

Chapter 2 - Scope & Administration

KEY ASPECTS

Coverage - it is appropriate that the Draft Undertaking not cover the provision of above-rail services and below-rail standard gauge services used by interstate traffic.

Land holder approval - the Undertaking will need to address the provision of information in relation to property on which rail infrastructure is located and which is not controlled by QR.

Term - the Undertaking's term should commence on its date of approval and expire on 30 June 2005.

Review - the QCA and QR should meet one year after the commencement of the Undertaking to review its operation.

Grandfathering - the Undertaking may only operate in respect of future arrangements and not in relation to any existing arrangements.

Reporting - for the Undertaking to be effective it is necessary there be a regime of transparent reporting in relation to its operation.

2.1 Introduction

There are important scope and administrative matters that should be addressed in an approved Undertaking to provide certainty to access seekers negotiating access to declared services.

The QCA considers that ongoing public reporting of QR's compliance with an approved Undertaking is an important means of providing confidence to access seekers regarding the access regime.

2.2 Coverage of declared services

Background

The Draft Undertaking provides that the services of QR's track and associated rail infrastructure essential to the use of the track will be subject to the Undertaking. However, negotiations for access to stations, platforms and marshalling yards were not to be subject to the Undertaking. The QCA expressed some concerns in the Draft Decision about these proposed exclusions. This issue is addressed in section 4.2 of Chapter 4.

The QCA endorsed QR's position that the Undertaking would not cover above-rail services and below-rail standard gauge services used by interstate traffic. For QR's dual-gauge track, the QCA understood that interstate services would be covered by the national rail access regime administered by ARTC and intrastate services by QR's Undertaking.

Stakeholder views

QR - does not object to the further extension of the scope of the Undertaking to include the declared service elements of stations and platforms. However, there are some aspects of the Undertaking that could not be implemented in full under the current proposed drafting, eg. ring-fencing.

ARTC - raised the following concerns regarding the treatment of interstate services on the mixed gauge track.

ARTC is responsible for the provision of access to the national standard gauge rail network and, as such, is not significantly impacted by QR's Undertaking as its scope does not relate to interstate train services. ARTC is currently negotiating a wholesale arrangement with QR which will lay out the terms and conditions under which this part of the QR network will be accessed by interstate rail services and how these services will interact with intrastate standard gauge movements.

With regard to the exclusions from the scope of the Undertaking, ARTC is still concerned that it is not clear how interstate and intrastate services operating on the mixed gauge track between Acacia Ridge and Fisherman Islands will be treated. The scope of the Undertaking does not extend to interstate train services operating on standard gauge track. The QCA has recognized that, on the mixed gauge, interstate services and intrastate services will operate under different regimes. Such an arrangement would be unique in Australia and, to work in practical terms, the two regimes would need to be consistent and also consistent with the terms of ARTC's wholesale agreement with QR, particularly in the area of train management. Given that the QCA has made no comment as to how services operating under the two regimes are to be handled in this regard (except that the administration of QR's Undertaking would need to have regard to interstate influences), it is presumed that the ARTC/QR wholesale agreement would need to set out this detail.

The QCA has indicated it understands that interstate train services using this mixed gauge track (and for that matter interstate train services on the other standard gauge) would be covered by the national rail access regime administered by ARTC. Since the submission of QR's Undertaking to the QCA, some doubt has been raised as to whether the planned wholesale arrangements between ARTC and QR give ARTC sufficient control over the operation of interstate services on standard gauge track in Queensland for ARTC to be

considered the ‘owner or operator of the facility’ as defined for the purposes of the Trade Practices Act. Whilst this point is still open to debate, it renders ARTC unable to submit an undertaking with respect to those parts of the interstate network it does not own or lease (including the standard gauge network in QR). It appears likely that QR, as the owner of the network, will be required to submit such an undertaking, to be administered by ARTC, or risk declaration.

FreightCorp - recognises the QCA’s position, however, it is concerned about:

- time being taken to achieve a uniform interstate agreement. It is unclear whether one will actually eventuate and, if so, when it will be achieved; and
- the potential for problems to arise on dual gauge track if the undertakings/regimes applying are inconsistent.

QCA’s analysis

QR has accepted the QCA’s proposal to extend the scope of the Undertaking to include the declared service elements of stations and platforms. The QCA also accepts that an exemption from certain aspects of the Undertaking’s ring-fencing arrangements regarding access to stations and platforms is required. These matters are addressed in Chapter 4.

The QCA recognises ARTC’s concerns about the uncertainty associated with interstate services on the dual gauge track being covered by the national access regime not QR’s Undertaking, whereas intrastate services using the dual-gauge track would be covered by the Undertaking. Given two regimes will apply to this track, the QCA agrees that it is important QR’s access regime is compatible with the national regime.

The QCA considers the area of compatibility of greatest importance is in scheduling processes. The QCA has proposed information dissemination on train movements and capacity availability on QR’s network to facilitate harmonisation of access arrangements. The QCA also proposed a consultative process for the development of QR’s master and daily train plans that explicitly recognises the role of interested parties beyond QR and access seekers/third-party operators. This should facilitate the incorporation of interstate interests in the development of QR’s schedules as the Authority considers that the key interface between access regimes created under the QCA Act and legislation in other jurisdictions (most probably Part IIIA of the Trade Practices Act) for the standard gauge and dual gauge track concerns ensuring compatibility in scheduling arrangements and the consequential need for transparent information flows. Further development of these interface arrangements is problematic until QR and ARTC finalise their wholesaling arrangements. Scheduling matters are discussed in Section 6.2 of Chapter 6.

QCA’s position

The QCA considers it appropriate that the Draft Undertaking does not cover the provision of:

1. **above-rail services; and**
2. **below-rail standard-gauge services used by interstate services.**

2.3 Rail infrastructure on privately-owned land

Background

While QR leases the majority of the land upon which its rail network is constructed from Queensland Transport under a long-term arrangements, in some parts of the network, QR does not own or lease the land upon which rail infrastructure is located. Consequently, QR does not have the authority to allow third-party operators to access its infrastructure on this land without the consent of the landowner.

To facilitate the access negotiation process, the QCA proposed that the Undertaking should commit QR to provide an access seeker in such a situation with:

- the name, address and contact details of the land owner;
- advice as to the nature and extent of the rights which QR hold in relation to the infrastructure; and
- a letter indicating that the access seeker is negotiating with QR and whether or not QR has any objections

within 14 days of the lodgement of the access application.

Stakeholder views

QR - does not object to further clarifying the meaning of reasonable assistance to reflect desired outcomes but has some concerns with the specific measures suggested by the QCA. The measures specified must reflect the information that is reasonably at QR's disposal, and take account of the timeframe in which an access seeker is likely to require this information as well as the time likely to be taken by QR in accessing this information.

FreightCorp - QR should be required to assume tenure risk and accordingly contract to allow access to and use by third- party operators.

The accuracy of the information provided to access seekers is critical. QR should be required to warrant title to, or right to allow third party operators access to, and to use of, land on which rail infrastructure is located. Schedule E should reflect this position.

Liability for breach of the warranty as to tenure or right of access will allow recovery according to the common law principles of remoteness of damage, ie. without limitation on liability.

QCA's analysis

While not objecting to clarifying 'reasonable assistance', QR argues the measures specified must reflect the information that is reasonably at its disposal, take account of the time frame in which an access seeker is likely to require the information and QR access it. However, QR does not explain how the QCA's proposal should be amended to reflect these objectives. In contrast, FreightCorp proposes that QR should be required to assume tenure risk.

The QCA considers adequate information provision along the lines provided for in the Draft Decision is the key issue and reflects a reasonable balance between the legitimate business interests of QR and access seekers. The QCA's proposed approach recognises that this issue arises because QR is not legally capable of selling access to affected lines. Accordingly, it would appear inappropriate to assign tenure risk to QR at this time, although this issue is likely to re-emerge in subsequent reviews (especially if evidence emerges that QR is using its limited tenure to create a barrier to entry for prospective third-party operators). Accordingly, the QCA does not consider that QR should assume land tenure risk because the uncertainties regarding

land tenure were created by the introduction of the *Transport Infrastructure Act 1994*. Consequently, the Authority has not changed its position on this matter.

As discussed in section 4.6.3 of Chapter 4 of the Draft Decision, the QCA understands that if QR provides information to access seekers, it has statutory, common law and equitable obligations to ensure the accuracy of that information.

QCA's position

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

- 1. QR committed to provide an access seeker, seeking access to rail infrastructure on land to which QR is not authorised to grant access, with:**
 - **the name, address and contact details of the relevant landowner;**
 - **advice of the nature and extent of the rights, if any, which QR holds in relation to the infrastructure; and**
 - **a letter indicating that the access seeker is negotiating with QR with respect to the use of QR's rail infrastructure and whether or not QR has Network Access objection to the third-party operator negotiating access to the land and in that event full details of the objections;**

within 14 days of the lodgement of the access application by the access seeker.

2.4 Term of QR's Undertaking

Background

In its Draft Decision, the QCA endorsed QR's proposed three-year term of the Undertaking, on the grounds this period is long enough to provide reasonable certainty to both access seekers and QR, but allows issues to be revisited reasonably quickly should problems emerge.

Stakeholder views

ARTC - a five year term is more appropriate because it would provide greater certainty to new entrants who may need to invest significantly to commence operations.

FreightCorp - supports the three-year term.

QCA's analysis

While the QCA endorsed the proposed three-year term of the Undertaking in the Draft Decision, for clarity, it should be noted that the term of the Undertaking commences on the date of approval and concludes on 30 June 2005 (the reference tariffs approved as part of this Undertaking are valid until this date).

QCA's position

The QCA considers it appropriate that the Draft Undertaking's term commences from its date of approval and expires on 30 June 2005.

2.5 Review of the Undertaking

Background

The QCA accepted QR's position that the two parties should conduct a review of the operation of the Undertaking 12 months after its commencement. The QCA noted that it would not be able to require QR to change an approved Undertaking during the period that it is in force by relying upon the QCA Act. As such, it would not be possible for the QCA to require QR to lodge an amending Undertaking following the 12-month review if any problems were identified.

Stakeholder views

ARTC - is disappointed that the QCA will not be able to impose any amendment to the Undertaking. It considers that leaving the lodgement of a draft amending undertaking at QR's discretion if the review identifies that amendments are required seems pointless.

FreightCorp -strongly supports that the QCA or QR should conduct a review of the operation of the Undertaking 12 months after its commencement.

Following any review of the Undertaking that results in a variation to it, each access agreement between QR and a rail operator should be subject to review by them with a view to agreeing any amendments to the access agreement that may be required as a consequence of that review.

QCA's analysis

The QCA has not changed its position in the Draft Decision accepting QR's proposal that a review of the Undertaking be conducted 12 months after its commencement. The fact that the QCA Act does not allow the QCA to require QR to submit an amending Undertaking if, as a result of a review, it considers that one would be appropriate, has been taken into account in the assessment of the Draft Undertaking. In particular, this limitation has been taken into account by the Authority through addressing the issues raised by the Draft Undertaking in considerable detail, through an extensive consultation process and by reserving the QCA's right under the Undertaking to resolve disputes regarding certain matters.

In terms of FreightCorp's comment about the status of access agreements following the 12 month review, this would need to be addressed in the access agreements themselves and will be resolved through the standard access agreement process.

QCA's position

The QCA considers it appropriate that QR and it conduct a review of the operations of the Undertaking 12 months after its commencement.

2.6 Transitional arrangements

There were no stakeholder comments on this clause of the Draft Undertaking. Consequently, the QCA has not added to the views it expressed in the Draft Decision. However, transitional

arrangements in the context of the development of reference tariffs were discussed in Chapters 1 and 16.

2.7 Public reporting of QR's compliance with the Undertaking

Background

The QCA considers that performance monitoring forms an important part of the regulatory environment as it promotes accountability on QR's part and provides evidence of the integrity and effectiveness of the Undertaking. These are likely to be important factors in the early stages of development of a competitive above-rail market. However, the QCA recognised that public reporting is not a costless exercise for QR and, as such, should be constrained to that information necessary to minimise the relevant disadvantages of interested parties other than QR.

The QCA proposed a number of performance indicators in respect of QR's compliance with its Undertaking, to be reported to the QCA within the first half of each financial year, in respect of its previous financial year.

Stakeholder views

QR - does not object to the inclusion in the Undertaking of annual performance indicators demonstrating QR's compliance with the Undertaking. While QR is prepared to accept many of the QCA's proposed indicators, QR has some concerns regarding whether certain of these are directly related to QR's compliance with the Undertaking. QR intends to address this matter in the redrafting of the Undertaking. (see QR's comments on reporting of alleged and actual ring-fencing breaches).

ARTC - supports the QCA's proposed compliance indicators for reporting purposes:

FreightCorp - supports strongly the findings of the QCA in relation to compliance reporting.

The need for transparency and accountability is commensurately more critical where the owner/operator of essential rail infrastructure is also a participant (at the moment the dominant participant) in the potentially contestable market.

It is apparent that a critical element in the negotiation of an access agreement is the length of time that the process takes. This is critical to both transaction costs and entering the market to service the needs of end-users. The NSW Rail Access Regime provides for the reporting of negotiations that take in excess of three months to the responsible Minister.

FreightCorp considers it appropriate for QR to report to the QCA two measures with respect to the length of time negotiations are conducted for access agreements:

- the average time for completion of negotiations. This will provide a measure of the efficacy of negotiations; and
- specific reporting to the QCA of all negotiations that exceed three months when this actually occurs, with continued monthly reporting until negotiations are complete, whether on conclusion of an access agreement or negotiations cease, whether on proceeding to dispute resolution or abandonment.

Further, although the Draft Decision discusses the public reporting of these measures, we would ask the QCA specifically to identify its intention that the reporting be public to avoid any doubt as to this.

QCA's analysis

The QCA notes QR's preparedness to accept many of the QCA's proposed compliance indicators, however, QR has some concerns regarding whether certain of these are directly related to its compliance with the Undertaking.

The QCA considers that it is inappropriate for QR to change or omit certain of the proposed compliance indicators in its re-drafting of its Undertaking. The QCA has proposed and subjected to consultation a set of compliance indicators. Given the general support for the proposed indicators, the QCA considers they should apply for the term of an approved Undertaking. However, recognising QR's concerns, the proposed 12-month review would appear to be an appropriate time to reassess the situation.

The QCA accepts FreightCorp's suggestion that the time for completion of negotiations should be included as an indicator to measure the efficacy of access negotiations. However, FreightCorp's proposal for QR to report all negotiations that exceed three months, with continued monthly reporting until a negotiation is complete, is not accepted. Such an indicator provides little additional information to the above indicator proposed by FreightCorp and accepted by the Authority. Instead periods for QR's negotiation processes for internal and external clients will be sought.

To address FreightCorp's concerns regarding delays in information provision by QR (refer to section 4.6.2 of Chapter 4), the QCA has added to the compliance reporting requirements, the additional days taken for each inquiry when QR fails to meet the specified timeframes for preliminary information provision.

The QCA considers it is important that it has the power to request that QR give it further information after the Undertaking is approved by the QCA. As such, the QCA considers the Undertaking should provide that the QCA reserves the right to, by written notice, request that QR provide any information and documents the QCA require for the purpose of performing its functions under the QCA Act or this Undertaking. QR will comply with any such request, by the time stated in the notice, unless there is a reasonable excuse for QR's non-compliance.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that QR reported to the QCA within the first half of each financial year, in respect of its previous financial year:

- 1. The number, and percentage, of requests for preliminary information responded to within the nominated timeframe.**
- 2. The number of additional days taken when QR fails to meet the specified timeframes for provision of preliminary information for each inquiry.**
- 3. The number, and percentage, of access applications acknowledged within the nominated timeframe.**
- 4. The number, and percentage, of access applications in which an extension of time for provision of an indicative access proposal is sought by QR.**
- 5. The number, and percentage, of indicative access proposals**

provided within the nominated timeframe.

6. The average number of days taken to acknowledge an access application, in those circumstances where QR has taken in excess of 7 days to respond to access seekers.
7. The average number of days taken to provide the indicative access proposals, in those instances where QR has taken in excess of 30 days to provide the document to access seekers.
8. The number, and percentage, of instances in which an access seeker has notified QR that it believes that the indicative access proposal has not been prepared in accordance with the Undertaking.
9. The number of non-ring-fencing related disputes, regarding an alleged procedural breach of the Undertaking, that are referred to the dispute resolution process.
10. The number of non-ring-fencing related disputes, regarding an alleged substantive breach of the Undertaking, that are referred to the dispute resolution process.
11. The number of disputes where QR was found to have committed a procedural breach of the Undertaking.
12. The number of disputes where QR was found to have committed a substantive breach of the Undertaking.
13. The number of complaints received regarding an alleged breach of QR's ring-fencing obligations.
14. The number of complaints where QR was found to have breached its ring-fencing obligations.
15. The time taken to negotiate each access application resulting in an agreement.
16. The time taken to negotiate each access application that does not result in an agreement.
17. The number of agreements concluded.
18. The number of variations to existing agreements concluded.

In addition, the QCA considers it appropriate to amend the Draft Undertaking such that:

- the QCA has a right to, by written notice, request that QR provide any information and documents the QCA requires for the purpose of performing its functions under the QCA Act or this Undertaking. QR will comply with any such request, by the time stated in the notice, unless there is a reasonable excuse for QR's non-compliance.