one might trade rights to net tonne kilometres or gross tonne kilometres within a system, or paths where a minimum percentage of the right is taken up (say 50%). Consequently, FreightCorp suggests the QCA should outline the conditions and parameters for the operation of the secondary market.

As noted above, S106 of the QCA Act provides for transfer of rights under access agreements. Three issues of clarification arise:

- Does the QCA anticipate that access agreements themselves should contain a mechanism to effect transfer, or should those that want to transfer capacity use s106?
- If s106 and access agreements contain a transfer mechanism, the interrelationship the QCA intends to exist between the access agreement and sub-paragraph 106(6)(c).
- If the access agreement is not to contain a transfer mechanism, the extent to which the QCA intends that the Undertaking will effect s106(1) pursuant to sub-paragraph 106(6)(b).

RTBU - the 'solutions' proposed by the QCA – particularly the establishment of a secondary market in access rights – promise to inappropriately shift some of the risks associated with over-bidding for capacity from access-seekers (who should bear those risks in full) to QR.

Moreover, given the QCA's pre-occupation with hypothetical threats from QR's operations, and its acknowledgment that QR could be harmed by bidders 'hoarding' capacity, the QCA seems strangely blind to opportunities it is creating for collusive conduct by access seekers.

The secondary market proposals should be withdrawn, so that QR has the opportunity to recover losses it would have incurred from access seekers 'over-bidding' from the resale of unused access rights.

QCA's analysis

Surrendering access rights to Network Access

QR does not object, in principle, to the QCA's proposed relinquishment amendments, however, it proposes that, unless otherwise agreed in an access agreement, reasonably consistent relinquishment rights be applied for all traffics as follows:

- in the event that an operator cannot 'trade' its capacity entitlement in accordance with the secondary trading mechanism described below, the operator has a right to relinquish (at a fee);
- for coal traffics, the fee for relinquishment will be equivalent to 2 years payment of the take-or-pay component of the operator's access charge; and
- for non-coal traffics, the relinquishment fee would be the amount that would be achieved over 2 years from the contribution the traffic makes to the fixed costs of operating the rail infrastructure.

The QCA accepts QR's proposed 2-year take-or-pay relinquishment fee for coal traffics. The QCA recognises that the grounds on which QR proposes to assess whether a reduction in the relinquishment fee is warranted, are intended to avoid QR 'double dipping' as far as the collection of those fees is concerned.

For non-coal traffics, QR proposes the relinquishment fee would be the amount that would be achieved over 2 years from the contribution the traffic makes to the fixed costs of operating the rail infrastructure. QR argues its approach would enable a third-party operator to sever its ties with QR immediately, and not be required to make on-going payments to QR for their contribution to fixed costs for the remainder of the contract term or until QR has reassigned the capacity. The QCA agrees that this approach is better than the one proposed in the Draft Decision.

The QCA accepts the conditions on which QR intends to reduce relinquishment fees.

The QCA also accepts QR's proposed requirement that the capacity entitlement be reassigned at the same time that it is relinquished in order for the incumbent party's relinquishment fee to be mitigated. The QCA agrees with QR that this is reasonable bearing in mind the 2-year limitation that QR is prepared to accept for the calculation of the relinquishment fee.

FreightCorp is seeking a right to surrender capacity that relates to:

- train services provided by it to an end-user where that end-user ceases to contract with a mine within a cluster but contracts with a second mine within the cluster and contracts with FreightCorp for the provision of train services in respect of the second mine; and
- a mine (whether the customer of FreightCorp is a mine or a person that takes supply from a mine) within a cluster when it commences train services in relation to another mine in that cluster.

It argues that QR has refused to provide such flexibility in negotiations with FreightCorp. However, the QCA considers that the relinquishment right proposed by QR or the secondary trading arrangements discussed in the next section of this chapter would be able to address the circumstances FreightCorp refers to.

FreightCorp asks the QCA to magnify its intention regarding the test to apply where QR assigns surrendered capacity to the next access seeker that seeks rights consistent with those that have been surrendered. FreightCorp argues it has been consistently confounded by the narrowness of QR's interpretations.

The QCA considers consistency of access rights for relinquishment purposes is principally determined by the specification of the relevant capacity entitlement. As discussed in the context of scheduling arrangements, cyclical and timetabled traffics are two distinct forms of capacity entitlement. The QCA considers consistency in access rights for timetabled traffics will generally be narrower because capacity is defined in terms of specific origin-destination, day of week, time of day paths. In contrast, the capacity entitlement for cyclical traffic is likely to be broader, such as a certain number of train services per week for a specific origin-destination (but no commitment to time of day or day of week). As a result, the threshold for consistency in access rights for cyclical traffics is likely to be far lower.

Consequently, for cyclical traffics, the QCA agrees with FreightCorp's wide interpretation of consistency for relinquishment purposes. That is, a train of similar configuration servicing a mine on the same corridor but not running on the specific path, rather a path of reasonably similar characteristics, would be consistent for relinquishment purposes. The matter of consistent access rights is discussed further in the next section

Secondary market in access rights

QR accepts secondary trading in capacity entitlements, provided a consistent capacity entitlement is being transferred. It argues the following are prerequisites for a consistent capacity entitlement:

- the same description of capacity entitlement (that is, either defined by way of a number of trains per week or nominated timetabled path (with scheduling constraints)); and
- the same origin/destination.

QR argues that trade involving a change in origin/destination combinations is outside the scope of secondary trading, as it is effectively a different service that is being traded, and a party cannot trade something that it does not have. The QCA agrees that an operator cannot trade something it does not have, however, QR's interpretation is too narrow. This matter is discussed in more detail in the context of coal and non-coal traffics below.

The QCA accepts that an over-riding requirement of any secondary trade should be that QR is made no worse off financially. This requirement should apply to the financial return from access charges rather than to QR's costs of doing business. In addition, it is reasonable to expect the relevant parties would indemnify QR in respect of any associated costs or losses from a secondary trade. This should address RTBU's concerns that a secondary market in access rights inappropriately shifts some of the risk associated with over-bidding for capacity from access seekers to QR.

In addition, the QCA accepts that the following factors that QR proposes should be adequately recognised in any secondary trades:

- product carried and the nature of other arrangements;

- rollingstock used; and
- safety and environmental controls adopted.

In response to FreightCorp's query, the QCA considers that the capacity trading arrangements contained in the Undertaking should supersede those in the QCA Act.

Coal traffics

The QCA considers that there should be full secondary trading within each system on the Central Queensland coal network. In other words, secondary trading should be allowed within each of the Goonyella, Moura and Newlands systems. On the Blackwater system, secondary trading would be allowed within the Blackwater cluster but not from the Blackwater cluster to the Stanwell cluster. Secondary trade could occur between the mines in the Stanwell cluster.

The QCA recognises that the level (reflecting stand-alone costs) and structure of reference tariffs on the respective coal systems, with the associated arbitrage opportunities, would mean that certain secondary trades across coal systems would leave QR worse off financially. Consequently, the constraint on secondary trading across the respective systems is consistent with the overriding requirement that QR be made no worse off financially.

It is recognised that there is a small risk of these arrangements being manipulated in the future (for example, by distant mines overestimating demand and then trading capacity with mines closer to the port). The QCA considers any attempt to manipulate these forecasts will be obvious in future reviews, and if exposed could easily be addressed by applying historical average distances to forecast tonnes.

Non-coal traffics

As discussed in the section on relinquishment rights, the QCA considers consistency in access rights for timetabled traffics will generally be narrower because capacity is defined in terms of specific origin-destination, day of week, time of day paths. Nevertheless, this does not mean that secondary trades should be restricted to origin-destination paths.

To provide an example of how the QCA envisages a secondary trade of non-consistent origin-destination paths to work, a Brisbane-Townsville path on the North Coast line could be traded for a Brisbane-Gladstone path. The swap means that the Gladstone-Townsville portion of the original path is no longer required. The QCA considers that this residual path should be subject to the relinquishment process for non-coal traffics proposed by QR. Consequently, the relinquishment fee would be the amount that would be achieved over 2 years from the contribution the traffic makes to the fixed costs of operating the rail infrastructure.

Similarly, the QCA envisages secondary trading would be able to occur in relation to a specific bottleneck between origin-destinations that are not directly related. For example, a 'slot' at the port (the only common link between different origin-destination train services) could be traded. The remainder of the 2 origin-destination services would be subject to the relinquishment provisions.

Given the relatively small contribution made by non-coal traffics to QR's fixed costs (compared to coal traffics), the QCA considers that secondary trades should be able to occur across the different non-coal traffics. Nevertheless, there is likely to be price differentiation between these traffics, which could provide arbitrage opportunities. The QCA does not have the information to be definitive about the extent of price differentiation, however, to prevent such arbitrage opportunities, it is likely rules will need to be developed for secondary trades.

In response to FreightCorp's query whether the commerciality test referred to in the Draft Decision refers to unacceptable financial risk, the QCA considers that it does. The QCA agrees with FreightCorp that the assignor's liability includes the payment obligation. The QCA understands that a common factor taken into account when deciding whether consent has been unreasonably withheld regarding a leasing arrangement is whether the proposed assignee is a financially responsible person who is experienced in conducting a business which is substantially similar to that of the lessee. Consequently, if the credit rating of the assignee is an acceptable credit rating, the QCA considers that QR's consent may not be unreasonably withheld to a secondary trade on this ground.

The intention is that the standard access agreement will provide a means by which a contract will come into existence between QR and the assignee whereby QR may proceed against the assignee and the assignee against QR.

The QCA notes that there is a significant de facto secondary trading market currently operating on QR's coal systems,¹ however, the QCA does not intend that this be brought within the secondary trading arrangements discussed above. Rather, it is more a scheduling matter to be addressed in capacity entitlements.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

Surrendering access rights

1. **a rail operator has a right to relinquish its capacity entitlement if it cannot effect a 'trade' in accordance with the secondary trading arrangements, subject to a relinquishment fee;**
 - **for coal traffics, the fee for relinquishment will be equivalent to two years payment of the take-or-pay component of the operator's access charge; and**
 - **for non-coal traffics, the relinquishment fee would be the amount that would be achieved over two years from the contribution the traffic makes to the fixed costs of operating the rail infrastructure;**
2. **the capacity entitlement may be reassigned at the same time that it is relinquished in order for the incumbent party's relinquishment fee to be mitigated;**
3. **QR is obliged to assign surrendered access rights to the next access seeker that seeks rights consistent with those that have been surrendered;**
4. **if QR could not have supplied a train path to the next access seeker without using some part of the surrendered capacity, then the access rights are considered consistent and the surrendered party's obligation to QR would then be**

¹ Mines indicate preferences to QR in the week prior to the week of operation of the train service and paths are assigned accordingly. However, during a week there may be switching of assigned paths as a result of loading problems at a mine on a particular day or changes in the port's requirements (reflecting ship arrival).

terminated;

Secondary trade in access rights

5. **the transfer of unwanted capacity rights between participants, including partial transfer is allowed, by bilateral negotiation, subject to the establishment of adequate notification procedures between QR and capacity holders;**
 - **secondary trading could occur within each system on the Central Queensland coal network and between mines in the Stanwell cluster;**
 - **secondary trading could occur across different non-coal traffics;**
6. **the over-riding requirement of any secondary trade is that QR is made no worse off financially;**
7. **the following factors are adequately recognised in secondary trades:**
 - **products carried and the nature of other arrangements;**
 - **rollingstock used; and**
 - **safety and environmental controls adopted;**
8. **access agreements are allowed to make appropriate adjustments to access rights so that transferability could be accommodated; and**
9. **subject to a commerciality test, QR is not allowed to unreasonably withhold consent for the transfer of capacity.**