



Dr Malcolm Roberts
Chairman
Queensland Competition Authority
GPO Box 2257
BRISBANE QLD 4001

17 April 2015

Dear Malcolm

Response to the QCA's Draft Decision on Aurizon Network's 2014 Draft Access Undertaking – Policy & Pricing Principles

Please find enclosed Aurizon Network's submission in response to the Queensland Competition Authority's (QCA's) Policy & Pricing Principles Draft Decision (P&P Draft Decision) issued on 30 January 2015 concerning Aurizon Network's 2014 Draft Access Undertaking (2014DAU).

Aurizon Network would like to acknowledge the contribution of the QCA when aiming to balance the interests of all stakeholders in considering Aurizon Network's policy & pricing positions.

In submitting this response, Aurizon Network seeks to provide information to address all matters contained within the QCA's P&P Draft Decision. As the QCA's Draft Decisions on the 2014DAU was split into two decisions provided at different times, Aurizon Network has, based upon new information within this P&P Draft Decision, provided information that further addresses matters contained in the Maximum Allowable Revenue Draft Decision.

Aurizon Network is committed to establishing a clear and timely engagement program with the QCA and stakeholders, which aims to address matters raised across the two QCA Draft Decisions to ultimately establish an approved undertaking.

Aurizon Network's remains committed to the QCA's timeline where a Final Decision will be issued by 31 July 2015.

If you have any questions on this matter please contact Jon Windle on (07) 3019 8460.

Yours sincerely



Alex Kummant
Executive Vice President
Aurizon Network Pty Ltd

2014 Draft Access Undertaking

Aurizon Network Response to

Queensland Competition Authority's Draft Decision on
Policy and Pricing Principles



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Executive Summary

Introduction

Aurizon Network is committed to working with its operating customers, the coal industry and the QCA to achieve the economically efficient operation and sustainable growth of the Central Queensland Coal Region. The regulatory environment within which Aurizon Network operates must ensure it can responsibly invest in, operate and maintain, a safe, reliable and efficient network.

The privatised Aurizon Network is now a fitter, more robust, more responsive rail infrastructure service provider. The strong focus on productivity and efficiency over recent years, has yielded record volumes, major reductions in delays and derailments, low levels of cancellations and, importantly, a significant increase in above rail competition.

With third party rail operators now providing almost 30% of above rail services on the CQCR Network, together with End Users taking responsibility for an increasing proportion of Train Service Entitlements through direct Access Agreements, a fundamental objective of the Access Regime in the *QCA Act* – the promotion of downstream competition – is a real and tangible outcome of Aurizon Network's management of the rail infrastructure. The QCA, the coal industry and the public in general can have confidence that the growth of above rail competition has not been impeded by Aurizon Network, and the object of the *QCA Act* is, in fact, being advanced.

In making this Submission, Aurizon Network is conscious of the need to finalise an Undertaking that has already taken more than two years to reach this stage. While this Submission sets out significant issues and concerns with the regulatory reach proposed by the QCA, Aurizon Network's committed objective is to find a timely resolution to these concerns through active negotiation with the QCA and stakeholders, rather than pursue a path of legal challenge.

Aurizon Network is concerned that the QCA's Draft Decision and the amendments it proposes are the product of a reading of its own legislation that does not reflect the original legislative intent of the Parliament. This has resulted in a misapprehension of the functions and powers of the QCA in considering amendments to the proffered Draft Undertaking.

It was never envisaged that the function of the QCA was to reformulate a Draft Undertaking offered by an access provider just because it prefers different drafting. In addition, the QCA is obliged to have a factual basis upon which to reject terms that have been offered and to substitute its own. There must be a factual foundation to substantiate that the terms that have been offered by Aurizon Network would not or might not work, or have not worked in the past. As it stands, the QCA does not adequately support its Draft Decision with facts, and many drafting changes reflect the preferences of the QCA, rather than any substantiated errors on the part of Aurizon Network. Moreover, the QCA has sought to convert a series of voluntary undertakings by Aurizon Network into mandatory obligations developed by the QCA.

Specifically, the QCA has sought to establish provisions reflecting authority, in Aurizon Network's view, not fully afforded by the *QCA Act*. In many cases there are provisions which overturn outcomes which have been agreed between Aurizon Network and other parties through a process specifically requested by the QCA. These include:

1. The introduction of a right for the QCA to undertake its own capacity review, determine the existence of any capacity deficit and direct investment to occur to remedy any such deficit
2. The obligation on Aurizon Network to fund extensions or enhancements to the system at the direction of the QCA
3. The allocation of responsibility for planning and construction of private connecting infrastructure to third parties other than Aurizon Network
4. A requirement for Aurizon Network to direct its related parties to take actions, when Aurizon Network has no legal power to do so, and the Act contains no such requirement upon the Access Provider.
5. An excessively broad interpretation of confidential information that embraces any information that Aurizon Network may possess, irrespective of its relevance to the provision of access to the network
6. The institution of the QCA as a gatekeeper for matters which could readily be addressed by agreement between Aurizon Network and access seekers or holders

7. Complicated and time consuming mechanisms for recording the management of confidential information, including a requirement to seek approval from the owner of information at each transactional juncture
8. The removal of means by which parties can come to agreement over the management of confidential information outside of these onerous provisions
9. Non-discriminatory provisions expanded to ports owned by a related party only, but not applied to all of the supply chain
10. Inclusion of Aurizon's shared services function in coverage of confidential information sharing provisions despite Access Holders gaining the benefit of lower costs from this more efficient organisational structure; and
11. Excluding the potential for Aurizon Network to differentiate price for a related party even if it fairly reflects the costs of that service provision.

The QCA's position on capacity expansions and the obligation on Aurizon Network to fund extensions or enhancements to the system at the direction of the QCA could be seen as creating a significant sovereign risk.

In developing the 2014 DAU, Aurizon Network included a number of amendments which were substantially agreed with customers (represented by the Queensland Resources Council - QRC) at the encouragement of the QCA. In particular, the pricing principles (Part 6) and the expansion process (Part 8 clauses 8.1 to 8.10) were negotiated in detail with the QRC.

In comparing the 2014 DAU with the 2013 DAU, the QRC noted:

In preparing the most recent draft of access undertaking 4 (UT4) Aurizon Network has had regard to a number of submissions and comments previously made by the QRC and other stakeholders. For this reason, the QRC is generally supportive of most of the changes to UT4 proposed by Aurizon Network.¹

Following submission of the 2014 DAU in August 2014, Aurizon Network undertook further negotiations with customers to agree additional drafting amendments to the document.

Aurizon Network's submission in October 2014 outlined the specific amendments to the 2014 DAU which were agreed with customers. Aurizon Network has included for ease of reference the documentation of agreed positions in Appendix 2.

In its Draft Decision, the QCA has made substantial changes to many of the sections which were negotiated and agreed with the QRC and the customers it represents. These changes have been put forward without any explanation as to why the positions that were agreed with Aurizon Network's customers were not appropriate such as to require their replacement.

The QCA appears to interpret s.69E of the QCA Act as a statutory allocation to it of the responsibility for the "...economically efficient operation of, use of and investment in..." the CQCR network. Rather, s.69E seeks the QCA to promote those principles in overseeing the Access regime for the network.

The QCA is not being asked by its legislation to ensure the rail network is run in an efficient manner. That is properly the responsibility of Aurizon Network as it seeks to meet its accountability to its customers and shareholders. The QCA is simply being asked to ensure that access arrangements do not impede the achievement of efficiency in the Network, or the achievement of a competitive environment in the markets Aurizon Network serves.

Based on the above considerations, Aurizon Network is strongly of the view that the QCA has overreached its powers and, therefore, that many of its decisions cannot be reasonably accepted and could be open to legal challenge. However it is not Aurizon Network's objective to seek such a legal challenge. Instead the objective is to arrive at a commercially acceptable and complying Access Undertaking, with Part 2 of this submission presenting a "Way Forward" aimed at reaching mutually agreeable positions in a timely matter.

¹ QRC, 2014, Main Submission on the 2014 DAU, p. 4.

Part 3 – Intent and Scope

The object of the *QCA Act* is not to achieve equality between competitors, it is to ensure there is no ‘unfair differentiation’ between them. Aurizon Network considers the QCA’s proposed insertion of the broad principle of “non-discrimination” is, again, not reflective of the *QCA Act*.

However, if the QCA still considers it would be desirable to include a “clear statement regarding non-discriminatory treatment”, Aurizon Network would be happy to work with the QCA to develop a clause which clearly states an objective of preventing unfair differentiation in terms which are consistent with section 137(1A) of the *QCA Act*

Aurizon Network submits that rather than seeking to set out each way in which Aurizon Network could discriminate, it would be more efficient and appropriate to include a single formulation, which captures the essence of the requirement in section 137(1A) (the prohibition on unfair differentiation), and which includes appropriate qualifications to ensure it remains clear that (consistent with the terms of section 137(1A)) the restriction on discrimination is:

- limited to unfair differentiation that has a material impact on competition between users or access seekers
- drafted to expressly prohibit differentiation where different treatment is reasonably justified because of different circumstances applicable to the relevant access provider, access seeker or users.

In principle, Aurizon Network has no issue with including as an objective of the Undertaking ensuring that Aurizon Network does not prevent or hinder access of Access Seekers or Access Holders. However, it is not appropriate that the clause included in the Undertaking extends to ensuring that Aurizon Network procure conduct of its Related Operator.

The supply of electricity is not part of the Declared Service and therefore Aurizon Network is under no obligation to offer to supply electricity as part of its Undertaking. It follows logically that, although Aurizon Network has made a voluntary commitment to supply electricity, it need not make any commitment with respect to dispute resolution and it has therefore chosen not to do so.

Coal industry stakeholders did not support the Draft Incentive Mechanism submitted to the QCA in May 2012. Aurizon Network concedes it will be difficult to reach agreement with stakeholders on an alternative incentive mechanism which meets the clause 2.8(b) criteria and which:

- creates a positive, meaningful incentive to improve system performance;
- is sufficiently timely to incentivise management behaviour; and
- addresses the issues regarding alignment with TSEs and equalisation between 3rd party operators and Related Operators.

Nevertheless, Aurizon Network is willing to explore with coal industry stakeholders alternative mechanisms which could be acceptable to all parties. Aurizon Network therefore accepts the QCA’s proposal which facilitates approval of the mechanism provided it is agreed between Aurizon Network and those stakeholders.

Part 4 – Ringfencing

Aurizon Network is concerned by the QCA’s approach to its assessment of the Ringfencing provisions contained in the 2014DAU. These provisions were developed in the 2013DAU to clearly and unambiguously describe a lawful, workable and efficient ringfencing regime. The 2014DAU included modifications to this framework resulting from consultation with key industry and operator stakeholders.

The QCA appears to have given little consideration to the specific proposal put by Aurizon Network, and has instead decided to draft its own provisions. While it states these provisions are based on the 2010AU, they have been substantially rewritten in a way that introduces complexity and inflexibility, and the potential (unless the provisions are suitably modified) to introduce a significant increase in costs and operating inefficiencies.

As explained in section 2 above, this approach is inconsistent with the QCA Act. The QCA's role is not to rewrite the Undertaking, but rather to consider whether the Undertaking submitted is appropriate having regard to each of the factors set out in s.138(2). Given the nature of those factors, it follows that in any instance there will be a range of Undertakings and measures within such Undertakings which may be appropriate to address those issues. Where the Undertaking proffered is appropriate having regard to those factors, it is not for the QCA to substitute its own version of the Undertaking merely because it prefers an alternate set of words or measures to achieve the relevant objectives.

The legislative basis for the QCA's decision to compel Aurizon Network (through the "voluntary" undertaking process) to directly employ persons for specific tasks is not apparent. The drafting prepared by the QCA for the "voluntary" undertaking that it would approve in place of the 2014DAU prepared by Aurizon Network, effectively seeks to achieve a functional separation of Aurizon Network from all other parts of the Aurizon Group. Functional separation was not considered necessary when the Queensland Parliament created the Aurizon Group and there is nothing in the QCA Act that could possibly justify a decision by the QCA to bring it about through the voluntary undertaking process or otherwise.

The QCA's extensive rewrite of the ringfencing provisions are particularly disappointing in circumstances in which the QCA has been unable to provide cogent evidence to support its supposition that the ringfencing provisions are inadequate. The QCA has failed to demonstrate that the proposal offered by the 2014DAU contained an appreciable risk of inappropriate disclosure of confidential information. The QCA has offered the following flawed justification for its decision to reject the 2014DAU ringfencing regime in favour of its own:

"Not only do stakeholders consider Aurizon Network's 2014 DAU ring fencing proposals inadequate, the also claim a lack of confidence in the 2010AU ring fencing regime.

We note, however, that despite an apparent lack of confidence, there have been very few complaints and audit issues with respect to the existing ring fencing provision. In our view the mere absence of complaints alone does not suggest that the regime is effective. It could also suggest, for example that:

- *The audit scope requires refocusing; and or*
- *Stakeholders accept the existing ringfencing regime, despite concerns; and/or*
- *Stakeholders are unwilling to lodge complaints or regard the complaint process as ineffective*

Against this background, we are of the view that there is a lack of clarity regarding the effectiveness of the existing ring fencing regime, and there is insufficient data to demonstrate conclusively whether the regime is effective or not"

As is apparent from the quote above, the QCA had no facts before it to justify the measures it has proposed. In the admitted absence of any material complaints of contravention of the existing regime under UT3, the QCA has relied on an expression of "lack of confidence" by stakeholders and its own view that a lack of evidence of failure simply means a lack of data to demonstrate that the existing regime is effective, to justify the imposition of a regime which is much more extreme than the regime currently in place. That is an unusual approach to regulation.

The QCA also attempts to make much of the Aurizon Group's stated intent to leverage the benefits of vertical integration. The QCA incorrectly assumes statements are indicative of an anticompetitive intent or scheme that Aurizon Network should favour its related operator to the competitive detriment of its above rail rivals. Given there are many legitimate ways to leverage the benefits of vertical integration which do not involve anticompetitive conduct (including the use of shared services to reduce costs and create economies of scale)², and given that anticompetitive conduct of the kind concerning the QCA is prohibited by the QCA Act as well as potentially other competition legislation, such a supposition is illogical. When used as a justification for the proposed ringfencing regime, this supposition leads to both perverse and inefficient consequences which both inhibit Aurizon Network conducting its legitimate business, and increase the cost of it doing so.

² See for example Fels A (2012), *Regulatory and Competition Policy Context for Rail Privatisation in Queensland*, October, and other reports cited in our submission in support of the 2013 DAU, Volume 2 at pages 56 to 57.

In a number of instances, the QCA has gone considerably beyond its statutory powers in the provisions it has suggested should be included in the Undertaking. These include an attempt to prevent Aurizon Network owning or investing in certain businesses, and a requirement that Aurizon Network procure that its holding company execute a revised and punitive version of the Ultimate Holding Company Deed, which seeks to bind the holding company which is not the operator of the declared service.

Importantly, the regime proposed by the QCA is also unreasonable and beyond the scope of any ringfencing regime permitted by the QCA Act because of the way in which it is centred on such a very broad definition of confidential information. A ringfencing regime that complies with the objects of the QCA Act should apply constraints on the actions of access providers concerning the provision of the declared service and not otherwise. The QCA Act restricts the ambit of a ringfencing regime further still by limiting its application to conduct that of an access provider that might have a defined affect on access seekers and access holders. The ringfencing regime proposed as part of Aurizon Network's 2014DAU was designed with these objectives and limitations in mind.

By contrast, the QCA has developed a regime which centres on a definition of confidential information similar to one that would apply at common law and one which:

- would render information susceptible to the restrictions in the Undertaking no matter who disclosed the information to Aurizon Network – it would not have to come from an access seeker or access holder
- applies irrespective of whether its disclosure could lead to conduct in contravention of any of the statutory prohibitions on unfair differentiation and hindrance to access
- was favoured over the use of the term 'Protected Information' proposed by Aurizon Network's regime because the QCA was concerned that the regime proposed for that term by Aurizon Network, did not place a constraint on Aurizon Network where (as one might expect) no competition concern could arise from its disclosure.

The regime proposed by the QCA also contains provisions which are unenforceable at law and lacking in logic. For instance,

- the regime restricts Aurizon Network's ability to disclose confidential information even where the owner of that information has published it to the world at large
- the QCA regime seeks to create an agency and trustee relationship between the QCA and third parties without the consent of the third party
- the QCA's regime seeks to impose an obligation on Aurizon Network to pay liquidated damages for breaches of confidence when the amount of the damages specified unilaterally by the QCA is quite clearly a penalty.

In the circumstances, we consider it appropriate that the QCA accept the 2014DAU. However, we recognise that based on its draft decision the QCA has a number of concerns with specific aspects of the 2014DAU. We are prepared therefore to modify at least some of these aspects. Those are set out in our response in Part 4.

Part 5 – Reporting

Aurizon Network remains committed to providing greater transparency throughout our CQCR train operations which will provide tangible benefits to our stakeholders and the supply chain as a whole. Aurizon Network is focused on delivering accurate reports, providing its stakeholders with relevant and informative data, and moving away from 'legacy' metrics of little residual use. Aurizon Network will continue to engage with industry on enhancing transparency, within the constraints that individual stakeholders may propose for the protection of their information.

Aurizon Network disagrees with the QCA's proposals to include a reconciliation between the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. Aurizon Network is only required to report to the QCA financial information relating to the regulated services.

Aurizon Network is willing to report on self-insurance arrangements as part of the annual regulatory accounts, including disclosing the number of self-insurance events by type and value each year. Aurizon Network is proposing, as per its response to the MAR Draft Decision that all incidents under \$50,000 be aggregated for reporting purposes. This has been proposed to reduce the large administrative requirement that would be involved in reporting every incident individually.

The QCA has implied in their Draft Decision that Stakeholders are requesting a regulated monthly network performance report to be generated to provide their businesses with the information they require to make informed operational decisions. Operators should not be making operational decisions based upon information generated as part of the regulatory obligations. Instead, Aurizon Network will include a KPI regime in access agreements which will provide relevant information.

Aurizon Network cannot produce a publically available quarterly report within 10 business days after the end of the quarter. This has significant timing constraints and Aurizon Network would not be able to confirm the information as accurate.

Aurizon Network has engaged with stakeholders regarding their views on the monthly performance report. Aurizon Network has suggested to continue delivering a quarterly performance report with the layout of the report to be segregated by month as it believes this would be sufficient to satisfy its stakeholder's needs.

Aurizon Network agrees with the QCA's proposal to keep an issues register recording breaches of the undertaking and actions taken to remedy identified breaches.

Aurizon Network disagrees with the QCA's proposal to appoint the compliance auditor. If the QCA is responsible for engaging and appointing the auditor, Aurizon Network has no visibility to plan for the costs of the proposed audit. It cannot measure if the QCA's nominated auditor can provide their services at a competitive rate.

Part 6 – Dispute Resolution and Decision Making

While Aurizon Network agrees with the QCA's rationale of making the dispute resolution process more robust and cost effective, it does not believe the QCA's proposed drafting brings this to effect. For example:

Conflicting Processes - As certain provisions of the Undertaking are incorporated by reference into the Access Agreement/Train Operations Deed (AA/TOD), if there is a conflict between the Undertaking and AA/TOD dispute provisions, it is not clear which process prevails.

The Scope for Dispute - The QCA has broadened the scope of the dispute resolution process to apply to all of Aurizon Network's obligations under the Undertaking and allows any party to raise a dispute under Part 11 (mirroring the position in UT3), increasing the risk of vexatious claims.

The Scope of Regulation - The right to dispute certain matters relating to the supply and sale of electricity under Part 11 results in the treatment of the sale and supply of electricity as a regulated service, which is beyond the powers granted by the QCA Act.

Anomalous Procedures - The combined effect of the explicit non-exhaustive list of matters that can be the subject of a dispute, in clause 8.2.2 (a) of the QCA's proposed draft of the Undertaking, and the deletion of clause 8.9.2 of Aurizon Network's 2014DAU is that Users have the ability to dispute under Part 11 the provisions of the template Standard User Funding Agreement (which is approved by the QCA) and other matters for which a contractual dispute resolution mechanism is already available.

Extent of Regulatory Involvement in Disputes - Having to keep the QCA regularly informed in relation to any Dispute (which includes "...any dispute **or question arising**" [*emphasis added*]) in relation to the matters listed in clause 11.1.1(a) potentially means that any questions formally raised by a party in relation to Aurizon Network's obligations under the Undertaking must be provided to the QCA.

Fettering of CEO resolution - The new requirements in clause 11.1.2(c) in relation to the chief executive resolution procedure defeat the purpose of the process which is supposed to facilitate a quick and timely resolution of disputes.

The management of these disputes will also include additional costs that Aurizon Network is not compensated for through its Maximum Allowable Revenue (MAR).

Part 7 – Negotiation Framework

Aurizon Network generally accepts the principle of including more prescriptive drafting where it can clarify Part 4 (Negotiation) of the Access Undertaking. It does not accept drafting which is put forward simply as a matter of preference, however. The application of this principle throughout the drafting creates undue process and may inadvertently lead to an inefficient allocation of capacity in the supply chain. Aurizon Network has proposed various amendments to address these issues, many of which were previously agreed with the QRC.

The QCA has cited the need to achieve a better balance of rights and interests of parties in Negotiations as key to the refusal to approve Part 4 of the Access Undertaking

The majority of changes proposed by the QCA are acceptable in principle, and to a certain extent, have previously been agreed between the QRC and Aurizon Network. Aurizon Network does however consider that further drafting changes are required to better prescribe the processes, such as in the processes for recovery of costs, the dispute provisions for cessation of negotiations and the capacity to vary access applications.

The QCA has refused Aurizon Network's proposed arrangements relating to the information it provides, and can request or require, as part of the process for applying for access and negotiating agreements. Aurizon Network substantially agrees in principle with the changes proposed, as most of these had previously been negotiated between the QRC and Aurizon Network. Aurizon does however have some concerns with their application in the manner proposed by the QCA in its Draft Decision.

Part 8 – Access Agreements

Aurizon Network agrees with the rationale that there should be standard provisions which act as a safe harbour where access seekers and Aurizon Network do not or cannot agree a different position. However, the appropriate place to include these provisions is in the Access Agreement/Train Operations Deed (AA/TOD) and not the Undertaking as Aurizon Network should have the ability to agree otherwise in the AA, and not be in breach of an Undertaking obligation in doing so. This is consistent with the QCA's Draft Decision in Part 8.1 which states that it

“will approve Part 5 if amended to provide for the new standard arrangements (AA/TOD) to govern the terms of access to the CQCN, unless otherwise agreed by the access seeker and Aurizon Network.”
(emphasis added)

Furthermore, Aurizon Network considers that the QCA approach:

- introduces uncertainty as to what the terms of the AA and TOD will be in the future in successive regulatory periods, which could lead to corporate governance issues in seeking approval to execute an access agreement and also increased administrative costs for both Aurizon Network and Access Holders; and
- results in Aurizon Network being subject to the remedies available under the QCA Act for any breach of obligations without the benefit of the contractual limitations of liability that are included under the AA/TOD which substantially changes Aurizon Network's risk profile for provision of the regulated service. The QCA has not proposed any mechanism to compensate Aurizon Network for this additional risk.

Aurizon Network is of the view that the ability to resume access rights for failure to hold or have the benefit of Supply Chain Rights promotes the efficient utilisation of the network, particularly in the short term. This additional reason for resumption, should be reinstated in the AA and TOD together with the concept of an Underutilisation Event.

If existing resumption provisions were to continue, the economically efficient operation of the CQCR would not be optimised, detracting from the object of the access regime set out in s.69E of the QCA Act.

There are sufficient safeguards incorporated into the resumption provisions proposed by Aurizon Network to adequately protect access holders against resumption of access rights which the access holder has an ability and need to utilise.

Aurizon Network is concerned about QCA proposals to expand its exposure to liability for actions which are taken to ensure compliance with statutory accreditation requirements and where ad hoc train services are provided.

The QCA has provided no justification for reducing the Allowable Threshold from 10% to 5%. Aurizon Network cannot accept the reduction in the Allowable Threshold as it substantially increases Aurizon Network's potential liability for non-provision of access without any additional return provided for this risk.

It is important that Aurizon Network can appropriately manage its potential credit exposure and, given the increasing trend of smaller mine owners becoming access holders, many future access holders may not have the financial capability of the incumbent operators and therefore pose a greater credit risk to Aurizon Network. Aurizon Network needs to have comfort that it will have security to cover 12 months Take or Pay charges.

Aurizon Network has included further detailed comments on the QCA's amendments to the SAA and TOD in Appendix 3.

Part 9 – Connecting Private Infrastructure

Aurizon Network has included the process for connecting Private Infrastructure in its 2014 DAU on a voluntary basis. There is no requirement under the QCA Act to include this process in an Access Undertaking. As such, Aurizon Network is not willing to accept amendments proposed by the QCA where they increase costs and risks to Aurizon Network above those that it has voluntarily offered.

The QCA appears to interpret s69E as a statutory allocation to them of responsibility for the “..economically efficient operation of, use of and investment in...”, the CQCR network. Rather, s69E seeks the QCA to promote those principles in overseeing the Access regime for the network.

The QCA is not being asked by the Act to ensure the rail network is run in an efficient manner. That is properly the responsibility of Aurizon Network as it seeks to meet its accountability to its customers and shareholders. The QCA is simply being asked to ensure that access arrangements do not impede the achievement of efficiency in the Network, or the achievement of a competitive environment in the markets Aurizon Network serves.

While this may seem an obvious point, the Private Connecting Infrastructure regime proposed by the QCA seeks to direct practices which it perceives to be efficient, rather than its proper role of ensuring efficient outcomes are not inhibited by the connection process. The QCA's approach towards the manner by which private infrastructure is connected to the CQCR network represents an attempt to allocate risks, determine performance management arrangements and even impose penalties, which only the parties to a contract can properly determine through negotiation. Moreover, recommendations such as allowing parties other than Aurizon Network to have responsibility for project-managing connections to its mainline Network directly threaten Aurizon Network's capability to ensure the efficiency of the Network and to meet its statutory obligations for rail safety.

These measures are proposed to address unsubstantiated perceptions of a risk that Aurizon Network would seek to misuse its exclusive control of the rail infrastructure to unnecessarily delay connections, to seek unreasonably high prices or make arrangements which favour its related above-rail party. No evidence is provided that these risks have ever come to bear in the past connection activity of Aurizon Network. Specifically in regards to pricing for connecting infrastructure, Aurizon Network has voluntarily included in the SRCA that it will only recover the “reasonable and prudent costs” associated with the connecting infrastructure³.

The QCA purports a need to ‘design and develop connections more quickly and with greater certainty’, without any comparative benchmark to suggest this hasn't occurred to date. Indeed, Aurizon Network has clear commercial incentives to expedite connection of private infrastructure to the network as that connection allows the operation of revenue services which enter and exit the network from the private infrastructure. The QCA prescriptions on private infrastructure connections are simply unnecessary and are in any event beyond power.

³ Standard Rail Connection Agreement clause 3(a)(ii)

Part 10 – Capacity Alignment

Supply Chain Groups

Aurizon Network agrees there is benefit from involvement with supply chain groups and seeking to improve the efficiency of all supply chains we are involved in. Aurizon Network currently participates with a number of groups on a voluntary basis. Aurizon Network agrees to continue to participate on a voluntary basis, however it is beyond the QCA's power to require Aurizon Network to be involved, or to have to accept directions/outcomes from the supply chain groups. Aurizon Network proposes the undertaking should revert to the volunteered participation in our 2014DAU.

Capacity Review

The capacity review should be undertaken on an annual basis or when significant changes are made to the System Operating Parameters. Aurizon Network will assess capacity using the Central Queensland Supply Chain Model using input parameters specified in the System Operating Parameters. Where the outcome of the capacity review is disputed Aurizon Network will engage an independent expert to determine whether the capacity review is correct.

Aurizon Network does not agree to provide a capacity performance guarantee. It is beyond the power of the QCA to require Aurizon Network to fund expansions. Aurizon Network does agree to consider funding expansions to overcome Capacity Deficits on a case by case basis. Aurizon Network also agrees to explore non-expansion options for overcoming Capacity Deficits including supply chain options, review of operations and resumption of unused capacity.

Aurizon Network supports identification of Available Capacity but is concerned that any informal indication of an estimated available capacity could lead to a misconception by access seekers that there is no requirement to build additional infrastructure and they may well proceed to erroneously develop their own project assumptions without testing this through the appropriate access process.

Aurizon Network believes that there is more value in access seekers using the formal access requests to understand what is required to support their access needs. This approach would enable a more robust and informative answer to be provided to each access seeker and would need to be replicated if an access seeker sought access in any event.

System Operating Parameters (SOP)

Aurizon Network agrees with the QCA that clarity on the content of the System Operating Parameters (SOP), the relationship with other planning documents and how they are incorporated into the SOP is of significant benefit to the Supply Chain in better understanding capacity. Aurizon Network agrees to consult with stakeholders on the content of the SOP. This consultation can be wider to the extent the owners of confidential information agree to the sharing of such information and the undertaking allows such provision of information.

Much of the detail in the SOPs is drawn from negotiated Access Agreements, where it is the Access Holder that provides the information. The proposed role of the QCA in reviewing and approving SOPs would be superfluous and inefficient, and potentially causing Aurizon Network to breach its customer agreements. Aurizon Network contends the direct engagement it proposes provides the Supply Chain with the information required without an additional level of administration.

Network Development Plan (NDP)

Aurizon Network does not agree to narrow the objective of the NDP as proposed by the QCA. The NDP must be considered integrally with the expansion process and between them they provide high level general capacity enhancement information, followed by specific detailed information suitable for investment decisions.

Aurizon Network does not agree with undertaking dynamic capacity analysis as a part of the NDP process. Dynamic capacity analysis would require speculative definition of detailed variables as the input parameters are not of an appropriate level of certainty at that stage of development. This would take time, impose cost and not provide outcomes of any greater certainty.

Aurizon Network recognises that consumers, and operators, need clarity on the potential rail infrastructure requirements for new and expanded mines. It is important to note, however, that the information contained in the NDP is not sufficient to identify the precise investment requirements or tariff implications of any proposed development.

Aurizon Network proposes to continue with our voluntary engagement with supply chain members as a key input into the NDP development. It is not appropriate for the access undertaking to prescribe a detailed engagement process. While Aurizon Network will consider submissions made, it is for it to decide if and when such views are incorporated into the NDP. It is unclear what would be achieved through dispute resolution on matters associated with the NDP, which is simply a planning document. The NDP informs the expansion process on options available to expand capacity. Decisions made around specific expansions are dealt with in the expansion process with appropriate dispute resolution,

NDP should not be restricted to the consideration of current operational paradigms (e.g. SOPs) as this limits the ability to consider the most efficient options to expand the network and could funnel decisions toward capital investment in infrastructure imposing a massive and possibly unnecessary cost to access seekers and holders.

Part 11 – Available Capacity

Aurizon Network is very concerned at the series of additional restrictions on Aurizon Network's capability to effectively manage the capacity of the CQCR network proposed by the QCA, which go beyond or effectively distort the provisions of the 2010AU.

Aurizon Network has serious concerns that some of the fundamental elements necessary to achieve an effective access regime are jeopardised by these proposals. The list of concerns below could demonstrably work against the legitimate business interests of Aurizon Network [s.138 (2) (b)], while also frustrating the legitimate aspirations of a qualified access seeker [s.138 (2) (e)], with the potential to conflict with the public interest of having competition in markets [s.138 (d)].

Specifically, the QCA is proposing to:

- constrain Aurizon Network from preventing capacity hoarding and other anti-competitive behaviour by its customers;
- force Aurizon Network to entertain any party that has an interest in existing Access Rights irrespective of their capacity or genuine intent to do so and prioritise their request simply on the basis of it being received at an earlier time to another access seeker;
- frustrate Aurizon Network's ability to respond promptly in instances where it is clear that the access holder is not able to utilise the access rights.
- remove Aurizon Network's ability to withdraw a renewal application if the ability of the party is not demonstrated;
- remove Aurizon Network's discretion to prioritise an Access Seeker who is ready and willing to enter into an access agreement;
- maintain a lumpy, mechanistic and inflexible approach to treatment of applications within the capacity queue.

It is difficult to see how constraining Aurizon Network from actively exploring opportunities to optimise the economically efficient operation of the CQCR would not detract from the Object of the access regime set out in s.69E of the QCA Act.

Aurizon Network's proposed capacity allocation criteria and process have been developed upon identified opportunities for improvements to the administrative efficiency of the current 2010AU provisions. Although Aurizon Network's position remains that its capacity allocation criteria and process should be approved as it satisfies the QCA's objective in s.138(2)(a) of the QCA Act, and rejects the Authority's Draft Decision to re-instate the current provisions from UT3. Aurizon Network could agree to the re-inclusion of the queue on the basis that there are clear and effective criteria to allow for reordering of the queue to ensure the efficient allocation of access rights.

Aurizon Network's position is that the Force Majeure provisions and transfer, relinquishment and resumption provisions remain in the Access Agreements, consistent with a general position that contractual certainty is enhanced by the retention of key clauses in Access Agreements.

Aurizon Network's proposed renewal provisions were developed to improve clarity and ultimately assist in the administration of these provisions. Although Aurizon Network's position remains that its renewal provisions should be approved as they advance the interests of access seekers consistent with s.138 (e) of the QCA Act, Aurizon Network and the QRC agreed detailed changes to the drafting for the process of renewals, and as such Aurizon Network would agree to amend the 2014 DAU to include these changes.

Part 12 – Network Development and Expansion Process

Part 8 of the 2014 DAU (Network Development and Expansions) was developed by Aurizon Network as a result of an extensive process of engagement with the QRC over its principles and drafting. During this engagement process Aurizon Network and the QRC reached agreement on the expansion process principles and most of the drafting required to reflect those principles.

In its October 2014 submission to the QCA on the 2014 DAU the QRC stated:

*'The QRC has engaged in consultation with Aurizon Network in respect of the Expansion Process since Aurizon Network's submission of the 2013 DAU. Through that engagement, Aurizon Network and the QRC have reached an agreed position in relation to the Expansion Process, except to the extent of Aurizon Network's funding obligations.'*⁴

The QRC did go further to indicate a desire for '*minor mark-up*'.

The QRC also indicated a need for '*some aspects of the expansion process section that will need to be modified*'⁵ in relation to changes needed to take account of SUFA. Aurizon Network agrees that provisions in addition to Part 8 in the 2014 DAU are needed to be included to facilitate SUFA developments.

Other stakeholders have indicated they have concerns with Part 8 of the 2014 DAU despite the agreement between Aurizon Network and the QRC.

Given the extent of stakeholder agreement and the limited number of outstanding issues, Aurizon Network was surprised that the QCA's UT4 Draft Decision contained such a wholesale revision of Part 8 of the 2014 DAU. Although some elements of the changes are of a stylistic nature, many others are substantive and make fundamental changes to the principles agreed with the QRC. Indeed it is questionable why any stylistic drafting changes have been made as they simply add to the already substantial workload that stakeholders face in responding to the QCA's Draft Decision when all parties are striving to resolve this Undertaking within tight timelines. Such stylistic changes also appear inconsistent with s138(5) of the QCA Act.

In Aurizon Network's view it would have been more pragmatic for the QCA to limit its consideration of Part 8 to:

- SUFA related inclusions, and
- key issues raised by other stakeholders

Given the extent of agreement with QRC, it is unclear why Part 8 in the 2014 DAU needed to be extensively revised as part of the UT4 process, rather than allowing it to be "road-tested" as part of UT4. If this course of action had been adopted, all stakeholders would have been well-placed to further consider the expansion process for future access undertakings in the light of experience with the UT4 expansion process.

⁴ QRC, 2014, Main Submission on the 2014 DAU, Part 8, Section 3, p. 39.

⁵ QRC, 2014, Main Submission on the 2014 DAU, Part 8, Section 3.2, p. 46.

The QCA has not provided a compelling argument that the extent of changes that it has made were necessary to satisfy s138(2) of the QCA Act. That is, there is no clear explanation as to why the proposed Part 8 was not appropriate under the terms of the QCA Act.

Notwithstanding these concerns, Aurizon Network has fully addressed in Part 12 of this submission the expansion process proposed by the QCA in its Draft Decision. Part 12 provides Aurizon Network's responses to

- each of the QCA's draft decisions on Part 8 of the 2014 DAU
- key issues included in the redrafted Undertaking that were not reflected in each of the QCA's draft decisions on Part 8 of the 2014 DAU
- key issues in the QCA-proposed SFA

Part 13 - Network Management Principles

Aurizon Network supports the QCA's intent of ensuring transparency in the application of the Network Management Principles, however, we do have concerns about the workability of some of the QCA's proposals.

For example, Aurizon Network considers that it should not bear the onus of ensuring Access Holders agree to the disclosure of their confidential information to other Access Holders, Access Seekers and the general public. This would entail a laborious process which will frustrate the timely provision of information, and the ultimate goal of greater transparency. Recent attempts by Aurizon Network to share information among access holders proved to be highly time consuming and eventually unsuccessful.

Furthermore, some changes proposed by the QCA are not agreed as they have the real potential to constrain Aurizon Network's capacity to meet our responsibility for efficient operation of the CQCR Network. For example, Aurizon Network reserves the right to adjust the Daily Train Plan after its finalisation to maintain its prerogative to facilitate efficient operations on any day.

The requirement to take direction from Supply Chain Groups on the determination of Train Paths Efficiency similarly undermines Aurizon Networks authority to manage the infrastructure service efficiently. What the Supply Chain wants and what is efficient can be two different things.

Part 14 – Regulatory Asset Base and Customer Voting

The QCA's Draft Decision is to refuse Aurizon Network's proposed capital approval process and instead propose an alternative process for assessing Aurizon Network's annual capital expenditure submission.

Aurizon Network believes that some guidance on an alternative, 'holistic' framework is appropriate to provide certainty around investment proposals and to assist with the preparation of the annual capital expenditure claim.

In view of the above, Aurizon Network accepts the Draft Decision on the basis that the test of "prudence and efficiency" is broadly equivalent to the prudence of standard, scope and cost set out in Schedule E of the 2014DAU. Aurizon Network is willing to work with the QCA, both before and after the Final Decision, to develop a new capital expenditure review process which is reasonable for both parties and balances the QCA's preference of a holistic framework with Aurizon Network's need for investment certainty.

The QCA refuses to approve Aurizon Network's proposals and instead to reinstate and modify UT3 drafting which allows the QCA to reduce the RAB value where demand has reduced. The QCA accepts Aurizon Network's proposal to remove the threat of by-pass of the relevant RAB assets as the basis for a RAB reduction. Aurizon Network disagrees with reduction of RAB due to demand and supports removal of the threat of by-pass, as:

- these optimisation 'events' are more efficiently addressed in Schedule F of Aurizon Network's proposed 2014DAU;
- Draft Decision 14.2 raises the issue of compensation for Aurizon Network investors (in the form of a higher WACC) which is not addressed in the QCA's discussion of the Draft Decision; and
- the issue of compensation for Aurizon Network investors can be avoided by approving the proposed 2014DAU.

The 2014 DAU had proposed the removal of the link between Condition Based Assessments (CBAs) and the RAB which was introduced in the 2010AU. Aurizon Network considers that the uncertainty around a reduction of RAB is sufficiently reduced by the QCA's proposal to limit any reduction to avoidable and long-term deterioration, its endorsement of Aurizon Network's proposal for an end of term CBA and Aurizon Network's intention to submit an Asset Management Plan for QCA approval, and therefore is prepared to accept the Draft Decision.

Aurizon Network welcomes the general endorsement of the QCA and stakeholders of a separate claim for equity raising costs. As indicated in the UT4 submission, such claims are consistent with regulatory precedent including decisions by the Australian Energy Regulator (AER) and also the QCA in relation to the Dalrymple Bay Coal Terminal (DBCT). Aurizon Network seeks clarification by the QCA regarding its application of "a case-by-case approach" including achieving a consistent approach between Aurizon Network-funded and SUFA-funded investments.

The QCA refuses to approve Aurizon Network's proposed approach for the voting process, and has instead proposed its own process as Schedule E in its redrafted Undertaking. Aurizon Network disagrees with this Draft Decision as there is no basis upon which the process proposed by Aurizon Network is not appropriate, as it is designed to improve the efficiency of investment in the system and was supported by stakeholders.

It would be more efficient for the Undertaking to provide flexibility around the voting process allowing votes earlier than the point of completion of the Feasibility Study and also allowing for votes for scope, standard and costs separately or together.

The QCA's position also raises fundamental issues about the rights and obligations of various parties in the project development process. Aurizon Network would submit that it is the funder that should be deciding on whether or not to seek a vote or preapproval.

Similarly it should solely be at the election of the funder whether or not to seek pre-approval of a project after a vote has been held. The Undertaking should not prescribe this as a requirement, nor should it impose an obligation on Aurizon Network to fund a project simply because a study may find it feasible.

Furthermore, only Access Seekers engaged in a project should have a right to vote, existing Access Holders should not be afforded such a right as their interests may be advanced by impeding the development of the project.

The key benefit of the vote to a funder of a project is that it provides an option to fast track the QCA's acceptance of the project as 'prudent'. If the QCA reserves the right not to accept a positive vote, it would obviate the voting process which would be of little value to feasibility funders. Given the time pressures on a project at this stage of its analysis it would be expected that they would want Aurizon Network to bypass the voting process and seek QCA approval under Schedule E.

Parts 15 and 16 - Pricing Frameworks and Principles

The QCA seeks to create a number of pricing obligations upon Aurizon Network to address theoretical risks which have no practical evidentiary basis in the performance of Aurizon Network or its predecessors.

There are a number of instances where QCA has rejected positions agreed between Aurizon Network and the QRC, such as the expansion pricing framework and the process for calculating cross system reference tariffs.

There are also instances where provisions rolled forward from the 2010AU have been rejected without valid reason. Where proposed new arrangements are not endorsed by the QCA, it either reverted to the 2010AU model, or suggested a completely new arrangement at its discretion. This contradictory and unstructured approach results in an ad hoc series of arrangements the direction and purpose of which is difficult to discern.

The QCA is recommending a series of measures which discriminate against new Access Seekers in favour of existing Access Holders and work against the promotion of economic efficiency in the CQCR Network.

For example, the QCA requirement to establish pricing limits with reference to the value of the RAB, and not the actual stand alone cost of Access, is economically inefficient and removes the flexibility for Aurizon Network to submit more 'customer responsive' and adaptable pricing solutions to the QCA for approval.

The QCA has not provided valid reasons for many recommendations. For example, the deletion of a clause allowing access prices to be set below the 'floor' price, provided other Access Seekers with similar Train Services are treated in the same manner. In order to address a general unsubstantiated concern about the potential for cross-subsidisation, this Draft Decision will create uncertainty and unnecessary complexity when setting access charges within the CQCR Network.

Aurizon Network acknowledges the challenge of finding an appropriate and fair balance between the interests of existing and expansion users, and had materially agreed the 2014DAU expansion pricing framework with the QRC. The QCA's Draft Decision on expansion pricing has many elements that appear heavily skewed in favour of existing users, however, including:

- the quarantining of expansions with no explicit contemplation that, in certain circumstances, it may be reasonable to socialise expansions with the existing system within a materiality threshold⁶
- the requirement for a separate tariff for each expansion, based on an inflexible fixed cost regime
- an asymmetric approach to common costs and volume risk
- the removal of the 'minimum contribution to common cost' element from the Minimum Revenue Contribution (MRC) calculation, and
- the removal of a distance discount mechanism.

The QCA's Draft Decision appears to be inconsistent with the position of the coal industry on how the balance between existing and expansion users should be achieved.

Establishing a separate expansion tariff is generally appropriate where the expanding customers are the only ones utilising the infrastructure. Where an expansion/enhancement occurs on the common mainline corridor, and will be utilised by both expanding and existing users, however, the distribution of benefits becomes obfuscated, creating myriad opportunities for existing users to gain operational benefits without contributing to the costs of, or risks associated with, achieving those benefits.

Aurizon Network firmly believe in the principle of avoiding unfair differentiation, and the Undertaking should not require all expansions to be automatically isolated from the broader system for an indefinite period. The pricing arrangement for expansions, including an assessment of whether socialisation with the existing system is appropriate, should be assessed by the QCA on a case-by-case basis.

In Aurizon Network's view, the expansion pricing proposals of the QCA will not promote efficient investment in the network and will limit potential competition in the upstream market for coal. The QCA's proposals therefore fail to take proper regard of the objectives in s.69E and s.138(2)(d)&(e) of the QCA Act.

Part 17 – Reference Tariffs

Aurizon Network believes that the existing Reference Tariff pricing structure accurately reflects the costs a train service imposes on the network. Nevertheless, it is willing to look at better ways of presenting the information so that users can more readily comprehend the options that may be available to them within the pricing framework.

Aurizon Network is concerned that the QCA is attempting to unwind its previous determinations for new projects including Caval Ridge and GAPE. It is not appropriate to retrofit the new pricing principles of the 2014DAU to pricing agreements which were accepted in good faith on the principles existing at the time. Indeed, in its determinations on those projects, the QCA itself confirmed that a pricing agreement could only be struck on the principles that are in effect at the time of the investment.

We are also concerned that the QCA is refusing to accept positions which have been agreed between Aurizon Network and the QRC, as the representative of customers, such as the system for the calculation of cross system reference tariffs.

⁶ Note that the concept of 'materiality' is recognised as a principle of the Expansion Pricing Framework, and has been accepted by the QCA in Draft Decision 16.6.

Aurizon Network acknowledges the merits of having a more detailed strategic review of Reference Tariffs, and is willing to proactively engage with stakeholders in that process beyond approval of UT4.

Part 18 – Take or Pay Arrangements

The QCA has proposed to provide a number of amendments intended to provide greater certainty around the determination of Take or Pay liabilities.

Aurizon Network agrees with the intent of the amendments proposed by the QCA, although some points of drafting may require clarification.

The QCA has removed the exclusion of WICET gtns from the Take or Pay trigger test for UT1 Access Holders. Aurizon Network is prepared to agree with the QCA's Draft Decision on the basis that the QCA approves the December 2014 pricing proposal for WIRP.

In addition the QCA has removed provisions to shift Aurizon Network Cause paths from a post - UT1 agreement to a UT1 agreement regarding a particular origin-destination pair.

The 2014DAU proposals were on the basis that in circumstances where more than one Access Agreement is in place for the same origin-destination pair and Take or Pay is triggered, it is necessary for a 'hierarchy' to be applied for allocation the consumption of Train Service Entitlements (TSEs), and the allocation of the Aurizon Network Cause.

Aurizon Network is willing to propose drafting in the Standard Access Agreements to ensure alignment of the consumption of TSEs and the allocation of Aurizon Network Cause for all Access Holders in circumstances where the Access Holder and origin-destination pair are the same.

1 Introduction

Aurizon Network is committed to working with its operating customers, the coal industry and its Regulator to efficiently achieve the sustainable growth of the Central Queensland Coal Region.

The regulatory environment within which Aurizon Network operates must ensure its shareholders can responsibly invest in, and maintain, a safe, reliable and efficient network.

The privatised Aurizon Network is now a fitter, more robust, more responsive rail infrastructure service provider. The strong focus on productivity and efficiency over recent years, has yielded record volumes, major reductions in delays and derailments, low levels of cancellations and, importantly, a significant increase in above rail competition. As a commercial organisation, Aurizon Network understands the current market challenges facing our customers, particularly Australian coal producers. In a subdued, low-growth economic environment, Aurizon Network has a relentless focus on cost reduction and productivity improvement. It is working closely with its customers to deliver efficiencies across the supply chain - the collective objective being that Australian exports remain competitive in the global market.

Aurizon Network is committed to building a long term sustainable business that delivers lasting value to our customers, shareholders, employees and communities.

Lifting our productivity and operational efficiency (enabling increasing payloads, reducing turnaround times, increasing network utilisation) allows us to increase customer throughput.

More tonnes are being moved with less resources.

Aurizon Network aims to take the safest and most efficient and least resource-intensive approach to the services it provides.

1.1 Aurizon Network's Contribution to the Coal Sector

The Aurizon rail network is a highly sophisticated and complex system that provides vital transport infrastructure linking more than 44 mines to three ports and six export coal terminals in the Central Queensland Coal Region (CQCR). Aurizon Network underpins a competitive market for above rail services provided by three operating companies, and dealing with at least 16 coal companies, many of which are global corporations with have a market capitalisation well in excess of that of Aurizon Holdings.

The maintenance and growth of the CQCR system is essential to the strong performance and ongoing development of the coal industry in Queensland, yielding important production, employment and budget revenue outcomes for Queensland and Australia.

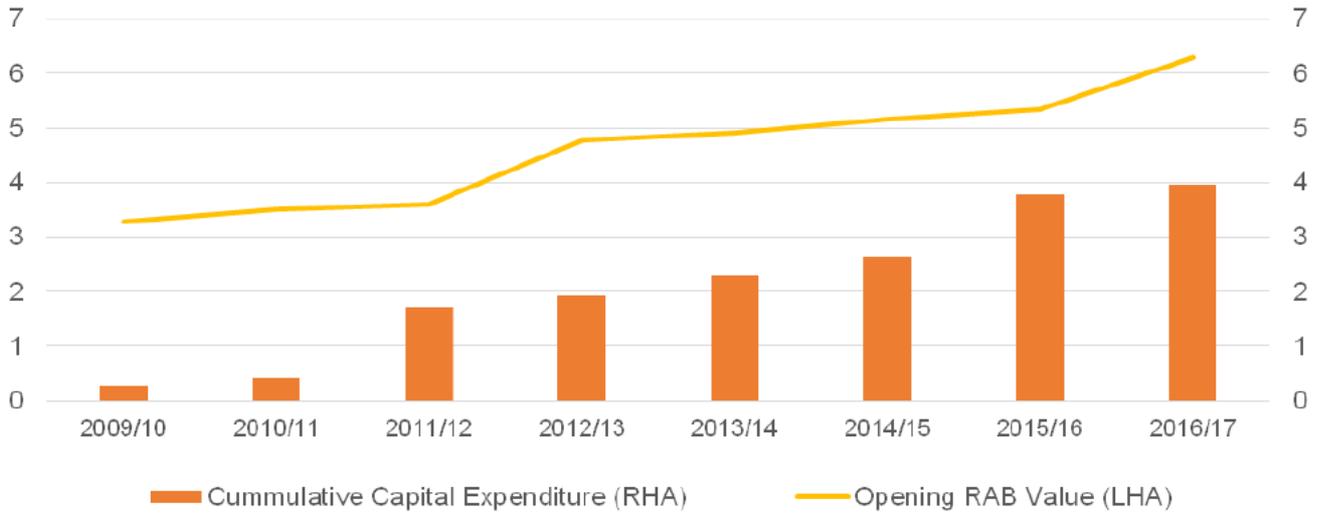
As the QCA has recently pointed out to the Productivity Commission, the continued growth and development of the resources sector will be fundamentally important to the ongoing health of the Queensland economy, and a significant source of future revenue growth for the Queensland Government. Future growth in the coal sector can also be expected to bring significant additional economic benefits to Queensland, in the form of higher economic growth and greater levels of job creation than would otherwise be the case.

While global coal prices have declined in recent years, demand for coal continues to see record tonnages transported on the rail network – now double the levels of a decade ago, and 30% higher than average annual volume in the previous undertaking period. The QCA itself has indicated it expects any moderation in coal prices to be offset by increases in volumes, and this is consistent with the experience of Aurizon Network.

With that increase in traffic and tonnages, the effective maintenance and renewal of the network asset is critical to ensure the efficient delivery of coal to export markets continues.

While the recent surge in coal volumes was unexpected, the significant strategic investment in the Network (shown in the graph below) has ensured Aurizon Network's ability to meet the challenge of these market opportunities. This DAU seeks to maintain that capacity and accommodate demand growth into the future.

Figure 1.1 – Growth in the Regulatory Asset Base (RAB) (\$ billion)



The performance of Aurizon Network should be judged on its capacity to deliver infrastructure where and when it is required by customers, meeting the transport needs of customers with high levels of reliability, productivity and cost effectiveness, and pursuing operational safety as its highest priority.

Aurizon invests in its network through the maintenance and infrastructure programs to support demand from its customers. Our coal customers provide the impetus for expansion and growth on the coal networks and manifest their belief in the requirement for this infrastructure through contracts for tonnes that warrant the investment.

Aurizon Network will continue the investment as planned if the returns are commensurate with the risks to which it is exposed. The public interests are served with reliable and timely operation and investment in the CQCR.

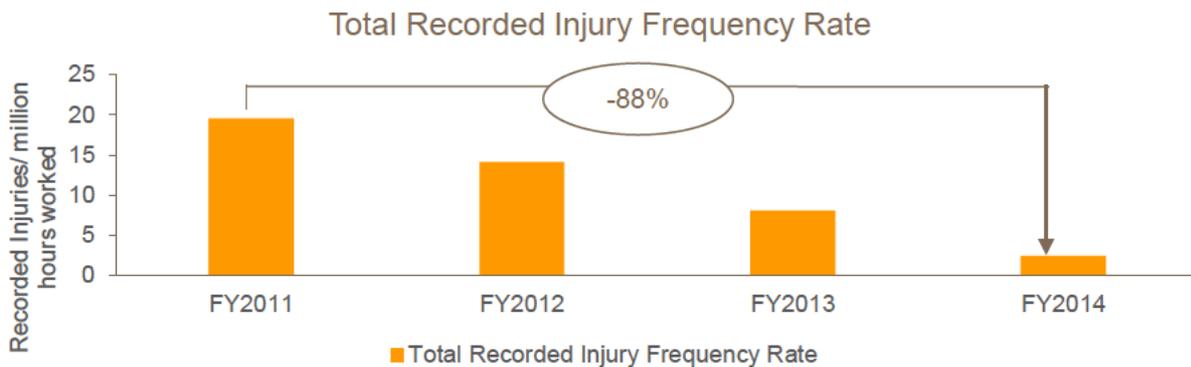
1.2 Continuous Improvement – Delivering Better, Safer Services

The investment, maintenance and operational program of Aurizon Network is carefully designed to achieve continuous improvement in safety, efficiency, productivity and service quality. Over recent years, Aurizon Network has made significant advances in pursuing each of these goals.

1.2.1 Working toward *ZeroHarm*

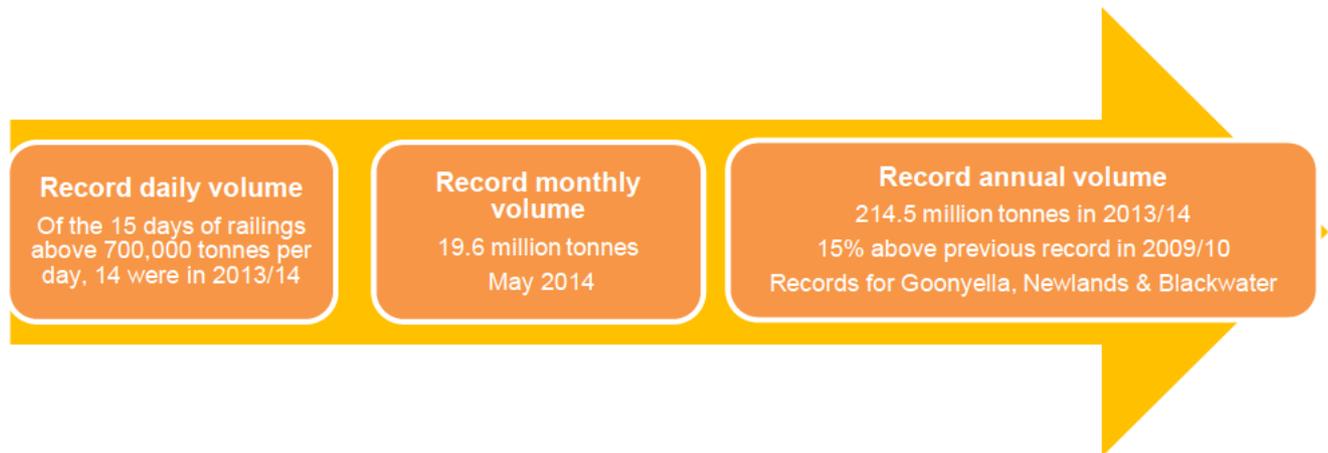
Safety is Aurizon Network’s core value and the commitment to the *ZeroHarm* program has seen a dramatic reduction in the total recorded injury frequency rate over the last 4 years (and a corresponding increase in the productivity of the workforce.)

Figure 1.2 –Safety Performance of Aurizon Network



1.2.2 Delivering competitive outcomes - Record Volumes with Reduced Real Costs and Improved Reliability, with increasing above rail competition

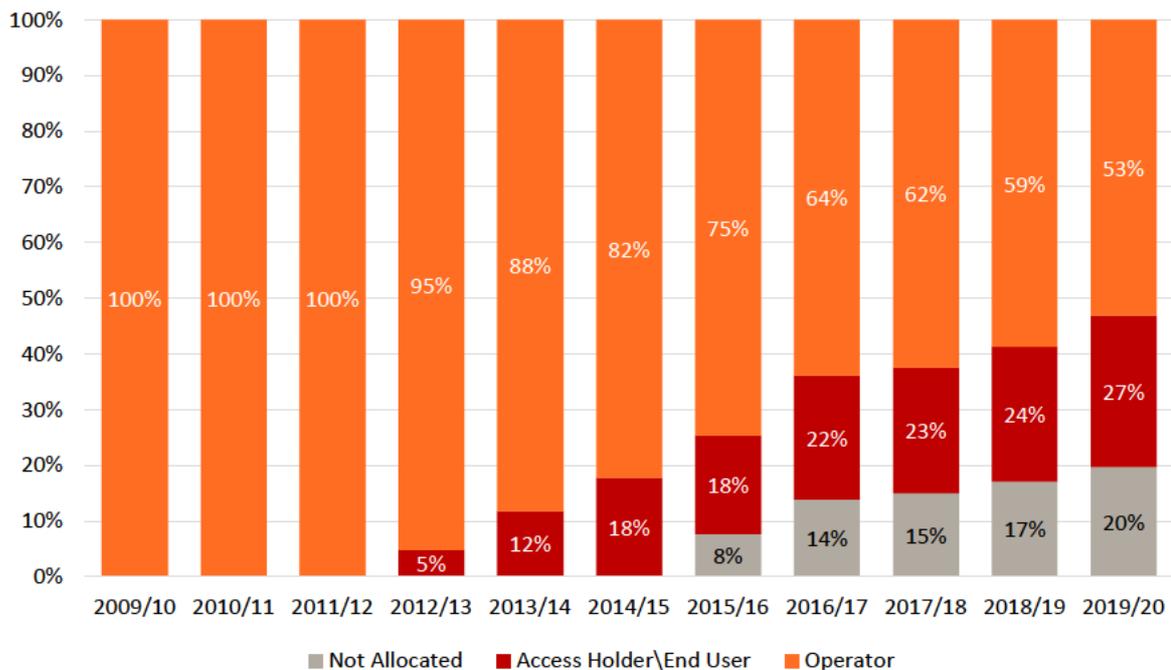
Aurizon Network is keeping pace with customer demand - delivering record volumes in 2013/14, which are likely to be exceeded again in 2014/15.



As volumes increase the market share of above rail operators has also diversified, with non-Aurizon rail operators increasing their market share from 7.8% in 2010 to almost 30% in 2015. In the Goonyella system, almost 50% of the above rail traffic is now managed by rail operators other than Aurizon.

The prospects for greater competition into the future are also strong, with End Users increasingly securing their own Train Service Entitlements. In the next 5 years, rail operators will hold only 54% of Train Service Entitlements, meaning they will need to actively compete to win business off mines directly holding the Train Service Entitlements.

Figure 1.3 – Trends in Train Service Entitlements through changing participation in Access Agreements



This means that a fundamental objective of the Access Regime in the QCA Act – the promotion of downstream competition – is a real and tangible outcome of Aurizon Network’s management of the rail infrastructure, for

example by facilitating the active participation of mine owners in the negotiation of Access Agreements. The QCA, the coal industry and the public in general can have confidence that the growth of above rail competition has clearly not been impeded by Aurizon Network, and the object of the QCA Act is, in fact, being advanced.

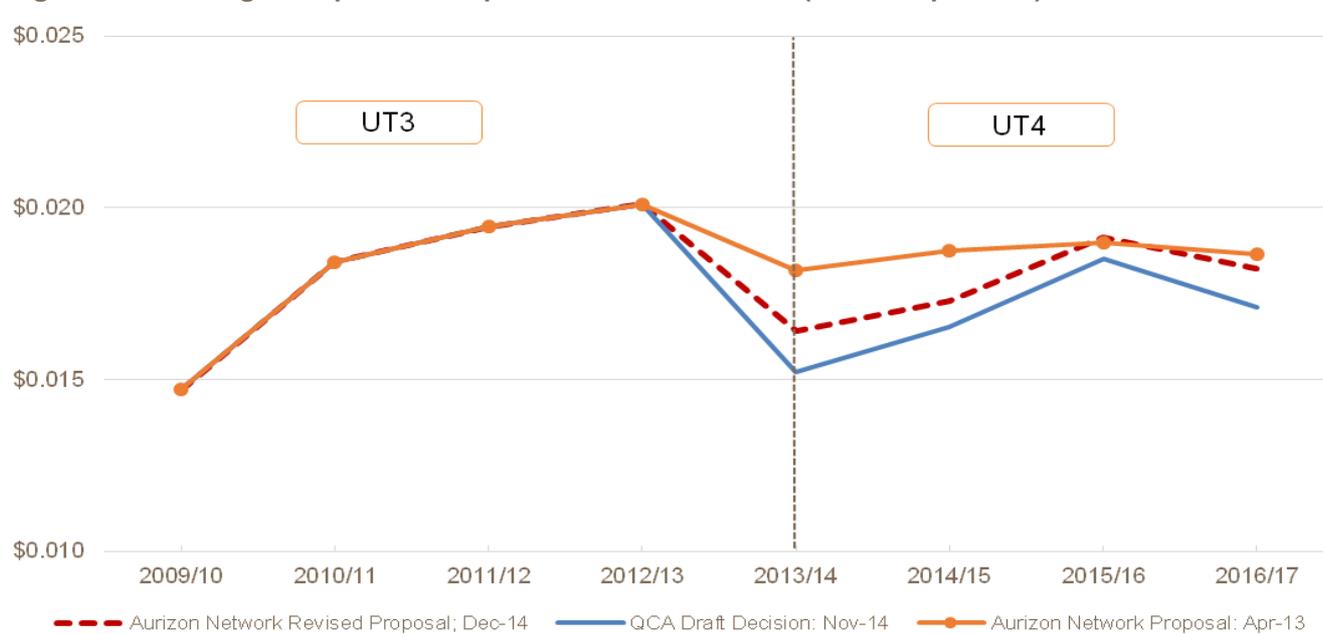
This is consistent with the findings of the recent Final Report of the Harper Competition Policy Review, which commented that the distinct access regimes established under the National Competition Policy “...appear to be achieving the original policy goals identified by the Hilmer Review.”⁷

The increase in tonnages railed has necessarily meant that the total costs involved in operating the network have increased, and combined with a substantial investment program in new infrastructure, aggregate costs will continue to increase through the remainder of the UT4 period, while tonnages continue to ramp up.

As the system expands, the distribution of fixed costs can be extended to the benefit of all users, however. Aurizon Network customers will benefit from lower prices as the average unit cost to coal customers under our proposed MAR will actually fall in real terms (\$2012/13) - from \$ 0.0201 per NTK in 2012/13 to \$0.0182 per NTK in 2016/17 – a real reduction of 9.5% in unit cost. This is illustrated in Figure 2.3 below.

These average costs would fall substantially further if coal companies maximise their utilisation of the contracted capacity of the CQCR over the remainder of the UT4 term.

Figure 1.3 – Average real price: MAR per Net Tonne Kilometre (\$2012/13 per NTK)



Note: Figures up to and including 2013/14 are based on actual volumes and approved MAR

Aurizon Network has contributed to the record volumes by achieving dramatic increases in the availability, reliability and efficiency of the Network since 2010/11, with a 44% reduction in network caused delays, low levels of cancellations and an 82% reduction in mainline derailments attributable to below rail.

The average number of speed restrictions has also been halved in every system by targeting our maintenance effort to the most significant threats to normal train operations.

The UT4 period has the potential to deliver lower real access charges, greater reliability and more efficient utilisation of the network, while continuing to meet our contractual obligations to customers demanding greater volumes. The investment and expenditure that will be supported by our Draft Access Undertaking is critical to ensure the operational gains we have achieved are retained and enhanced, to the benefit of the export performance of our customers, the royalty income of the State, and the Nation’s balance of trade.

⁷ Australian Government, 2015, Final Report - Competition Policy Review, p.431.

Aurizon Network is particularly concerned with the approach by the QCA to the 2014DAU as it can have the effect of limiting the ability to be flexible and innovative in response to customer requirements, as well as creating a risk averse culture that is not necessarily aligned to changing customer needs or market conditions. It also has the effect of increasing costs for both Aurizon Network and the coal industry, particularly at a time when the coal industry is under significant pressure. In addition to these direct costs of increased regulation there is the very important question as to the indirect costs of increased regulatory intervention, such as decreasing the scope for innovation, which would be contrary to the international competitiveness requirements of the coal sector.

1.3 The Regulatory Framework

The regulatory arrangements that govern the provision of the infrastructure facilities which underpin the operation of the resource sector will have a critical influence on its ultimate sustainability as a vibrant and competitive industry. An appropriate regulatory environment which reflects the spirit and intent of the *QCA Act* will ensure the transport of Queensland's coal to market occurs in the most economically efficient way. Key supply chain constraints on coal export growth would be:

- Insufficient investment in necessary infrastructure and future coal mines caused by inadequate institutional or regulatory structures to allow that investment to proceed
- Inefficient processes and pricing arrangements for managing the demand for access to the rail network, and
- Inadequate maintenance allowances yielding an unreliable rail system which would impede coal companies and above rail operators from responding promptly to their coal market opportunities.

As the sole infrastructure provider servicing multiple customers, Aurizon Network behaves as a responsible supplier of below rail infrastructure services. We believe that economic regulation of our network should facilitate transparency and certainty about the responsible manner in which Aurizon Network builds, maintains and operates its infrastructure assets. Aurizon Network respects the statutory processes that the QCA administers in bringing that regulation to effect.

Aurizon Network engages constructively in the regulatory processes, in order to build a robust and sustainable operational model that meets the needs of our customers and shareholders. We have already made significant improvements since listing on the Australian Stock Exchange (ASX) in 2010.

In seeking to prescribe unnecessarily complicated and onerous policies and procedures which will have the effect of constraining the efficient operation and expansion of the Central Queensland Coal Region network, it is disappointing that the QCA has failed to acknowledge the significant advances that Aurizon Network has made in servicing its customers efficiently and fairly.

Aurizon Network has engaged in this Undertaking process in a constructive and collaborative way, volunteering to make provisions that could not be required by the QCA under the *QCA Act*. Aurizon Network has, with the active encouragement of the QCA, engaged actively with industry over a long period to resolve matters of policy and agree specific drafting. The results of that process were reflected in the 2014 DAU submitted by Aurizon Network for approval.

Surprisingly, without providing any justification for doing so, in its 2015 Draft Decision on 2014DAU the QCA has indicated its intention to ignore most of the positions agreed by Aurizon Network with industry and to change virtually every page of Aurizon Network's 2014DAU.

In its Draft Decisions on the 2014DAU the QCA has also sought to impose positions in a "voluntary" undertaking that it cannot compel by law.

A final decision on 2014DAU reflecting the Draft Decisions would be beyond power in many respects. An outline of some of the areas of particular concern is contained in Part 2 of this submission. A proposed way forward is also contained in Part 2.

2 Matters ‘beyond power’ and a way forward

2.1 Matters beyond power

The QCA's Draft Decisions on the 2014DAU fall short of recognising fully some key principles in the QCA Act (**Act**) namely, that:

- the Act expressly grants an access provider and an access seeker the freedom to negotiate any terms they like, as long as those terms are not inconsistent with the object of Part 5 and the prohibitions within it; and
- the QCA cannot apply a different standard to that required by the Act in determining whether to accept or reject a Draft Access *Undertaking* (DAU) or in setting the MAR; and
- the QCA's role in approving or rejecting a draft access undertaking is to determine whether the proposed undertaking is “appropriate” having regard to the list of factors in section 138(2); not to apply a different or higher standard.

The list of factors in section 138(2) can conflict with each other and many can be achieved in a variety of ways. The QCA must approve an undertaking if its terms are “appropriate” even if other terms might also achieve the result. The QCA cannot prefer its own drafting if the drafting submitted by the access provider achieves the required result.

Most importantly, in seeking to reject Aurizon Network's proposed undertaking and in purporting to draft an undertaking that the QCA would approve, the QCA cannot:

- assess the draft undertaking against an object that is different to the object in Part 5 of the Act;
- seek to impose a form of undertaking that applies a different object to that expressed in the Act;
- seek to impose amendments to a DAU that are not justified by the Act; or
- propose different methods of achieving the same object where there is no evidence or suggestion that the provisions proposed by Aurizon Network did not meet the statutory purpose.

The principles discussed above are confirmed in a number of judicial decisions. For example:

- In *Re GasNet Australia (Operations) Pty Ltd*⁸ the Competition Tribunal was asked to adjudicate in a case where the ACCC had refused to approve a proposed tariff on the grounds that it did not comply with the reference tariff principles in the legislation.

The Tribunal confirmed that :

- application of the principles involved “*issues of judgement and degree*” and that “[d]ifferent minds, acting reasonably can be expected to make different choices within a range of possible choices which nonetheless remain consistent with the Reference Tariff Principles”; and
 - that as the arrangement proposed by the access provider was within the range of choices reasonably open to it within the principles, it was beyond the power of the regulator to refuse the proposal “*simply because it prefers a different [access arrangement] which it believes would better achieve the relevant Regulators’ understanding of the statutory objectives of the Law*”.
- In *ACCC v Australian Competition Tribunal and Anor*⁹ the Full Court of the Federal Court approved the decision in the GasNet case and stated that:

“In assessing an Access Arrangement proposal and deciding to approve it or not, the ACCC is not at large simply to substitute its own preferred Access Arrangement”.

⁸ *Re GasNet Australia (Operations) Pty Ltd* [2003] ACompT6

⁹ *ACCC v Australian Competition Tribunal and Anor* (2006) 152 FCR 33

- In the Canadian decision in *Penteanguishene Medical Health Centre v Ontario*¹⁰ in considering a discretion to make an “appropriate” order, the Court concluded that this conferred the power to make “...the least onerous and least restrictive” order consistent with achievement of the relevant factors required by the legislation.

Contrary to the judicially recognised standard applicable to the regulator’s role in considering a proposed access arrangement, the QCA has rejected what is an “appropriate” access undertaking from Aurizon Network in favour of a much more onerous and restrictive one, that in a number of respects, is beyond the QCA’s power to compel. Simply adopting a different style of drafting is not permitted. For example, the QCA has not sought to justify its global change of the promise that Aurizon Network “will” do certain things to a requirement that it “must” do those things. The effect of that change is to underline the fact that the QCA is converting a voluntary undertaking by Aurizon Network into a mandatory obligation developed by the QCA.

The Draft Decisions by the QCA and the draft undertaking proposed by the QCA as one it would approve are replete with numerous examples of matters which are contrary to the Act. By way of illustration the list includes the following:

Table 2.1 – Contradictions of Statutory Powers

Reference	Comment
Objective and Interpretation of the Undertaking Clauses 2.2 and 2.3 of QCA’s redrafted Undertaking	<p>Clause 2.2 of the QCA’s draft undertaking fundamentally alters the object of the Act. It is not an object of the Act, and therefore improper to impose a constraint on an access provider, to prevent “<i>non-discriminatory negotiation of access agreements</i>”. Likewise, it is not the object of the Act to require that all access seekers be “<i>given an equal opportunity to obtain access rights</i>”.</p> <p>The Act does not prohibit discrimination per se and does not mention an unfettered right for equal treatment. It refers to “<i>unfair differentiation</i>” that operates in a way that has “<i>a material adverse effect</i>” on the ability of one or more access seekers and users to compete with other access seekers or users.</p> <p>Clause 2.3 requires that the Undertaking proposed by the QCA be interpreted in a manner that best achieves the objectives set out in clause 2.2. The objectives in clause 2.2 are without statutory foundation and clause 2.3 ensures that they infect the entire Undertaking prepared by the QCA. If Aurizon Network were to agree to the QCA’s drafting or if the QCA sought to impose its Undertaking, Aurizon Network would be exposed to a standard and liability that is not required by the Act.</p>
Anti-competitive conduct Clauses 2.2 and 2.3	<p>Clause 2.2 also states that one of the objectives of the Undertaking prepared by the QCA is to ensure that Aurizon Network does not engage in conduct “<i>which has the purpose of, results in or creates, or is likely to result in or create ... a substantial lessening of competition or a situation that is otherwise anti-competitive</i>”.</p> <p>The Act is not concerned with anti-competitive conduct in the general sense - only in conduct of that unfairly differentiates in a material way affecting the ability of access seekers used to compete with one another.</p> <p>There is no statutory basis for the purported object against which clause 2.3 requires the Undertaking to be interpreted. It is beyond the QCA’s power to require this aspect of clause 2.2 as an object of the Undertaking.</p> <p>It is also unreasonable to impose a standard that is incapable of precise meaning – “<i>...a situation that is otherwise anti-competitive</i>”.</p>
Procuring conduct of Related Parties Clauses 2.2(g) and 2.6	<p>Clause 2.2(g) of the QCA’s draft Undertaking provides that it is one of the objects of the Undertaking to ensure that Aurizon Network procures that its Related Parties do not engage in conduct for the purposes of preventing or hindering an access seeker’s or access holder’s access.</p> <p>The QCA Act does not contain any obligation on a service provider to control the actions of another person. The Act does not make a service provider vicariously liable for the conduct of another party, even if they are related. The Act only imposes obligations directly on the access provider to conduct itself in a particular way when dealing with access seekers.</p>

¹⁰ *Penteanguishene Medical Health Centre v Ontario* (2003) 237 DLR (4th) 1 at 16 -18

Reference	Comment
	<p>Aurizon Network is not in a position to control the conduct of its related corporations as a matter of law.</p> <p>It follows that clause 2.6 of the QCA's draft Undertaking which requires Aurizon Network to procure an Ultimate Holding Company Support Deed from its parent in the form proposed by the QCA is also unsupported.</p> <p>Clause 2.6(c) provides that any contravention of the Deed by Aurizon Holdings is "<i>deemed to be a contravention of this Undertaking by Aurizon Network</i>". It therefore seeks to impose strict liability vicariously for conduct of entities that Aurizon Network does not control and which are not subject to the Act.</p> <p>The QCA offered no justification for the measures it sought to impose by means of the Ultimate Holding Company Support Deed noting its Draft Decision that, despite an apparent lack of confidence by stakeholders in the existing 2010 ringfencing regime, there had been "<i>very few complaints and audit issues with respect to the existing ringfencing provision</i>".</p> <p>In the absence of any justification or evidence of wrong-doing for rejecting the Ultimate Holding Company Support Deed proposed by Aurizon Network, the QCA has acted unreasonably in seeking to impose its own version of a much more extreme regime and one that cannot be given life to as a matter of law and logic.</p>
<p>Materially unfair differentiation</p> <p>Clause 2.4(b)</p>	<p>Clause 2.4(b) requires Aurizon Network not to "<i>unfairly differentiate between access seekers in negotiation for the provision of access or between access holders in providing access</i>" in relation to certain matters.</p> <p>By contrast, section 100(2) of the QCA Act permits differentiation in such cases as long as it does not operate "<i>in a way that has a material adverse effect on the ability of access seekers to compete with other access seekers</i>".</p> <p>The requirement in clause 2.4(b) has no statutory basis and in fact, removes a right to differentiate expressly given by the Act.</p> <p>A breach of clause 2.4 can trigger a process of written complaint followed by an audit to be conducted by the QCA. The trigger for that audit is not conduct prohibited by the Act or conduct which is necessarily inconsistent with the objects of Part 5 of the Act.</p>
<p>Protected Information</p> <p>Part 3 – Ringfencing – of QCA's Draft Decision</p>	<p>The QCA in its Draft Decision foreshadows that it will reject the "Protected Information" regime proposed by Aurizon Network to ensure appropriate ringfencing of confidential information associated with a declared service in favour of a regime drafted by the QCA and centring on the concept of a very broad definition of confidential information.</p> <p>The regime preferred by the QCA attaches to "Confidential Information" which is so broadly defined it has the effect of imposing restrictions that apply regardless of the source of the information and regardless of whether any disclosure of that information would have consequences with which the Act is concerned. It is beyond power as it does not restrict itself to matters that aid the object in Part 5 of the Act and extends to all manner of commercial and other information not relevant under the Act.</p> <p>By contrast, the "Protected Information" regime proffered by Aurizon Network allowed for use of information when no competition concerns arose as a result of any potential disclosure. This is consistent with the Act which is concerned to ensure that no unfair and material advantage is given by an access provider to a related above-rail operator.</p> <p>The QCA provided no evidence and no justification for its view that the regime proposed by Aurizon Network "<i>increases complexity</i>".</p> <p>The QCA admits in its Draft Decision that there have been very few complaints of breach of the existing 2010 ringfencing regime. It nevertheless asserts that a stricter regime is needed because stakeholders demand it and because a lack of complaint does not mean that breaches have not occurred. That is not a well-founded or legitimate basis for rejecting a regime which is otherwise "appropriate" and for imposing a much more complex and extreme regime. It does not constitute a reasonable exercise of the QCA's statutory discretion.</p> <p>The QCA has also taken the form of confidentiality agreement that Aurizon Network had offered to enter with access seekers requiring it, and converted it into an agreement by which mutual promises of confidentiality are imposed on both the access seeker and Aurizon Network. The basis for such an imposition of general obligations of confidence on access seekers is not evident.</p>

Reference	Comment
	<p>By clause 7.1 of the QCA's drafting of the Confidentiality Agreement the QCA invests itself with the rights of an agent of and trustee for an access seeker or train operator in respect of confidential information. It is not legally possible for the QCA to constitute itself an agent of a third party without that third party's consent.</p> <p>Many of the changes proposed by the QCA in its draft Undertaking are simply cosmetic and have no material impact as compared to the regime proffered by Aurizon Network. . The QCA cannot reject a draft Undertaking because it would prefer a different style of drafting.</p>
<p>Restraints of Trade Clause 3.5(e) – Ringfencing</p>	<p>Clause 3.5(e)(i) of the QCA's draft Undertaking prohibits Aurizon Network from providing any Above Rail Services. The restraint in that clause is not limited in time or by geography. Its breadth is far too broad to be reasonable or necessary in support of the object of the Act. No justification is provided for its breadth.</p> <p>Similarly, clause 3.5(e)(iv) cannot be justified; it purports to prohibit Aurizon Network from holding "any direct or indirect interests in, operate or manage any coal mine or coal-extraction project". Again, there is no time or geographic limitation to the purported restriction and no justifications given for such a broad prohibition.</p> <p>Similarly, clause 3.5(e)(iii) would operate to prevent Aurizon Network for being in the provision of "any port services" in Queensland. The effect of the restraint of the provision of above rail services is to prevent Aurizon Network from conducting necessary operations that do not compete with any above rail operator services.</p> <p>The restrictions have no foundation under the Act and are unreasonable and beyond power.</p>
<p>Use of Shared Services Clause 3 – Ringfencing</p>	<p>Clause 3.7(f) of the QCA's draft Undertaking provides:</p> <p style="padding-left: 40px;"><i>"Aurizon Network must:</i></p> <ul style="list-style-type: none"> <li data-bbox="523 958 1506 1016">(i) At all times directly employ a self-contained regulatory affairs advisor, who would be deemed a High-Risk Person; and <li data-bbox="523 1025 1506 1120">(ii) Not assign, transfer, delegate or contract out to any Aurizon Party any regulatory function or position related to the development, application and interpretation of this Undertaking." <p>As the QCA is aware, Aurizon Network operates as a part of group of companies which utilises a shared services model to manage costs and to ensure the appropriate level of expertise is deployed to the benefit of all members of the group. No justification is offered by the QCA's Draft Decision for the imposition of clause 3.7(f). The extent of the restriction when it uses language such as "any regulatory function or position related to the development, application or interruption of this Undertaking" is impossible to discern.</p> <p>In any case, clause 3.7(f) of the QCA's drafting cannot be justified unless it can be established that all the people it is seeking to remove from any involvement with the Undertaking will have access to confidential information that cannot otherwise be protected to ensure the achievement of the object of the Act.</p> <p>There is no evidence referred to in support of the need for the QCA's extreme position.</p> <p>The QCA's drafting represents an unreasonable and unjustified interference in the proper operation of the Aurizon group of companies and is so ambiguous as to render its application unworkable.</p>
<p>Access Conditions Clause 6.13</p>	<p>As the QCA is aware, Aurizon Network had proposed in its Access Undertaking a set of provisions which would allow Commercial Terms to be agreed in certain circumstances with a User Funding Agreement as a fall back for parties that did not wish to agree to Commercial Terms. That fall back was in addition to the statutory arbitration procedure already envisaged by the Act.</p> <p>The introduction of SUFA obviates the need for oversight of access conditions by the QCA. Customers now have a regulated alternative where Aurizon Network is not prepared to fund an expansion.</p> <p>The QCA has purported to reject that approach and instead, imposed a complicated multi-step process which involves more direct engagement with the QCA in the approving or rejecting of any proposed access conditions. It is a more invasive and complex regime than the one applying under UT3.</p> <p>The process proposed by the QCA includes a provision which states that following a refusal to accept an access condition by the QCA, Aurizon Network must either "<i>proceed to negotiate ... on the basis of the access conditions which have been approved</i>" or enter into negotiations for a separate</p>

Reference	Comment
	<p>arrangement “that will be regarded as entirely outside of the scope (and not covered in any way by) this Undertaking”.</p> <p>The curious reference to negotiations for a separate arrangement that would be regarded “as entirely outside of the scope (and not covered in any way by) this Undertaking” is clearly directed to supporting clause 16.13.2(g)(ii) of the QCA’s proposed draft. That provision states:</p> <p style="padding-left: 40px;"><i>“In circumstances where Aurizon Network elects for the Non-undertaking Route, Aurizon Network agrees that this Access Undertaking authorises the QCA to make an access determination of a nature contemplated by s.119(4)(a) of the Act if the QCA wishes to do so.”</i></p> <p>Section 119(4)(a) provides:</p> <p style="padding-left: 40px;"><i>“Despite subsection 2(c) the Authority may make an access determination requiring an access provider to extend, or permit the extension of, a facility if –</i></p> <p style="padding-left: 80px;"><i>(a) The requirement is consistent with the requirement imposed under an approved access undertaking for the service that was approved by the Authority under ss.136(4) or 142(2) and the requirements under s. 4(B) are met; or</i></p> <p style="padding-left: 80px;"><i>... “</i></p> <p>Clause 6.13.2(g)(iii) constitutes an attempt by the QCA to confer upon itself a jurisdiction to require Aurizon Network to extend and pay for the extension of the facility. As Aurizon Network cannot be obliged to extend the facility at its cost unless it volunteers to do so, the attempt by the QCA to impose such a ‘voluntary’ obligation is beyond power and invalid.</p>
<p>Liquidated damages</p> <p>Clause 8(c) of the Confidentiality Agreement</p>	<p>Clause 8(c) of the QCA draft Undertaking would oblige Aurizon Network to pay the other party to a confidentiality agreement liquidated damages if the counterparty can establish that a Related Operator is in possession of the counter-party’s confidential information.</p> <p>Clause 8(c) is an unlawful penalty. It is not invoked by any proof of breach; only that a Related Party has information. The clause then reverses the onus, requiring Aurizon Network to prove that it has not breached the confidentiality obligations in order to avoid having to pay the liquidated damages.</p> <p>There can be no substance to the clause in the QCA’s drafting which describes the \$50,000 sum for liquidated damages as a genuine pre-estimate of a party’s loss. There is no counter-party at this point in time and therefore no basis upon which such an estimate could be made.</p> <p>The provision is irrational and unenforceable.</p>
<p>Regime for private infrastructure connections</p> <p>Part 9 of QCA’s redrafted Undertaking</p>	<p>Part 9 of the QCA’s redrafted Undertaking contains provisions dealing with private infrastructure that might be connected to Aurizon Network’s rail infrastructure.</p> <p>While Aurizon Network can volunteer such provisions (which it did in the 2014DAU) they cannot be imposed. The private infrastructure is not part of the declared service.</p> <p>The QCA has no power to alter what Aurizon Network had offered.</p>

2.2 Implications of the QCA’s Draft Decisions on Aurizon Network’s Maximum Allowable Revenue (MAR)

“At least” vs “no more than”

Aurizon Network believes that the QCA has misinterpreted the QCA Act, specifically in relation to the pricing principles. The principles outlined within s.168A of the QCA Act must be considered by the QCA when it decides whether to approve a draft access undertaking s.138(2)(g).

Paragraph 168A(a) states that the price of access should “generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved”. The QCA has failed to apply this test in the required legislative form.

The QCA in its Draft Decision, commenced to apply different principles to determine the appropriate maximum allowable revenue through its idea of efficient costs. The QCA further amended its principles to outline that it will use the term ‘reasonable costs in the absence of robust, evidence based benchmarks’. The QCA has applied their principle across both the operating and maintenance costs which equates to approximately 40% of Aurizon Networks allowable revenue.

Relying on s.138(2)(e) and s.138(2)(d) of the QCA Act, the QCA expressed its view that “Aurizon Network should be permitted to recover no more than efficient costs and return on investment as identified in s.168A(a)”. This is far from what the QCA Act requires

Section 168A(a) would not permit such an approach to the establishment of pricing principles. Principle (a) requires that the resulting price is “at least enough” to meet the efficient costs and will provide “a return on investment commensurate with regulatory and commercial risks involved”.

The expression “at least enough to meet the efficient costs” is starkly different from “to recover no more than its efficient costs”. This has consequently resulted in the QCA failing to demonstrate what an efficient cost for Aurizon Network is.

The application of a process designed to deliver “no more than” a particular level of costs is vastly different to one that is designed by the statute to deliver “at least” that level of costs. That process will obviously leave the access provider with material down-side risk and a lower number for its costs than the statute is designed to provide.

Ballast undercutting costs

As outlined in Aurizon Network’s response to the QCA’s MAR Draft Decision, the QCA has misinterpreted and subsequently incorrectly applied the legislation, which has a significant negative impact on the ballast undercutting allowance.

Aurizon Network submitted that its ballast undercutting costs will be \$326.64m (nominal) over the term of the 2014DAU. The QCA rejected this claim, and reduced it by one third to \$209.93m (nominal), based expressly on its misinterpretation of s.168A(a):

Sections 138(2)(g) and 168A(a) require that we have regard to certain pricing principles, including that the price for access to the declared service should generate expected revenue for the service that is at least enough to meet the efficient costs ... and include a return on investment commensurate with regulatory and commercial risks involved...

...

Conversely, ss.138(2)(e) and (d) require us to have regard to the interests of Access Seekers and the public interest...As identified earlier, consideration of all of these interests leads to a conclusion that Aurizon Network should also be permitted to recover no more than efficient costs and return on investment as identified in s.168A(a).¹¹

This highlights the QCA’s application of their ‘no more than’ test, which fundamentally distorts the entire QCA assessment of Aurizon Network’s ballast allowance. The ‘no more than’ test is not what the legislation requires nor is it a reasonable basis for determining the appropriateness of an Access Undertaking.

The QCA also made assumptions that Aurizon Network is seeking to be paid twice for the same ballast undercutting service:

...we also consider that access seekers should not be required to contribute to the cost of ballast cleaning in the 2014 DAU to the extent that costs have already been pre-recovered by Aurizon Network in previous undertaking periods for ballast cleaning that has not taken place. Aurizon Network’s proposal to again recover those costs would, in practical effect, lead to access seekers paying twice for the same service.¹²

¹¹ QCA, 2014a, Draft Decision: Aurizon Network 2014 Draft Access Undertaking – Maximum Allowable Revenue, p130

¹² QCA, 2014a, Draft Decision: Aurizon Network 2014 Draft Access Undertaking – Maximum Allowable Revenue, p130

The QCA's appointed consultants concluded that there was no conclusive evidence to suggest that significant remedial work was needed for ballast¹³. Therefore, the proposition that there should be no double payment is not relevant as the works are not required. However, the QCA Draft Decision continues to assume that Aurizon Network seeks this double payment for these works, without any evidence from Aurizon Network confirming that it is seeking this double payment.

The QCA's erroneous conclusion reveals the risks that arise from the misinterpretation of the "at least" test as really meaning 'no more than'. That is, non-payment of an amount, even if it results in Aurizon Network failing to recover costs, will by default satisfy the test of "no more than" the costs incurred and a return on investment.

From a regulatory perspective, the QCA cannot reject a claim for ballast cleaning on an assumption that double payment will occur and without identifying, on proper evidence, the "extent" of the asserted double counting.

The QCA cannot properly perform its statutory function simply on the basis of assumptions, particularly where those assumptions are challenged by the access provider.

MAR implications

Throughout the body of this response, Aurizon Network has outlined instances where the QCA's Policy and Pricing Draft Decision, if implemented as proposed by the QCA, would give rise to increased costs for Aurizon Network beyond what Aurizon Network submitted as part of its response to the Maximum Allowance Revenue on 19 December 2014. As these decisions were not known at that particular point in time, Aurizon Network could not be expected to account for these costs within the MAR response.

Aurizon Network has highlighted these specific instances in the relevant sections of this response, and summarised them in the table below. At this stage, we have not estimated specific costs as some of the decisions would be beyond the QCA's decision making powers and therefore should not be implemented.

This has been specifically included to highlight to the QCA that there may be unintended consequences of its Draft Decision that will impact Aurizon Network's ability to recover at least its efficient costs.

To the extent that the QCA remains committed to the Draft Decision on specific items, Aurizon Network would seek to quantify the cost implications as much as possible. If these elements of the Draft Decision were approved as part of the QCA's Final Decision in July 2015, Aurizon Network would seek to revisit its Maximum Allowable Revenue, specifically the Operating Cost Allowance, to ensure that these costs are accounted for in determining its efficient costs.

Table 2.2 MAR Implications of QCA's Draft Decision

Draft Decision	QCA Proposal	Aurizon Network View of MAR Implication
3.2(A)	The QCA has included the word 'Except where expressly stated on the contrary' to clause 2.5(a), and effectively broaden the scope of the Undertaking.	Additional administrative costs on Aurizon Network. For example, stakeholders can use the dispute mechanism provided in the Undertaking for non-access related issues.
3.4	The QCA requires Aurizon Network to include specific provision for dispute resolution regarding supply and sale of electricity.	Additional administrative costs on Aurizon Network, when electricity supply is voluntary, outside the scope of the Declared Service.
4.5 & 4.6	The QCA requires Aurizon Network to create a confidential information register and impose additional detailed reporting and record keeping obligations.	The implementation and maintenance of confidential information register requires substantial additional resources including both IT and personnel.
4.7	The QCA requires Aurizon Network to obtain the confidential information owner consent before disclosing the information to a subcontractor, even the subcontracted services from Aurizon Group to Aurizon Network.	The requirement may create difficulties for certain projects and increase the associated costs. It also increases the administrative and logistical burden within the group.
4.7	The QCA requires Aurizon Network to consult with Access Seekers and Holders when their	Additional administrative costs on Aurizon Network.

¹³ QCA, 2014a, Draft Decision: Aurizon Network 2014 Draft Access Undertaking – Maximum Allowable Revenue, p. 139.

Draft Decision	QCA Proposal	Aurizon Network View of MAR Implication
	information is to be passed onto another function within the Aurizon Group.	
4.7	The QCA has narrowed the exemption of confidential information disclosure. Disclosures to external legal, accounting, financial or engineering advisors or consultants need to be placed in the information register.	Additional administrative costs on Aurizon Network.
4.7	The QCA requires Aurizon Network not to engage any other function outside of Network for regulatory advice, which means Aurizon Network cannot obtain internal legal service as they are employed by Aurizon Operations.	Additional costs associated with regulatory advice (e.g., external lawyer fees).
4.9	The QCA requires confidential information training for all Aurizon Network employees, and more detailed robust training for high risk personnel.	The training includes operational staff (around 80% of Network employees) who have no access to confidential information. This imposes additional costs to facilitate training and potential issue in completing the required maintenance scopes.
Clause 3.14 (b) (i) of the DAU	This clause requires Aurizon Network to provide training for all Aurizon Group employees on an ongoing basis.	The training includes over 7,000 Aurizon Group employees, which significantly increases the training costs.
4.11	The QCA expands security measure to all Aurizon Network premises and requires accompaniment of non Aurizon Network staff at all times.	Additional security costs Additional administrative costs with the stringent requirement.
4.14	The QCA requires Aurizon Network to notify the QCA of secondments/transfers of employees and also have a separate email address for Aurizon Network employees.	Additional administrative costs and IT costs associated with a separate email system.
5.2	The QCA requires Aurizon Network to disclose the number of self-insurance events by type and value each year.	Additional administrative costs on Aurizon Network.
5.3	The QCA requires Aurizon Network to present the planned scope of maintenance for any forthcoming year to access holders.	Additional administrative costs on Aurizon Network. Substantial IT costs if reporting on renewals v maintenance is included.
5.5	The QCA requires Aurizon Network to provide monthly network performance reports within ten business days of the end of the calendar month.	Monthly report requires substantial amount of resources and upgrades to IT system. Additional administrative costs and IT costs.
5.8	The QCA include a clause for it to appoint the compliance auditor.	The audit cost may be higher than Aurizon Network planned cost.
6.1	The QCA has broadened the scope of disputes and allowed any party to raise a dispute.	This increases the risk of excessive claims and increase the administrative costs.
6.2	The QCA requires Aurizon Network to provide copies of any dispute notices and formal correspondence exchanged between parties in connection with the dispute and otherwise keep the QCA regularly informed of the progress of the resolution of the dispute, including the outcome.	This requirement is impractical, time consuming and imposes additional administrative costs on Aurizon Network.
7.1	Clause 4.5(a) allows access seekers to revise their access application at any time, rather than prior to the issuing of an IAP.	Aurizon Network needs to provide revised IAP in response, which increases administrative costs.
7.2	Clause 4.4(i)(ii) requires Aurizon Network to inform an access seeker of any changes to an expansion that will impact the access seeker's access application within 10 days.	Additional administrative costs on Aurizon Network.
7.3	Clause 4.8(a)(ii)(D) requires Aurizon Network to negotiate with multiple operators and access	Additional administrative costs associated with multiple concurrent negotiations.

Draft Decision	QCA Proposal	Aurizon Network View of MAR Implication
	seekers for the same access rights before the end user appoint a rail operator.	
9.1	Clause 9.1(d) and 9.1(f) requires Aurizon Network to notify the QCA and the Private Infrastructure Owner (PIO) relating to the connection milestones and connection criteria.	The notification represents an unwarranted intervention in Aurizon Network's day to day operation and impose additional administrative costs.
10.1	The QCA requires Aurizon Network to participate in any coal supply chain group's master plan, review capacity options and investigate operational capacity enhancing improvement.	This requires additional modelling and planning resources to operate across all the relevant supply chain groups in accessing operation enhancements, which means additional administrative costs.
10.2	The QCA can require an independent review of the capacity.	The draft decision does not explain who pays for the review, which could mean potentially higher consultancy costs for Aurizon Network.
10.4	The QCA requires Aurizon Network to consult with all access holders, end customers and supply chain groups on all capacity and operation assumptions which underpins baseline capacity review.	This level of consultation requires substantial amount of time and resources. It increases the administrative costs for Aurizon Network.
10.5	The QCA requires dynamic assessment to be performed on all options examined in the NDP.	This would significantly increase the cost of each study. Additional IT costs to facilitate this will also be incurred.
11.2	Clause 7.2.3(a)(iii) requires any party that has an interest in existing access rights to be included in the committed capacity register.	This is unnecessary as they are not allocated any capacity yet. It increases the administrative costs with committed capacity register.
12.4	The QCA requires all processes and decisions made with respect to the expansion process are subject to the dispute resolution mechanism.	The fact everything in expansion domain can go for resolution is likely to increase the costs.
12.12	The QCA includes a review process to review Standard User Funding Agreement (SUFA) framework.	Any review of SUFA will entail substantial costs, demonstrated by the current SUFA development process. Even though the SUFA Draft Decision 11.3(b) indicated that "efficiently incurred costs by Aurizon Network in seeking an ABA will be included in its operating costs", an estimate of the SUFA development costs, along with any reviews planned, will need to be added to the MAR for UT4.
12.13	The QCA requires Aurizon Network to commit to developing a suite of tax efficient financing options for small to medium expansion projects.	Exploring a new suite of options requires substantial resources and involves substantial costs.
Clause 8.8.1(b) of the DAU	This clause requires Aurizon Network to negotiate with funders (not just access seekers).	Parallel negotiation will increase the associated costs.
13.2	The QCA includes a provision to require the Strategic Train Plan (STP) to be reviewed by an independent expert and audited.	Additional consultancy and audit expense.
13.3	The QCA has requested Aurizon Network setting out of the assumptions used in development of the Master Train Plan	This will increase workload and delay delivery.
13.4	The QCA has requested additional transparency in Network Operations Pathing Planner (NOPP) and ViziRail for the Intermediate Train Plan (ITP).	This will require software enhancements for both ViziRail and NOPP and training for resources which use these systems.
13.4	The QCA is wanting supply chain groups to be able to use pathing similar to a portfolio style.	This will increase the workload in having 3rd parties determine orders and priorities.

Draft Decision	QCA Proposal	Aurizon Network View of MAR Implication
13.5	The QCA requires Aurizon Network to provide full transparency of train paths allocated to maintenance.	To facilitate the inclusion of maintenance paths, the NOPP and ViziRail software need to be upgraded. This increases the IT costs.
13.6	The QCA requires Aurizon Network to include reporting of planned services in the ITP and Daily Train Plan (DTP) in the monthly train service entitlement (TSE) notice, and also publish a monthly aggregate TSE reconciliation report by system.	Including planned services in DTP is especially resource intensive and may require changes to IT systems. Therefore, additional IT costs and administrative costs. Moreover, additional administrative costs is required for the reconciliation report.
14.8	The QCA requires Aurizon Network to remove from the Regulatory Asset Base (RAB) the full value of asset disposals unless Aurizon Network can provide annual justification for the reduction of the value.	It will increase the resources required to manage the RAB roll-forward process and will require substantial additional IT costs to enable the tracking of individual asset disposals.
14.10	The QCA extends the voting process to include scope, standard, cost and capacity.	It will increase the resources required for the voting process given the increased voting scope.
14.11	The QCA has broadened the interested parties in the voting process.	It costs more to consult more widely.
14.13	The QCA requires Aurizon Network to adopt a 'best endeavours' approach when providing information, conducting forums and engaging in discussions with interested participants in relation to a voting proposal.	'Best endeavours' means Aurizon Network needs to spend whatever is required rather whatever is reasonable in the process.
14.15	The QCA requires Aurizon Network to redo the voting process if the auditor identifies a flaw in the vote of interested participants.	Redoing the voting process even if the flaw is minor and does not affect the outcome will unduly increase the voting costs.
16.2	The QCA expands UT3 access condition provisions to require non-standard terms that have cost and risk implications to Aurizon Network to be subject to QCA approval and provide a copy of non-standard agreement within five business days of signing.	The approval and submission process increases the administrative costs with non-standard agreements.
16.5	The QCA requires Aurizon Network to calculate a separate MAR and reference tariff for each customer.	The strictly 'incremental' cost-reflective pricing arrangements, at best, would require each system to be broken up into groups displaying similar characteristics, such as geography and a reversion to 'cluster pricing'. If interpreted literally, a separate reference tariff would be required for every Origin-Destination pair. This proposal creates considerable administrative complexity when establishing and maintaining access charges for Access Seekers.

Excluding the above points relating to the unquantified Policy and Pricing positions proposed by the QCA, Aurizon Network's position on MAR remains the same as what it submitted in response to the QCA Draft Decision on that matter.

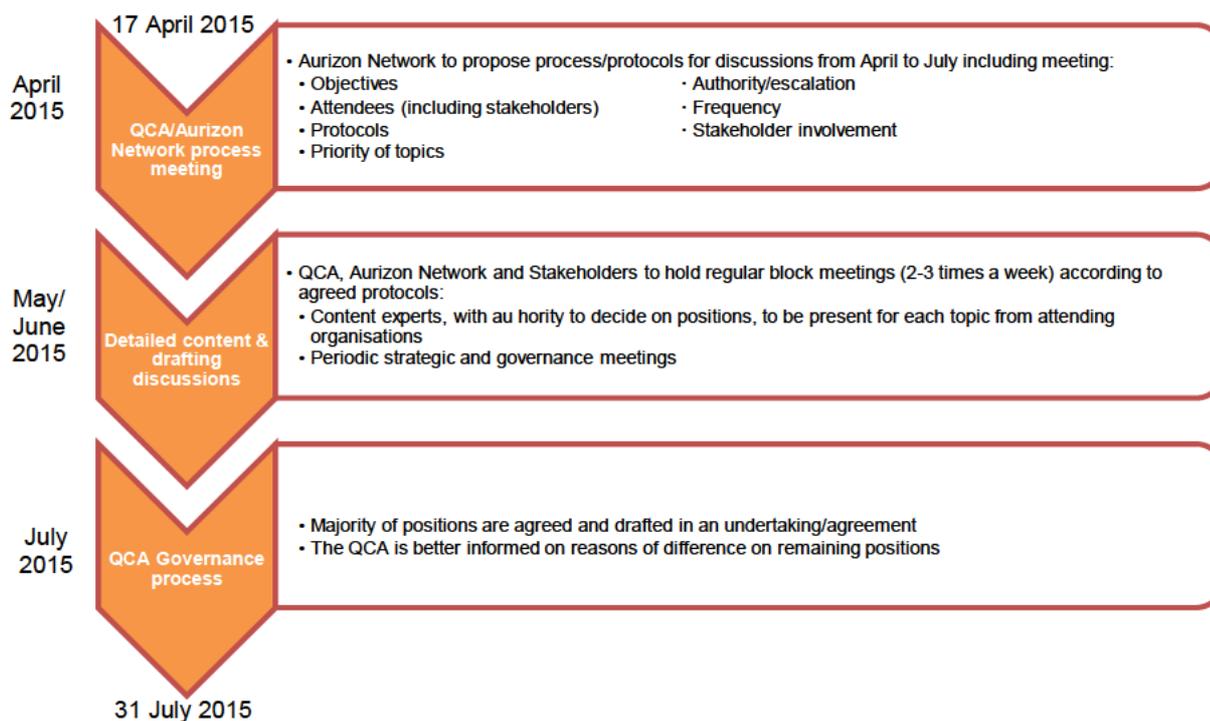
2.3 A way forward

If the QCA were to make a final decision reflecting the matters contained in both its MAR and Policy & Pricing Draft Decisions it would be fundamentally flawed and open to legal challenge. It is not Aurizon Network's objective to seek such a challenge. The objective is to arrive at a commercially acceptable and complying Access Undertaking even if it means agreeing to some positions that Aurizon Network cannot be legally compelled to accept. Against that background:

- set out in the table below is a summary of the positions Aurizon Network is proposing to adopt in response to the QCA's Draft Decisions in relation to Parts 1 to 11 of the Undertaking and a summary of its reasons; and
- set out in the detailed submissions in the balance of this document are Aurizon Network's positions on the Schedules and standard agreements proposed by the QCA.

We would be happy to meet with representatives of the QCA to work through the table to provide any clarifications you need and to see if any outstanding issues can be finalised.

Aurizon Network strongly believes that the timely completion of the approved UT4 is dependent on engaging in discussions and drafting between April and July 2015 (as indicated in the chart below), to enable substantially agreed UT4 positions upon which the QCA can make a final decision. This will enable a complying Access Undertaking (including standard agreements) to be submitted for final approval in September 2015.



It is Aurizon Network's submission that the QCA should ultimately make a final decision which reflects the positions in the table, following any clarifications and refinements agreed with the QCA through the proposed meeting process.

The table references to Parts and Schedules are references to Parts and Schedules of the DAU prepared by the QCA unless otherwise indicated.

Table 2.3 – Proposed Resolution of DAU positions

Proposed resolution of DAU positions			
Item No.	Part, Clause or Schedule	Aurizon Network's reasoning	Aurizon Network's proposed resolution
1	Part 1		Aurizon Network accepts the QCA's draft.
2	Clauses 2.2 – 2.5, inclusive – Objective, Interpretation, Non-discriminatory treatment and scope	The QCA's drafting of these clauses introduces objects that are not consistent with those in the Act, seeks to make Aurizon Network liable for the conduct of third parties and is beyond power.	Aurizon Network proposes that the final decision accept the drafting proposed by Aurizon Network in its 2014 DAU with the relevant amendments as accepted by Aurizon Network outlined in Part 3 of this submission.
3	Clause 2.6 – Ultimate Holding Company Support Deed	There is no statutory basis upon which the QCA can require any form of Ultimate Holding Company Support Deed.	Aurizon Network and its parent are willing to provide an Ultimate Holding Company Support Deed in the form proposed by Aurizon Network in its 2014 DAU. That form is designed to reinforce aspects of the ringfencing obligations proffered by Aurizon Network
4	Clause 2.7(c) – Electricity - disputes	This provision has the effect of investing the QCA with an arbitration right in respect of the supply of electricity. That is beyond the scope of the QCA's powers under the Act as the supply of electricity is not part of the declared service under section 250 of the Act. Aurizon Network does not agree to the inclusion of clause 2.7(c).	Aurizon Network proposes that the final decision should not include clause 2.7(c)
5	Clause 2.8 – Incentive Mechanism	There is no statutory basis for the QCA to compel an incentive mechanism. In any case, the vaguely described incentive mechanism set out in clause 2.8(b) relates to Aurizon Network's performance of contractual obligations and is beyond the scope of the Act.	Aurizon Network proposes the final decision should only include clause 2.8(a). Any incentive mechanism will be developed in consultation with industry and a copy will be supplied to the QCA. Aurizon Network will not be obliged to adopt any changes suggested by the QCA. If the incentive mechanism requires any changes to UT4, Aurizon Network agrees to submit a DAAU.
6	Part 3 – Ringfencing	For the reasons articulated in items 5, 6 and 7 of Table 3.1 above, the ringfencing regime proposed by the QCA is beyond power and unjustified. It is not appropriate. We note that the QCA's draft is a more extreme version of the ringfencing provisions contained in UT3. One of the reasons that Aurizon Network rejected adopting the same approach in UT4 was the ambiguous nature of the obligations in UT3 which were difficult to interpret particularly in so far as it related to undefined concepts like "business units" within Aurizon Network. Their full meaning and effect is unclear and do not provide either Aurizon Network or industry with certainty. By contrast, the ringfencing provisions proposed by Aurizon Network in its 2014 DAU seek to directly deal with what is an appropriate target for a ringfencing regime namely, access to protected	Aurizon Network proposes that the final decision accept the drafting proposed by Aurizon Network in its 2014 DAU with the relevant amendments as accepted by Aurizon Network outlined in Part 4 of this submission. Aurizon Network is also prepared to discuss any specific aspects of its Ringfencing proposals which the QCA believes do not meet the requirements of the Act.

Proposed resolution of DAU positions			
Item No.	Part, Clause or Schedule	Aurizon Network's reasoning	Aurizon Network's proposed resolution
		<p>information by persons within the Aurizon Group directly involved in the pricing of above rail services in competition with other above rail operators.</p> <p>The protected information regime proposed by Aurizon Network is designed to protect exactly what access holders, competitors in the market for above rail services and the QCA should be concerned about. It is an appropriate regime which the QCA should approve.</p>	
7	Part 4 – Negotiation Framework	<p>Aurizon Network agrees with many of the principles set out in the QCA's Draft Decision. However, the drafting prepared by the QCA in the draft Undertaking does not effectively reflect those principles. The QCA's application of the principles is confusing and introduces additional process and uncertainty for both Aurizon Network and access seekers. The drafting proposed by the QRC in its October 2014 submission to the QCA better reflects those principles.</p>	<p>Aurizon Network proposes that the final decision accept the drafting proposed by the QRC, to the extent it is supported by Aurizon Network in our submission to the QCA dated 14 October 2014</p>
8	Part 5 – Access Agreements	<p>The QCA has proposed that following the approval date of the access undertaking a further review of the Standard Access Agreements take place and that any amendments to the Standard Access Agreements must be approved by the QCA and failing approval, that the QCA should have the ability to develop its own amendments to the Standard Access Agreements.</p> <p>The QCA's proposal does not provide certainty to Aurizon Network or industry participants. Aurizon Network has submitted as part of the 2014 DAU fully developed Standard Access Agreements which have been the subject of detailed discussions within industry. There is no need for any further review and the QCA should either approve those agreements submitted or not, and if not, the basis of that rejection would need to be fully articulated and in accordance with the Act.</p> <p>The suggestion that the QCA should invest itself with the ability to draft its own version of the Standard Access Agreements "to improve their workability" is beyond power.</p>	<p>Aurizon Network proposes that the final decision will include the ability of the QCA to require a review of the SAAs every two years and an obligation to submit the reviewed agreement for approval. If following review of the submitted SAA the QCA rejects the proposed changes, the standard access agreement as previously approved will remain in place.</p> <p>Aurizon Network confirms its support for the proposed simplification of the standard access agreements so that the Access Agreement and Train Operations Deed is adopted as the only form of standard access agreement. This is subject to certain customer related provisions (as previously outlined to the QCA in Aurizon Network's submission dated 4 October 2014) being included in those documents to adequately reflect the way in which access rights will be held.</p>
9	Clause 6.1 – 6.9, inclusive – Pricing principles, differentiation and setting of access charges	<p>The changes made to Part 6 of the 2014 DAU submitted by Aurizon Network by the QCA are beyond power.</p> <p>The limitations on the price differentiation proposed by the QCA's drafting prohibit price differentiation which the Act permits. Section 100(2) of the Act, for example, permits differentiation as long as it does not operate 'in a</p>	<p>Aurizon Network proposes that the final decision accept the drafting proposed by Aurizon Network in its 2014 DAU with the relevant amendments as accepted by Aurizon Network outlined in Part 16 of this submission.</p>

Proposed resolution of DAU positions			
Item No.	Part, Clause or Schedule	Aurizon Network's reasoning	Aurizon Network's proposed resolution
		<p>way that has a material adverse effect on the ability of access seekers to compete with other access seekers'.</p> <p>The Act does not contain any absolute prohibition on discrimination, unfair or otherwise, in respect of a 'Related Competitor' as defined by the QCA's drafting, or differentiation in respect of a Third Party that has 'commercial arrangements with a Related Competitor' (whatever that means).</p> <p>The Act does not give the QCA a right to approve access charges as contemplated by clause 6.2.3 of the QCA's drafting. The QCA has no role in doing so. In fact, the Act expressly recognises the right for access providers and access seekers to negotiate access charges and other terms and conditions of access, which the Act says may be inconsistent with an undertaking – section 168.</p> <p>Pricing principles are not required by the Act to be included in an undertaking. We are prepared to maintain the principles in the access undertaking as submitted as part of the 2014 DAU. Those principles apply whether or not an expansion is required and also include specific provisions relevant to an expansion scenario.</p> <p>The principles were the subject of agreement with industry participants including the QRC.</p>	
10	Clause 6.13 – Access Conditions	For the reasons articulated in item 8 of Table 3.1, the QCA's proposed approach to access conditions is beyond power and not accepted by Aurizon Network.	Aurizon Network proposes that the final decision accept the drafting proposed by Aurizon Network in its 2014 DAU
11	Part 7 – Capacity	<p>Aurizon Network agrees to the re-inclusion of the capacity queue subject to having the flexibility to reorder the queue to best meet s.69E of the QCA Act to ensure capacity is allocated efficiently. The drafting proposed by the QRC in its October 2014 submission to the QCA better reflects those principles.</p> <p>The renewals process contained in the 2010 AU is mechanistic and inflexible and results in uncertain application for both Aurizon Network and renewing access seekers. As well as reverting to the 2010 AU, the QCA has gone further to make additional amendments to these provisions. Aurizon Network considers a number of these amendments proposed by the QCA Act go beyond the power assigned to it under the QCA Act. Aurizon Network has amended this process to ensure transparency and simplicity for all stakeholders. The QRC supported the process submitted by Aurizon Network subject to some minor drafting changes for clarification.</p>	<p>Aurizon Network proposes that the final decision should:</p> <ul style="list-style-type: none"> • accept the drafting for allocation of mutually exclusive capacity proposed by the QRC, to the extent it is supported by Aurizon Network in our submission to the QCA dated 14 October 2014. • include drafting to incorporate a queue mechanism for mutually exclusive capacity in the Access Undertaking, which can be reordered in accordance with the allocation criteria. • accept the drafting for renewals proposed by the QRC, to the extent it is supported by Aurizon Network in our submission to the QCA dated 14 October 2014. • reinstate the provisions in their proper place in an access agreement.

Proposed resolution of DAU positions			
Item No.	Part, Clause or Schedule	Aurizon Network's reasoning	Aurizon Network's proposed resolution
		<p>Aurizon Network disagrees with the removal of provisions related to transfers, relinquishments, resumptions and force majeure events being moved from the Standard Access Agreement to the Access Undertaking.</p> <p>These are purely contractual issues which manage changes to access rights which have already been granted. Making these provisions subject to the access undertaking of the day introduces an uncertainty for both Aurizon Network and access holders in regards to what provisions they sign up for when they enter an access agreement.</p> <p>Furthermore, Aurizon Network believes these changes included by the QCA to transfer the resumptions and force majeure provisions from the standard access agreement to the access undertaking are beyond the powers provided to it under the QCA Act.</p>	
12	Part 7A – Baseline Capacity	<p>Aurizon Network accepts the QCA's proposal to have oversight of the development and approval of System Rules, however believe a better way to achieve this objective is to include the content within Schedule G.</p> <p>Aurizon Network believes the exception included in clause 7A.2.1 of the QCA's drafting in regards to disputes of the Network Management Principles is unworkable and will create considerable confusion for both Aurizon Network and access holders.</p> <p>Aurizon Network currently voluntarily participates in supply chain groups. Aurizon Network intends to continue its participation in supply chain groups. Aurizon Network does not agree to a mandatory obligation to participate or to accept outcomes of a supply chain group. This is not a requirement of the QCA Act, and Aurizon Network does not volunteer to accept this position.</p> <p>Aurizon Network proposed to undertake a review of capacity on an annual basis, or where triggered by significant changes to the operation of the coal chain. The QCA has further required the completion of a baseline capacity assessment 6 months following the approval of the access undertaking. Aurizon Network considers it inefficient to have two different processes which ultimately produces the same outcome.</p> <p>Aurizon Network agreed with the QRC particular parameters around the completion of an independent expert review of Aurizon Network's capacity assessment, as an independent expert should not have an unfettered ability to influence Aurizon Network's assessment of its capacity. To do this would potentially expose Aurizon Network to being in breach of its access agreements and</p>	<p>Aurizon Network proposes that the final decision should:</p> <ul style="list-style-type: none"> remove the process for development and approval of system rules and instead incorporate the principles and processes contained in these system rules into Schedule G. reinstate its original drafting for compliance with the Network Management Principles. reinstate its original drafting for participation with supply chain groups include an obligation to complete a capacity review 6 months after the commencement of the access undertaking. The process for this review will mirror that proposed by Aurizon Network for the annual capacity review. accept the drafting for system operating parameters and the capacity assessment proposed by the QRC, to the extent it is supported by Aurizon Network in its submission to the QCA dated 14 October 2014. remove any obligation associated with a capacity performance guarantee. accept the drafting for Network Development Plan proposed by the QRC, to the extent it is supported by Aurizon Network in its submission to the QCA dated 14 October 2014.

Proposed resolution of DAU positions			
Item No.	Part, Clause or Schedule	Aurizon Network's reasoning	Aurizon Network's proposed resolution
		<p>ultimately could result in customers wearing additional costs.</p> <p>Aurizon Network does not agree to the provision of a capacity performance guarantee. It is beyond the power of the QCA to require Aurizon Network to fund expansions.</p> <p>Aurizon Network agrees it is useful for customers to have an understanding of available capacity. The mechanism under Part 4 is the best process for providing customers with an assessment of what is available for them to contract.</p> <p>System Operating Parameters are developed taking into account contractual information from access agreements. A large proportion of the information contained in the System Operating Parameters is in fact not information "owned" by Aurizon Network, but provided to Aurizon Network by Access holders in the process of negotiating and executing access agreements. Hence, the QCA should not have an ability to amend the SOPs. Aurizon Network believes the QCA is attempting to grant itself powers which are not afforded to it under the QCA Act.</p> <p>The Network Development Plan is a voluntary obligation from Aurizon Network to assist with decision making by the supply chain on the most efficient ways to expand the network in the future. Aurizon Network does not agree with the QCA making further amendments to give itself oversight of the development of this document.</p>	
13	Part 8 - Expansions	<p>QCA's drafting of Part 8 introduces elements that are beyond the power of the QCA to compel. For example:</p> <ul style="list-style-type: none"> • The proposed drafting of clause 8.2.1(i) has the effect of imposing on Aurizon Network a cost relating to an expansion contrary to the Act which expressly limits the circumstances in which Aurizon Network would incur any cost in relation to an expansion; • Clause 8.2.2(a) effectively gives the QCA a right to arbitrate a disputed decision by Aurizon Network not to fund an expansion which would give the QCA the power to order Aurizon Network to fund an expansion – contrary to the express provisions of the Act; • Clause 8.3.1(b) imposes a costs on Aurizon Network which is not permitted by the Act; • The provisions of clause 8.9.3 which require Aurizon Network to fund a shortfall expansions are beyond power. <p>The provisions of Part 8 which were included in the 2014 DAU submitted by Aurizon Network were heavily negotiated with industry and in particular,</p>	<p>Aurizon Network proposes that the final decision:</p> <ul style="list-style-type: none"> • include Part 8 as offered in Aurizon Network's 2014 DAU with the relevant amendments as accepted by Aurizon Network outlined in Part 12 of this submission subject to further discussion with the QRC. • Consider any additions that should be included to facilitate the effective implementation of SUFA. Aurizon Network would be happy to meet with the QCA to discuss such proposals. • include an obligation to review the Expansion provisions in Part 8 on receipt of a notice from the QCA. The review would be conducted in consultation with the QCA and industry following the first expansion utilising the Expansion provisions to see how they might be improved.

Proposed resolution of DAU positions			
Item No.	Part, Clause or Schedule	Aurizon Network's reasoning	Aurizon Network's proposed resolution
		<p>the Queensland Resources Council. The QRC even provided some of that drafting. The QCA has elected to delete the agreed positions with industry without proffering any reason for doing so.</p> <p>The position which Aurizon Network offered in its 2014 DAU included an obligation to fund capacity shortfalls in specific circumstances, even though it cannot be compelled to do so under the Act. It is prepared to live by that commitment.</p> <p>Aurizon Network does not accept the drafting proposed by the QCA which in large parts, is beyond power.</p>	
14	Part 9 – Connecting Private Infrastructure	For the reasons articulated in item 10 of Table 3.1, the QCA cannot compel the inclusion of provisions in the access undertaking relating to Connecting Private Infrastructure.	Aurizon Network proposes that the final decision accept the drafting proposed by Aurizon Network in its 2014 DAU with the relevant amendments as accepted by Aurizon Network outlined in Part 9 of this submission.
15	Part 10 – Reporting	<p>Subject to the matters discussed below and minor drafting issues, Aurizon Network otherwise agrees to accept the QCA's drafting changes in Part 10 of its draft undertaking.</p> <p>Aurizon Network does not agree to the QCA's proposal that it should have the right to appoint Auditors. It is not appropriate for the reasons articulated in Part 5 of this Submission.</p> <p>Aurizon Network does not agree to allow the QCA to have a right to copies of the working documents of the Auditor. This is beyond the power of the QCA and exposes Aurizon Network and its customers to release of commercially sensitive information.</p> <p>Aurizon Network does not agree to changing quarterly to monthly reporting. However, the quarterly reporting will provide monthly breakdowns.</p> <p>Aurizon Network does not agree to the automatic disclosure of non-standard access agreements within 5 business days as this obligation is beyond power.</p>	<p>Aurizon Network proposes that the final decision:</p> <ul style="list-style-type: none"> not include clause 10.3.1(b) reinstate Aurizon Network's provisions relating to appointment of an auditor reinstate quarterly reporting with appropriate amendments to provide for monthly breakdown of information
16	Part 11 – Dispute resolution	The QCA's proposed changes to the 2014 DAU are beyond power, expose Aurizon Network to loss of legal professional privilege and invest the QCA with dispute resolution powers beyond those in the Act. Aurizon Network does not agree to the proposed changes for these reasons and those more fully explained in Part 6 of this Submission.	Aurizon Network proposes that the final decision accept the drafting proposed by Aurizon Network in its 2014 DAU.

3 Intent and Scope

3.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed Intent clause of the 2014 DAU. We would approve arrangements with amendments to:</p> <ul style="list-style-type: none"> (a) refer to the 'non-discriminatory' negotiation of access agreements (b) provide that the provisions of the undertaking be applied consistently, except where the undertaking 'expressly' provides otherwise (c) include a clause similar to the non-discriminatory treatment clause that was included in the 2010 AU, with some amendments for clarity and to ensure it is fit-for-purpose for the 2014 DAU regulatory framework (d) provide that the general principles of non-discrimination and independence include that Aurizon Network will not unfairly discriminate in favour of: <ul style="list-style-type: none"> ports or coal mines in central Queensland in which the Aurizon Group holds an interest; or third-parties which have commercial agreements with related party above-rail operators (e) move the general principles of non-discrimination and independence from Part 3 to Part 2 (f) include a heading for clause 2.2 of 'Objective' and include the words 'The objective of this Undertaking is, without limitation, to' at the beginning of the clause (g) include a new 'Interpretation' clause (as clause 2.3). 	3.1	<ul style="list-style-type: none"> (a) Disagree (b) Agree (c) Disagree (d) Disagree (e) Agree (f) Agree (g) Agree, subject to appropriate redrafting.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed Scope clause of the 2014 DAU. We would approve arrangements with amendments to:</p> <ul style="list-style-type: none"> (a) include the words 'Except where expressly stated to the contrary' at the beginning of clauses 2.3(a) and 2.3(f) (now cls.2.5(a) and 2.5(f) in our marked up drafting) (b) provide for clause 2.3(e) (cl.2.5(e) in the marked up drafting) to read: 'Nothing in this Undertaking affects the rights of Aurizon Network or other parties under the Act'. 	3.2	<ul style="list-style-type: none"> (a) Disagree (b) Agree
<p>Our Draft Decision is to approve Aurizon Network's 2014 DAU proposal, as it relates to supply and sale of electricity.</p>	3.3	Agree
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal, as it relates to electricity dispute resolution. We would approve amendments to include specific provision for dispute resolution regarding supply and sale of electricity, as set out in the marked changes to Part 2 of this Draft Decision.</p>	3.4	Disagree
<p>Our Draft Decision is to approve Aurizon Network's proposal to not include a definition of, or obligations related to, Associated Services in the 2014 DAU.</p>	3.5	Agree
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal, as it relates to the incentive mechanism. We would approve arrangements with amendments to include</p>	3.6	Agree

a process providing for the development of a draft incentive mechanism.		
Our Draft Decision is to refuse to approve Aurizon Network's proposed clauses 2.2(b)(i) and 2.3(b)(ii) of the 2014 DAU. We would approve arrangements with amendments to include: (a) the word 'flexible' in the list of descriptors of the processes for access negotiations and utilisation of capacity (cl.2.2(b)(i)) (b) a requirement for Aurizon Network to notify access holders in writing if it is not the owner, or does not have a legal right to authorise access to, land to which the access holder is seeking access (this is cl. 2.5(c) in our marked-up drafting) (c) movement of the requirements relating to the Ultimate Holding Company Support Deed from Part 3 to Part 2 (as cl.2.6 in our marked-up drafting).	3.7	(a) Agree (b) Agree (c) Agree – subject to our comments on the contents of the UHCD.

3.2 Summary of Aurizon Network's Position

The object of the *QCA Act* is not to achieve equality between competitors, it is to ensure there is no 'unfair differentiation' between them. Aurizon Network considers the QCA's proposed insertion of the broad principle of "non-discrimination" is, again, not reflective of the *QCA Act*.

However, if the QCA still considers it would be desirable to include a "clear statement regarding non-discriminatory treatment", Aurizon Network would be happy to work with the QCA to develop a clause which clearly states an objective of preventing unfair differentiation in terms which are consistent with section 137(1A) of the *QCA Act*

Aurizon Network submits that rather than seeking to set out each way in which Aurizon Network could discriminate, it would be more efficient and appropriate to include a single formulation, which captures the essence of the requirement in section 137(1A)(the prohibition on unfair differentiation), and which includes appropriate qualifications to ensure it remains clear that (consistent with the terms of section 137(1A)) the restriction on discrimination is:

- limited to unfair differentiation that has a material impact on competition between users or access seekers
- drafted to expressly prohibit differentiation where different treatment is reasonably justified because of different circumstances applicable to the relevant access provider, access seeker or users.

In principle, Aurizon Network has no issue with including as an objective of the Undertaking ensuring that Aurizon Network does not prevent or hinder access of Access Seekers or Access Holders. However, it is not appropriate that the clause included in the Undertaking extends to ensuring that Aurizon Network procure conduct of its Related Operator.

The supply of electricity is not part of the Declared Service and therefore Aurizon Network is under no obligation to offer to supply electricity as part of its Undertaking. It follows logically that, although Aurizon Network has made a voluntary commitment to supply electricity, it need not make any commitment with respect to dispute resolution and it has therefore chosen not to do so.

Coal industry stakeholders did not support the Draft Incentive Mechanism submitted to the QCA in May 2012. Aurizon Network concedes it will be difficult to reach agreement with stakeholders on an alternative incentive mechanism which meets the clause 2.8(b) criteria and which:

- creates a positive, meaningful incentive to improve system performance;
- is sufficiently timely to incentivise management behaviour; and
- addresses the issues regarding alignment with TSEs and equalisation between 3rd party operators and Related Operators.

Nevertheless, Aurizon Network is willing to explore with coal industry stakeholders alternative mechanisms which could be acceptable to all parties. Aurizon Network therefore accepts the QCA's proposal which facilitates approval of the mechanism provided it is agreed between Aurizon Network and those stakeholders.

3.3 Insertion of the word non-discriminatory in clause 2.2(a) (Draft Decision 3.1(a))

The QCA has inserted the word "non-discriminatory" into the following clause:

"The intent of this Undertaking is to:

- (a) Facilitate the non-discriminatory negotiation of access agreements by Aurizon Network and Access Seekers"*

Aurizon Network agrees that, consistent with section 137(1A) of the QCA Act, it is important that the Undertaking contain provisions to ensure that Aurizon Network does not unfairly differentiate between access seekers or users in a way that materially affects their ability to compete with each other.

Aurizon Network considers that the QCA's proposed amendment is inappropriate to achieve that objective, however, as the term "non-discriminatory" is too broad, unless appropriately qualified. That is because it could capture differences in treatment of two access seekers which are:

- not unfair (e.g. required for legitimate operational reasons);
- objectively justified, for example, as a result of different circumstances of each operator (e.g. different proposed operating plans, different impacts on the network or its capacity); or
- insufficiently material to have any impact on competition between access seekers or users.

It is for this reason, that the relevant parts of the QCA Act which deal with differentiation between access seekers and users:

- restrict only unfair differentiation that has a material impact on competition (see section 100(2) and section 137(1A), and
- expressly permits differentiation which is reasonably justified due to the different circumstances applicable to the relevant access seeker (see, for example section 100(2) and (3))

That approach within the QCA Act reflects the fact that differentiation in appropriate circumstances promotes:

- flexibility for the benefit of access seekers and holders; and
- economically efficient operation and use of the declared service consistent with section 69E of the QCA Act.

Aurizon Network considers that clauses 2.2(e) and (f) already deal adequately with this issue. Specifically:

- Clause 2.2(e) specifically provides that an objective of the Undertaking is to ensure that Aurizon Network complies with its obligations under section 100(2) to (4) of the QCA Act.
 - Section 100(2) provides that Aurizon Network must not in negotiating access agreements or amendments to access agreements, unfairly differentiate between access seekers in a way which has a material adverse effect on the ability of 1 or more access seekers to compete with other access seekers.
 - Section 100(3) provides that section 100(2) does not prevent an access provider treating access seekers differently to the extent the different treatment is reasonably justified because of the different circumstances applicable to the access provider or any of the access seekers.
 - Section 100(4) states that section 100(3) does not authorise an access provider to engage in conduct for the purpose of preventing or hindering a user's access or proposing a price inconsistent with the pricing principles.

- Clause 2(f) provides that an objective of the Undertaking is to ensure that Aurizon Network applies the provisions of the Undertaking consistently. Note: Aurizon Network does not have any objection to the QCA's proposed inclusion of the word "expressly" in this clause.

For these reasons, Aurizon Network considers the QCA's proposed insertion of the word "non-discriminatory", is not acceptable. The object of the Act is not to achieve equality between competitors, it is to ensure there is no unfair differentiation between them.

However, if the QCA still considers it would be desirable to include a "clear statement regarding non-discriminatory treatment", Aurizon Network would be happy to work with the QCA to develop a clause which clearly states an objective of preventing unfair differentiation in terms which is consistent with section 137(1A) of the QCA Act, and which includes appropriate qualifications as discussed above,

3.4 Procuring conduct of Related Parties (Inclusion of clause 2.2(g)(i))

Aurizon Network is already bound by section 104 and section 125 not to engage in conduct which prevents or hinders a user's access under an access agreement or access determination. In principle, Aurizon Network has no issue with including as an objective of the Undertaking ensuring that Aurizon Network does not prevent or hinder access of access seekers or access holders. However, it is not appropriate that the clause included in the Undertaking extends to ensuring that Aurizon Network procure conduct of its Related Operator.

The QCA Act does not require a service provider to control the actions of another person, even where that party is a related company. There is no provision of the QCA Act which makes an access provider vicariously liable for the conduct of a third party, even if that party is a related company. In the event that a related party counsels or procures a contravention, or is itself responsible for a contravention, the QCA Act allows the QCA or affected party to seek remedy directly from the related party. It follows that the Undertaking should not seek to impose such obligations or liability on an access provider in respect of the conduct of its related entities.

Under Australian law, Aurizon Network, which is a subsidiary company, has no power to procure that its parent or related companies behave in a particular way. Indeed, even a holding company has limited power to control the conduct of its subsidiaries¹⁴As a result it is inappropriate for the Undertaking to include an objective which Aurizon Network cannot meet.

For clarity, Aurizon Network would agree to inclusion of clause 2.2(g)(i) so long as the reference to procuring conduct of its Related Parties is deleted.

3.5 Non-discriminatory Treatment clause (Draft decision 3.1(c))

It is assumed this item relates to clause 2.4 of the QCA's redrafted Undertaking that amends a similar clause that existed in 2010AU. Although Aurizon Network agrees that its Undertaking should include provisions which prevent, identify and remedy unfair differentiation between access seekers and access holders in accordance with the provisions of section 137(1A) of the QCA Act, Aurizon Network has the following objections to clause 2.4 as included in the QCA's redrafted Undertaking:

- For the reasons explained in section 3.2 above, the restriction on unfair differentiation should be:
 - limited to unfair differentiation that has a material impact on competition between users or access seekers; and

¹⁴ See *re Quintex Australia Ltd v ANZ Executors and Trustees* (1991) 2 QdR 360 at 374 per Mcpherson J.

- drafted to expressly exclude differentiation to the extent different treatment is reasonably justified because of different circumstances applicable to the relevant access provider, access seeker or user
- It is not clear why clause 2.4(c) is required in addition to clause 2.4(b), as the harm 2.4(c) seeks to address (unfair differentiation in favour of a related operator) is already dealt with in 2.4(b). Aurizon Network suggests the clause is deleted.
- Clause 2.4(c)(ii) is unnecessary as the issue (provision of a declared service of a superior quality or nature to a related operator) is already dealt with in both 2.4(c)(i) and 2.4(b). Aurizon Network suggests the clause is deleted.

Aurizon Network would be happy to work with the QCA to develop a clause which addresses these concerns, and which is consistent with section 137(1A) of the Act.

3.6 Ports or coal mines in which Aurizon Group holds an interest (Draft decision 3.1(d) relating to clause 2.2(g)(ii))

In broad terms, Aurizon Network is prepared to volunteer a commitment that it will not unfairly differentiate in a way that materially impacts competition in respect of access related matters in favour of ports or mines in the CQCR in which it holds an interest.

However, Aurizon Network considers that the drafting adopted by the QCA in its redrafted Undertaking may be inadvertently broader than necessary to achieve this objective. Specifically:

- the definition of Related Competitor which we assume is intended to capture ports or mines connected to, or proposed to be connected to the CQCR is too broad as it extends to any ports or coal mines in Queensland.
- It could therefore capture a port or mine which is not connected, or proposed to be connected, to the declared service.
- This is beyond the legitimate scope of the Undertaking.

A more appropriate definition of Related Competitor, to which Aurizon Network would agree, would relate to ports or coal mines connected to, or proposed to be connected to, the CQCR. Moreover, the restriction on unfair differentiation should be subject to the same qualifications discussed at section 3.1.3 above, namely:

- the restriction on unfair differentiation should be:
 - limited to unfair differentiation that has a material impact on competition between users or access seekers; and
 - drafted to expressly exclude differentiation to the extent different treatment is reasonably justified because of different circumstances applicable to the relevant access provider, access seeker or user

Aurizon Network would be happy to work with the QCA to develop a clause which addresses these concerns.

3.7 Location of general principles of non-discrimination and independence (Draft Decision 3.1(e))

Aurizon Network agrees with Draft Decision 3.1(e).

We have stated a number of concerns with the content of these provisions throughout this submission. However, assuming those concerns are addressed, we have no issue with including the relevant provisions in Part 2 instead of Part 3 of the Undertaking.

3.8 Other amendments to “Objective” Clause 2.2 (h)

This clause contains multiple, slightly different formulations of a similar concept – namely that Aurizon Network should not discriminate between access seekers and access holders. The clauses variously state as an objective of the Undertaking “arms length dealing”, “equal treatment”, “provision of a consistent level of service” and “provision of equal opportunity to obtain Access Rights”.

We submit that rather than seeking to set out each way in which Aurizon Network could discriminate, it would be more efficient and appropriate to include a single formulation, which captures the essence of the requirement in section 137(1A) (i.e. a prohibition on unfair differentiation), and which includes appropriate qualifications to ensure it remains clear that (consistent with the terms of section 137(1A)) the restriction on discrimination is:

- limited to unfair differentiation that has a material impact on competition between users or access seekers
- drafted to expressly exclude differentiation to the extent different treatment is reasonably justified because of different circumstances applicable to the relevant access provider, access seeker or users

Whether a single reference to “unfair differentiation” is adopted, or multiple examples of unfair differentiations are provided, it is important that such qualifications are included. Failure to do so is inconsistent with section 137(1A) of the QCA Act, and may have significant unintended consequences, such as inflexibility in Aurizon Network’s dealings with access seekers and access holders (e.g. according the same treatment to access holder even though their individual circumstances would objectively justify different treatment) which would not be:

- in the best interests of users of the declared service, nor
- consistent with the object of Part 5 of the Act: efficient use of, operation of and investment in the relevant infrastructure promoting effective competition in upstream and downstream markets.

As stated above, we recognise that inclusion of provisions consistent with section 137(1A) is an important aspect of Aurizon Network’s access undertaking, and we are happy to include provisions within the Undertaking which are consistent with it. However, Aurizon Network does not consider it is necessary or appropriate to make additional commitments of the type set out in the QCA’s redrafted Undertaking.

Clause 2.2(i) – a substantial lessening of competition

This clause states that an objective of the undertaking is to ensure that Aurizon Network does not engage in any conduct (or agree to engage in any conduct) “*which has the purpose of, results in or creates, or is likely to result in or create... a substantial lessening of competition or a situation which is otherwise anticompetitive*” is an appropriate objective for the Undertaking.

The QCA Act does not regulate anticompetitive conduct generally. That task is left to the Competition and Consumer Act 2010 (Cth) which is administered by the Australian Competition and Consumer Commission. The QCA Act is purposefully more limited in its aims and its provisions. Its operation is limited, relevantly to “promoting effective competition in upstream and downstream markets” through the “efficient operation of, use of and investment in significant infrastructure” (s69E) and preventing unfair differentiation between access seekers and holders that adversely impacts competition between them. It does not seek to regulate anticompetitive conduct generally, nor should the Undertaking. Aurizon Network submits this clause should be deleted

3.9 : New “interpretation” clause (as clause 2.3 - Draft Decision 3.1(g))

In principle we have no issues with a clause that states that the Undertaking should be interpreted in a manner that achieves the objectives set out in clause 2.2 (subject to the issues we raise in respect of that clause in this submission being addressed) and section 69E of the QCA Act.

However, we believe that drafting improvements should be made to the clause included in the QCA's proposed redrafted undertaking to ensure that the clause is clear and does not add uncertainty to the application or operation of the Undertaking

In particular, we consider that it should be made plain that the interpretation clause is not intended to displace the plain meaning of the Undertaking, and will only apply where there is ambiguity or uncertainty as to its meaning –i.e. it is only when on a plain reading of the Undertaking there are two or more possible interpretations that the clause will operate to inform the interpretation of the Undertaking. To hold otherwise would supplant the words of the Undertaking. That principle is consistent with the general rules of statutory interpretation in Australia and the operation of section 15 AA the Acts Interpretation Act 1901 (Cth).¹⁵

We are happy to discuss with the QCA modifications to the clause that would achieve this objective.

3.10 Modifications to Scope (Draft Decision 3.2(a) and (b) relating to clause 2.5)

Clause 2.5(a)

Aurizon Network's Access Undertaking relates to the provision of access to the declared service. The QCA has no power to require that the Undertaking extend to matters beyond the declared service. Therefore Aurizon Network disagrees with the QCA's proposal to include the following underlined words in clause 2.5 (a):

“Except where expressly stated to the contrary, this Undertaking provides only for the negotiation and provision of Access and is not applicable to the negotiation or provision of services other than Access”

Should Aurizon Network choose to volunteer to accept provisions unrelated to provision of the declared service, there should be specific reference to those clauses rather than relying on a catchall statement such as “except where expressly stated to the contrary”.]

Clause 2.5(c)

Aurizon Network agrees with clause 2.5(c).

Clause 2.5(e)

This clause has been amended to refer to a standard access agreement instead of the Access Agreement and Train Operations Agreement (as previously defined). As standard access agreements are always the subject of negotiation between the parties, this drafting means the access agreements between Aurizon Network and access holders that are negotiated will not be caught by this clause and therefore the Undertaking could require Aurizon Network to vary the relevant access agreement or act in a way inconsistent with the access agreement. We assume this was not intended, and consider that the wording should be revised to address this concern.¹⁶

Clause 2.5(g)

There has been a further amendment to this clause 2.5 to insert a new clause 2.5(g) so that it reads “Nothing in this Undertaking affects the rights of Aurizon Network or other parties under the Act”. Aurizon Network accepts this amendment.

¹⁵ See for example, Pearce and Geddes, *Statutory Interpretation in Australia* (7th edition) LexisNexis Butterworths, Australian 2011 at pages 35 to 36, and the cases cited therein.

¹⁶ Aurizon Network raised this issue in its request for information to the QCA. In its response to that request dated 23 March 2015 the QCA has noted the concerns and indicated it will consider this drafting further in its Final Decision.

3.11 : Refusal to approve Aurizon Networks' electricity dispute resolution (Draft Decision 3.4)

As acknowledged by the QCA the supply of electricity is not part of the declared service and therefore Aurizon Network is under no obligation to offer to supply electricity as part of its Undertaking. It follows logically that, although we have made a voluntary commitment to supply electricity, we need not make any commitment with respect to dispute resolution and we have therefore chosen not to do so. Please refer to Part 6 which deals with dispute resolution for further discussion on this point.

3.12 Incentive Mechanism (Draft Decision 3.6)

3.12.1 Introduction

Draft Decision 3.6 is to refuse to accept Aurizon Network's proposal to remove 2010AU provisions regarding an incentive mechanism.

The QCA has proposed new drafting which sets out requirements for an incentive mechanism which Aurizon Network may submit to the QCA for approval. These requirements are equivalent to, but not the same as, the requirements set out in clause 2.6 of the 2010AU. Related amendments have also been made to Schedule F to delete clauses relating to the payment of an Increment (Draft Decision 17.8).

Aurizon Network accepts the Draft Decision, including the proposed clause 2.8, Schedule F of the 2014DAU mark-up and the related amendments in Schedule F relating to the Increment.

3.12.2 Discussion

Clause 2.6 of the 2010AU required Aurizon Network to consult with coal industry stakeholders on a Draft Incentive Mechanism (DIM) and submit it to the QCA for approval.

In May 2012, Aurizon Network submitted a DAAU which gave effect to the DIM via the revenue cap arrangements in Schedule F. The DIM comprised:

- three service standard metrics (Asset Availability, Asset Reliability and Asset Performance) for Blackwater and Goonyella;
- an operational and throughput performance incentive; and
- a supply chain coordination and efficiency incentive.

The DIM met the requirements of clause 2.6 in that:

- it would have operated in a manner such that the objective was reasonably related to contracted Train Service Entitlements (TSEs);
- it would have operated in a symmetrical manner; and
- it would not have had the effect of reducing or increasing any System Allowable Revenue by more than 5%.

Aurizon Network concedes that whilst the DIM met the 2010AU requirements, it did not meet the expectations of coal industry stakeholders. To date, the QCA has neither approved nor rejected Aurizon Network's proposed DAAU to establish the DIM, nor has it proposed an alternative incentive mechanism.

Aurizon Network is willing to re-engage with coal industry stakeholders to explore options for an alternative mechanism.

For the mechanism to be efficient, Aurizon Network, coal industry stakeholders and the QCA will need to agree that it meets the criteria in clause 2.8 of the QCA's redrafted Undertaking. The key hurdles in agreeing an efficient incentive mechanism will be a) agreeing metrics which are aligned with TSEs and which Aurizon Network is able to

directly influence and b) addressing the imbalance created by Aurizon Network's membership of the Aurizon Group.

These issues were raised by stakeholders in their responses to the QCA's consultation on the DIM. A discussion of each issue is presented below.

Alignment with TSEs

As indicated above, the DIM proposed three service quality incentives linked to metrics under the direct control of Aurizon Network. These were able to operate in a symmetrical manner, in that opportunities for over-performance were broadly the same as for under-performance. The incentives were limited to 1% of System Allowable Revenues in the Goonyella and Blackwater systems.

Various stakeholders raised concerns that the metrics were not reasonably related to the delivery of TSEs. Aurizon Network acknowledges that a measure aligned with TSE delivery could form the basis of an incentive mechanism. For such an incentive to be acceptable, however, the following issues would need to be overcome:

- that TSE delivery is influenced primarily by parties other than Aurizon Network (i.e. port, mine and above rail operations); and
- that TSE delivery is asymmetric in distribution (actual delivery is skewed to the downside i.e. less than 100% delivery).

Aurizon Network believes that it is possible to agree an efficient incentive mechanism which corrects for these issues. For example:

- an independent review could be completed on a periodic basis to attribute TSE losses between Aurizon Network and other parties (or confirm an attribution by Aurizon Network);
- differential incentive rates could be provided to 'normalise' the asymmetry (such that payments for good performance are higher than deductions for poor performance);
- a target TSE delivery of less than 100% in a nominated period could be agreed; and/or
- Aurizon Network could be compensated (through an operating cost allowance) for an agreed level of asymmetry.

Whilst Aurizon Network does not believe that the issues can be overcome to the express satisfaction of all parties, it is willing to discuss with stakeholders whether a compromise can be reached.

Imbalance of Incentives

Asciano also expressed concern about a perceived imbalance of incentives between related members of the Aurizon Group and 3rd party operators. Aurizon Network and Asciano have not been able to agree on alternative contractual arrangements (as provided for in the Standard Access Agreement) to address this imbalance.

Aurizon Network agrees with Asciano as to the nature of the imbalance, however disagrees as to whether this imbalance should – or could – be corrected. Currently, Aurizon Operations holds the greater market share (and in some cases absolute market share) in the Goonyella, Blackwater, Moura and Newlands/GAPE systems. Good or poor performance in the CQCR therefore impacts primarily on Aurizon Operations coal and freight operations (and its end customers) but also proportionately on 3rd party coal operators (and their end customers) and passenger operators (i.e. QR Passenger).

With a broad mix of access contracts it is currently difficult for Aurizon Network to perform – deliberately or otherwise - in such a way that would favour a Related Operator over a 3rd party operator.

Aurizon Network recognises however that if the broad mix of contracts narrows (for example, a 3rd party operator becomes the dominant or sole operator in a system) then there may be incentives for Aurizon Network to favour one train operator (not just the Related Operator) over another. Aurizon Network believes that if this arises, the matter is better addressed through the existing provisions in the Access Undertaking relating to discriminatory conduct and asset condition, rather than through an incentive mechanism in the 2014AU or in access contracts.

Aurizon Network is also willing to re-commence discussions with 3rd party operators on whether an incentive mechanism – in either the Access Agreement or Access Undertaking - can be developed which addresses this concern.

3.12.3 Way Forward

For the 2014DAU, Aurizon Network proposed to exclude from Schedule F the three service standard metrics, but to include in Schedule F the operational and throughput performance incentive and the supply chain coordination and efficiency incentive (to be allowed as an Increment).

The Draft Decision rejects these proposals. The QCA has also proposed a new clause 2.8 setting out requirements for an incentive mechanism which Aurizon Network may submit to the QCA for approval.

Clause 2.8 of the QCA's redrafted Undertaking states that:

“Following the Approval Date, Aurizon Network may develop an incentive mechanism to provide Aurizon Network with an incentive to:

- (i) operate, and invest in, the Rail Infrastructure efficiently; and*
- (ii) do so in a way that promotes efficiency of the Supply Chains, and, once developed, may submit to the QCA draft amendments to this Undertaking to establish the incentive mechanism.”*

Aurizon Network acknowledges that the criteria set out in clause 2.8(b) are broadly equivalent to the requirements of clause 2.6 of the 2010AU.

In addition, related amendments have also been made to Schedule F to delete clauses relating to the payment of an Increment (Draft Decision 17.8).

Coal industry stakeholders did not support the DIM submitted to the QCA in May 2012. Aurizon Network concedes it will be difficult to reach agreement with stakeholders on an alternative incentive mechanism which meets the clause 2.8(b) criteria and which:

- creates a positive, meaningful incentive to improve system performance;
- is sufficiently timely to incentivise management behaviour; and
- addresses the issues above regarding alignment with TSEs and equalisation between 3rd party operators and Related Operators.

Nevertheless, Aurizon Network is willing to explore with coal industry stakeholders alternative mechanisms which could be acceptable to all parties. Aurizon Network therefore accepts the QCA's proposed clause 2.8 which facilitates approval of the mechanism provided it is agreed between Aurizon Network and those stakeholders. Aurizon Network also accepts removal of related provisions regarding the Increment (clauses 4.4 and 4.6 of Schedule F, Draft Decision 17.7).

In March 2015, Aurizon Network formally requested to withdraw its DIM. Aurizon Network will consider an alternative under UT4.

3.13 Location of the UHCD (Draft Decision 3.7)

We have substantial objections to the QCA's proposed changes to the UHCD, which are set out in detail in the Ring Fencing chapter below. These objections extend to the specific provisions of clause 2.6. However, subject to those issues, we do not perceive an issue with provisions relating to the UHCD moving from Part 3 of the Undertaking to Part 2.

4 Ring Fencing

4.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's rationale for its 2014 DAU ring fencing arrangements. We would approve amendments that:</p> <p>(a) adopt the ring fencing provisions in the 2010 as the baseline from which to assess the extent of subsequent change.</p>	4.1	Disagree. Each Undertaking position is specific to the requirements (legislative, business, market cycle) at the time of development. It should not be considered as a build upon the previous version.
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU provisions regarding its commitment to avoid anti-competitive and discriminatory behaviour. We would approve amendments that:</p> <p>(a) include an overarching principle-based set of statements (similar, but updated, to that in clause 2.2(a) of the 2010 AU) reinstated in Part 2</p> <p>(b) replace clause 3.2 of the 2014 DAU with a strengthened version of clause 3.2 from the 2010 AU, widening its coverage to issues surrounding port and mine ownership and clarifying the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing (and moved to Part 2).</p>	4.2	A – Disagree B – Disagree
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU provisions regarding the ultimate holding company support deed. We would approve arrangements that:</p> <p>(a) provide that, at all times, the ultimate holding company deed is in full force and effect in the form set out in schedule D our marked up DAU</p> <p>(b) move clause 3.2 to part 2 and amend it to mirror the requirements of the ultimate holding company support deed and outline the implications if the ultimate holding company support deed is not in full force and effect.</p>	4.3	A –Disagree The UHCD is a voluntary commitment from Aurizon Network and not a legislative requirement that requires a regulatory decision upon it. B- Disagree with Amendments The UHCD is a voluntary commitment from Aurizon Network and not a legislative requirement that requires a regulatory decision upon it
<p>Our Draft Decision is to refuse to approve the definition of protected information. We would approve amendments to:</p> <p>(a) replace the definition of protected information with a modified version of the definition of confidential information used in the 2010 AU</p> <p>(b) replace, in all instances 'protected information' with 'confidential information'.</p>	4.4	A- Disagree with amendments Definition of Confidential information is too broad and not specific to access of the CQCR B – Agree with amendments to definition of Confidential Information
<p>Our Draft Decision is to refuse to approve Aurizon Network's disclosure process and provisions regarding the protected information register. We would approve amendments to:</p> <p>(a) replace the protected information register with the confidential information register</p> <p>(b) include in the confidential information register entries as set out in clause 3.13 of the marked 2014 DAU</p>	4.5	A – Disagree Confidential Information is a general term that can be confused with other forms of confidential information that is not applicable to access. B- Disagree – Overly prescriptive and contents should not be a regulated process. C- Disagree

Draft Decision	Reference	Aurizon Network Position
<p>(c) require a record of all confidentiality agreements to be maintained as part of the confidential information register.</p>		
<p>Our Draft Decision is to refuse to approve Aurizon Network's protected information register in the 2014 DAU as a credible source of information. We would approve arrangements with amendments to include provisions:</p> <ul style="list-style-type: none"> (a) for Aurizon Network, following consultation with access holders and train operators, to develop a proposed structure and definition set for inputs into the confidential information register. This must be submitted to the QCA for approval within the first 4 months of the operation of this Undertaking (b) for the confidential information register to be submitted to the QCA, every 12 months or upon request, for review (c) that allow the QCA to undertake spot audits at its discretion, to ensure the processes and procedures underpinning the information collection are fit-for-purpose, being adhered to and used in a consistent manner. 	4.6	<p>A - Disagree with amendments</p> <p>Stakeholders can provide input via consultation on the development of the Protected Information register, however this should not be binding upon Aurizon Network.</p> <p>QCA should not approve the register due to the implications when associated with their other Draft Decisions</p> <p>B- Agree with amendments</p> <p>This should be submitted as part of the audit process</p> <p>C - Agree</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's exemptions process, confidentiality and consent provisions in the 2014 DAU. We would approve arrangements with amendments to:</p> <ul style="list-style-type: none"> (a) replace the obligations and processes for disclosure of confidential information in accordance with our marked drafting (b) allow any relevant party, at any time during negotiations for access, to require Aurizon Network to enter into the standard form confidentiality agreement (schedule 1) (c) replace the standard form confidentiality agreement in accordance with our marked drafting. 	4.7	<p>A – Disagree with Amendments</p> <p>B – Agree with amendments</p> <p>C – Disagree with amendments</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's omission of decision making principles in the 2014 DAU. We would approve arrangements with amendments to:</p> <ul style="list-style-type: none"> (a) re-instate the decision making principles included in the 2010 AU. 	4.8	A - Agree with Amendments
<p>Our Draft Decision is to refuse to approve Aurizon Network's training and exit certificate provisions in the 2014 DAU. We would approve arrangements with amendments to:</p> <ul style="list-style-type: none"> (a) require confidential information training for all Aurizon Network personnel, as well as employees of the Aurizon Group receiving or having access to confidential information (b) require Aurizon Network to adopt a 'best endeavours' approach to obtaining exit certificates for Aurizon Network personnel that have had access to confidential information (c) include provisions that: <ul style="list-style-type: none"> a. require the development of a high-risk personnel register that can be used to target training requirements 	4.9	<p>A – Agree with amendments</p> <p>Exclusion of the broader Aurizon Group personnel who have no likely exposure to Protected information or even Aurizon Network.</p> <p>B – Agree with amendments</p> <p>C – Agree with amendments</p>

Draft Decision	Reference	Aurizon Network Position
<ul style="list-style-type: none"> b. provide for a copy of the high-risk personnel register to be given to the QCA, upon request, and to allow for the QCA to audit its development and update over time. 		
<p>Our Draft Decision is to refuse to approve Aurizon Network's commitments to information security in the 2014 DAU. We would approve amendments that:</p> <ul style="list-style-type: none"> (a) require Aurizon Network not to disclose confidential information for the purpose of a related operator or associated port/rail and mine/rail entities obtaining an unfair commercial advantage. 	4.10	Agree in consideration to response 4.2
<p>Our Draft Decision is to refuse to approve Aurizon Network's commitments regarding the security of premises in 2014 DAU. We would approve amendments that require:</p> <ul style="list-style-type: none"> (a) security measures to apply to: <ul style="list-style-type: none"> (i) all persons other than directors/employees of Aurizon Network (ii) all Aurizon Network premises (b) any person visiting an Aurizon Network premises to be accompanied by an Aurizon Network employee (c) a record to be maintained of all persons who have accessed an Aurizon Network premises, with the exception of Aurizon Network directors/employees (d) an employee of Aurizon Network on secondment with another Aurizon Group company to be considered as staff of that other company and be subject to the security measures for non-Aurizon Network employees. 	4.11	A - Disagree with amendments B – Disagree Overly restrictive, ability to implement and ability to confirm compliance C – Agree with amendments to what is included within the definition of premises and their relation to Ringfenced Information. D - Agree
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposals allowing for Aurizon Network and third party access seekers or access holders to agree to waive the ring fencing provisions in 2014 DAU. We would approve amendments that:</p> <ul style="list-style-type: none"> (a) prohibit Aurizon Network from requesting an access holder, access seeker or train operator to waive Aurizon Network's ring fencing obligations (b) ensure ring fencing obligations and requirements are not superseded by: <ul style="list-style-type: none"> (i) a confidentiality agreement/deed or (ii) an access agreement containing confidentiality provisions in relation to the negotiation or provision of access rights. 	4.12	A – Disagree Retain 2014DAU drafting which allow Access Holder to approve waiver and provide AN with flexibility. It is an Access Holders decision if they wish to waive the protections afforded to their protected information. B - Disagree
<p>Our Draft Decision is to refuse to accept Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligation to perform these in the 2014 DAU. We would approve amendments to:</p> <ul style="list-style-type: none"> (a) remove clause 3.4 and 3.5 (b) include an overarching statement that Aurizon Network's primary function is to supply the declared service and provide all relevant functions (c) require Aurizon Network not to: <ul style="list-style-type: none"> (i) undertake any above-rail services (ii) undertake the operating or marketing of train services, unless for the provision of the declared 	4.13	A – Disagree Revert back to 2014DAU drafting B- Disagree Revert back to 2014DAU drafting C – Disagree

Draft Decision	Reference	Aurizon Network Position
<p>(iii) service undertake any port service or hold any direct or indirect interest in any port in Queensland.</p>		
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding employee separation in the 2014 DAU. We would approve amendments that:</p> <ul style="list-style-type: none"> (a) reinstate the working group concept and extend its application to associated rail-port and rail-mine entities (b) require Aurizon Network to notify the QCA of secondments/transfers of employees to another Aurizon party prior to being made (c) require Aurizon Network employees to have a separate email address that identifies them as Aurizon Network employees. 	4.14	<p>A – Disagree B – Agree with amendments C - Agree with appropriate adjustment to Aurizon Network Maximum Allowable Revenue to allow for these unaccounted costs.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding management separation in the 2014 DAU. We would approve amendments to:</p> <ul style="list-style-type: none"> (a) remove clauses 3.8, 3.9 and 3.10 (b) reinstate an updated version of clause 3.1.2 of the 2010 AU to account for associated rail-port and rail-mine entities, as well as related operators. 	4.15	A & B - Disagree with amendments
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding accounting separation in the 2014 DAU. We would approve amendments that:</p> <ul style="list-style-type: none"> a) include the accounting separation process in clause 10.1.1 of the 2010 AU in Part 10 of the 2014 DAU b) (b) delete clause 3.7 of the 2014 DAU. 	4.16	Addressed within Aurizon Network's response to Section 5 of the QCA's Draft Decision.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposals regarding the complaints handling process in the 2014 DAU. We would approve amendments that:</p> <ul style="list-style-type: none"> (a) reflects the complaints handling process in clause 3.19 of our marked up drafting. 	4.17	Agree with amendments
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals regarding the right to request the QCA to waive all or some of its ring fencing obligations. We would approve amendments that:</p> <ul style="list-style-type: none"> (a) prohibit Aurizon Network from requesting the QCA to waive Aurizon Network's ring fencing obligations (b) include an obligation for Aurizon Network to provide a six-monthly compliance declaration to the QCA. 	4.18	<p>A - Agree B – Disagree with amendments</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals to remove Aurizon Network's ring fencing obligations regarding the rail infrastructure associated with the declared service. We would approve amendments that:</p> <ul style="list-style-type: none"> (a) reinstate appropriately updated versions of clauses 3.8.1 and 3.8.2 of the 2010 AU. 	4.19	Agree

4.2 Overview of Ringfencing Arrangements (Decision 4.1)

Aurizon Network is concerned by the QCA's approach to its assessment of the Ringfencing provisions contained in the 2014DAU. These provisions were developed in the 2013DAU to clearly and unambiguously describe a lawful, workable and efficient ringfencing regime. The 2014DAU included modifications to this framework resulting from consultation with key industry and operator stakeholders.

The QCA appears to have given little consideration to the specific proposal put by Aurizon Network, and has instead decided to draft its own provisions. While it states these provisions are based on the 2010AU, they have been substantially rewritten in a way that introduces complexity and inflexibility, and the potential (unless the provisions are suitably modified) to introduce a significant increase in costs and operating inefficiencies.

As explained in section 2 above, this approach is inconsistent with the *QCA Act*. The QCA's role is not to rewrite the Undertaking, but rather to consider whether the Undertaking submitted is appropriate having regard to each of the factors set out in s.138(2). Given the nature of those factors, it follows that in any instance there will be a range of Undertakings and measures within such Undertakings which may be appropriate to address those issues. Where the Undertaking proffered is appropriate having regard to those factors, it is not for the QCA to substitute its own version of the Undertaking merely because it prefers an alternate set of words or measures to achieve the relevant objectives.

The legislative basis for the QCA's decision to compel Aurizon Network (through the "voluntary" undertaking process) to directly employ persons for specific tasks is not apparent. The drafting prepared by the QCA for the "voluntary" undertaking that it would approve in place of the 2014DAU prepared by Aurizon Network, effectively seeks to achieve a functional separation of Aurizon Network from all other parts of the Aurizon Group. Functional separation was not considered necessary when the Queensland Parliament created the Aurizon Group and there is nothing in the QCA Act that could possibly justify a decision by the QCA to bring it about through the voluntary undertaking process or otherwise.

The QCA's extensive rewrite of the ringfencing provisions are particularly disappointing in circumstances in which the QCA has been unable to provide cogent evidence to support its supposition that the ringfencing provisions are inadequate. The QCA has failed to demonstrate that the proposal offered by the 2014DAU contained an appreciable risk of inappropriate disclosure of confidential information. The QCA has offered the following flawed justification for its decision to reject the 2014DAU ringfencing regime in favour of its own:

"Not only do stakeholders consider Aurizon Network's 2014 DAU ring fencing proposals inadequate, the also claim a lack of confidence in the 2010AU ring fencing regime.

We note, however, that despite an apparent lack of confidence, there have been very few complaints and audit issues with respect to the existing ring fencing provision. In our view the mere absence of complaints alone does not suggest that the regime is effective. It could also suggest, for example that:

- *The audit scope requires refocusing; and or*
- *Stakeholders accept the existing ringfencing regime, despite concerns; and/or*
- *Stakeholders are unwilling to lodge complaints or regard the complaint process as ineffective*

Against this background, we are of the view that there is a lack of clarity regarding the effectiveness of the existing ring fencing regime, and there is insufficient data to demonstrate conclusively whether the regime is effective or not"

As is apparent from the quote above, the QCA had no facts before it to justify the measures it has proposed. In the admitted absence of any material complaints of contravention of the existing regime under UT3, the QCA has relied on an expression of "lack of confidence" by stakeholders and its own view that a lack of evidence of failure simply means a lack of data to demonstrate that the existing regime is effective, to justify the imposition of a regime which is much more extreme than the regime currently in place. That is an unusual approach to regulation.

The QCA also attempts to make much of the Aurizon Group's stated intent to leverage the benefits of vertical integration. The QCA incorrectly assumes statements are indicative of an anticompetitive intent or scheme that Aurizon Network should favour its related operator to the competitive detriment of its above rail rivals. Given there are many legitimate ways to leverage the benefits of vertical integration which do not involve anticompetitive conduct (including the use of shared services to reduce costs and create economies of scale)¹⁷, and given that anticompetitive conduct of the kind concerning the QCA is prohibited by the QCA Act as well as potentially other competition legislation, such a supposition is illogical. When used as a justification for the proposed ringfencing regime, this supposition leads to both perverse and inefficient consequences which both inhibit Aurizon Network conducting its legitimate business, and increase the cost of it doing so.

In a number of instances, the QCA has gone considerably beyond its statutory powers in the provisions it has suggested should be included in the Undertaking. These include an attempt to prevent Aurizon Network owning or investing in certain businesses, and a requirement that Aurizon Network procure that its holding company execute a revised and punitive version of the Ultimate Holding Company Deed, which seeks to bind the holding company which is not the operator of the declared service.

Importantly, the regime proposed by the QCA is also unreasonable and beyond the scope of any ringfencing regime permitted by the QCA Act because of the way in which it is centred on such a very broad definition of confidential information. A ringfencing regime that complies with the objects of the QCA Act should apply constraints on the actions of access providers concerning the provision of the declared service and not otherwise. The QCA Act restricts the ambit of a ringfencing regime further still by limiting its application to conduct that of an access provider that might have a defined affect on access seekers and access holders. The ringfencing regime proposed as part of Aurizon Network's 2014DAU was designed with these objectives and limitations in mind.

By contrast, the QCA has developed a regime which centres on a definition of confidential information similar to one that would apply at common law and one which:

- would render information susceptible to the restrictions in the Undertaking no matter who disclosed the information to Aurizon Network – it would not have to come from an access seeker or access holder
- applies irrespective of whether its disclosure could lead to conduct in contravention of any of the statutory prohibitions on unfair differentiation and hindrance to access
- was favoured over the use of the term 'Protected Information' proposed by Aurizon Network's regime because the QCA was concerned that the regime proposed for that term by Aurizon Network, did not place a constraint on Aurizon Network where (as one might expect) no competition concern could arise from its disclosure.

The regime proposed by the QCA also contains provisions which are unenforceable at law and lacking in logic. For instance,

- the regime restricts Aurizon Network's ability to disclose confidential information even where the owner of that information has published it to the world at large
- the QCA regime seeks to create an agency and trustee relationship between the QCA and third parties without the consent of the third party
- the QCA's regime seeks to impose an obligation on Aurizon Network to pay liquidated damages for breaches of confidence when the amount of the damages specified unilaterally by the QCA is quite clearly a penalty.

In the circumstances, we consider it appropriate that the QCA accept the 2014DAU. However, we recognise that based on its draft decision the QCA has a number of concerns with specific aspects of the 2014DAU. We are prepared therefore to modify at least some of these aspects. Those are set out in our response in Part 4.

¹⁷ See for example Fels A (2012), *Regulatory and Competition Policy Context for Rail Privatisation in Queensland*, October, and other reports cited in our submission in support of the 2013 DAU, Volume 2 at pages 56 to 57.

4.3 Non-Discriminatory Treatment (Decision 4.2)

Non-discriminatory Treatment

See Aurizon Network's response in Part 2 of this Submission.

Ownership arrangements

The QCA has also chosen to include additional clauses within Part 3 that seek to avoid discrimination by proscribing the activities of Aurizon Network. These clauses include specific provisions that limit the business activities of Aurizon Network by preventing it from:

1. Undertaking any Above rail Services
2. Undertake the operation or marketing of Train Services on the rail infrastructure, unless for the purpose of providing a Below Rail Service or for the provision of services in respect of private infrastructure.
3. Provide any port services (including providing access to a port service) or hold direct or indirect interest in any port in Queensland, whether as an owner, lessee, trust unit holder, operator, manager or otherwise and whether alone or together with others
4. Hold any direct or indirect interest in, operate or manage any coal mine or coal-extraction project, whether as owner, lessee, trust unit holder, operator, manager or otherwise and whether alone or together with others.

While the 2014DAU sought to ensure the non-discriminatory principles applied to providing access to a related party which owned or operated a port connected to the rail infrastructure, this position was voluntarily offered within the 2014DAU. With that agreed extension of the non-discrimination principles, industry did not express any objection to ownership or interest in a port by Aurizon Network or a related party.

These limitations constitute a restraint on trade, unlimited by any temporal or spatial conditions that might relate to the provision of rail infrastructure services in the CQCR. If these provisions were contained in a private contract, it would be void, and it is similarly unsupportable as part of an Access Undertaking.

Most alarming is the proposal of these rigid constraints in the absence of any explanation or evidence that these provisions are in anyway necessary to facilitate the access of third parties to the rail infrastructure, or to forestall any unfair differentiation between parties.

Given the purpose of the *QCA Act*, there is no scope in an Access Undertaking to prohibit Aurizon Network from entering the market to either own a Port, Mine or undertaking Above Rail Services outside of the CQCR. Certainly, the Aurizon Network Access Undertaking with the QCA should not be a barrier for Aurizon Network to progress its legitimate business interests. If the QCA continues to hold reservations about the scope of Aurizon Network's investments, it should petition the Parliament to amend the *QCA Act*, but as it stands, the legislation does not proffer the power upon the QCA to impose these absolute prohibitions.

4.4 Ultimate Company Holding Support Deed (Decision 4.3)

Aurizon Network has voluntarily offered to request that its parent company execute an Ultimate Company Holding Deed (UHCD) as part of the 2014DAU and previous Access Undertaking. The QCA has provided a draft decision that substantially expands upon Aurizon Network voluntary offer by imposing an obligation on Aurizon Network to procure that its parent company execute the UHCD and significantly expanding the scope, terms and effect of the UHCD.

The QCA's redrafted Undertaking requires Aurizon Network to procure that its ultimate holding company execute a revised UHCD. A failure to procure the execution of a deed by the ultimate holding company of Aurizon Network has the effect that Aurizon Network cannot disclose "Confidential Information" to "any person or entity outside Aurizon Network" although it might have to do so to carry on business.

The redrafted UHCD obliges Aurizon Holdings itself to, and procure that every member of the the Aurizon Corporate Group do a number of things, including “comply with the arrangements prescribed in Part 3 of the Undertaking”, as well as take steps to ensure Aurizon Network’s compliance. Part 3 of the Undertaking contains a number of obligations relating to the protection of confidential information by Aurizon Network, but a number of other matters, including staffing of Aurizon Network and the provision of below rail services in accordance with the Undertaking.

These are matters properly within the control and responsibility of Aurizon Network, as the access provider of the declared service. They are not matters properly within the control of its related entities. It is not appropriate for Aurizon Holdings and each member of the corporate group to voluntarily assume liability for these matters as they are not matters properly within their control. A more appropriate scope for such a commitment, which would be within the power and control of the holding company, would be the commitment originally proposed by the 2014 DAU, namely, “not to direct or request Aurizon Network to act in contravention of its obligations in Part 3 of the Undertaking”.

Clause 2.6(c) of the Undertaking provides that any contravention of the UHCD by Aurizon Holdings is “deemed to be a contravention of this Undertaking by Aurizon Network”. Thus Aurizon Network becomes strictly liable vicariously for the conduct of its parent company which it does not, and cannot, control. It is difficult to see how this could possibly be a reasonable requirement.

It is difficult to understand the basis upon which such an extreme obligation has been sought to be placed on Aurizon Network. It obliges Aurizon Network first to “procure” the execution of a deed by a company over which it has no control. Second, it is obliged to ensure that that company maintains the deed “in full force and effect at all times” although it has no means to ensure that is done. Thirdly it is obliged to ensure that Aurizon Holdings “at all times complies with the requirements of the deed”. How Aurizon Network can possibly do that is not explained as a subsidiary company, under Australian law, it has no right to control its holding company or other members of the corporate group.

The QCA provides no evidence to support its view that the UHCD included in the 2014DAU is ineffective and lacks sufficient strength or credibility to ensure compliance with the ring fencing regime. The closest it comes to a justification is as follows:

“in light of Aurizon Groups stated strategic intent to leverage the benefits obtained from vertical integration, as well as developments in the corporate structure of the Aurizon Group, we are also of the view that the status of the Ultimate Holding Company Deed and its contents requires enhancement. Our view reflects the fact that the potential for conflicts of interest and incentives for anticompetitive conduct and discriminatory conduct are increased with the changes that have occurred to the Aurizon Group corporate structure”

As explained above, the QCA’s contention that an intent to leverage the benefits of vertical integration necessarily involves an anticompetitive scheme by a related access providers to favour a related operator, is misguided and unsupported. There are a myriad of other potential advantages of vertical integration which do not involve any anticompetitive conduct – quite the reverse in fact, as the economic literature shows that vertical integration can result in significant economic efficiencies and result in benefits to end users.¹⁸The QCA does not explain which developments in the corporate structure of the Aurizon Group are of concern to it, nor how these justify the changes it proposes, or render the proposal put by Aurizon Network ineffective. As a result, Aurizon Network does not consider that the QCA has made its case for the need for measures additional to those contained in the 2014DAU,

Moreover, it is important to note that while Aurizon while Aurizon Network can voluntarily commit to gaining the agreement of related parties to not to direct or require Aurizon Network to breach Part 3 of the Undertaking, the QCA can only reject such a commitment. That is, the QCA has no powers under the QCA Act to force the provider of a declared service to compel conduct of a third party, even if that person is a related operator. No part of the QCA Act requires a service provider to control the actions of any other person.

On the contrary, in the event that an access provider contravenes one of the provisions of the QCA Act, say section 104 which prohibits conduct for the purpose of preventing or hindering access under an Access Agreement and which might be constituted by the provision of terms of access more favourable to a related body corporate, the QCA (or any other person with standing) can apply for separate injunctions and remedies : (a) against the access provider; and (b) any person who aided, counselled or procured the breach (e.g. in appropriate circumstances, the related operator)

¹⁸ See for example Fels A (2012), *Regulatory and Competition Policy Context for Rail Privatisation in Queensland*, October, and other reports cited in our submission in support of the 2013 DAU, Volume 2 at pages 56 to 57.

(sections 151,153). However, there is no provision of the QCA Act which constitutes a service provider vicariously liable for the conduct of another party, even if that other party is a related corporation. Rather the provisions of the QCA Act which impose the most fundamental obligations upon the access provider (e.g. sections 100,104 and 125) address the possibility that a related party might be favoured by imposing obligations upon the access provider, *and only the access provider*, to conduct itself in a particular way, but do not render the access provider liable for the conduct of its related entities.

There are two obvious reasons why this is so. There is no necessity to impose such an obligation where a remedy can already be effectively, and most appropriately sought, against the access provider, which is in the best position to monitor and control its own conduct. To the extent the QCA wishes to monitor the relationship between the access provider and related entities, it has information gathering powers at its disposal. The second reason is that unless an access provider is a holding company of the related corporations concerned, it will have no ability to control the conduct of those related corporations. Even a holding company has limited power to control the conduct of its subsidiaries.¹⁹

It follows that QCA has no power to enforce Aurizon Network to 'procure' its parent to establish the UHCD in its current form, unless the holding company is minded to voluntarily execute the UHCD. In its current format Aurizon Network could not recommend to its parent company that it execute the deed, and does not expect that its parent company would agree to do so.

Aurizon Network is not willing to volunteer to establish the UHCD as redrafted by the QCA, and submits that the UHCD should be accepted by the QCA as originally drafted, and voluntarily submitted, within the 2014DAU.

4.5 Protected versus Confidential Information (Decision 4.4)

The QCA has replaced the 2014DAU term 'Protected Information' within Confidential Information in all instances and with that change, has supplied a new definition for the term Confidential Information.

In their decision, the QCA considered that 'protected information' in the 2014DAU:

- Narrows the range of information to which the ringfencing provisions apply;
- Increases the scope of information disclosure and the level of subjectivity associated with the disclosure; and
- Widens the spectrum of exemptions/carve-outs²⁰

The QCA was concerned that the protected information provisions increases complexity about whether specific information should be classified as protected or not, which in-turn could lead to disputes.

We agree that a clear and specific definition is very important to provide certainty to stakeholders and employees. However, we have concerns that the QCA's redrafted definition will create additional confusion, and appears to have inadvertently sought to regulate the treatment of all confidential information held by Aurizon Network, rather than simply that which it receives as a result of its role as an access provider to the declared service.

The QCA has required Aurizon Network to revert to using the term 'Confidential Information' that was in place for the 2010AU and has supplied a new definition of that term.

Aurizon Network has two issues with the QCA's proposed approach:

- The QCA's new definition does not restrict the information protected by the Undertaking to confidential information it receives from third party access seekers or holders in the course of negotiating or providing access to the declared service. As a result the provisions could inadvertently capture the treatment of information that Aurizon Network receives which is confidential but which it receives independently of its role as access provider. This is contrary to the position taken in the 2010AU which clearly stated that the provisions related to the handling confidential information applied only in respect third party access seeker or holder information disclosed or obtained in the course of the negotiation or provision of access (see clause 3.4(b) 2010AU), and is clearly outside the legitimate scope of the Undertaking. The QCA, and the

¹⁹ See for example, *re Quintex Australia Ltd v ANZ Executors and Trustees (1991) 2 QdR 360 at 374 per Mcpherson J.*

²⁰ QCA, 2015, Draft Decision: Volume I – Governance & Access, Part 4 Ringfencing, Section 4.5.3, p. 58.

Undertaking have no legitimate interest in regulating Aurizon Network's treatment of information that it receives independent as its role as access provider; and

- The use of the term "Confidential Information" is potentially confusing. Aurizon Network holds a range of confidential information, including confidential personal employee information, confidential information from advisers, consultants and services providers, information about its own confidential internal affairs and information about its related entities commercial affairs. Aurizon Network prefers the use of a separate term, such as "Protected Information" to distinguish the confidential information of third party access seekers and holders from this information, and to ensure employee and stakeholders are alerted to its special status under the Undertaking, and the specific protections accorded to it.

Aurizon Network therefore considers it inappropriate to adopt the QCA's suggested definition and use of the term Confidential Information

4.6 Confidential Information Register (Decision 4.5 & 4.6)

Rename the Protected Information Register to Confidential Information Register - A

The QCA in their draft decision has outlined the need for Aurizon Network to create a confidential information register.

Aurizon Network agrees to inclusion of the register. It notes however that, consistent with its comments in section 4.5 above, it is critical that only confidential information obtained in the provision or negotiation of access to the declared service is subject to the register requirements. A decision to apply the register to a broader class of confidential information would be clearly beyond the appropriate scope of the Undertaking and would have a substantial cost impact, requiring a review of Aurizon Network's applicable operating allowance submitted as part of its MAR response.

Confidential Information Register Contents

The QCA has in their draft decision required Aurizon Network to create a Confidential Information register after consulting with the Access Holders and Railway Operators on its structure and contents. The QCA believes that this will assist to determine:

- whether the information within the register is meaningful and sufficient;
- how broad, clear and transparent the list of exemptions are;
- whether the confidential information register accurately reflects the incidence of disclosure; and
- confidentiality and consent

The QCA's Draft Decision on Confidential information is to make the Confidential Information register a credible source of information. The decision is based upon a perceived the lack of information from previous Access Undertaking periods to form an opinion on the level or confidential information flow within Aurizon Group.

Aurizon Network agrees that having a Confidential Register to record where and for what purposes confidential information is used within the organisation, will provide assurance to all stakeholders that their information is being managed within the requirements of the Access Undertaking. Aurizon Network also supports the idea of consulting with Access Holders and Railway Operators (or their industry groups) to inform the development of the structure and contents of the register

The QCA's redrafted Undertaking outlines the minimum contents of the Confidential Information Register to be:

- I. The identity of persons or entities who request access to confidential information:
- II. In respect of each recipient:
 - a. the identity of the recipient who has been approved to have access to confidential information and the identity of the Aurizon Network person who approved that access;
 - b. the period for which the recipient had access to the confidential information;
 - c. the defined category of confidential information;

- d. the purpose for which the confidential information is to be used, including the decision made using the Confidential Information and how those decisions were made;
 - e. confirmation that the recipient has signed a declaration signifying their awareness and understanding of the obligations
- III. A record of any confidentiality agreement entered into;
 - IV. A record of persons or entities that have signed a declaration signifying their awareness and understanding of Aurizon Network's obligations regarding Confidential Information in accordance with clause 3.12(a)(v)
 - V. A record of the signing of an exit certificate by Aurizon Network personnel working within Aurizon Network at the time that Aurizon Network Personnel leaves the employment with Aurizon Network (whether to another business unit within the Aurizon Group on a temporary or permanent basis or to a Third Party)
 - VI. Details of any compliance issues in relation to Confidential Information where an investigation revealed a breach of Aurizon Network's obligations

Aurizon Network has concerns with some of these items. These concerns are discussed below :

Clause II b

This clause requires the register to stipulate the period for which the relevant person had access to the confidential information. Additional resources would be required to retain oversight of timeframes during which someone holds confidential information. The time that would be consumed is disproportionate to the risk being managed. The risks involved in such data provision would be better managed by appropriate access restrictions, briefings and training for affected staff.

We are not suggesting the provision of such data is voluminous, because it is not. However, each additional administrative task adds additional cost and takes additional time to complete, and it is appropriate that such costs are only imposed where necessary.

By way of example, Aurizon Network, on occasion, provides information to personnel within the Programme Delivery business unit that design and construct infrastructure within the CQCR (and which currently sits outside the Aurizon Network business). Before provision of any access the Compliance Officer determines if access is appropriate. If it is appropriate, then the small number of personnel who require the information, are provided with briefings, fact sheets and communications on the importance of protecting Confidential Information and not sharing that information with anyone that is not authorised to have access, and does not have a legitimate business need for it. They are requested as part of this process to declare that they understand their obligations.

As the projects that these Programme Delivery personnel work upon have long project times, the required timeframe for access may in fact be either short or lengthy. Monitoring the period over which that information is retained would not provide any additional protection to access holder and seekers, but would add additional costs..

Clause II d

This clause requires that the register should disclose:

- The purpose for which the Confidential Information is to be used
- The decision made using the Confidential Information and how those decisions were made

Aurizon Network agrees that there should be appropriate detail within the confidential information register that explains what the information is to be used for. To address this in an efficient manner, Aurizon Network suggests, the creation of appropriate standard descriptions. Aurizon Network will address this as part of the stakeholder consultation on the development of the register.

Note that at present the requirement to enter information in the register would extend to where confidential information is provided to legal advisors for the purposes of seeking legal advice. If that position is maintained, it will be important to ensure that any description of purpose, in cases where legal advice is sought, is sufficiently generic to avoid disclosure of legally privileged information.

In respect of 'what decisions were made using the confidential information'²¹ and how they were made Aurizon Network has the following concerns:

- it will not be possible in every instance to determine what decisions, if any, are made using the relevant information, nor possible to record the manner in which those decisions were made. In some instances (e.g. long projects), multiple decisions will be made over a period of time;
- in some instances, the information will be aggregated with other information (in a manner which means it will not be possible to identify individual access holders or seeker information) and multiple decisions made;
- it is not clear what is meant by "how those decisions were made", and we have concerns about what information we would be expected to provide under this heading. We request clarification of the QCA's intent;
- to keep a record of decisions made and how those decisions were made substantial resources would be required – i.e. ongoing management and oversight by a compliance function.

For this reason, we do not consider it appropriate to include within the register details of what decisions were made or how they were made. It should be sufficient that the register includes the detail of the purpose for which the information was provided.

Clause II e and IV

The purpose of these proposed clauses is to ensure that an employee of the Aurizon Group (non-Network) or an external contractor have been made aware of the obligations associated with the ringfencing arrangements through a relevant briefing or training session.

Aurizon Network agrees with the inclusion of clause II (e), however this is then duplicated for clause IV, with some further exclusions applied by the QCA. To clarify this, Aurizon Network suggests that the drafting be amended within clause II (e) to cover off all situations, such as the drafting by Aurizon Network in Clause 3.18(c).

Clause III

Clause III requires the keeping of a record of any confidentiality agreement entered into. This proposal is new to the 2014DAU as it has not previously been voluntarily offered by Aurizon Network. Aurizon Network agrees that a register of all confidentiality agreements should be maintained, although this register should only contain agreements relating to the management of 3rd party confidential information in respect of access to the CQCR. As the QCA's proposal stands, when coupled with the broad definition of 'confidential information', any confidentiality agreement to which Aurizon Network is a party to, would be required to be listed on the register. If this is the intent of the QCA, then Aurizon Network considers that this would be beyond the powers provided to the Authority by the QCA Act.

Clause V

This clause requires a record of the signature of exit certificates. Aurizon Network agrees that the register must contain a record of those Employees who have completed exit certificates. Aurizon Network does not agree with the proposed range of people to be required to complete exit certificates and has addressed this in the response to the QCA draft decision 4.9.

Submission and Access to the Confidential Information Register

The Draft Decision also outlines that the Confidential Information register is to be submitted to the QCA at least every 12 months (or upon request). Aurizon Network agrees that appropriate oversight is required, however questions the purpose of this additional administrative process to be completed every year.

²¹ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 4.5.3, p. 60.

Aurizon Network believes that it would be more appropriate to include this step within the Audit process outlined in Part 10 of the Access Undertaking as it would be assumed that any request from the QCA to view the register would be to develop the scope of a future audit engagement.

The QCA's redrafted Undertaking allows all Access Seekers, Holders and Train Operators to view the contents of the Confidential Information Register that relate to information that they have supplied as part of gaining or maintaining access. Aurizon Network continues to support this, although to maintain transparency of such access, suggests that any requests must be completed in writing and submitted to the Aurizon Network Compliance Officer.

4.7 Disclosure of Confidential Information (Decision 4.7)

The QCA has redrafted the Undertaking to include a group of prescriptive lists and cross-references to determine who, either internal or external, can access Confidential Information and what controls or protections are required prior to that information being shared with another part of the Aurizon Group.

The QCA's revised drafting in Clause 3.12, is difficult to navigate, as a reader is required to complete multiple cross references to determine what, if any access is allowed. Aurizon Network believes that this drafting is more complex than any previous undertaking and that will not provide any additional assurance to stakeholders, rather add additional confusion and compliance complexity. As a company seeking to operate efficiently, and reduce legal and compliance costs for the benefit of its stakeholders, it is important to Aurizon Network that its legal obligations are clearly stated and readily understood.

The controls imposed are restrictive, and require specific consents from access seekers and holders in many instances, as well as detailed entries in the confidentiality register. These measures are likely to slow internal processes and impose additional costs to the detriment of stakeholders, without any material benefit in terms of increased ringfencing compliance.

There appears to be little basis for the QCA's decision to impose these measures. Indeed, audits completed during the 2010AU (by 2 separate providers with an audit scope approved by the QCA) have confirmed the effectiveness of the present regime. In this light, it is difficult to understand how the QCA considers these restrictive and intrusive measures can be justified.

Background

Aurizon is a large organisation which is made up of separate business units in a cross-functional model. The benefits of being part of a large organisation are clear when it comes to costs and ability to source the relevant in-house expertise. To assist the reader for the remainder of this response, outlined in figure 4.1 below is Aurizon's organisational structure:

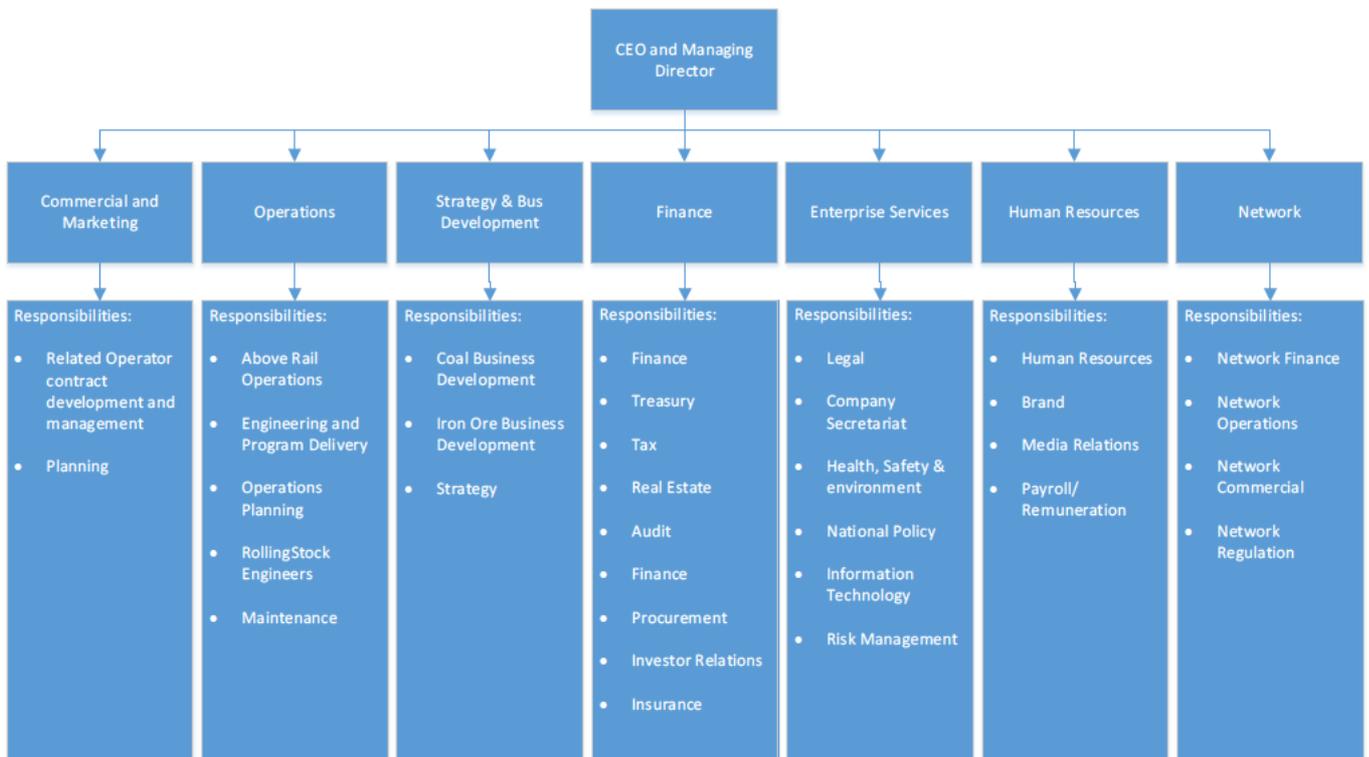


Figure 4.1 – Aurizon’s organisational structure

Aurizon Network receives services from various parts of the Aurizon Group, and as a result achieves cost savings. The services currently procured by Aurizon Network from other parts of the Aurizon Group were dealt with in detail in Aurizon Network’s Operating Expenditure submissions. For example these services include Information Technology, Insurance, Legal, Audit, Safety, Real Estate, Environmental and Procurement, There are substantial efficiencies associated with these arrangements. The details and costs have been discussed in the Operating Expenditure section of Aurizon Network’s various responses on Maximum Allowable Revenue. In the event, the inefficiencies introduced through the QCA’s proposed consent and register provisions prevail, it may be necessary to unwind some of these arrangements and establish stand-alone functions within the Network business which would result in additional cost, and a need to revise the Aurizon Network’s Maximum Allowable Revenue.

QCA’s Proposed Process

To assist stakeholders understand the process it proposed, the QCA provided a table summary which we have presented below in a simplified form. For clarity, we have included a column that sets out Aurizon Network’s position on each issue. However, as a matter of principle, we consider the better and more appropriate approach would be to simply revert to Aurizon Network’s 2014DAU.

Table 4.1 – QCA disclosure matrix

#	Reason for Disclosure	Confidentiality Agreement	Consultation	Register	Consent Provision	AN Agree?
1	If, but only to the extent, required or compelled by any Law, an order of a court, notice validly issued by any authority or the safety regulator	No	No	No	No	Yes
2	If necessary for the conduct of any legal proceedings, any dispute resolution process or audit under the undertaking, QCA Act or standard agreement	No	No	No	No	Yes
3	If to any person involved in clearing an incident or emergency that is preventing the operating of train services on the rail infrastructure	No	No	No	No	Yes
4	If required under any stock exchange listing requirement or rule	No	Yes	No	No	Yes
5	If for the purposes of train control in the usual course of undertaking train services	No	No	No	No	Yes
6	If to a railway manager to the extent required for the purpose of negotiating or providing access to that railway manager's rail transport infrastructure. <ul style="list-style-type: none"> If to an infrastructure provider for infrastructure forming part of the supply chain for the purpose of facilitating the coordination of the capacity allocation process of the infrastructure provider and Aurizon Network 	Yes	No	No	No	Yes
7	If to a subcontractor to the extent necessary to enable subcontractors to perform the relevant subcontract	Yes	No	Yes	Yes	No
8	If to external legal, accounting, financial, engineering advisors or consultants to Aurizon Network whose role in advising or providing services to Aurizon Network requires disclosure, are under an obligation of confidentiality to	No	No	Yes	No	No

	Aurizon Network and have been advised of the Aurizon Group's obligations regarding confidential information. These service providers do not include any member of the Aurizon Group or a service provider engaged by a member of the Aurizon Group for the benefit of Aurizon Network.					
Disclosure with the Aurizon Group						
9	Aurizon Network employees and officers may access and use confidential information to the extent necessary to perform their duties	No	N/A	No	No	Yes
10	Directors of Aurizon Network and Aurizon Holdings; executives of the Aurizon Group, including the Chief Executive Officer of the Aurizon Group, the Chief Financial Officer of the Aurizon Group or the General Counsel of the Aurizon Group; any Company Secretary or Assistant Company Secretary of Aurizon Network or Aurizon Holdings; and any persons providing clerical or administrative assistance to any of the above	Yes	N/A	Yes	No	No
11	Subcontracted service provision from the Aurizon Group to Aurizon Network	Yes	N/A	Yes	Yes	No
12	Subcontracting to an Aurizon Group entity anything associated with regulatory advice regarding the development/interpretation of the Undertaking	Prohibited due to conflict of interest				No
13	Related operators, rail-port entities and mine-rail entities	Yes	N/A	Yes	Yes	No
14	All other confidential information flow from Aurizon Network to an individual in the Aurizon Group	Yes	N/A	Yes	Yes	Yes

Source: Table 10 and 11 from the QCA Draft Decision, Volume 1, pg 68-70

To respond to this draft decision, Aurizon Network will first respond to the overarching processes proposed by the QCA. The second part of the response will seek to address the specific example where Aurizon Network does not agree with the approach outlined by the QCA as per the column on the far right from the table above.

4.7.1 Overarching processes

Confidentiality Agreements

The QCA appears to have sought to extend the provisions of the 2010AU as to which personnel, business units and organisations are required to execute a Confidentiality Deed or Agreement.

Aurizon Network agrees that this is an appropriate control that should be put in place, for external parties who are not already subject to obligation of confidence. There is a confusion between the QCA's decision and its redrafted Undertaking. The redrafted Undertaking does not require a confidentiality agreement from anyone within Aurizon Network or an Aurizon Party, which would mean the executive and board would not need to sign one. By contrast, the decision appears to require a confidentiality agreement from such parties. Aurizon Network would appreciate clarification. It submits that an agreement is more appropriate with external parties.

Consultation

The QCA has proposed a consultation process where there is a requirement to disclose confidential information that affects a third party (again definitional issues) to the ASX or any other exchange in which Aurizon may be listed. Aurizon Network agrees with this proposal.

Confidential Information Register

While Aurizon Network supports the concept of a Confidential Information Register (subject to its comments above), Aurizon Network is concerned that in some instances, the need to make an entry on every occasion that confidential information is supplied to some shared support services (e.g. the IT function, the legal function, the safety function) will be unduly burdensome.

For this reason, Aurizon Network submits the QCA's redraft is not appropriate and submits that its 2014DAU should be accepted. Failing that Aurizon considers it is critical that the QCA, Aurizon Network and stakeholders agree a list of exceptions to these requirements.

Consent

Aurizon Network is concerned about the QCA's requirement to consult with Access Seekers and Holders when their information is to be passed onto another function within the Aurizon Group. This is concerning when coupled with the removal of all waiver provisions by the QCA in its Draft Decision.

Adding in a consent process for sharing confidential information has the potential to substantially slow down any process where this is a requirement. In some cases it will be impractical when confidential information for all Access Holders across the entire CQCR is used. For example, in the past Aurizon Network has experienced delays when seeking consent from a group of access holders to provide access holder information to external engineers (under conditions of strict confidentiality) to conduct capacity or maintenance analysis tasks. As the number of miners who hold access rights directly increases, the complexity of securing such consents increases.

For this reason, Aurizon Network submits the QCA's redraft is not appropriate and submits that its 2014DAU should be accepted. Failing that Aurizon considers it is critical that the QCA, Aurizon Network and stakeholders agree a list of exceptions to these requirements.

7 - Disclosure to a Subcontractor

Aurizon Network notes the QCA's proposed requirements that prior to its provision of confidential information to external subcontractor, Aurizon Network must:

- enter into a confidentiality agreement
- note the provision in the confidential information register; and
- obtain the confidential information owner consent.

Aurizon Network has concerns that the requirement to obtain the information-owners consent may create difficulties for certain projects (e.g. IT projects) which may require contractors or subcontractors to access significant volumes of potentially confidential data.

By contrast, the 2014DAU permits disclosure to external consultants whose role in advising or providing services to Aurizon Network requires access to the information and who are under an obligation of confidence to Aurizon Network. This provision was specifically drafted with instances like this in mind, because a requirement to procure consent from all access holders across the CQCR for projects of this nature is administratively difficult, results in substantial risk of delay for critical projects, and raises the risk of a single access holder materially delaying or hindering a business critical project for the benefit of all access holders. As miners are increasingly holding their access rights directly, the number of parties from whom such consents must be sought is increasing.

Even the 2010AU had provisions which ensured that consent can not be unreasonably held where appropriate confidentiality arrangements are in place (see for example 3.4.1(c)). These provisions have been removed from the QCA's redrafted Undertaking.

For this reason, we submit that the QCA's redrafted Undertaking is inappropriate and the 2014 DAU should be accepted.

8 – External professional advisers or consultants

Aurizon Network notes that the QCA's Draft Decision now requires all transfers of confidential information to external legal, accounting, engineering or financial advisers or consultants to be recorded within the register. Overall, Aurizon Network believes that this does not assist it to manage the declared service in any way.

Aurizon Network believes that inclusion of these transfers within the register does not manage any risk associated with confidential information and only provides information on when these transfers occur.

With respect to transfers to external legal advisers, there are likely to be multiple occasions upon which external legal advisers are provided with information relating to access holders and access seekers when advising on the formation or interpretation of agreements or the Undertaking. It will be very time consuming to include each such instance in the register, and we query whether doing so is an efficient use of resources, particularly when those providers are already bound to strict professional duties to prevent disclosure of confidential information, and more generally to the management of actual or perceived conflicts of interest

The QCA 's redrafted Undertaking has also specifically removed the exemption applied to engineers and environmental advisers/consultants. Aurizon Network believes that the exclusion of these categories may be an oversight, as this deletion was not otherwise referred to in the draft decision, and asks the QCA to confirm this.

More generally, the very nature of the register sought by the QCA, together with the level of specificity required in the register itself, may result in significant and unwarranted commercial detriment to Aurizon Network by disclosing matters of a confidential or sensitive nature, but which relate to the legitimate conduct of Aurizon Network's business – including but not limited to the declared service. For example, as currently suggested by the QCA, these provisions could result in the disclosure of information that is commercially sensitive (e.g. the nature of communications with financial advisors) or which directly or indirectly compromises legally privileged communications (e.g requests for, and the subsequent provision of legal advice).

9 – Bankers and other financial institutions

The QCA has deleted the 2010AU provision which allowed disclosure “to the recipient's bankers or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements”, subject to execution of appropriate confidentiality arrangements. No explanation has been provided for this. It is important that Aurizon Network is able to provide information to its bankers or other financial institutions to raise funds. We request that this provision be reinstated.

Disclosure outside of the Aurizon Network Function

The QCA's drafting applies multiple steps with clause 3.12 to assess whether the sharing of Confidential Information is allowable within the Aurizon group. In the 2014DAU, Aurizon Network substantially redrafted these to reflect the structure of the Aurizon Group.

The QCA has carried the 2010AU drafting over into its redrafted Undertaking and added further compliance requirements, specifically for all parties to sign confidentiality agreements and recording of any confidential information within the confidential information register.

10 –Directors and Executives of the Aurizon Group

The QCA drafting requires these positions to execute confidentiality deeds (although we note that the QCA's redrafted undertaking does not appear to require confidentiality agreements, rather requires a declaration) and have all confidential information transfers recorded within the register.

Aurizon Network believes that this should be more targeted to specifically exclude those executives that oversee the marketing and related operator functions, as these personnel should not be able to access confidential information in any way.

Aurizon Network does not agree with the obligation that requires these employees to enter confidentiality deeds on top of their existing employment contracts and other controls. All Aurizon Network employees are required to be compliant with all applicable laws and regulations, including the Access Undertaking, when performing their duties. This coupled with awareness training, would ensure that they know their Access Undertaking obligations and know the protocols of not disclosing confidential information to those parts of the business that are operating in competing markets.

11 – Subcontracted Services from Aurizon Group to Aurizon Network

Aurizon Network's understanding is that this is to cover the shared service functions of the Aurizon Group. The Draft Decision places a huge administrative and logistical burden and negatively impacts any possibility of an efficient process. It would only introduce additional costs that are not accounted for within Aurizon Network's response to the QCA's MAR Draft Decision. Inclusion of these process would need an updated Operating Allowance. .

The 2014DAU provided specific drafting that allowed Aurizon Network to utilise those shared services of the Aurizon Group. Aurizon Network included the following drafting after consultation with industry:

'...allowing a person employed within the Aurizon Group in an area employed in the provision of shared services and corporate functions to different functional areas and parts of the Aurizon Group, to provide such services to Aurizon Network in the performance of Access-related Functions and/or compliance with the requirements of this Undertaking'²²

This clause was in addition to the carry-over from the 2010AU to the 2014DAU which allowed (with restrictions) confidential information to be provided to other areas of the group such as Audit, Health & Safety, Environment, Real Estate and IT. This clause was also purposefully included to allow for those business units that are employed by Aurizon Operations being contracted back to Aurizon Network on a full time basis to assist Aurizon Network. The Aurizon Network Legal business unit is an example of this.

The QCA has deleted these provisions and included the following General Clause to cover all those areas:

'Subject to compliance with Aurizon Network's obligations under this Part 3, Aurizon Network may obtain assistance in the performance by Aurizon Network of Below Rail Services and to comply with its obligations in this Undertaking from staff employed within the Aurizon Group in the provision of shared services and corporate functions to different functional areas and parts of the Aurizon Group'²³

Those obligations under Part 3 with which Aurizon Network must comply include briefings, confidentiality agreements, disclosure within the register and seeking consent from the confidential information owner. From a cumulative perspective, these processes are highly restrictive to Aurizon Network operating efficiently and would not allow for any timely resolution of a task that may improve the efficiency of the supply chain.

²² Aurizon Network, 2014, 2014 Draft Access Undertaking, Clause 3.17 (c)(G).

²³ QCA, 2015, Draft Decision: Draft Access Undertaking, Clause 3.7 (C).

Aurizon Network has significant concerns with the QCA's proposal for consent provisions and recording disclosures within the confidential information register. This proposed position inhibits and diminishes the efficient operation of the declared service. Common examples of when consent would be required that would substantially slow down or even prevent a process from occurring includes:

:

- When an IT issue arises relating to the Day-of-operation software. Aurizon Network would need to consult with all Access Holders to allow the Aurizon Information Technology personnel to access the system to rectify the issue. Aurizon Network would then be required to disclose all information that was made available to IT within the register. A recent example of this was the quarterly report data, where Terabytes of data for all access holders was required to be viewed by IT staff;
- When internal audit is engaged to complete an investigation into a complaint or a suspected compliance issue; and
- Where Rolling stock engineers are required to review the appropriateness of wagons and locomotives for operation within the CQCR

Aurizon Network believes that the drafting provided within the 2014DAU should be re-instated as this will give Access seekers/Holder transparency of those functions that fall under this clause. To improve the level of assurance to Access Seekers/Holder, Aurizon Network suggests that the same controls that were in force during the term of the 2010AU, should be re-drafted into the 2014DAU.

12 – Subcontracting to an Aurizon Group Entity anything associated with regulatory advice

The Draft Decision outlines that Aurizon Network cannot engage any other function outside of Network for regulatory advice in relation to the development, application or interpretation of the Undertaking. The QCA's redrafted Undertaking does not go so far as to explicitly exclude the notion of receiving regulatory advice from other Aurizon functions, although it specifically states that Aurizon Network:

1. cannot disclose confidential information to any other function for regulatory advice;
2. must employ a self-contained regulatory affairs adviser; and
3. must not assign, transfer delegate or contract out to any Aurizon Party any regulatory function or position related to the development, application and interpretation of the Undertaking.

These significant and far-reaching prohibitions are expressed by the QCA without explanation or justification. It is appropriate to deal with each of the three prohibitions in turn:

Regulatory advice

While Aurizon Network has no objection to the protection of confidential information, the blanket prohibition on disclosure of confidential information to any other function for regulatory advice is an unnecessary and inefficient restriction. The 2014 DAU proposed a detailed regime for the protection of such information, for its quarantining from parts of Aurizon's business with the potential to benefit from it, for the disclosure of information on a need to know basis only, and more broadly for the prohibition of unfair differentiation. In these circumstances it is difficult to see the basis upon which it could be asserted that such a regime is not sufficient of itself to prevent the misuse of confidential information, let alone in circumstances which give rise to unfair differentiation. Further, this prohibition will lead to significant duplication within Network of the various resources required *at times but not at all times* to advise on regulatory matters – for example, treasury, tax, finance, company secretariat, engineering and even specialist safety resources. More broadly it precludes Aurizon Network from passing to its customers the legitimate efficiencies and economies of scale of the broader Aurizon business by legitimately utilising shared service functions.

More broadly, assuming that appropriate confidentiality procedures are applied, it is entirely inappropriate for the QCA to seek to control from what source Aurizon Network receives regulatory advice or input. It is commonplace for companies to seek regulatory advice from a number of sources, either external or across their broader corporate organisation. It is possible to manage this process without inappropriate disclosure of confidential information, or with appropriate mechanisms in place to ensure that confidential information is not disclosed to parts of the business that are not Related Operators or Competitors.

Self-contained regulatory affairs advisor

Aurizon Network has complied with this provision in the past and will do so going forward. For this reason, it is difficult to understand the restriction outlined in point 1 and 3 in the above list in relation to the disclosure of confidential information.

Development of undertaking

The discussion in relation to regulatory advice is equally applicable here – but in addition, the peril of seeking such advice from, or otherwise utilising, such resources is harder again to understand. The development of a new undertaking involves little or no consideration of confidential information – and the approval of such undertaking is a matter for the QCA. On this basis it is difficult to see how the utilisation of resources within the broader Aurizon group could ever result in behaviour (in relation to a new undertaking in particular) which offends the Act. Further, Aurizon Network is subject to independent management and has its own Board. The preparation of a new undertaking is ultimately a matter for that independent management team and Board – any liaison with other parts of the Aurizon business are merely inputs into this process.

Finally, the Undertaking itself will not be confidential, and anybody within the organisation is entitled to express a view about the application and interpretation of the Undertaking. It is the right of Aurizon Network to adopt or apply any such view, whatever the source.

Replace the confidentiality deed with the QCA's proposed deed

The QCA's Draft Decision at 4.7(b) is to allow any relevant party, at any time during negotiations for access, to require Aurizon Network to enter into the standard form confidentiality agreement (Schedule I). The standard form confidentiality agreement at Schedule I has been substantially redrafted by the QCA.

Aurizon Network agrees in principle that access seekers should have the option of entering into a confidentiality agreement to protect information they provide to Aurizon Network in respect of a request for access from inappropriate disclosure. However, Aurizon Network has the following concerns about the way in which the QCA's proposes this to be implemented.

- The QCA's redrafted Undertaking (clause 3.10) does not give Aurizon Network and the relevant Access Seeker the option of entering into an alternate confidentiality agreement should they agree to do so. This unduly restricts the abilities of parties to reach alternate commercial arrangements. It is not uncommon for commercial parties to negotiate variations to standard form documents where it is in the interests of both parties to do so. There is no risk that Aurizon Network will be able to coerce a counterparty into an alternate agreement, if there is a requirement that the parties must enter into the standard form agreement unless an alternate agreement is reached. This issue could be easily addressed by reinstating the language in Aurizon Network's original drafting (relevant text underlined) which provided that the relevant parties "*must, unless otherwise agreed, enter into a confidentiality agreement in the form set in Schedule I*". This language is consistent with that used in the 2010AU.
- The QCA has sought to use the same Confidentiality Agreement as the agreement which certain parties who receive Confidential Information from Aurizon Network must execute. It would be more effective to include two separate agreements, so that the agreements can be more appropriately tailored and streamlined.
- The Confidentiality Agreement itself has a number of issues. For convenience, a number of these are set out in the table below.

Clause	Description	Issue/ Proposed Solution
1 (Definitions)	There is no definition of Recipient.	Include definition

6 (Aurizon Network Obligations)	Aurizon Network is obliged to procure the Aurizon Group's compliance with all obligations of the Aurizon Group under Part 3 of the Undertaking relating to Confidential Information.	Aurizon Network does not have the power to procure compliance of the Aurizon Group, as it is a group subsidiary and cannot control the conduct of its parent or sister companies. Delete obligation to procure the Aurizon Group's compliance.
7 (Benefit of Agreement)	To the extent that Aurizon Network's obligations under the agreement related to Confidential Information belonging to a third party, the QCA is said to hold rights under the agreement as agent of and trustee of that third party. The agreement is said to be provided in favour of the QCA.	It is not necessary or appropriate for the QCA to involve itself in an agreement between Aurizon Network and an Access Seeker, or to seek to enforce an agreement on behalf of an Access Seeker, as the Access Seeker can enforce the agreement directly against Aurizon Network. We do not understand what the QCA is seeking to achieve with this clause. We are however happy to discuss its objective with the QCA , with a view to determining if there is some other way in which we can address its concerns.
8(a)	The owner of Confidential Information " <i>may take legal proceedings against the Recipient.... if there is any.... breach by a Aurizon Party of a confidentiality deed or confidentiality provisions contained in another arrangement with Aurizon Network which the Confidential Information was disclosed to it</i> "	This clause is unclear (it is not clear which confidentiality arrangements it is referring to). It is onerous, as it imposes liability on Aurizon Network in respect of conduct of other Aurizon parties. The QCA does not have power to impose liability on Aurizon Network for the actions of third parties. Redraft clause and remove liability resulting from other Aurizon Party actions.
8©	Liquidated damages of \$10,000 where Counterparty can establish that a Related Operator is in possession of the Counterparty's Confidential Information.	This is effectively a penalty and therefore unenforceable. It is inappropriate to have mutual confidentiality agreement with two way obligations but only a one-way liquidated damages provisions

Table 4.2 – Problems with, and solutions for, QCA's Confidentiality Agreement model

4.8 Decision Making Process (Decision 4.8)

The QCA's position is to re-instate the decision making process back into the 2014DAU from the 2010AU.

We do not have significant concerns with a reinclusion of this clause, but note that 3.18(a)(ii) should be redrafted to ensure that it does not require a greater homogeneity of treatment between access seekers and holders than that which would be required to comply with section 137(1A) of the act which requires only that the Undertaking include provisions which prevent a related access provider from unfairly differentiating between access seekers and access holders in a way that has a material adverse effect on the ability of one or more of them to compete with each other.

4.9 Training and Exit Certificates (Decision 4.9)

Training – Decision A

For Aurizon Network employees, a risk based approach to training is currently in place. This risk-based approach is already in line with the QCA's draft decision and has been audited during the 2010AU term.

This training framework was deemed appropriate as it took into account those personnel that may come across Confidential Information during the course of the duties. It purposely removed the requirement from the 'Operational' based staff that would not be exposed to any information.

The operational staff within Aurizon Network make up approximately 80% of its workforce or approximately 800 people. The majority of these employees are field based with limited access to computers, therefore training needs to be facilitated in a classroom format. However the training is not relevant to them as their lack of technological access means there is no risk of their being exposed to information that could impact the commercial affairs of a third party access holder, nor is it likely that any of their day to day decisions could constitute discriminatory behaviour. These employees are not in any position to influence an outcome of an access related decision

For those positions that were required to undertake the training, it is a mandatory requirement that it is completed at least annually, with compliance alerts built into the system and quarterly audits completed by the Compliance Officer.

However the QCA's drafting (clause 3.14(b)) does not align with this decision, as the QCA in their redrafted Undertaking requires additional training to all Aurizon employees (interpreted as Aurizon Group) within 3 months of the commencement of the Access Undertaking or within 1 month of them commencing employment with the Aurizon Group.

Aurizon Network has reviewed this drafting and is concerned by the potential over-reach and additional compliance requirement to implement this. Aurizon Group consists of 7524²⁴ employees spread across most states within Australia. The logistics in managing that all employees are trained on a particular matter are complex, time-consuming, costly and difficult to monitor compliance.

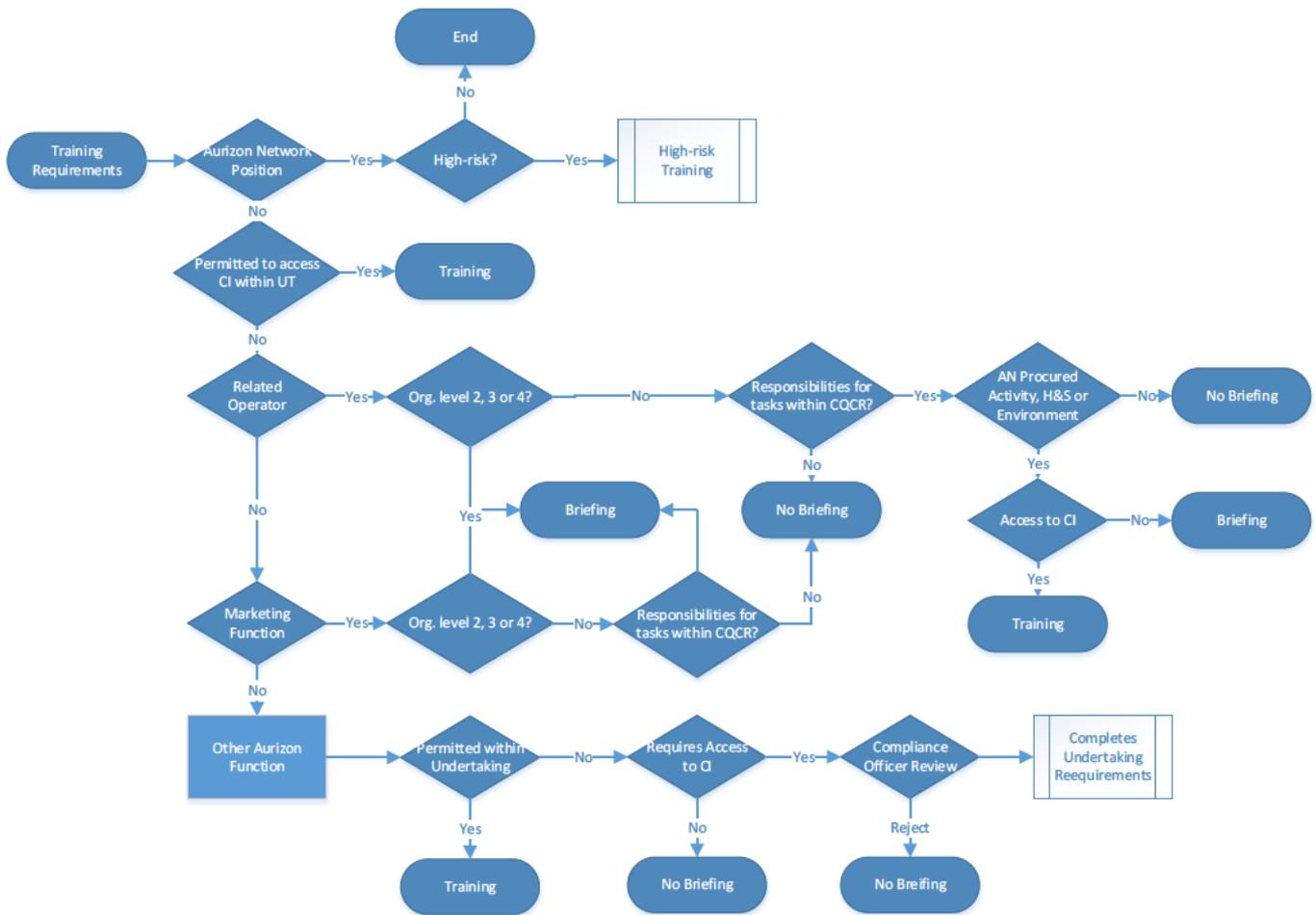
What risk would this requirement be managing if a truck driver in Western Australia was required to complete the training?

Aurizon Network believes that this is out of scope of the QCA powers to mandate this requirement.

When deciding if training is the appropriate control to put in place to manage a regulatory risk, a risk assessment is completed. Aurizon Network suggests that to determine if a non-Network employee should complete training on Aurizon Network's ringfencing obligations, the following process should govern this:

²⁴ Aurizon, 2014, Aurizon Annual Report 2013-14, p. 52.

Figure 4.2 – Training Assessment



Aurizon Network considers that it is important for briefings to be targeted to those areas outside of Network that have risk associated to them through their ability to compete with 3rd parties for access within the CQCR. Those areas that are at risk are the shared services, related operator or the marketing function. These three functions alone, would cover off the majority of the employee base of Aurizon, therefore a further risk based analysis should include assessing the level of influence within the organisation, primary location of tasks and whether there is a direct interaction with Aurizon Network under a service level agreement. These assessments should give stakeholders assurance that those positions that can influence a decision; engage with Aurizon Network; or can access Aurizon Network, fully understand the ringfencing obligations, controls and consequences for non-compliance with the Confidential Information provisions.

Aurizon Network suggests that the drafting be amended to reflect the abovementioned positions.

Exit Certificates - Decision B

Aurizon Network agrees with the 'best endeavours' approach from the QCA for completing Exit Certificates. However, the 'best endeavours' approach should only apply to those personnel not on the High-Risk register.

For those that are on the High-risk register, it should be a mandatory requirement to complete an exit certificate. Adopting this approach will strengthen Aurizon Network's commitment to compliance whilst adopting a commercially focussed risk based approach. This will provide further assurance to Access Holders that Aurizon Network manages confidential information in a systematic and compliant manner.

This will also assist any auditors, who are engaged to review this process, undertake completeness testing to assess compliance.

High-Risk Personnel - Decision C

Aurizon Network believes that it is already in compliance with this requirement and this has been included within Audit Scope for the past 2 years. The High-risk personnel concept was developed in 2013 to directly target more specific compliance controls to those functions, positions and personnel within Aurizon Network who are more 'At-risk' to the obligations associated with managing protected information. Not only is this a risk based approach, but it is also a commercial approach to the training requirements.

The QCA in the Draft Decision has requested that there be detailed reasoning as to why a position is on the register. Aurizon Network experience suggests that the majority of positions fit into a small number of common groups, being those positions responsible for

- Negotiation of Access rights to the CQCR;
- Management of Access Agreements
- Administrative tasks associated with the handling of Access Agreements;
- Capacity management and assessment;
- Network control services in line with the Network Management Principles
- Procuring and facilitating maintenance activities;
- Developing, interpretation and reporting on compliance with the Access Undertaking;
- Analysing and structuring pricing arrangements for individual Access Holders
- Aurizon Network Management and Network Board;
- All employees located at Aurizon Network's registered office at 192 Ann Street, Brisbane; and
- Those positions and functions of the Aurizon Group outlined in c3.4.2 of the 2010AU.

These groups are real examples, and detail how the high-risk register is currently constructed. This is a considered assessment of who within Aurizon could manage Protected Information which was then used to develop the Access Related functions terminology within the 2014DAU. Therefore this drafting should be retained.

The QCA's Draft Decision also provides that the QCA can request a copy of the High-Risk personnel register at anytime. Aurizon Network believes that this is unnecessarily broad and open-ended. In most cases access to the Register would be required to construct an audit scope or to use in the QCA's analysis of a Compliance Breach.

4.10 Information Security (Decision 4.10)

Aurizon Network has already outlined its position on mine, port and rail ownership earlier in this chapter's response, please refer to the response on Draft Decision 4.3 for this information.

Aurizon Network is comfortable with the principles of this Draft Decision, specifically the strengthening of the overarching commitments to not disclose confidential information to a related entity for the purposes of obtaining an unfair advantage.

4.11 Aurizon Network Premises Security (Decision 4.11)

The QCA's Draft Decision aims to clarify the requirements for premises security with the aim of protecting confidential information. The security arrangements the QCA Draft Decision has outlined should be expanded upon to include:

- All Aurizon Network Premises;
- All persons visiting those premises that are not either a director or an employee of Aurizon Network; and
- Any person visiting must be accompanied by Aurizon Network personnel at all times.

Aurizon Network manages its building security in line with the Aurizon Holdings Protective Security Corporate Principle and the Ringfencing Management Principle. These principles outline both the legal and regulatory requirements with which Aurizon Network must comply.

Aurizon Network currently has 35 permanent premises located throughout Queensland and various other 'demountable' premises set-up for temporary activities. Of those 35 premises, only 3 premises would hold confidential information and Aurizon Network employees with responsibilities to manage that information. Aurizon Network has interpreted the drafting to not include track corridor or temporary buildings within the definition of premises. If this was due to be included within the definition or the intention of this Draft Decision, then Aurizon Network strongly opposes this decision for simple reasons of practicality.

Aurizon Network confirms that those 3 premises are limited to 192 Ann Street, Brisbane and both the Planning & Day of Operations premises in Rockhampton and Mackay. The remaining sites are operational premises and do not have any responsibilities relating the management of confidential information or controlling access to the CQCR. The integrated Logistics Centre (ILC) at Mackay is not included with these premises as Aurizon Network only leases its portion of that site with the remainder leased by other supply chain participants. Aurizon Network is not responsible for security at this site.

Those 3 sites already have security processes that ensure that only those people authorised to do so, can access those sites. This authorisation is not a blanket authorisation across the entire Aurizon Network function, it is specific to the location and the nature of the work completed within.

The 2014DAU proposed that the Secure Premises obligation should only be applied to its major offices²⁵ and those personnel located at those premises would be included within the High-Risk register. The QCA's Draft Decision and its accompanying redrafted Undertaking, outline that security measures must be applied to all Aurizon Network Premises²⁶. Applying the security protocols to all 35 premises is unreasonable as it manages a confidential information risk that is not prevalent.

Aurizon Network suggests that the Drafting should be amended to reflect the intention of the 2014DAU to include only its major premises housing those personnel that are classified as High-risk, who have exposure to Protected Information or make decisions that could impact access holders of the CQCR.

Aurizon Network's Position – Accompaniment of non Aurizon Network staff

Aurizon Network agrees that accompaniment is an appropriate control, however the ability to fulfil the strict requirement of 'at all times' (2014DAU c3.17(c)(ii)) is impractical and unmanageable, particularly with the broader definition of 'premises'.

Current practice involves Aurizon Network adopting a 'where appropriate' stance when accompanying externals to Aurizon Network. Particular focus is given to all Access seekers/holders, any related operator and the Aurizon Marketing function.

Aurizon Network, employs long-term contractors from time to time to assist with specific deliverables. These long-term contractors who could be engaged for a period of years, are employed by Aurizon Network only and are treated like employees by having to comply with the same requirements (training, recipients of communications etc).

The 2010AU allowed for these types of arrangements through clause 3.4.1, however the QCA has chosen to not carry this clause over into their redrafted Undertaking. The QCA's redraft, if not limited by the list provided within Clause 3.12(d), and requires the highest level of controls to manage the confidential information risk, which in many cases would be unnecessary.

Aurizon Network is a large organisation with both fixed and variable requirements for human resources. Accordingly, in order to satisfy these requirements efficiently, Aurizon Network engages contractors to undertake some tasks. Operational sites engage engineers and tradesmen to carry out work both on and off track. They are employed under commercial contractual arrangements that prohibit disclosure of confidential information and require compliance with Aurizon Network policies and directions – including, for example, Aurizon Network's current policy on ringfence information. These contractual arrangements manage the vast majority of the risks associated with contractors on site and reduce the requirement for these people to be accompanied 'at all times'. In addition to the contractual arrangement, there are impracticalities that limit constant supervision. Cleaners and

²⁵ Aurizon Network, 2014, 2014 Draft Access Undertaking, Clause 3.22.

²⁶ QCA, 2015, Draft Decision: Draft Access Undertaking, Clause 3.17 (c).

delivery people work outside of office hours, in some cases when no Network people are present at the premises. Aurizon Network believes that the QCA Draft Decision is not intended to cover these instances.

More generally, however, Aurizon Network suggests that the risk the QCA seeks to address in its proposal has already been addressed in 3.22 of Aurizon Network's 2014 DAU.

4.12 Access Seeker/Holder Waivers (Decision 4.12)

Aurizon Network does not agree with the removal of the drafting that allows for 3rd party access seekers/holders to waive Aurizon Network obligations to comply with the ring-fencing provisions that affect them. This is overly restrictive and does not allow 3rd parties to manage their confidential information in the way in that they see fit.

Asciano in their submission, argues that these waiver provisions were a key example of how 'Aurizon is a weakening of the non-discrimination provision in a number of key areas'²⁷. It is difficult to understand the rationale of Asciano's thinking on this, as all waivers are conditional upon the approval of either the 3rd party whom it may effect or the QCA. How this weakens the non-discriminatory or ring-fencing framework is not clear.

As outlined in the response to 4.6 above, in the event that the QCA drafting was 'hard-coded' into the Access Undertaking outlining the requirements of the Protected Information register, and Aurizon Network and Stakeholders agreed as part of consultation not to include a certain aspect, Aurizon Network would seek a waiver from Access Holders. However, this cannot occur under the current QCA drafting.

A waiver provision that requires an affected parties approval must be retained within the Access Undertaking as this will allow timely resolution of matters without involving further external parties.

For these reasons, the 2014DAU drafting must replace the QCA drafting.

4.13 Functional Separation(Decision 4.13)

The QCA has rejected the Aurizon Network proposed 'approach to functional separation. Amendments include:

- The removal of clauses 3.4 and 3.5
- Inclusion of an overarching statement that Aurizon Network's primary function is to supply the declared service and provide all relevant functions
- Require Aurizon Network not to:
 - Undertake any above-rail services
 - Undertake the operating or marketing of train services, unless for the provision of the declared service
 - Undertake any port service or hold any direct or indirect interest in any port in Queensland.

The QCA has indicated it is concerned that the 2014 DAU "*adopts a narrow, overly prescriptive definition of Aurizon Network's functional responsibilities, while simultaneously allowing Aurizon Network to perform functions not related to those functional responsibilities.*"

With respect, we do not accept that it is part of the role of the QCA to dictate what business activities Aurizon Network, or any other access provider, may undertake in addition to provision of access to a declared services, so long as there are appropriate measures in place to ensure that:

- there is no unfair differentiation between operators with a material adverse effect on competition between them
- the confidentiality of information received by the access provider from access holders and seekers in the course of the provision or negotiation of access is respected, and such information is not passed to related operators
- any potential conflicts of interest between the related access provider and related operators are appropriately managed.

²⁷ Asciano, 2013, Submission to the QCA in relation to the 2013 Aurizon Network Draft Access Undertaking, p. 19.

It is true that section 137(2) contemplates that an Undertaking “*may include ... arrangements to be made by the owner or operator to separate the owner’s or operator’s operations concern the services from other operations of the owner or operator concerning the service*”, but that does not require that an access provider be prohibited from undertaking any activities other than the provision of the declared service, merely that there is appropriate separation between such activities.

We have a range of concerns with the QCA’s proposed redraft of the provisions relating to functional separation which are set out below.

Definition of and use of the terms “Below Rail Services” and “Above Rail Services”

The QCA has sought to include within this term the procurement and management of electric energy. This is not part of the declared service, so its inclusion within the definition of Below Rail Services is inappropriate.

The QCA has included both the provision and procurement of maintenance and renewal of the Rail Infrastructure within the definition of Below Rail Services, and then provided in clause 3.6(a) that such Below Rail Services must not be transferred or delegated or contracted out to, or otherwise undertaken by a Related Operator. The inclusion of the *provision* of maintenance and renewal services (as opposed to the inclusion of the *procurement* of such services) is inappropriate. Maintenance and renewal services are available from a range of commercial suppliers. The provision of such services, compared to their procurement, is not an integral function of an access provider, and it is appropriate that an access provider be permitted to secure these services either externally, or from a related entity. These resources have no ability to influence the rights of access seekers and holders, let alone to perpetrate unfair differentiation between access seekers or holders, therefore it is unclear why the QCA considers the prohibition necessary. Its inclusion would substantially disrupt Aurizon Network’s current maintenance and renewal regime, as at present it secures these services from a related entity, which also supplies such services to external parties.

The definition of Above Rail Services, and the prohibition on Aurizon Network providing Above Rail Services, also creates difficulties. Above Rail Services encompasses activities, other than Below Rail Services, required to provide and operate Train Services including Rollingstock provision and maintenance. This potentially prohibits Aurizon Network undertaking activities such as maintaining rollingstock used to maintain its network, such as rail grinders (which travel on rail) or the rail motor which it uses to inspect track. We assume this is not intended. Moreover the restriction extends beyond the CQCR. Should Aurizon Network wish to undertake Above Rail Services on another network, there should be no reason that the Undertaking should prevent that.

Proposed restrictions on port and mine ownership

In relation to the proposed restriction on ownership of ports and mines, these provisions are clearly inappropriate and beyond power. Aurizon Network has addressed this in its response in Part 4.3 above.

4.14 Employee Separation (Decision 4.14)

The QCA has provided a draft decision to reject Aurizon Network 2014DAU that deals with the staffing of Aurizon Network. The QCA draft decision extends to:

- The reinstatement of the working group provision;
- The requirement to notify the QCA of secondments/transfers of employees to another Aurizon Party prior to that secondment being made; and
- Requiring Aurizon Network to have a separate email address that identifies them as Aurizon Network employees.

In addition, the QCA’s redrafted Undertaking has revised clause 3.6 of the 2014DAU (now clause 3.7 of the QCA’s redrafted Undertaking), to materially restrict the activities of employees whose duties primarily involve the provision of Above Rail Services.

Working Group

The concept of the working group was contained within the 2010AU, and was included to assist Aurizon Network with avoiding any conflicts of interest by preventing their participation in working groups that may affect access²⁸. The inclusion of this clause within the Access Undertaking presented Aurizon Network with unclear guidelines on AN employee's participation within broader working groups and was therefore deleted from the 2014 DAU as unnecessary and unworkable, and replaced with more general restriction in clause 3.6 f the 2014DAU with respect to the activities of staff engaged primarily in Access related functions.

To understand the issues with the working group drafting, an example has been provided below with reference to the QCA's drafting:

- An Aurizon Network employee who manages a train control team within the CQCR – Clause 3.5(d)(vii);
- This employee will have access to 3rd party Access Holder confidential information – Clause 3.12 (b) (ix);
- The employee's team are employed via Enterprise Agreements which are up for renewal. These agreements are the same as the train drivers employed by the related operator and all are represented by the same Union;
- A project team (or working group) has been established with management from the related operator and the Aurizon Network employee has been requested to participate on – Clause 3.7 (d) (I); and
- The Train Drivers agree to take protected action and the train control team agree to take action in support. These actions affect access to the entire CQCR which will include ramifications on 3rd party access holders – Clause 3.7 (d).

Under this example and in light of the QCA's drafting, the Aurizon Network employee would not be able to participate in the working group and therefore potentially reduce the likelihood of the outcome. This example outlines that the working group example does not address any discrimination issues that this drafting is trying to protect, all it does is limit Aurizon Network's legitimate business interests.

The fundamental concern of Aurizon Network is the terminology 'affect or could affect the access of third party access holders...(or) seekers'²⁹. This drafting is broad and the materiality of 'affect or could affect' can be interpreted in a variety of ways which would ultimately limit Aurizon Network's ability to operate.

For these reasons, Aurizon Network submits that reinclusion of the working group clause is inappropriate.

Employee Secondments

For clarity as they are not defined terms, Aurizon Network understands that secondments or temporary transfers do not include where an Aurizon Network employee permanently moves to another function within the Aurizon Group.

The QCA has based its decisions upon stakeholder comments that stated that 'Aurizon Networks' secondment proposals are insufficient due to the continued crossover of people that was symptomatic of a culture of non-compliance³⁰. This statement was not expressly contained within any of the stakeholder submissions.

Aurizon Network would like to take this opportunity to clarify that in the last 2 years, only 4 secondments have occurred. These secondments have been managed in-line with the exit process from the 2010AU along with additional internal controls relating to access to systems and premises. To say that there is a culture of ringfencing non-compliance related to the continued crossover of people with only 4 secondments occurring, is misleading.

It is important to note that, through Aurizon Network voluntarily applying the exit certificate process, secondments have been included in the QCA's audit scope for at least the last 3 years with no material issues being identified. The QCA should therefore have a baseline of information to draw upon to understand the risk which its drafting is purportedly trying to manage.

²⁸ Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Table 1, p. 61.

²⁹ QCA, 2015, Draft Decision: Draft Access Undertaking, Clause 3.7 (d).

³⁰ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 4.7.2, p. 80.

The QCA 2014DAU, outlines that all secondments for all Aurizon Network employees must be notified to the QCA prior to occurring. While Aurizon Network does not consider this measure is necessary, it is comfortable with this approach, as long as it is limited to Aurizon Network employees who are on the High-Risk register and are temporarily transferred to a division (Commercial and Marketing or Operations from Figure 4.1 above) that competes with 3rd party access seekers within the CQCR.

Separate Email Addresses

The QCA has decided that Aurizon Network must have email address that clearly identify them as Aurizon Network Employees. This has been drafted into the Access Undertaking, in Clause 3.17 (b).

Aurizon Network does not consider this measure is necessary for an effective ringfencing regime. It would however volunteer to implement this as long as it was appropriately compensated for the implementation of this through the Maximum Allowable Revenue, specifically the Operating Allowance. Without a commitment for compensation through the Operating Allowance, Aurizon Network cannot commit to this measure.

As it would take some time to implement this measure, Aurizon Network would also need to ensure that the obligation within the Undertaking not become effective until the completion of an appropriate implementation timeframe

Restrictions on the activities of staff whose duties primarily involve the provision of Below Rail Services

Aurizon Network believes the QCA's redrafted position, which requires that employees engaged to work for Aurizon Network and whose duties primarily involve the provision of Below Rail services will work *only* for Aurizon Network, (as opposed to *primarily* for Aurizon Network) is unduly restrictive. There are a number of instances where an employee within Aurizon Network may have specific expertise which could be useful to the broader Aurizon Group, and it seems inappropriate that they should be prevented from sharing that expertise, so long as they still primarily work for Aurizon Network. For example, a capacity modeller for Aurizon Network might reasonably be asked to advise on capacity modelling for a rail project in another jurisdiction, or an access expert might reasonably be asked to comment on a proposed access regime for a rail project not subject to the declaration. So long as confidentiality is protected, time is properly accounted for and conflicts of interest are avoided, it is difficult to see what justification there is for the Undertaking seeking to prevent such activities. We therefore submit that the proposed amendment is inappropriate.

4.15 Management Separation (Decision 4.15)

Aurizon Network submits that the 2014DAU appropriately dealt with these issues and should be accepted. That said, it does not have any material issue with the alternate clauses proposed by the QCA To the extent that the QCA wishes to deal with the issue of "Related Competitors" please note that it will be necessary to deal with our comments in respect of the defects in the definition of Related Competitor expressed in Part 3 (Intent and Scope) above.

Aurizon Network seeks to address the QCA specific concerns below:

- QCA concern - *'explicitly excludes related operators from directly supervising Aurizon Network's executive management team'*.
 - Aurizon Networks intent was outlined in Table 1 in the 2013 undertaking Proposal, specifically *'...has independent management reporting and supervision lines that do not include any person with direct management responsibility for a related operator'*³¹. Aurizon Network is willing to address this with clearer drafting of its 2014DAU
- The purpose of having the Aurizon Network Executive Officer at an equivalent or greater level was to ensure *'comparable influence and decision-making ability within the broader Aurizon organisation as does the equivalent related operator executive'*³².
 - If a dispute arises between Aurizon Network and the related operator, and both executives have the same influence and authority, the issue, by definition, cannot be resolved by a superior level of authority.

³¹ Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Section 5.2.4, Table 1, p. 61.

³² Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Section 5.5.3, p. 70.

- The QCA's comments around a director/managing director being appointed to the Aurizon Network management team, is simply a mis-reading of the drafting by the QCA. Aurizon Network does not have any Executive Directors (excluding the CEO) upon either the Network or Holding Board, they are all Non-Executive Directors. Therefore, this precludes them from being able to be appointed to a managing role within the actual business itself.
 - Aurizon Network will work with the QCA to address this issue in any subsequent drafting
- The QCA's view on the protections in relation to Access Rights and Aurizon Network not acting at the direction of the Related Operator to grant these access rights is incorrect. This is an additional protection and commitment by Aurizon Network to provide further assurance to 3rd Party Stakeholders that Aurizon Network does not act at the directions of the Related Operator except in terms of their rights as an ordinary Operator.
- The Clause *'nothing prevents the Related Operator providing a direction to Aurizon Network in relation to the exercise of the Related Operator's Access Rights in accordance between the related Operator and Aurizon Network'*³³.
This clause was inserted to provide clarity that the related operator (like 3rd party access holders) that their 'direction' rights afforded to them within their access agreements are retained in line with their agreed access agreements. This was confirmed in the Aurizon Network 2013 Undertaking Proposal³⁴.

Overall, Aurizon Network believes that the QCA has mis-interpreted Aurizon Network 2014DAU drafting and failed to acknowledge its intention to provide additional assurance to all Access Holders. Aurizon Network is willing to work with the QCA to clarify its 2014DAU drafting.

4.17 Complaints Process (Decision 4.17)

Aurizon Network agrees with the complaints handling process as outlined with the QCA 2014DAU. However, Aurizon Network believes that the inclusion of Clause 3.19(g) is better suited for inclusion within Clause 10.1.2.

4.18 QCA Waiver and Compliance Declaration (Decision 4.18)

Waiver

The QCA's Draft Decision was to reject Aurizon Network position on allowing the QCA to approve a request from Aurizon Network to waive its responsibilities to the obligations contained within Part 3 of the Undertaking. The purpose of the waiver provisions was to provide flexibility to Aurizon Network, with the appropriate oversight, if circumstances of the organisation change.

The 2010 AU provide this flexibility in various locations and the waiver provision in the 2014DAU was to provide a concise location for these provisions.

The use of a waiver is common amongst vertically integrated companies and is used considerably by those organisations regulated by the National Electricity Regulator. In addition the ACCC use the waiver provisions effectively and in their consideration of a waiver application, *'weigh up the costs of their impositions against the public benefit'*³⁵.

The QCA in their final determination on Electricity Distribution: Ringfencing Guidelines, supported the concept of having a waiver in place, as long as there were detailed procedural requirements that accompanied the waiver process. These procedural requirements specifically captured times frames between QCA decision documents, to be a maximum of 60 days.

The QCA decision to reject this waiver proposal, will force Aurizon Network to adopt the more formal regulatory process if change is required, which could result in multiple Draft Amending Access Undertakings for minor matters that could have been dealt with through the waiver process.

³³ Aurizon Network, 2014, 2014 Mark-up Draft Access Undertaking, Clause 3.10, p. 19.

³⁴ Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Section 5.5.3, p. 71.

³⁵ QCA, 2000, Final Determination – Electricity Distribution: Ringfencing Guidelines, p. 14.

Compliance Declaration

The QCA Draft Decision introduces a new obligation that requires Aurizon Network through its Executive Officer to declare every six months *'that there have been no breaches of the Ringfencing arrangements set out in the Part 3 of the Undertaking during the six (6) months period'*³⁶.

This compliance declaration is in addition to the Reporting requirements from Clause 10.2 of 2014 DAU that have been retained by the QCA, that require Aurizon Network to advise the QCA of a breach as soon as it becomes aware of a breach.

Aurizon Network believes that the addition of the 6 monthly compliance certification as Clause 3.4 of the QCA redrafted Undertaking, creates duplication as the nature and content of the breach reports will be exactly the same, however the timing will be different. An efficient and effective compliance regime requires dynamic not static reporting which where possible means continuous disclosure. The addition of Clause 3.4 will not add any additional controls to the compliance framework or level of assurance to stakeholders.

Aurizon Network believes that clause 3.4 should be removed in favour of a strengthened Clause 10.2. The strengthening should be based upon the QCA's draft clause 3.4(b)(ii) and should include the following:

- The nature and circumstance of the breach;
- Any immediate actions taken to mitigate the impact of the breach;
- Whether the breach is under investigation;
- Any Remedial Actions that will be implemented;
- Confirmation that any affected parties have been advised and where appropriate consulted with; and The signing of the breach reports should at all times sit with the Executive Officer only.

The requirement to have the other member of the senior manager team who is *'most directly responsible'*³⁷ for the compliance breach does not align with the effective governance framework requirements, as the executive officer is the one ultimately accountable for compliance with the Access Undertaking. If an additional signatory is required, then it should be the Compliance Officer who is accountable for ensuring that compliance with the remedial action is completed.

4.19 Rail Infrastructure (Decision 4.19)

Aurizon Network has no objection to this decision.

³⁶ Aurizon Network, 2014, 2014 Draft Access Undertaking, Clause 3.4.

³⁷ Aurizon Network, 2014, 2014 Draft Access Undertaking, Clause 3.4 (c).

5 Reporting

5.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve clause 10.1 Part 10 of the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as indicated in our proposed draft to:</p> <ul style="list-style-type: none"> (a) require financial reports to be provided to the QCA within four months, rather than six months, of the end of the financial year (b) reflect amendments to clause 10.1.1 in our attached changes to the 2014 DAU and any minor amendments to clause 10.1 	5.1	(a) Agree (b) Agree
<p>Our Draft Decision is to refuse to approve clause 10.1 Part 10 2014 DAU. We would approve amendments to the 2014 DAU to provide that self-insurance arrangements be reported as part of the annual regulatory accounts (cl. 10.1.1) including disclosing the number of self-insurance events by type and value each year.</p>	5.2	(a) Agree with amendments but with inclusion of reporting threshold.
<p>Our Draft Decision is to refuse to approve clauses 10.1.3 and 10.1.4 of Part 10. We would approve amendments to the 2014 DAU to:</p> <ul style="list-style-type: none"> (a) require Aurizon Network to provide access holders (and their customers) a presentation on the planned scope of maintenance for any forthcoming year, three months prior to the commencement of that year. 	5.3	(a) Agree
<p>Our Draft Decision is to refuse to approve clauses 10.1.3 and 10.1.4 of Part 10 of the 2014 DAU. We would approve amendments to the 2014 DAU, to:</p> <ul style="list-style-type: none"> (a) require annual maintenance cost and scope reporting to be consolidated into a comprehensive single report for all stakeholders (b) require the maintenance cost report to be provided within four months of the end of the financial year (c) include asset renewals as part of maintenance costs reporting (cl. 10.1.3). 	5.4	(a) Agree (b) Agree (c) Agree
<p>Our Draft Decision is to refuse to approve clauses 10.1.5 of Part 10. We would approve amendments to the 2014 DAU that:</p> <ul style="list-style-type: none"> (a) require Aurizon Network to provide monthly network performance reports within ten business days of the end of the calendar month. 	5.5	(a) Disagree increased administrative burden, and duplication of reporting.
<p>Our Draft Decision is to approve Aurizon Network's proposal to include a condition based assessment in the 2014 DAU.</p>	5.6	(a) Agree
<p>Our interim position, as reflected in this Draft Decision, is to refuse to approve the compliance reporting provisions proposed by Aurizon Network in its 2014 DAU. We</p>	5.7	(a) Agree (b) Disagree

<p>would accept arrangements that:</p> <ul style="list-style-type: none"> (a) include an obligation for Aurizon Network to keep an issues register recording breaches of the undertaking and actions taken to remedy identified breaches (b) include an obligation for Aurizon Network to disclose non-standard access agreements to us within five business days for signing. 		
<p>Our Draft Decision is to refuse to approve the audit arrangements for the 2014 DAU proposed in Part 10 of the 2014 DAU. We would approve amendments to the 2014 DAU which:</p> <ul style="list-style-type: none"> (a) make minor amendments to the annual compliance report process (b) include a new clause to re-instate a conflicts audit (c) require the QCA to appoint the compliance auditor (d) include clauses to reflect annual audits requirements, including a compliance audit (e) include drafting to allow the QCA to request from Aurizon Network a plan for audit recommendation implementation, and consequential changes. 	5.8	<ul style="list-style-type: none"> (a) Agree (b) Agree (c) Disagree (d) Agree with amendments (e) Agree with amendments

5.2 Summary of Aurizon Network’s Response

Aurizon Network remains committed to providing greater transparency throughout our CQCR train operations which will provide tangible benefits to our stakeholders and the supply chain as a whole. Aurizon Network is focused on delivering accurate reports, providing its stakeholders with relevant and informative data, and moving away from ‘legacy’ metrics of little residual use. Aurizon Network will continue to engage with industry on enhancing transparency, within the constraints that individual stakeholders may propose for the protection of their information.

Aurizon Network disagrees with the QCA’s proposals to include a reconciliation between the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. Aurizon Network is only required to report to the QCA financial information relating to the regulated services.

Aurizon Network is willing to report on self-insurance arrangements as part of the annual regulatory accounts, including disclosing the number of self-insurance events by type and value each year. Aurizon Network is proposing, as per its response to the MAR Draft Decision that all incidents under \$50,000 be aggregated for reporting purposes. This has been proposed to reduce the large administrative requirement that would be involved in reporting every incident individually.

The QCA has implied in their Draft Decision that Stakeholders are requesting a regulated monthly network performance report to be generated to provide their businesses with the information they require to make informed operational decisions. Operators should not be making operational decisions based upon information generated as part of the regulatory obligations. Instead, Aurizon Network will include a KPI regime in access agreements which will provide relevant information.

Aurizon Network cannot produce a publically available quarterly report within 10 business days after the end of the quarter. This has significant timing constraints and Aurizon Network would not be able to confirm the information as accurate.

Aurizon Network has engaged with stakeholders regarding their views on the monthly performance report. Aurizon Network has suggested to continue delivering a quarterly performance report with the layout of the report to be segregated by month as it believes this would be sufficient to satisfy its stakeholder's needs.

Aurizon Network agrees with the QCA's proposal to keep an issues register recording breaches of the undertaking and actions taken to remedy identified breaches.

Aurizon Network disagrees with the QCA's proposal to appoint the compliance auditor. If the QCA is responsible for engaging and appointing the auditor, Aurizon Network has no visibility to plan for the costs of the proposed audit. It cannot measure if the QCA's nominated auditor can provide their services at a competitive rate.

5.3 Financial Reporting

The QCA's Draft Decision is to reject the proposed Annual financial reporting requirements but approve with amendments. The QCA in their decision have proposed a new timeframe within which the Annual Financial Report should be submitted.

Aurizon Network accepts the Draft Decision to amend the 2014DAU to require financial reports to be provided to the QCA within four months, rather than six months as required by the 2010 AU, of the end of the financial year.

Within the Draft Decision, clause 4.9.3 alludes to the QCA believing our 2014 DAU proposal reduces robustness and transparency because it removes the link with Aurizon's general financial statements. The QCA feel the merit of this approach is unclear, particularly as Aurizon Network already has an obligation to produce financial accounts which comply with existing legislation and accounting standards.

Following the restructure of Aurizon Network Pty Ltd in FY13, the company is required by the *Corporations Act 2001* to prepare and lodge general purpose financial statements annually. The company did not have the same obligation under the *Corporations Act 2001* (it was exempted by being part of a Deed of Cross Guarantee with the other entities in the Aurizon Group) during the previous years of UT3. Due to this change in circumstance, we did not believe it would be necessary to duplicate this statutory obligation in the Undertaking. The statutory financial statements will continue to be publicly available for comparison to the financial statements prepared for the regulated business in accordance with the Costing Manual.

Aurizon Network disagrees with the QCA's proposals to include a reconciliation between the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. Aurizon Network is only required to report to the QCA financial information relating to the regulated services.

Clause 4.9.3 also states "*we consider it appropriate that Aurizon Network's Executive Officer should certify that the relevant financial statements have been prepared in accordance with the costing manual*", rather than that the financial statements are 'accurate'. Aurizon Network accepts this change, however this has not been reflected in the Draft Undertaking as the clause is still referencing 'accurate'

5.4 Self-insurance provision

The QCA's Draft Decision is to reject the proposed self-insurance arrangements as they are not transparent to Aurizon Networks customers, and suggest a proposed methodology for the development of self-insurance estimates. The QCA has suggested Aurizon Network develop and maintain a comprehensive database of self-insured losses, believing that it would significantly streamline the analysis and provide for more robust outcomes. Note that the term "self-insurance" and what it covers can be unclear when considering insurance and review events. Aurizon Network has planned to provide further clarification internally and workshop with stakeholders on each mechanism to provide clarity and consistency throughout future claims.

In short, Aurizon Network's current insurance arrangements cover a discreet number of assets, being bridges and electrical feeder stations, within the CQCR. The actual infrastructure (formation, ballast, rail, sleepers etc.) are not covered by insurance (outside of derailments). Therefore, Aurizon Network self-insures for events up to the Review Event threshold of \$1million and then relies upon the review event process to cover the remaining costs greater than \$1million. It is important to recognise that Aurizon Network self-insures because Insurance underwriters are not willing to cover these risks at premiums that would be acceptable to Aurizon Network.

Aurizon Network is willing to report on self-insurance arrangements as part of the annual regulatory accounts, including disclosing the number of self-insurance events by type and value each year. We are proposing, as per our response to the MAR Draft Decision that all incidents under \$50,000 be aggregated for reporting purposes. This has been proposed to reduce the large administrative requirement that would be involved in reporting every incident individually. All derailments will be reported as part of these reporting requirements, as that is what the customers pay for in the 'self-insurance provision'.

Aurizon Network will identify the appropriate requirements necessary to capture all of the self-insured events and to retain this data suitable for auditing purposes. Aurizon Network will communicate with the QCA on the outcome of this process to agree on the way self-insurance reporting will be implemented from FY16 onwards.

As part of the decision process on the 2010AU, there were requirements placed upon Aurizon Network to review and where appropriate, implement additional Insurance arrangements. Subsequently, during the term of the 2010AU, these were not implemented with the major contributing factor being the costs applicable to such arrangements along with the impact of the socialisation of these costs.

5.5 Performance and Asset Reporting Framework

The QCA's Draft Decision is to reject clause 10.1.3 and 10.1.4 of Part 10 but would approve with amendments. The QCA has described the concern from stakeholders about the maintenance performance, highlighting the planned scope not being delivered.

Aurizon Network understand the stakeholders concern and wish to work with all parties to provide a transparent and interactive maintenance plan.

We agree with the Draft Decision to add a clause to provide Access Holders, and their Customers, if applicable, with a briefing in the form of a presentation on:

- a) Details of the planned scope of maintenance for the forthcoming year, four months before the commencement of each year; and
- b) The content of the maintenance cost reports, within one month after the submission of the maintenance cost report to the QCA

5.6 Maintenance Reporting

The QCA's Draft Decision is to reject clause 10.1.3 and 10.1.4 of Part 10 of the 2014DAU but would approve with amendments.

- a) Aurizon Network agrees with the annual maintenance cost and scope reporting to be consolidated into a comprehensive single report for all stakeholders. This will provide a streamlined simple report which will give stakeholders confidence that the report which is being generated to the QCA is the same which is being released publically
- b) Aurizon Network agrees with the QCA's proposal for the maintenance cost report to be provided within four months of the end of the financial year to align with all of the annual reports which are required in the proposed undertaking
- c) Aurizon Network agrees to include asset renewals as part of maintenance cost reporting with amendments.

Aurizon Network can see the benefit of reporting details of all capital expenditure related to asset renewals as part of the Annual Maintenance cost report. The QCA's amendments to the Draft Undertaking seek to commit Aurizon Network to "...report details of all capital expenditure related to asset renewal incurred in place of planned maintenance work during the relevant year". This clause 10.1.4(c)(vii) does not reflect the intent outlined within the Draft Decision. Aurizon Network disagrees with the clause located within the redrafted undertaking as our current business systems do not distinguish asset renewal expenditure between planned renewal or replacing planned maintenance.

The primary reason asset renewal work is carried out is to replace an asset which has reached its functional limits, or which have been deemed a safety risk, due to unforeseeable circumstances. While asset renewals should help to reduce additional maintenance which is required on the Network, they do not offset general maintenance which is required to keep the QCQR running efficiently and effectively, providing a safe and reliable Network for all users. Aurizon Network currently reports Asset Renewals within the Capital Expenditure report as per the 2010AU. This report is not published by either the QCA or Aurizon Network. As outlined earlier, Aurizon Network is committed to providing transparent information to all of our stakeholders and therefore believes that asset renewal reporting to interested stakeholders will benefit the knowledge of our supply chain counterparts. Therefore, Aurizon Network will replicate the Asset renewal information from the Capital Expenditure report within the Maintenance Cost Report. This will not outline where asset renewals are completed in place of maintenance activities, which is the intent of the QCA Draft Decision, as this the data is not captured within the Network Asset team, in any event. If the maintenance team are tasked to perform a maintenance activity and find the asset needs to be replaced, it will only detail an "asset renewal activity" took place at that particular section. Aurizon Network are opposed to future reporting of asset renewal activities performed in place of maintenance as this is not the purpose of asset renewals

5.7 Timing of operational performance reports

The QCA's Draft Decision is to not approve clause 10.1.5 of Part 10 but would approve with amendments. The QCA has stated that the performance data reports are used by access holders and access seekers to help make informed decisions, and timely operational information is crucial to these stakeholders.

Aurizon Network disagrees with the QCA's proposal to provide monthly network performance reports within ten business days of the end of the calendar month.

The QCA has implied in their Draft Decision that Stakeholders are requesting a regulated monthly network performance report to be generated to provide their business with the information they require to make informed operational decisions. The purpose of the Regulatory reports is to provide stakeholders the comfort that Aurizon Network is in compliance with the fair treatment of all operators by providing agreed metrics to the individual operators and public. It would not be wise for Operators to make operational decisions based on the information provided as part of the regulatory reports due to the intent of the report. The below table describes the main differences between regulatory reporting and operational reporting and demonstrates how it would not benefit access holders to inform their operational decisions through the regulatory report.

	REGULATORY REPORT	OPERATIONAL REPORTS
TRAIN SERVICES	Cancellations are counted as any scheduled service which has been cancelled within the Vizirail system	Cancellations are counted in different stages – Weekly, 72hr, 48hr and Day of Operations.
On Time Performance	Allotted Time Threshold = +/- 30 minutes	Allotted Time Threshold North = +/-15 minutes South = +10/-5 minutes
CANCELLATIONS	Cancellation Responsibility <ul style="list-style-type: none"> - Below Rail - Operator - Unallocated 	Cancellation Responsibility <ul style="list-style-type: none"> - Below Rail - Operator - Unallocated - Mine - Port - Force Majeure
VOLUMES	Billed Volumes Generated by Network Finance - SAP	Operational Volumes Generated by Network Operations - ViziRail

These are just some of the examples of differences within the Regulatory and Operational environments.

The Regulatory report does not provide the level of detail required to allocate the cause of cancellations and delays when they are reported as from a total of 6 responsibility codes they are assigned to only 3 categories. On Time Performance thresholds differ considerably from the Regulatory report and the operational reports with the allocated time thresholds and these numbers would not reconcile. Cancellations which have not been agreed can be amended, causing the reported information to change.

An example of a report which Operators may use to make informed decisions would be an “On Time Performance” report. If Operators wanted to look at how many delays they were causing on train running due to crew changes, they could limit the report to show all train crew delays. This could then help them plan their crew changes differently, and thereby improve their operations. The quarterly performance report does not show that level of detail and would be extremely difficult for an operator to make an informed decision about their operations by analysing the information provided in the regulatory reports.

Aurizon Network has in the past, received adhoc requests from Access Holders to provide them with weekly and monthly reports tailored with specific operational metrics which are of importance to them. Network analysts are able to generate these reports for Supply chain parties to help provide them with information to benefit their operations and reporting requirements.

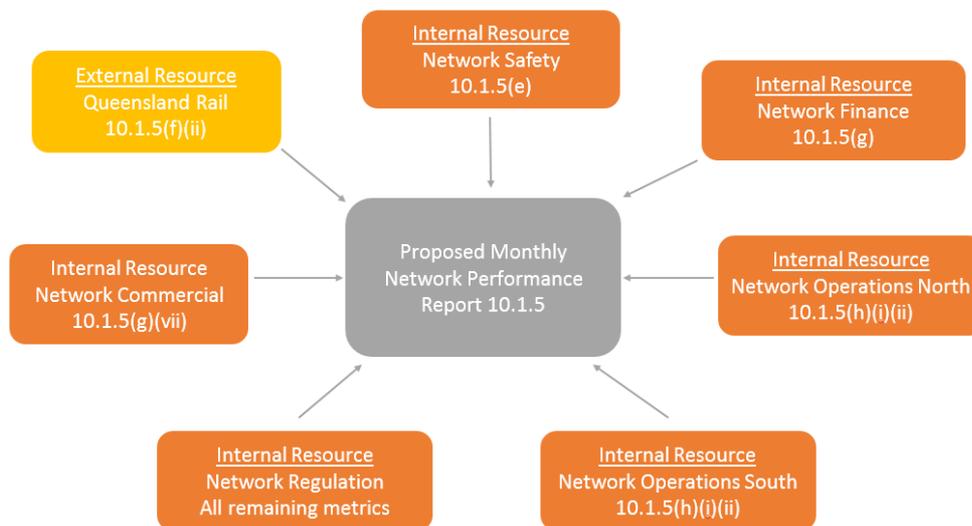
Aurizon Network has the ability to report on just about any operational function which is performed on the Network. If an operator, for example, was considering trialling a larger consist on the network they could request specific operational information relating to that consist to help analyse the operational performance of the trial. This is a real example of an operator making informed decisions about their operations using tailored operational data reporting provided by Aurizon Network.

Aurizon Network believes that if stakeholders are seeking operational information to make informed decisions then this should not be a requirement of the Undertaking, but a specifically designed report which could be delivered on a more frequent basis. For example, KPIs under access agreements or through reports distributed at supply chain forums.

Locking reporting into the regulatory process for the term of the Access Undertaking, results in metrics becoming less relevant for decision making purposes as operators alter their focus to the relevant metric as their business needs evolve.

Customers are better served receiving their operational performance data from the Operational Reporting process, and not indirectly through reports designed to inform the Regulator and the broader public.

Currently Aurizon Network delivers a quarterly performance report which is due 30 days after the end of the reportable quarter. The quarterly performance report requires sourcing information from six separate internal resources and one external resource to complete this report with all the required undertaking information included. Below is a diagram using the proposed monthly network performance reporting requirements and the resources that would be required to build this report.



Each of the above internal and external resources that provide information for the report, need to gain approval from their delegated manager to sign off on the information. This process alone can take up to 10 business days to acquire the information with line management sign off, and to then analyse the data for trending metrics and unusual results which would then be queried or verified with the metric owner.

To maintain the integrity of data, the information goes through an appropriate governance process to verify the information which is to be made public. This information is closely scrutinised by external financial analysts, and must be accurate to ensure compliance with ASX obligations not to mislead investors. A more reasonable timeframe to complete the monthly report would be 20 business days after the end of the month.

As demonstrated above, the proposed 10 business day timeframe to have the report generated, and made public is not practical from a producing and data integrity perspective.

Another issue Aurizon Network has identified with the new proposed timeframe is Aurizon Network currently has contractual arrangements with Queensland Rail to provide information for 10.1.5(f)(ii) 12 days after the end of each quarter. This contractual arrangement has been created as Aurizon Network currently do not have the resources available to test for On Track Condition Index of our CQCR Network and require Queensland Rail to use their Track Recording Vehicle to determine these results.

Adjusting data systems

In the Aurizon Network business, train operation information is subject to frequent adjustment as particular operational circumstances are clarified. The information comes from the Day of Operations, planning and scheduling tool, ViziRail, which is updated live 24hours a day.

There are a wide range of events which impact upon operational performance, the causes of which require detailed investigation to result in an accurate allocation of responsibility. Safety incidents, unplanned maintenance and speed restrictions are just some of the circumstances which can result in delays or cancellations, but the precise cause of these events is not always readily known, and often requires investigation before performance statistics are fully accurate.

Currently our IT systems are configured to quarantine this information from further change or “locked down” seven days after the end of the quarter. By locking down the data, it can be extracted for use by auditors at any time and the results will be consistent even if the live data has subsequently changed further as the outcomes of investigations emerge. Locking the data down, also allows for Aurizon Network to have consistent data should analysis against historical results be required.

Locking down the data gives the auditors the capability to run their queries against consistent data to ensure we are in compliance with the requirement to report information correctly.

Clause 10.1.5(b)(i) and 10.1.5(b)(ii) currently remains “the number and percentage of Train Services that reached (or did not) reach their destination within the Allotted Time Threshold”. Aurizon Network has proposed to define the term “Destination” as per the proposed Access Agreement which would then limit these services to arrival at Port only, as this is predominately used as a train service destination. Aurizon Network is proposing to add “Origin and Destination” in the clause to pick up services which reach (or did not) reach their origin within the Allotted Time Threshold therefore picking up services arriving predominately at a mine location. This is better aligned with our current reporting requirements and what Access Holders need to know.

Clause 10.1.5(e) was excluded from the provisions and was required to be reported for each coal system including GAPE. Aurizon Network currently does not split out Safety incidents by GAPE as GAPE is considered to be part of the Newlands system. Aurizon Network is unable to see why this particular metric needs to split GAPE out separately. In addition to these concerns, Aurizon Network has issues about the treatment of other expansions as individual systems as outlined within the QCA Draft Decision in Volume III. In the event that the pricing principles as detailed by the QCA in relation to expansions are approved (which Aurizon Network has outlined its issues with), then there would be additional reporting requirements for those ‘systems’. This will create an additional compliance burden, requiring extra cost and resources to address this.

Again, for clause 10.1.5(k) Aurizon Network cannot produce a publically available quarterly report within 10 business days after the end of the quarter. This, as mentioned above, has significant timing constraints and Aurizon Network cannot endorse the information as being correct.

The QCA must consider that any changes to the quarterly performance report will have IT implications causing additional cost and time for our business.

Aurizon Network are proposing to deliver a quarterly performance report and providing more transparency by segregating the data by month. This would provide the results which were accumulated in that quarter and we believe would be sufficient for our stakeholders have gain comfort that non discriminatory treatment is visible.

5.8 Disclosures of requested information

The QCA’s Draft Decision is to reject the compliance reporting provisions but would approve with amendments.

- a) Aurizon Network agrees with the QCA’s proposal to keep an issues register recording breaches of the undertaking and actions taken to remedy identified breaches. The QCA should be conscious this represents an additional compliance obligation which will require resources to take on this administrative burden which should be reflected in the MAR. Aurizon Network are in agreement with the QCA that keeping an auditable issues register would provide stakeholders with confidence that all breaches are being captured appropriately and will be audited as part of the annual compliance audit.
- b) Aurizon Network disagrees with the QCA’s proposal for Aurizon Network to disclose non-standard access agreements to the QCA within five business days of signing.

The QCA’s reasoning for Aurizon Network to disclose this information is based on the need for stakeholders to feel confident that access arrangements satisfy the provisions of the Undertaking, particularly highlighting non-discrimination provisions. As discussed in Part 2 of this response, the requirement under the QCA Act is to ensure there is no unfair differentiation between access holders which has a material impact on their ability to compete. It is not the QCA’s role to review every access agreement to ensure there is no discriminatory treatment between access holders. As such, Aurizon Network does not accept the inclusion of this obligation for disclosure of access agreements in its Access Undertaking.

In addition, as per clause 103 “Requirement to produce access agreement” of the QCA Act, the QCA may request copies of access agreements to be provided by Aurizon Network, with Aurizon Network to be given at least 14 days to respond to such written notice. If a Stakeholder felt that unfair differentiation which has a material impact on them was taking place, the QCA could use this clause under the Act to gain confidence. An Access Agreement is a contract between Aurizon Network and that particular Access Holder and the QCA does not need to oversee that process where the provisions have been negotiated and agreed between both parties. The approach within the QCA Act reflects the fact that differentiation in appropriate circumstances like the non-standard access agreement process promotes flexibility to the benefit of success seekers and holders.

5.9 Compliance and Audit Reporting

The QCA’s Draft Decision is to reject to approve the audit arrangements for the 2014 DAU proposed in Part 10 but would approve with amendments.

- a) Aurizon Network agrees with the QCA’s proposal to make minor amendments to the annual compliance report process.
- b) Aurizon Network agrees with the QCA’s proposal to include a new clause to re-instate a conflicts audit, subject to amendments

Aurizon Network disagrees with the clause 10.9(b) “In considering Aurizon Network’s compliance with its obligations under Part 3, the auditor may take into account Aurizon Network’s compliance with any relevant internal procedures”. Aurizon Network disagrees with this clause proposed in the QCA’s redrafted Undertaking, as this is outside of the audit scope. Any internal processes that Aurizon Network host, are our own management procedures and should not become a factor when the auditors are assessing our compliance with the Undertaking. Clause 10.9(b) should be removed from the Undertaking.

- c) Aurizon Network disagrees with the QCA’s proposal to appoint the compliance auditor

If the QCA is responsible for engaging and appointing the auditor, Aurizon Network has no visibility to plan for the costs of the proposed audit. We cannot measure if the QCA’s nominated auditor can provide their services at a competitive rate. Nor is it clear who would be liable should the auditor be found to be incompetent or unable to successfully complete the audit.

In addition, Aurizon Network would have no means of gaining assurance that the auditor selected has not been engaged by a third party access seeker or access holder as the QCA has not been transparent on how they would review and manage conflicts.

Under the current audit framework, Aurizon Network discloses all engagements of EY by the Aurizon group, the QCA approves the auditor annually and a tri-partite letter is executed by all parties to allow for the provision of information to the QCA. Under the proposed framework by the QCA, none of these provisions exists, resulting in the potential that the audit could be tainted by conflicts and reported on without the audit framework fundamentals that allow Aurizon Network the ability to respond to issues identified prior to these being reported.

Aurizon Network proposes that we continue to undertake the current process of communicating to the QCA, any engagements that the previous year’s auditor is engaged upon, run a competitive tender process to procure an auditor, nominate a compatible auditor and have the QCA approve the auditor.

- d) Aurizon Network agrees with the QCA’s proposal to include clauses to reflect annual audit requirements, including a compliance audit but has proposed amendments

Aurizon Network does not agree with the QCA being provided all information obtained from the auditor as a result of the audit. The auditor should not have to provide all information to the extent that it related to provision of non-

regulated revenue and associated costs, not related to declared services or is information not “owned” by Aurizon Network (eg. Aurizon Group overhead costs).

Aurizon Network's main concern with the QCA obtaining all of the data is that some of the information would be of a confidential nature of third party access seekers, access holder and our related operator and the data is not related to the provision of the declared service.

- e) Aurizon Network agrees with the QCA's proposal with amendments to allow the QCA to request from Aurizon Network a plan for audit recommendation implementation, and consequential changes

Aurizon Network propose that for clause 10.10(k) the clause read as follows:

“Unless otherwise agreed between Aurizon Network and the QCA, after at least three (3) months have elapsed, following the provision to the QCA of an audit report...

Aurizon Network acknowledges the QCA's intent to have the agreed recommendations implemented as soon as possible to improve the compliance of the undertaking, however Aurizon Network needs to take into consideration, IT adjustments which may be required with some future recommendations and staffing constraints that could prevent the recommendations being implemented within the 3 month period.

Clause 10.1.6 of the QCA's redrafted Undertaking calls for an Annual Regulatory Asset Base roll-forward report.

Aurizon Network cannot provide the Asset Base roll-forward report for each coal system if this subsequently includes NAPE. As outlined within section 17.7NAPE should not be reported as an individual coal system.

6 Dispute Resolution and Decision Making

6.1 QCA’s Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism. We would approve consolidated provisions for dispute resolution in Part 11 with amendments to:</p> <ul style="list-style-type: none"> (a) apply broadly to Aurizon Network's obligations within the undertaking (b) be open to any party that has legitimate concerns about Aurizon Network's conduct, decisions and performance. 	6.1	<p>Disagree</p> <p>The changes proposed by the QCA will provide Users with the ability to dispute under Part 11 the provisions of the template Standard User Funding Agreement which is approved by the QCA and other matters for which a contractual dispute resolution mechanism is already available.</p> <p>In particular the QCA's approach of incorporating certain provisions in the Undertaking by reference into the AA and TOD effectively duplicates the dispute mechanism, creating uncertainty as to which mechanism applies. UT3 currently provides that once an AA/TOD is executed, those dispute resolution procedures govern any disputes relating to the subject matter of the AA/TOD. This is the sensible approach.</p> <p>Other matters of concern include:</p> <ul style="list-style-type: none"> • All Aurizon Network's obligations under the Undertaking are subject to dispute by any party, and not only Users; • The inclusion of supply and sale of electricity in the Undertaking dispute provisions; • The potential for any questions formally raised by a party being provided to the QCA; and • The formalization of the informal chief executive resolution procedure.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism. We would approve consolidated provisions for dispute resolution in Part 11 with amendments to make the:</p> <ul style="list-style-type: none"> (a) dispute resolution process more robust and cost effective (b) outcome of decisions binding on parties. 	6.2	<p>Disagree</p> <p>While Aurizon Network agrees with the QCA's rationale of making the dispute resolution process more robust and cost effective, we do not believe that the effect of the QCA's proposed drafting does so. Please refer to our comments in Part 8.1 above.</p>

6.2 Summary of Aurizon Network's Response

While Aurizon Network agrees with the QCA's rationale of making the dispute resolution process more robust and cost effective, it does not believe the QCA's proposed drafting brings this to effect. For example:

Conflicting Processes - As certain provisions of the Undertaking are incorporated by reference into the Access Agreement/Train Operations Deed (AA/TOD), if there is a conflict between the Undertaking and AA/TOD dispute provisions, it is not clear which process prevails.

The Scope for Dispute - The QCA has broadened the scope of the dispute resolution process to apply to all of Aurizon Network's obligations under the Undertaking and allows any party to raise a dispute under Part 11 (mirroring the position in UT3), increasing the risk of vexatious claims.

The Scope of Regulation - The right to dispute certain matters relating to the supply and sale of electricity under Part 11 results in the treatment of the sale and supply of electricity as a regulated service, which is beyond the powers granted by the QCA Act.

Anomalous Procedures - The combined effect of the explicit non-exhaustive list of matters that can be the subject of a dispute, in clause 8.2.2 (a) of the QCA's proposed draft of the Undertaking, and the deletion of clause 8.9.2 of Aurizon Network's 2014DAU is that Users have the ability to dispute under Part 11 the provisions of the template Standard User Funding Agreement (which is approved by the QCA) and other matters for which a contractual dispute resolution mechanism is already available.

Extent of Regulatory Involvement in Disputes - Having to keep the QCA regularly informed in relation to any Dispute (which includes "...any dispute **or question arising**" [*emphasis added*]) in relation to the matters listed in clause 11.1.1(a) potentially means that any questions formally raised by a party in relation to Aurizon Network's obligations under the Undertaking must be provided to the QCA.

Fettering of CEO resolution - The new requirements in clause 11.1.2(c) in relation to the chief executive resolution procedure defeat the purpose of the process which is supposed to facilitate a quick and timely resolution of disputes.

The management of these disputes will also include additional costs that Aurizon Network is not compensated for through its Maximum Allowable Revenue (MAR).

6.3 Conflict between dispute provisions

The QCA has proposed that certain provisions in the Undertaking from time to time, will be incorporated by reference into the AA and TOD.

One of the issues³⁸ with the approach adopted by the QCA is that both the Undertaking and AA/TOD both contain dispute resolution provisions. By incorporating provisions by reference to the Undertaking, it is unclear which dispute resolution procedure applies in the event of a dispute. For example, if there is a dispute in relation to the reduction, relinquishment or transfer provisions in Part 7 of the Undertaking, the dispute is to be dealt with under Part 11 (as these provisions sit in the Undertaking). As these provisions are incorporated in the AA/TOD by reference and the AA/TOD have their own dispute resolution provisions, if there is a conflict between the Undertaking and AA/TOD provisions, it is not clear which dispute resolution process prevails.

Aurizon Network's view is that a dispute in relation to an executed AA/TOD should be resolved in accordance with the dispute resolution procedure in that Agreement and there should be no avenue for an access holder to raise a dispute under the Undertaking in such circumstances. The current position under UT3 is that once an AA/TOD is executed, the dispute resolution procedures in the AA/TOD govern any disputes relating to the subject matter of the AA/TOD. In Aurizon Network's view this is the appropriate approach.

³⁸ For a discussion of more of these issues, please refer to Part 8 of Aurizon Network's Response

Based on the current drafting, Aurizon Network's view is that both dispute resolution procedures would apply which creates unnecessary confusion and uncertainty, and the potential for forum shopping. While Aurizon Network acknowledges that the QCA has attempted to deal with this through a combination of clauses 2.5(f) and 11.1.1(c) of the QCA's proposed draft Undertaking, we note in the QCA's responses to Aurizon Network's request for information that the QCA would consider including an 'avoidance of doubt' clause in the Undertaking to make this clearer.

Aurizon Network agrees that the drafting requires amendment to avoid any ambiguity.

6.4 Scope for Dispute

The Undertaking governs how Aurizon Network provides access to the declared service. The parties who are actively engaged in this process are Users, which, as defined in the Undertaking, includes Access Seekers, Access Holders and/or their Customers (if any). Accordingly it is the Users, and only the Users, who should have the right to dispute any matter under the Undertaking.

The QCA has broadened the scope of the dispute resolution process to allow any party to raise a dispute, although it has not provided any justification for why parties who are not either seeking access or access holders (or their customers) should have the right to dispute any matter within the Undertaking (which, after all, has the sole purpose of governing access).

Aurizon Network has previously submitted to the QCA that this increases the risk of vexatious claims, which could directly impact on the efficiency of the operation, use of and investment in the rail infrastructure service. For example, a claim could be made by a party with the key aim of delaying a competitor's development – one example of this would be a dispute in relation to a decision on expansion study funders or scopes of such studies.

In the Draft Decision³⁹ the QCA states that it has sought to address this concern by proposing amendments to processes and procedures to discourage frivolous or vexatious disputes by having the ability to award full costs to the initial party if it thinks the claim is vexatious. It is conceivable, however, that the commercial benefits to a vexatious perpetrator may outweigh the penalty of legal costs. Aurizon Network does not agree sufficient protections have been included and proposes to revert to Aurizon Network's previous drafting in its 2014 DAU.

Furthermore, as the QCA acknowledges this risk of frivolous and vexatious claims, it has a duty to have regard to the interests of genuine access seekers under s.138(2)(e) of the QCA Act in relation to such a risk, particularly where there is no demonstrable public interest in allowing a universal right to initiate a dispute.

6.5 Disputes in relation to sale and supply of Electricity

Under clause 2.7(c) of the QCA's redrafted Undertaking, the right to dispute certain matters relating to the supply and sale of electricity under Part 11 has been included. This language is currently, and in Aurizon Network's view, incorrectly included in UT3 and Aurizon Network had sought the deletion of the provision in the 2014 DAU. By reinstating this provision combined with the QCA's proposed binding nature of the dispute resolution provisions in Part 11, this results in the treatment of the sale and supply of electricity as a regulated service, which is beyond the power of the QCA under the QCA Act. This is also in contradiction to clause 2.7(a) of the Undertaking which provides that the sale or supply of electricity is not part of Access and not subject to the Undertaking.

The QCA has accepted, in its responses to Aurizon Network's request for information, that the sale or supply of electric energy is not part of Access. Given this, Aurizon Network cannot see any justification for why the QCA considers it appropriate⁴⁰ that the proposed terms and conditions on which Aurizon Network (or an Aurizon Party) offers to sell or supply electric energy should be subject to the dispute resolution process in Part 11, particularly given the fact that any decision in relation to a dispute on such matters will only be binding on Aurizon Network.

In Aurizon Network's view clause 2.7(c) of the QCA's proposed draft Undertaking should be deleted.

³⁹ QCA, 2015, Draft Decision: Volume I – Governance & Access, p. 126.

⁴⁰ QCA, 2015, Responses to Aurizon Network's Request for Information on Draft Decision 2014 DAU, No. 13.

6.6 Disputes under Part 8 (Network Development and Expansions)

Under the new clause 8.2.2(c) of the QCA's proposed draft Undertaking, a dispute notified under clause 8.2.2(a) of the Undertaking is a Dispute for the purpose of clause 11.1. Clause 8.2.2 (a) provides that any matter that may arise under Part 8 may be disputed and a non-exhaustive list of matters is included in that clause.

Clause 8.8.1 (a) (iv) the QCA's proposed draft Undertaking provides that the User Funding Agreement must be in the form of the Standard User Funding Agreement unless otherwise agreed by Aurizon Network and the proposed Expansion Funders (in which case, any amendments proposed to those terms must be negotiated by both Aurizon Network and the Expansion Funder acting reasonably and in good faith). This is an [amended] version of clause 8.9.1(a)(iv) proposed by Aurizon Network in the 2014DAU.

Clause 8.8.1 (a) (v) of the QCA's proposed draft Undertaking refers to a User Funding Agreement being agreed by Aurizon Network or its terms being determined through dispute resolution.

Unfortunately, as part of the QCA's proposed drafting to remove specific references to dispute resolution in certain parts of the Undertaking, the QCA has removed clause 8.9.2, which was proposed by Aurizon Network in the 2014DAU. This clause provided that if Aurizon Network and any User do not reach agreement on the completion of schedules to a User Funding Agreement that is in the form of the Standard User Funding Agreement, then any of those persons may at any time refer the matter to the QCA for determination under the dispute resolution procedures in clause 11.1.5 of the 2014DAU. This drafting made it clear that any amendments to the template SUFA could only be made by agreement and that only the completion of schedules could be subject to dispute resolution.

The combined effect of the explicit non-exhaustive list in clause 8.2.2 (a) and the deletion of clause 8.9.2 of the 2014DAU is that Users have the ability to dispute under Part 11 the provisions of the template Standard User Funding Agreement (which is approved by the QCA) and other matters for which a contractual dispute resolution mechanism is already available. Aurizon Network considers that this outcome could not have been intended as, in keeping with the spirit of the QCA's approach to Access Agreements, there should be standard "safe harbour" provisions where Users and Aurizon Network do not or cannot agree on a position.

In Aurizon Network's view, where the terms of a QCA approved Standard User Funding Agreement cannot be agreed, any dispute should be resolved by the QCA or an expert, as applicable, by completion of the standard Standard User Funding Agreement.

6.7 QCA involvement in Disputes under Part 11

The QCA has proposed a new clause 11.1.1(g) in its draft Undertaking which provides that Aurizon Network must provide the QCA with copies of any Dispute Notices and formal correspondence exchanged between the parties in connection with the Dispute and otherwise keep the QCA regularly informed of the progress of the resolution of the Dispute, including its outcome.

However, as the QCA has reverted to the UT3 definition of Dispute being "*any dispute or question arising*" [emphasis added], this potentially means that any questions formally raised by a party on Aurizon Network's obligations under the Undertaking must be provided to the QCA. While we note the QCA's view that "*the increased transparency will encourage timely resolution of disputes, and provide [the QCA] with insights into the operation of the Undertaking,*"⁴¹ this is impractical, time consuming and imposes an additional administrative burden with additional cost on Aurizon Network, particularly when some of these questions could be resolved between the parties without the need for QCA involvement.

6.7 Chief Executive Resolution

The QCA has included a new requirement in clause 11.1.2(c) of the Undertaking that where a dispute is resolved through the chief executive resolution procedure, the resolution must be documented in writing and signed by the parties to the Dispute and Aurizon Network must provide a copy of that agreement to the QCA.

⁴¹ QCA, 2015, Draft Decision: Volume I – Governance & Access, p. 130.

This mechanistic procedure defeats the purpose of the chief executive resolution process which is supposed to facilitate a timely and cost effective resolution of disputes. It is an inefficient use of time and resources which could lead to protracted negotiations on the terms of any settlement agreement in relation to any Dispute.

Aurizon Network proposes that this clause be deleted.

6.8 Decisions to be binding

In the QCA's Draft Decision, it states that "*a dispute resolution process will only be effective if it is binding on the parties to the dispute, Part 11 of the DAU, as submitted, did not make it clear that the outcomes of disputes should be made binding.*"⁴²

Aurizon Network agrees that in the absence of fraud or manifest error an expert determination should be binding and had included a clause 11.1.4(e) to this effect in its 2014DAU which the QCA has deleted. In Aurizon's view the binding nature of any decision should be subject to an exclusion for fraud or manifest error. While the QCA's proposed draft retains the right to dispute a decision where there has been manifest error in clause 11.1.4(g), there is no similar exclusion for fraud. This is a generally accepted carve out in all dispute resolution provisions and should be reinstated.

⁴² QCA, 2015, Draft Decision: Volume I – Governance & Access, p.131.

7 Negotiation

7.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed process for applying for access and negotiating agreements. We would approve amendments to the 2014 DAU to:</p> <ul style="list-style-type: none"> (a) address Aurizon Network's ability to use its position to delay negotiations and increase the transparency and accountability of its decision making (b) clarify the process for applying for access and negotiating agreements and increase certainty over the process. 	7.1	<p>Aurizon Network substantially agrees with the QCA's Draft Decision, subject to resolution of the following:</p> <ul style="list-style-type: none"> ○ The recovery of costs from non-genuine Access Seekers has been agreed with the QRC and stakeholders and should stand. The requirement to provide fact based evidence to an Access Seeker where the Available Capacity has been reduced is too onerous, and may pose confidentiality concerns. ○ The limitations proposed for establishing an Interface Risk Management Plan (IRMP) are too restrictive, and limit Aurizon Network's ability to effectively manage risk, and would not provide the clarity and certainty the QCA desires. ○ Aurizon Network should not be exposed to liability in the outcome of a cessation dispute, where it has complied in good faith with the Undertaking. Proposed changes to enable variations to an Access Application are too fluid, and could disadvantage other parties where a material change impacts on Aurizon Network's ability to provide capacity.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed arrangements relating to the information it provides, and can request or require, as part of the process for applying for access and negotiating agreements. We would approve amendments to the 2014 DAU to:</p> <ul style="list-style-type: none"> (a) better balance Aurizon Network's and other parties' rights and interests, relating to the nature and type of information provided as part of the process (b) clarify the nature and type of information Aurizon Network provides, and can request or require – and increase certainty over when this information is to be made available as set out in the marked changes to Part 4, Schedule A and Schedule B attached to this Draft Decision. 	7.2	<ul style="list-style-type: none"> ● Aurizon Network generally accepts the principle of including more prescriptive and clarifying drafting throughout Part 4 of the Access Undertaking ● The application of this principle throughout the drafting creates undue process, however, and may inadvertently lead to inefficient allocation of capacity in the supply chain. ● Aurizon Network has proposed various amendments to address these issues
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposal that a train operator be required to be nominated by an end user for particular functions within the negotiation process. We would</p>	7.3	<ul style="list-style-type: none"> ● Aurizon Network agrees with the QCA's Draft Decision. ● Aurizon Network considers minor amendments can be made to improve and clarify the process for

<p>approve amendments to the 2014 DAU to:</p> <p>(a) allow an end user to nominate a train operator to act on its behalf — and in that event have sought to give primacy to that train operator</p> <p>(b) require Aurizon Network to continue negotiating with all train operators until a nomination is made.</p>		<p>dealing with concurrent negotiations.</p>
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7.2 Summary of Aurizon Network’s Response

Aurizon Network generally accepts the principle of including more prescriptive drafting where it can clarify Part 4 (Negotiation) of the Access Undertaking. It does not accept drafting which is put forward simply as a matter of preference, however. The application of this principle throughout the drafting creates undue process and may inadvertently lead to an inefficient allocation of capacity in the supply chain. Aurizon Network has proposed various amendments to address these issues, many of which were previously agreed with the QRC.

The QCA has cited the need to achieve a better balance of rights and interests of parties in Negotiations as key to the refusal to approve Part 4 of the Access Undertaking

The majority of changes proposed by the QCA are acceptable in principle, and to a certain extent, have previously been agreed between the QRC and Aurizon Network. Aurizon Network does however consider that further drafting changes are required to better prescribe the processes, such as in the processes for recovery of costs, the dispute provisions for cessation of negotiations and the capacity to vary access applications.

The QCA has refused Aurizon Network’s proposed arrangements relating to the information it provides, and can request or require, as part of the process for applying for access and negotiating agreements. Aurizon Network substantially agrees in principle with the changes proposed, as most of these had previously been negotiated between the QRC and Aurizon Network. Aurizon does however have some concerns with their application in the manner proposed by the QCA in its Draft Decision.

7.3 Streamlined Process for applying for access and negotiating

In the Draft Decision 7.1, the QCA has cited the need to achieve a better balance of rights and interests of parties as key to the refusal to approve Part 4 of the Access Undertaking. More specifically, the QCA has highlighted changes to the recovery of costs, cessation of negotiations provisions, as well as greater clarity and certainty as key to achieving this.

The majority of changes proposed by the QCA are acceptable, and to a certain extent, have previously been agreed between the QRC and Aurizon Network. Aurizon Network does however consider that further drafting changes are required to better prescribe the processes. The following sections detail Aurizon Network’s key concerns with the drafting.

7.3.1 Recovery of Costs

In its draft decision, the QCA rejected Aurizon Network’s proposal to recover costs directly from an Access Seeker where negotiations were validly ceased due to the Access Seeker failing to demonstrate their ability to utilise the rights. The QCA has justified this by asserting that such costs are already included in the approved costs.

Aurizon Network’s proposal to recover these costs directly had previously been supported by the QRC, and was not an issue raised by stakeholders. Accordingly, stakeholders were therefore in agreement that these costs should not be socialised across Access Holders.

Information provided as part of the negotiation process

Aurizon Network agrees with the majority of changes proposed in the QCA's Draft Decision around the prescription of information to be provided as part of the negotiation process. We consider that some of the changes however are overly prescriptive, or have been misinterpreted by the QCA and therefore require amendment.

Evidence of reductions in Available Capacity

The proposed inclusion of Clause 4.10.1(d)(iii) requires Aurizon Network to provide Access Seekers with an evidence based explanation as to why Available Capacity is being reduced. In most cases where this occurs, it will be due to another Access Seeker ahead in the re-introduced Queue executing an Access Agreement for their Access Rights. It is unreasonable to require Aurizon Network to disclose evidence based information relating to the Access Rights of another party. Providing evidence of another party signing an Access Agreement for a specified number of paths would breach Aurizon Network's confidentiality obligations, and would compromise the interests of one access seeker, to advance the interests of another.

This clause is therefore inconsistent with the confidentiality and ringfencing provisions of the Undertaking, and s.138(2) of the QCA Act. Aurizon Network suggests that Access Seekers are informed when Available Capacity has been reduced, however any evidentiary support should be limited to information that can be provided within the confidentiality provisions of the Access Undertaking.

Non-availability Requirements

Aurizon Network has previously agreed with the QRC to introduce the concept of Non-availability Requirements. We acknowledge the QCA's inclusion of Clause 4.10.2(e) excluding the ability for the negotiation period to be suspended where Access Seekers can reasonably demonstrate the information required is not available. In the interest of resolving Part 4, Aurizon Network can agree to this change.

It should however be noted that with this inclusion, there is the potential for capacity to be inefficiently allocated to the detriment of the supply chain. This change, coupled with the QCA's inclusion of a 5 year time period for the advanced execution of an Access Agreement may lead to capacity being allocated on the proviso of information being provided at some time in the future prior to the Access Rights commencing. As a result of the QCA's decision, Aurizon Network will be impeded from allocating capacity to alternative users who are ready and able to operate.

A better way to manage such circumstances is to ensure that where Non-availability Requirements were met as part of the negotiation process that the information in question must be provided to Aurizon Network prior to an Access Agreement being executed. We understand that this may not always be possible, particularly where agreements are being entered into 5 years in advance. Providing all stakeholders are comfortable with this potential risk for capacity to lie dormant for up to 5 years, Aurizon Network does not object to the drafting proposed by the QCA. Otherwise, Aurizon Network would seek reinstatement of the 2014DAU drafting agreed with the QRC.

Limitation of IRMP development

The QCA has proposed subtle changes to Part 4.10.2(c) that Aurizon Network considers were made in an effort to avoid unnecessary tasks. In doing so, however, the QCA has sought to place restrictions on when an IRMP must be undertaken, limiting the ability of Aurizon Network to undertake an IRMP where there are 'material differences between proposed and existing operations'.

Aurizon Network disagrees with this limitation on the basis that it has the potential to reduce our ability to effectively manage risk and safety interfaces between the Rail Infrastructure Manager and the Railway Operator. While we consider the QCA's proposed amendments do reduce the number of activities that are required to be undertaken as part of the negotiation, the QCA has failed to recognise the role, responsibility and other legislative obligations of Aurizon Network which specifically identifies and manages risk.

In order to comply with the Transport (Rail Safety) Act, and Aurizon Network's Rail Accreditation, it is essential that Aurizon Network actively manage interface risks arising due to operations on the CQCR. It is an essential component of our safety management system for which Aurizon Network is accountable under statute. If Aurizon Network is not able to manage these risks, the consequence could be the loss of rail accreditation and thereby the ability to operate

the network. Aurizon Network also disagrees with the QCA's proposed changes to Schedule A Part 1(n) on the same basis, as they propose limitations on Aurizon Network's capability to effectively manage safety and risk.

While a Rail Operator may have an IRMP executed previously for another Access Agreement, it is paramount that each Access Agreement reference a corresponding IRMP to manage the individual risks associated with such agreement. Practically, it may be beneficial to review an existing IRMP to reference the new agreement, but in doing so, it is essential to consider any new risks under each new Access Agreement. Simple replication of an IRMP will not comply with the Transport (Rail Safety) Act.

In making its Draft Decision, the QCA has had regard to what they consider is Aurizon Network's legitimate business interests. Aurizon Network considers that they have overlooked our legitimate business interest to safely manage the rail corridor, to maintain its accreditation under the Rail Safety Act. As such, Aurizon Network does not agree with the QCA's changes, and requests the original drafting proposed by Aurizon Network to be reinstated.

7.3.2 Dispute provisions for cessation of negotiations

The QCA has removed Aurizon Network's proposed drafting relating to the wrongful cessation of negotiations and allocation of liability where a dispute is resolved in the favour of the Access Seeker. Through this amendment, the QCA has placed additional risk on Aurizon Network, with the potential consequence of a breach of the Access Undertaking, even where our actions were made in good faith. Aurizon Network disagrees with the QCA's proposed removal of this clause.

The QCA has proposed this change to address its perception that the drafting was unduly in Aurizon Network's favour, and more specifically, at the Access Seeker's expense. This is inconsistent with the provisions of Part 11 of the 2014DAU where the costs of a dispute are shared. Additionally, an Access Seeker would not be exposed to any consequential costs as, in accordance with the QCA's proposed drafting of Clause 4.12(d), where a dispute is raised, the cessation is not valid until the dispute is resolved in Aurizon Network's favour. So where a cessation notice has been issued in error, the potential consequence to the Access Seeker will not, by definition, eventuate.

We also consider that the cessation of a negotiation where Aurizon Network considers there is no genuine intention of utilising the rights is not in Aurizon Network's favour, but for the benefit of other supply chain users (in the spirit of s.138(2)(e) Ceasing of an ambiguous negotiation has the potential to free up capacity for other access seekers willing and ready to use the Available Capacity. Aurizon Network does not benefit from this under the current revenue cap arrangement.

Accordingly, Aurizon Network does not accept the additional liability proposed by the QCA. We consider that there would be no consequence of such an error for the Access Seeker. In contrast, the consequence of Aurizon Network being in breach of the Access Undertaking is more severe, and not justified given the cause. Aurizon Network acknowledges that where we have been negligent in our actions, we should be held accountable, however where our actions were made in good faith, and to benefit the supply chain, deeming a breach of the undertaking is too harsh a penalty.

On this basis, Aurizon Network proposes to reinstate Aurizon Network's originally proposed drafting to state that despite the outcome of the dispute, Aurizon Network is taken to have complied with the Access Undertaking and is not liable provided Aurizon Network has made a good faith and reasonable attempt to comply with the relevant provisions of Part 4.

7.3.3 Provisions for revisions to an Access Application

In Draft Decision 7.1, the QCA has proposed consolidated provisions to deal with the revisions to an Access Application, in the interest of streamlining arrangements and for simplicity. In doing so, the drafting now provides for an Access Seeker to vary its Access Application at any time. Aurizon Network considers this is too broad, particularly when considering a material variation where an IAP has already been issued, and has the potential to detrimentally impact on the interests of other Access Seekers.

As drafted by the QCA, Clause 4.5 of the Access Undertaking will allow an Access Seeker to materially vary their Access Application after an Indicative Access Proposal (IAP) has been issued. Whilst the provisions adequately provide Aurizon Network to reassess the material variation, and produce a new IAP, the Access Seeker may retain

their position in the Queue. Aurizon Network considers this will disadvantage other Access Seekers. For example, where another Access Seeker has an Access Application in the Queue that is lower than one for which another Access Seeker has requested a material variation, if that material variation is to provide more capacity, this could have the effect of delaying or preventing other Access Seekers from receiving their Access Rights.

Aurizon Network agrees with the principle of offering flexibility to vary Access Applications, but to better manage the allocation of Available Capacity, Access Seekers should be limited to requesting material variations prior to the acceptance of the IAP. When an Access Seeker accepts an IAP, they confirm that they wish to proceed on the terms set out in the IAP and are placed in the Queue. It is at this point that any material variations may affect other parties in the Queue. Aurizon Network proposes that should a variation be suggested after acceptance of the IAP, Aurizon Network will advise the Access Seeker whether the change is considered a material variation, and where the change is deemed material, the Access Seeker should be required to submit a new Access Application. This will ensure the fair and equitable allocation of capacity, without unreasonably disadvantaging other Access Seekers.

In addition to the above issue, Aurizon Network believes that QCA has proposed an inadequate extension to the time period for developing an IAP where a material variation has been requested. The 5 day time period proposed is not sufficient particularly where the IAP has already been substantially developed, as Aurizon Network may be required to undertake another capacity assessment. If this is the case, it is highly likely that more than 5 days will be required. Aurizon Network suggests a better timeframe is to align to the date by which the notice under clause 4.5(c) was provided. Should this notice be provided within 10 days of the IAP being due, Aurizon Network suggests a time extension of 10 days be provided.

7.4 Providing relevant and accurate information, in a timely manner

In its Draft Decision 7.2, the QCA has refused Aurizon Network's proposed arrangements relating to the information it provides, and can request or require as part of the process for applying for access and negotiating agreements. Suggested amendments have been made with the intention of balancing the rights and interests of parties, and to clarify the nature and type of information Aurizon Network provides, and can request.

Aurizon Network substantially agrees with the changes proposed, as most of these had previously been negotiated between the QRC and Aurizon Network. Aurizon does however have some concerns with their application.

- The QCA has proposed that an Acknowledgement Notice provide advice as to whether the Access Seeker will be deemed to have joined the Queue in respect to the Access Rights sought. Aurizon Network considers this is premature, as in some cases, a capacity analysis will need to be undertaken before it can be determined if the Queue is required. We suggest the Indicative Access Proposal is a more appropriate point in the process to advise an Access Seeker if they will enter the Queue. This will provide the Access Seeker with better advice as to whether they wish to accept the IAP and progress towards negotiations on that more certain basis.
- The QCA has proposed that as part of developing the Acknowledgment Notice, where Aurizon Network considers that the Capacity is constrained, it must advise the Access Seeker and provide reasons why such a constraint cannot be mitigated except through an expansion. Aurizon Network considers it is unreasonable to expect this advice as part of an Acknowledgment Notice.

The provision of such advice at this early stage would suggest that Aurizon Network should be assessing operational improvements, which may involve third party changes which may be beyond the control of Aurizon Network. It may also involve changes to existing contracts, in which case negotiations with the relevant parties would be required. The ad hoc investigation of capacity enhancements cannot reasonably be undertaken within the timeframes associated with acknowledging an Access Application. Aurizon Network requests the removal of the drafting dealing with this issue. Aurizon Network will however provide advice to each relevant Access Seeker in the IAP, where their requested capacity cannot be provided except through an expansion. That is, the best mechanism by which to indicate the proposed access to the network is in the Indicative Access Proposal. We consider that more generally, such issues should be dealt with at a more strategic level, and suggest the System Operating Parameters may address such matters.

- New drafting has been included to specify that Aurizon Network must provide advice to each Access Seeker within 10 days of becoming aware of a change to an expansion that will impact the Access Seeker's Access Application. This is an onerous obligation that Aurizon Network considers should not be included in Part 4. Where an Access Seeker is seeking Access Rights as part of an Expansion, the customer may choose to participate in accordance with the principles in Part 8 of the Access Undertaking. Accordingly, notice provisions should be dealt with under Part 8.
- Where an Access Application is subject to an expansion, provisions have been included to enable Aurizon Network to require an Access Seeker to provide confirmation biannually of their ability to utilise the Access Rights. Provisions have also been included to allow Aurizon Network to deem the Access Application withdrawn where this information is not provided. The drafting is lacking a timeframe for the customer to provide this information. Accordingly, Aurizon Network suggests that a timeframe of 20 Business Days be provided for the customer to provide this advice.

7.5 Facilitating competition in above-rail markets

In its Draft Decision 7.3 the QCA has refused to approve Aurizon Network's proposal that a train operator be required to be nominated by an end user for particular functions within the negotiation process. This was made on the basis that as currently drafted, Part 4 unnecessarily restricted competition in the above rail market. The QCA proposed two changes:

- (a) To allow an end user to nominate a train operator to act on its behalf, effectively giving primacy to that train operator
- (b) To require Aurizon Network to continue negotiating with all train operators until a nomination is made.

As advised to the QCA in September 2014, Aurizon Network and the QRC had agreed to changes to ensure that, where two operators seek the same Access Rights for the same Customer, Aurizon Network will negotiate with each Operator until the Customer selects its preferred operator. Drafting was also proposed to enable a train operator to either assist in negotiations with the customer, or take over the Access Application. Accordingly, Aurizon Network accepts the QCA's recommendations for Draft Decision 7.3.

Whilst Aurizon Network understands this assists customers while they are progressing tenders, it should be noted that these changes do not create competition in above rail markets, nor do they restrict it. In its Draft Decision, the QCA has asserted their framework is more beneficial as it allows potential operators to negotiate the best Train Operations Deed (TOD) deal they can with Aurizon Network. Aurizon Network considers that this is inconsistent with the principles in Part 5 of the Access Undertaking, where the TOD provides for standardised terms and conditions and cannot be inconsistent with the terms of the corresponding Access Agreement. Aurizon Network considers that due to the prescriptive nature of the TOD, a better 'deal' cannot be negotiated with one rail operator over another.

However, in the interest of resolving this matter, Aurizon Network is willing to accept the requirement to negotiate with more than one operator for the same access rights. Aurizon Network has however identified the following issues within the drafting. Changes are required to address these to provide better clarity and certainty to the parties involved:

- Clause 4.8(b) fails to address the process for dealing with an Access Application for which the Customer has not nominated a Rail Operator, prior to an IAP being issued. In the case that this occurs, and to provide greater clarity, Aurizon Network proposes to treat the relevant Access Application as withdrawn, and in such circumstances, Aurizon Network should not be required to develop an IAP.
- Part 4 fails to address the process for ceasing negotiations with one of the train operators as an Access Seeker where the customer has provided nomination for another. Under these circumstances, Aurizon Network should be able to immediately cease negotiations with the unsuccessful Access Seeker to limit the duplication of effort. Changes to the drafting are required to enable this to occur.
- For clarity, drafting should be included to ensure that where a Customer nominates both Rail Operators to utilise a part of their access rights, the provisions dealing with revisions to an Access Application (Part 4.5) should apply.

With these changes, Aurizon Network considers that Draft Decision 7.3 can be implemented effectively. These changes will ensure there is no ambiguity in the process, and it functions both in the interests of Aurizon Network and the Access Seekers.

7.6 Matters not addressed within the Draft Decision

The QCA has proposed other amendments within the mark up to the Access Undertaking that have not been referenced within the draft decision. Without explanation of the QCA's intent of these changes, Aurizon Network has assessed a number of these to determine their acceptability.

- The QCA has proposed drafting in Clause 4.1(f) of the Access Undertaking to provide for a time extension to the 9 month negotiation period where a dispute is raised in accordance with Part 4. Aurizon Network considers this drafting requires amendments to clarify how the time extension will be granted, as the time extension may not be actually necessary. For example, should a dispute be raised as part of the IAP development phase, a time extension to the 9 month negotiation process would be preemptive. The time extension should be applied to the 20 Business Day timeframe for developing an IAP.
- Aurizon Network notes the deletion of Clause 4.6(h) of the Access Undertaking, which provided clarification that Aurizon Network does not have an obligation to produce an IAP for an Access Seeker that has advised Aurizon Network that they no longer wish to proceed with an Access Application. This would appear in error, as it is unreasonable to require Aurizon Network to continue with the negotiation process without a counter party to the negotiation. Any administrative finalisation of the Access Application would pointlessly waste time and resources. Aurizon Network therefore requires this drafting to be reinstated.
- Changes to Clause 4.10.1(c)(iv)(D) to remove any extension to the time period for negotiations that are subject to a dispute seem to be inconsistent with Clause 4.1(f) that provides for such an extension. The drafting should be clarified to address this inconsistency.
- Changes to Clause 4.12(c)(ii)(B) appear to be in error. The changes provide for all Access Seekers, other than Railway Operators to provide confirmation that they have secured a Rail Haulage agreement for the operation of the Train Services. Aurizon Network considers that it is essential that a Rail Operator be able to provide evidence that they have secured the rail haulage rights for a customer's mine. This demonstrates that they have the right to access and haul coal from a specified location.

8 Access Agreements

8.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Part 5 of the 2014 DAU. We would approve Part 5 if amended to:</p> <ul style="list-style-type: none"> (a) provide for the new standard arrangements (AA/TOD) to govern the terms of access to the CQCR, unless otherwise agreed by the access seeker and Aurizon Network (b) introduce a process for the review of the new standard arrangements during the term of the access undertaking. 	8.1	Agree in concept subject to agreeing the terms of the new standard arrangements
<p>Our draft decision is to refuse to approve the set of SAAs proposed by Aurizon Network on the basis that the current framework has become highly complex. We would approve a simpler set of standard arrangements consisting of:</p> <ul style="list-style-type: none"> (a) an access agreement (AA) – that allows either a mining company or a train operator to contract directly with Aurizon Network for access rights only. This agreement does not deal with above-rail operations (b) a train operations deed (TOD) – that allows a nominated train operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited operator to contract with Aurizon Network and take on the responsibility of train operations in connection with access rights granted under an access agreement. 	8.2	Agree in concept subject to agreeing the terms of the new standard arrangements
<p>Our Draft Decision is to amend the 2014 DAU and SAAs to:</p> <ul style="list-style-type: none"> (a) include matters in the body of the undertaking where they affect access seekers/holders more broadly and there is a public interest in having a consistent approach applied (b) incorporate these provisions from the undertaking into the AA and TOD by reference, providing a clearer link to matters dealt within the undertaking and which can be updated over time. 	8.3	<p>Disagree</p> <p>Aurizon Network agrees there should be standard provisions in relation to specific matters which act as a safe harbour where the access seeker and Aurizon Network do not or cannot agree but disagrees with the QCA proposal that certain provisions of the AU be incorporated by reference into the AA and TOD in order to ensure that certain terms are applied consistently across all access holders.</p>
<p>Our Draft Decision is to amend the terms and conditions of the 2014 DAU SAAs to:</p> <ul style="list-style-type: none"> (a) provide access holders with increased certainty and security over their access rights (b) ensure there is an appropriate balance between the interests of Aurizon Network and those of an access holder / train operator (c) better separate out the rights and responsibilities relating to an access holder and an operator 	8.4	<p>Disagree (unless indicated otherwise in the context of specific recommendations below)</p> <ul style="list-style-type: none"> (a) Certainty and security over access rights <p>Aurizon Network disagrees with the QCA's removal of (i) Aurizon Network's right to resume train paths for failure to hold or have the benefit of Supply Chain Rights</p>

Draft Decision	Reference	Aurizon Network Position
<p>(d) simplify arrangements and provide greater clarity around the rights and obligations of parties to an AA / TOD</p> <p>(e) reflect our broader structural reforms.</p>		<p>and (ii) the provisions dealing with Reduction in Nominated Monthly Train Services.</p> <p>(b) appropriate balance between the interests of AN and access seekers</p> <p>Accreditation</p> <p>Aurizon Network is required by law to comply with its accreditation. Aurizon Network should not be required to accept a position where compliance with accreditation causes it to be in breach of an AA / TOD.</p> <p>Adhoc obligation</p> <p>The QCA's amendment to include a reasonable endeavours obligation to schedule adhoc train services is unnecessary and conflicts with its scheduling obligations under the Network Management Principles.</p> <p>Threshold for liability</p> <p>Aurizon Network cannot accept this reduction as it substantially increases Aurizon Network's potential liability for non-provision of access.</p> <p>Security payable</p> <p>Given that Take or Pay charges are payable annually, an access holder could potentially be liable for 12 months Take or Pay charges and Aurizon Network would only have the ability to seek recovery of half of this amount under the security provisions.</p> <p>(c) clear separation of rights and responsibilities</p> <p>Aurizon Network accepts the removal of the requirement for Operators to provide security under the TOD on the basis that the Operator will not pay any Access Charges.</p> <p>(d) Simplifying processes and providing greater clarity</p> <p>This is to be addressed on detailed review of the SAAs.</p>

8.2 Summary of Aurizon Network's Response

Aurizon Network agrees with the rationale that there should be standard provisions which act as a safe harbour where access seekers and Aurizon Network do not or cannot agree a different position. However, the appropriate place to include these provisions is in the Access Agreement/Train Operations Deed (AA/TOD) and not the Undertaking as Aurizon Network should have the ability to agree otherwise in the AA, and not be in breach of an Undertaking obligation in doing so. This is consistent with the QCA's Draft Decision in Part 8.1 which states that it

"will approve Part 5 if amended to provide for the new standard arrangements (AA/TOD) to govern the terms of access to the CQCN, unless otherwise agreed by the access seeker and Aurizon Network."
(emphasis added)

Furthermore, Aurizon Network considers that the QCA approach:

- introduces uncertainty as to what the terms of the AA and TOD will be in the future in successive regulatory periods, which could lead to corporate governance issues in seeking approval to execute an access agreement and also increased administrative costs for both Aurizon Network and Access Holders; and
- results in Aurizon Network being subject to the remedies available under the QCA Act for any breach of obligations without the benefit of the contractual limitations of liability that are included under the AA/TOD which substantially changes Aurizon Network's risk profile for provision of the regulated service. The QCA has not proposed any mechanism to compensate Aurizon Network for this additional risk.

Aurizon Network is of the view that the ability to resume access rights for failure to hold or have the benefit of Supply Chain Rights promotes the efficient utilisation of the network, particularly in the short term. This additional reason for resumption, should be reinstated in the AA and TOD together with the concept of an Underutilisation Event.

If existing resumption provisions were to continue, the economically efficient operation of the CQCR would not be optimised, detracting from the object of the access regime set out in s.69E of the QCA Act.

There are sufficient safeguards incorporated into the resumption provisions proposed by Aurizon Network to adequately protect access holders against resumption of access rights which the access holder has an ability and need to utilise.

Aurizon Network is concerned about QCA proposals to expand its exposure to liability for actions which are taken to ensure compliance with statutory accreditation requirements and where ad hoc train services are provided.

The QCA has provided no justification for reducing the Allowable Threshold from 10% to 5%. Aurizon Network cannot accept the reduction in the Allowable Threshold as it substantially increases Aurizon Network's potential liability for non-provision of access without any additional return provided for this risk.

It is important that Aurizon Network can appropriately manage its potential credit exposure and, given the increasing trend of smaller mine owners becoming access holders, many future access holders may not have the financial capability of the incumbent operators and therefore pose a greater credit risk to Aurizon Network. Aurizon Network needs to have comfort that it will have security to cover 12 months Take or Pay charges.

Aurizon Network has included further detailed comments on the QCA's amendments to the SAA and TOD in Appendix 3.

8.3 Matters moved from the SAAs to the Undertaking

The following provisions have been removed from the AA and TOD and incorporated into the Undertaking (together the **UT Matters**):

- Requirements in relation to Operating Plans;
- Resumptions;

- Capacity Shortfall;
- Relinquishment;
- Transfers;
- Rollingstock Authorisation and IRMP processes; and
- Force Majeure provisions.

The QCA's basis for this transfer is that the UT Matters have impacts beyond the interests of the parties to an AA/TOD and relate to the effective functioning of the supply chain and should therefore apply consistently across all Access Seekers / Holders and be subject to enforcement under the QCA Act.

The QCA is also of the view that the AA and TOD should focus on the rights and obligations that are of a "private" nature which should only apply between Aurizon Network and the Access Holder.

Aurizon Network agrees with the rationale that there should be standard provisions in relation to the above matters which act as a safe harbour where access seekers and Aurizon Network do not or cannot agree a different position. However, the appropriate place to include these provisions is in the AA/TOD and not the Undertaking as Aurizon Network should have the ability to agree otherwise in the AA and not be in breach of an Undertaking obligation in doing so. This is consistent with the QCA's Draft Decision in Part 8.1 which states that it

"will approve Part 5 if amended to provide for the new standard arrangements (AA/TOD) to govern the terms of access to the CQCR, unless otherwise agreed by the access seeker and Aurizon Network."

Furthermore, Aurizon Network considers that the QCA approach:

- introduces uncertainty as to what the terms of the AA and TOD will be in the future in successive regulatory periods, which could lead to increased administrative costs for both Aurizon Network and access holders; and
- result in Aurizon Network being subject to the remedies available under the QCA Act for any breach of obligations without the benefit of the contractual limitations of liability that are included under the AA/TOD.

8.3.1 Introduces Uncertainty

The QCA has proposed that the relevant provisions in the Undertaking from time to time, will be incorporated by reference into the AA and TOD. This means that the relevant provisions in the Undertaking may be varied during a regulatory period and will typically be different in each successive regulatory period.

The change in provisions both during and between regulatory periods introduces uncertainty for Aurizon Network and access holders. When Aurizon Network and an access seeker executes an AA, they have no certainty that the provisions agreed upon execution will continue to govern their contractual relationship during the term of the AA, which is typically 10 years, given that an access undertaking typically has a [3/4] year term. It is important to access holders in the ongoing management of their access rights that these provisions remain consistent over the full term of the AA and TOD instead of just the particular regulatory period. Aurizon Network does not consider that this provides access holders with sufficient certainty over their access rights and how they may be affected over time (whether through relinquishment, transfer or resumption).

Another issue with the approach proposed by the QCA is that the proposed drafting in the AA/TOD is overly broad in the way in which it has sought to incorporate the provisions in the Undertaking by reference. For example, with respect to Access Charges, the drafting in the AA incorporates by reference effectively all of the provisions affecting or relating to the application or calculation of access charges under the AU. The proposed drafting would incorporate more provisions than are currently included in a UT3 access agreement and some of these provisions are not appropriate to be included in an AA.

A further issue with the approach adopted by the QCA is that the Undertaking and AA/TOD both contain dispute resolution provisions. By incorporating provisions by reference in the Undertaking, it is unclear which dispute resolution procedure applies in the event of a dispute. Based on the current drafting, Aurizon Network's view is that both dispute resolution procedures would apply which creates unnecessary confusion and uncertainty.

AN's view is that a dispute in relation to an executed AA should be resolved in accordance with the dispute resolution procedure in the AA and there should be no avenue for an access holder to raise a dispute under the Undertaking in such circumstances.

The current position under UT3 is that once an AA/TOD is executed, the dispute resolution procedures in the AA/TOD govern any disputes. In Aurizon Network's view this is the appropriate approach.

8.3.2 Extension of AN's risk & liability

The remedies available to an access holder which arise in respect of a breach of an obligation by Aurizon Network are different under the Undertaking and AA. Under the QCA Act, an access holder is entitled to claim compensation for breach by Aurizon Network of an obligation under the Undertaking. Under the AA, an access holder is entitled to bring a claim against Aurizon Network for breach of contract but this is always subject to the limitations of liability contained in the AA/TOD.

If Aurizon Network is in breach of an obligation that has been incorporated by reference into the AA/TOD, it will also be in breach of that obligation under the Undertaking and therefore Aurizon Network will be exposed to both contractual and statutory claims by the access holder. This is a departure from the position under UT3 where it only has contractual liability, which is subject to the limitations of liability contained in the AA/TOD, and increases Aurizon Network's risk profile compared to UT3. It is not commensurate to the return Aurizon Network earns under the AA.

The limitations of liability under the AA / TOD have been firmly established over the previous regulatory periods and as indicated by the QCA Draft Decision have been broadly accepted⁴³. The need for change is not obvious.

8.4 Standard Access Agreements – Terms and Conditions

8.4.1 Capacity and Security of Access Rights

Supply Chain Rights

In UT3, Aurizon Network only had capacity to resume access rights for underutilisation. This did not allow Aurizon Network to resume capacity in a timely manner in instances it was clear that the access holder would no longer have the capacity to utilise those access rights. A clear example of this would be the failure to continue to hold Supply Chain Rights or a mine closure. To address this in UT4, Aurizon Network sought to include resumption of capacity where an event or circumstance results in an access holder not being able to use that capacity. This policy decision was on the basis that the UT3 resumption rights did not provide Aurizon Network with the ability to proactively respond and allocate capacity to those access holders most likely to utilise the capacity, particularly in the short term.

In its Draft Decision, the QCA has reverted to the UT3 position and rejected Aurizon Network's right to resume access rights on a forward looking basis.

Aurizon Network is of the view that the ability to resume access rights for failure to hold or have the benefit of Supply Chain Rights promotes the efficient utilisation of the network, particularly in the short term. This additional reason for resumption should be reinstated in the AA and TOD together with the concept of an Underutilisation Event.

The proposed provisions do not give AN an unfettered right to remove access rights from access holders. There are sufficient safeguards incorporated into the resumption provisions proposed by Aurizon Network to adequately protect access holders against resumption of access rights which the access holder has an ability and need to utilise. For example, in Aurizon Network's proposed draft of the AA, the access holder is given the opportunity to

⁴³ QCA, 2015, Draft Decision: Volume I – Governance & Access, p. 174.

demonstrate that there is a reasonable likelihood that it is able to utilise and has a need to utilise the access rights that are proposed to be resumed. Aurizon Network must also show that there is a sustained alternative demand for those access rights. Furthermore, there is an opportunity to dispute Aurizon Network's position in relation to resumable access rights.

In the absence of the access holder transferring that capacity to another access holder that does have Supply Chain Rights or relinquishing access rights, Aurizon Network must rely on the existing resumption provisions which require that the access holder not use at least 85% of its contracted Train Service Entitlements for 4 consecutive quarters. This does not allow Aurizon Network to effectively manage and allocate capacity to access holders who are most likely to utilise and be able to utilise that capacity in a timely manner. Additionally, while the Access Holder may arrange a transfer to the relevant Access Seeker, this relies on the Access Holder and Access Seeker being aware of each other's capacity requirements. Aurizon Network, having the broadest view of the supply chains' access requirements, is ideally placed to assist in the allocation of capacity between Access Seekers and Access Holders.

Furthermore, it is to the benefit of the supply chain that capacity is utilised in the short term, as opposed to individual access holders being subject to take or pay arrangements as it minimises the likelihood of Take or Pay triggering in the particular system. In circumstances where an access holder consistently under-rails due to not holding the relevant Supply Chain Rights, but not significantly enough to trigger the resumption tests, Aurizon Network will need to adjust its forecast volumes to reflect this, resulting in an increase in Reference Tariffs that all users of that system will be paying. If existing resumption provisions were to continue, the economically efficient operation of the CQCR would not be optimised, detracting from the object of the access regime set out in s.69E of the QCA Act.

We note that the QCA is of the view that "commercial realities will ensure underutilisation is properly managed by the access holder" but Aurizon Network disagrees that this will always be the case.⁴⁴ Relying on Take or Pay provisions and not giving Aurizon Network the ability to resume access rights which are not required or needed to be used by an access holder is potentially anti-competitive as it favours those access holders that have the ability to pay and hold onto such capacity.

This may also perversely require Aurizon Network to create capacity through expansions where such additional capacity is not actually required and results in higher below rail infrastructure costs, in the form of higher reference tariffs than would otherwise be paid if the capacity was created through less costly operational improvements.

An example is where an access holder (**Access Holder A**) loses, or otherwise relinquishes, its port rights but continues to hold its below rail access rights and pay Take or Pay on those access rights. If another access holder (**Access Holder B**) secures port rights identical to those that were lost or relinquished by Access Holder A, then on the basis that Aurizon Network is not able to resume the access rights from Access Holder A, until such time as it fails the resumption test, Aurizon Network cannot provide the below rail access rights to Access Holder B without further infrastructure enhancements.

Aurizon Network proposes that the provisions for resumption should be reinstated.

Reduction of Nominated Monthly Train Services

Clauses 8, 9 and 10 of the DAU EUAA provided for reducing Nominated Monthly Train Services for three distinct reasons:

- Clause 8: where an Operator consistently over a 12 month period exceeded the Maximum Payload;
- Clause 9: where an Access Holder requested an increase to its Maximum Payload; and
- Clause 10: where it is the preferred option to increase capacity.

In respect of clause 8, the provision allows Aurizon Network to reduce the nominated train services only in circumstances where the operator has consistently over a 12 month period operated trains in excess of the Maximum Payload in breach of the TOD (and thereby reducing the number of train paths ordered). It is effectively an anti-avoidance provision. The effect of the provision is to adjust the nominated train paths to reflect how the

⁴⁴ QCA, 2015, Responses to Aurizon Network's Request for Information on Draft Decision 2014DAU, No. 42.

operations work in practice and to free up spare train paths for use by other users in the network. This will result in the same throughput of coal based on improved operations thereby promoting efficiency on the network. This provision should be reinstated as it was broadly agreed with Industry (QRC) and Operators through consultation prior to the submission of the 2014DAU.

Clause 9 was broadly agreed with industry to only allow Aurizon Network to increase the nominal payload and reduce the number of train services where requested by the access holder. . Clause 9 provides a contractually agreed mechanism for promoting above rail efficiencies. This provision should be reinstated as it was specifically included at the request of Industry (QRC) and broadly agreed with Operators through consultation prior to the submission of the 2014DAU.).

Aurizon Network does not consider that clauses 8 and 9 unreasonably interfere with above rail operations as the clauses reflect the practical reality that over the 10 year term of an AA / TOD, Operators will make improvements in payload sizes and not require the same Train Service Entitlements to achieve the same tonnage profile. Clauses 8 and 9 provide a clear mechanism for reduction of Train Service Entitlements in these circumstances, separate to the relinquishment provisions which attract a relinquishment fee, and are intended to deal with a reduction in Train Service Entitlements due to a reduction in tonnage profile. We note and appreciate that the QCA is willing to consider further whether there is merit in retaining this provision to enable an access holder to initiate an increase in Maximum Payload with a corresponding reduction in nominated monthly train services.

Clause 10 allows Aurizon Network to create capacity through increasing the maximum payload of trains operating on the network where Aurizon Network considers it is more cost effective than a below rail expansion of the network. In doing so, Aurizon Network is required to compensate the operator under the TOD for the net financial effect that arises. In the absence of such a mechanism, Aurizon Network would have no ability to achieve that outcome without commercial agreement with numerous access holders. This may result in Aurizon Network being forced to undertake more costly below rail investments unnecessarily where it cannot obtain the consent of access holders to increase their payloads to create additional capacity in the network.

The inclusion of this provision promotes competition by allowing Aurizon Network to proceed with the most cost effective option to create capacity for the supply chain. In circumstances where access holders have secured access rights, they have no commercial incentive to negotiate reductions in those access rights. Importantly, Aurizon Network provided in its 2014DAU EUAA that this process is only undertaken following consultation with Operators and End Users, which would include developing and issuing the NDP.

Aurizon Network does not consider that the certainty and security of access rights will be affected, as access holders will be guaranteed the same tonnage profile despite the reduction in Nominated Monthly Train Services. Clauses 8, 9 and 10 provide a mechanism for ensuring the efficient allocation of capacity across the supply chain and represents accepted positions as an outcome of consultation with Industry (QRC) and some operators.

8.4.2 Balancing interests of AN and Access Seekers

Liability of AN for breaches due to requirements of Accreditation

Aurizon Network is required by law to comply with its safety accreditation. Its obligations under its accreditation may change from time to time and during the extended life of an AA. Aurizon Network cannot accept a position where compliance with its accreditation causes it to be in breach of an AA/TOD.

Aurizon Network proposes that the limitation of liability in clause 16.2(a) of the 2014 DAU EUAA be reinstated.

Liability for provision of train services to include adhoc train services

Aurizon Network had included a provision which provided that once an ad hoc train service is scheduled in the DTP, the terms and conditions of the AA apply as if the ad hoc train service is a contracted train service under the AA. This meant that the terms of the AA and TOD apply to the operation of that train service, including, for example, obligations of compliance with the Operating Plan and IRMP, as well as the limitations and exclusions of liability.

The QCA has included a provision which requires Aurizon Network to use reasonable endeavours to schedule an ad hoc train service requested by an access holder in the DTP. The QCA's amendment is unnecessary and conflicts with Aurizon Network's scheduling obligations under the Network Management Principles. There does not need to be a contractual obligation to re-schedule where Aurizon Network already has an obligation to comply with the scheduling principles under the Network Management Principles.

Specifically the Network Management Principles provide that the allocation of paths in the ITP will be given firstly to Contracted TSE Orders, Additional Requested Contracted Orders (to assist in mitigation of Take or Pay liability throughout the year) and Adhoc Orders. This ranking is also used in the Contested Train Path Decision-making process in Appendix 2 of the Network Management Principles. The imposition of a reasonable endeavours obligation to schedule ad hoc train services under the AA creates uncertainty as to whether the ranking system in the Network Management Principles satisfies this obligation.

Additionally the Network Management Principles already provides that Aurizon Network will use best endeavours to allocate paths in accordance with Access Holder's Train Orders, including ad hoc train orders so the inclusion of a contractual obligation in the AA is both unjustified and unnecessary.

Consequently, Aurizon Network's drafting in the 2014 DAU EUAA should be reinstated.

Liability for removal of rollingstock

The QCA has removed from the TOD the release of liability and indemnity in favour of Aurizon Network where Aurizon Network has exercised its rights to remove rollingstock which has been parked on the infrastructure beyond the permitted period. This does not ensure a reasonable and commercially balanced allocation of rights, obligations and risks between the parties particularly given that, prior to Aurizon Network exercising its right to remove the relevant rollingstock, the operator is provided opportunities to do so itself. Consequently, Aurizon Network's drafting in the 2014 DAU EUAA should be reinstated.

Definition of Consequential Loss

In Aurizon Network's request for information dated 13 February 2015 addressed to the QCA, we asked why the definition of consequential loss in the AA and TOD had been amended so that references to loss of revenue, wasted overheads and demurrage as heads of consequential loss had been deleted. The QCA responded to say that existing paragraphs of the definition appear to already cover the items mentioned but that it would "*consider this further if Aurizon Network does not consider these items are adequately addressed and it can explain why it would be reasonable to include these items as consequential loss.*"⁴⁵

The Courts have traditionally taken a restrictive approach when interpreting exclusion clauses. The current position is that an exclusion clause is to be construed according to its natural and ordinary meaning, read in the light of the contract as a whole, giving due weight to the context in which the clause appears including the nature and object of the contract. Where there is any ambiguity, an exclusion clause will be construed *contra proferentum* (that is, against the party who drafted, and is relying on, the clause).⁴⁶

If loss of revenue, wasted overheads and demurrage are not included as express categories of loss in the Consequential Loss definition and an access holder / operator seeks to make a claim against Aurizon Network for loss of revenue, wasted overheads or demurrage, Aurizon Network would be left to argue that the those types of loss fall within one of the other categories of loss in the Consequential Loss definition. In our view, the most likely outcome is that the court would find that, as a matter of construction, loss of revenue, wasted overheads and demurrage do not fall within another category of loss in the Consequential Loss definition. Alternatively, a court might find that the Consequential Loss definition is ambiguous and, therefore, construe the consequential loss exclusion *contra proferentum* against Aurizon Network with the result that loss of revenue, wasted overheads and demurrage are held not to fall within another category of loss in the Consequential Loss. For that reason, these types of loss should be included as express categories of loss in the Consequential Loss definition.

⁴⁵ QCA, 2015, Responses to Aurizon Network's Request for Information on Draft Decision 2014DAU, No. 40.

⁴⁶ *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500

Decrease to Allowable Threshold

The QCA has provided no justification for reducing the Allowable Threshold from 10% to 5%. Aurizon Network cannot accept the reduction in the Allowable Threshold as it substantially increases Aurizon Network's potential liability for non-provision of access without any additional return provided for this risk.

Security

The QCA has proposed that the security amount required from access holders under the AA be reduced from 12 months of Take or Pay charges to 6 months of Take or Pay charges. Under previous undertakings, the security amount was equivalent to 12 weeks of Take or Pay charges which was aligned with the Variable Take or Pay (VTP) component of Take or Pay. The VTP was calculated monthly by applying a 3 month rolling trigger test and if the access holder did not pay VTP, Aurizon Network had the right to terminate the access agreement.

Given that VTP is no longer a component of Take or Pay and Take or Pay charges are payable annually, an access holder could potentially be liable for 12 months Take or Pay charges and Aurizon Network would only have the ability to recover half of this amount under the security provisions. It is important that Aurizon Network can appropriately manage its potential credit exposure and, given the increasing trend of end users becoming access holders, many access holders do not have the financial capability of the incumbent operators and therefore pose a greater credit risk to Aurizon Network.

If an access holder is unable to pay its Take or Pay charges, and the security amount is only 6 months of Take or Pay charges, the QCA would still recognise the full amount of Take or Pay charges as revenue in the Allowable Revenue adjustment calculations and Aurizon Network would be out of pocket. Aurizon Network therefore needs to have comfort that it will have security to cover 12 months Take or Pay charges to address this risk.

Aurizon Network therefore proposes that the security amount in the AA should be reinstated as 12 months of Take or Pay charges.

Alternatively, if Aurizon Network was to accept 6 months of Take or Pay charges as being the security amount, it could only be on the basis that any remaining amount of Take or Pay that is unpaid by an access holder (in circumstances where the unpaid amount of Take or Pay is undisputed) is and recoverable by Aurizon Network under the revenue cap.

Attached at Appendix 3 of this Response is a table setting out Aurizon Network's comments on the key issues in relation to the revised draft AA and TOD proposed by the QCA in its Draft Decision.

9 Connecting Private Infrastructure

9.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Part 9 of the 2014 DAU as proposed by Aurizon Network. We would approve Part 9 with amendments to:</p> <ul style="list-style-type: none"> (a) clarify the process for connecting private infrastructure and improve transparency (b) address Aurizon Network's ability to unreasonably delay or fail to enter agreements required to connect private infrastructure (c) clarify arrangements where Aurizon Network is responsible for designing and building the connecting infrastructure. 	9.1	<p>(a) Aurizon Network supports the QCA Draft Decision to ensure an appropriate level of transparency subject to the following: Aurizon Network does not agree correspondence in respect of connection approvals or otherwise should include milestones for the design, construction and commissioning of connecting infrastructure nor that such correspondence should be provided to the QCA.</p> <p>Any such "approval" must be conditional in nature and subject to finalization of an executed connection agreement.</p> <p>(b) Aurizon Network disagrees with this position.</p> <p>(c) Aurizon Network disagrees with this position.</p>
<p>Our Draft Decision is to refuse to approve the SRCA included in the 2014 DAU. We would approve the SRCA with amendments to:</p> <ul style="list-style-type: none"> (a) provide greater clarity (without changing the intent) (b) properly deal with our proposed approach to other parts of the access undertaking, including: <ul style="list-style-type: none"> (i) providing a process by which Aurizon Network may design, construct and commission the connecting infrastructure (ii) requiring Aurizon Network to consult (not just notify) with the PIO in respect of proposed changes to system operating parameters as soon as practicable. 	9.2	<p>(a) Aurizon Network disagrees with this position.</p> <p>(b) (i) Aurizon Network disagrees with this position. (ii) Aurizon Network agrees with this position</p>
<p>Our Draft Decision is to refuse to approve the proposed CLMPs included in the SRCA in the 2014 DAU. We would approve CLMPs that are:</p> <ul style="list-style-type: none"> (a) included as a schedule to the access undertaking (Schedule J) – with the SRCA referring to CLMPs as 	9.3	<p>(a) Aurizon Network disagrees with this position.</p> <p>(b) Aurizon Network disagrees with this position.</p>

specified in the access undertaking (b) better aligned with the 2010 CDMP, while also providing an adequate framework to implement 'best practice' strategies if it is practicable for the relevant coal producer to do so.		
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9.2 Summary of Aurizon Network's Response

Aurizon Network has included the process for connecting Private Infrastructure in its 2014 DAU on a voluntary basis. There is no requirement under the QCA Act to include this process in an Access Undertaking. As such, Aurizon Network is not willing to accept amendments proposed by the QCA where they increase costs and risks to Aurizon Network above those that it has voluntarily offered.

The QCA appears to interpret s69E as a statutory allocation to them of responsibility for the "...economically efficient operation of, use of and investment in...", the CQCR network. Rather, s69E seeks the QCA to promote those principles in overseeing the Access regime for the network.

The QCA is not being asked by the Act to ensure the rail network is run in an efficient manner. That is properly the responsibility of Aurizon Network as it seeks to meet its accountability to its customers and shareholders. The QCA is simply being asked to ensure that access arrangements do not impede the achievement of efficiency in the Network, or the achievement of a competitive environment in the markets Aurizon Network serves.

While this may seem an obvious point, the Private Connecting Infrastructure regime proposed by the QCA seeks to direct practices which it perceives to be efficient, rather than its proper role of ensuring efficient outcomes are not inhibited by the connection process. The QCA's approach towards the manner by which private infrastructure is connected to the CQCR network represents an attempt to allocate risks, determine performance management arrangements and even impose penalties, which only the parties to a contract can properly determine through negotiation. Moreover, recommendations such as allowing parties other than Aurizon Network to have responsibility for project-managing connections to its mainline Network directly threaten Aurizon Network's capability to ensure the efficiency of the Network and to meet its statutory obligations for rail safety.

These measures are proposed to address unsubstantiated perceptions of a risk that Aurizon Network would seek to misuse its exclusive control of the rail infrastructure to unnecessarily delay connections, to seek unreasonably high prices or make arrangements which favour its related above-rail party. No evidence is provided that these risks have ever come to bear in the past connection activity of Aurizon Network. Specifically in regards to pricing for connecting infrastructure, Aurizon Network has voluntarily included in the SRCA that it will only recover the "reasonable and prudent costs" associated with the connecting infrastructure⁴⁷.

The QCA purports a need to 'design and develop connections more quickly and with greater certainty', without any comparative benchmark to suggest this hasn't occurred to date. Indeed, Aurizon Network has clear commercial incentives to expedite connection of private infrastructure to the network as that connection allows the operation of revenue services which enter and exit the network from the private infrastructure. The QCA prescriptions on private infrastructure connections are simply unnecessary and are in any event beyond power.

⁴⁷ Standard Rail Connection Agreement clause 3(a)(ii)

9.3 Clarifying process for connecting private infrastructure

(QCA DRAFT DECISION 9.1 (a))

Overview of amendments to Part 9 proposed by the QCA

The QCA, in its Draft Decision, has proposed four categories of amendments to Part 9 of the 2014 DAU. The stated aims of the amendments are to clarify the process for proposing connecting infrastructure and to improve transparency.⁴⁸

Aurizon Network supports three of the four categories of amendments proposed by the QCA as these assist to increase the transparency of the process for both Aurizon Network and the private infrastructure owner (PIO). These are:

- PIOs to provide reasonably sufficient details about proposed connections;
- Aurizon Network to provide its realistic view of the capacity implications of a connection; and
- the SRCA to be used by the parties as an anchor for negotiations.⁴⁹

The fourth category of amendments proposed by the QCA, not supported by Aurizon Network is a requirement for:

- Aurizon Network to promptly assess the PIO's proposal and notify the PIO (and the QCA) whether the requirements for connection are satisfied or not satisfied and identify the amendments that might be made.⁵⁰

The QCA has indicated in its Draft Decision that these amendments are reflected in their redrafted clauses 9.1 (d) and (f) to Part 9 of the 2014 DAU.⁵¹

Amendments to clause 9.1 (d) that Aurizon Network does not support

Amended clause 9.1 (d) of the 2014 DAU requires, in part, Aurizon Network to notify the PIO and the QCA as to the timeframes (and the reasons underpinning those timeframes) in which Aurizon Network will:

- enter into an SRCA;
- design and construct the connecting infrastructure; and
- commission any connecting infrastructure (**Connection Milestones**).

While Aurizon Network overwhelmingly supports the QCA's amendments to Part 9 in relation to process and transparency, Aurizon Network believes a requirement to agree Connection Milestones as the next step following consideration of the PIO's initial connection proposal is impractical and will not benefit either Aurizon Network or the PIO. Aurizon Network does not volunteer to accept this additional obligation.

Reasons for not supporting a requirement for premature agreement of Connection Milestones

The design and construction of connecting infrastructure is only one aspect of the total project development opportunity faced by a PIO. Typically, Aurizon Network is approached regarding a potential connection some years prior to an actual requirement for the connection and the proposed first railing dates are not able to be determined with any precision. Indeed, discussions with potential PIOs can be fluid over a number of years and heavily dependent on changes in market sentiment.

When first railing dates are determined (which is commonly contingent on a number of factors including but not limited to mine/environment/finance approvals or supply chain development as examples) then commissioning

⁴⁸ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 184.

⁴⁹ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 185 (see dot points at the top of page 185).

⁵⁰ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 185 (see third dot point from top of page 185).

⁵¹ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 185 (see third dot point from top of page 185).

dates can be more realistically entertained. In turn, key details to be included as part of the SCRA and design and construction contract can be more readily ascertained by the parties as project certainty increases.

The QCA proposes that Connection Milestones are agreed by Aurizon Network immediately after Aurizon Network has received the PIO's initial connection proposal. This is premature and the consequences for Aurizon Network as proposed by the QCA in its decision are material (see discussion at 9.4 below) in respect of delay damages payable by Aurizon Network).

Aurizon Network in its 2014 DAU has proposed a process for connecting infrastructure which supports an appropriate and transparent process. The QCA has stated in its Draft Decision that stakeholders did not accept Aurizon Network's proposed process for connecting infrastructure.⁵² Aurizon Network notes that the stakeholder's to which the QCA refers to in its Draft Decision (and indeed any of the other stakeholder submissions received in respect of Part 9 have not proposed that Aurizon Network should agree milestones such as the Connection Milestones.⁵³ Rather stakeholders have instead indicated a desire for a simplified process. The QCA's proposed introduction of connection milestones goes beyond that requested by stakeholders and unnecessarily complicates the process despite stakeholder submissions highlighting a desire for simplification.

As such, Aurizon Network's view is that the requirement under clause 9.1 (d) of the 2014 DAU to specify the Connection Milestones at that point in the development phase is impractical and somewhat meaningless, and constitutes a risk that Aurizon Network is not compensated for and is not required to accept.

Requirement to notify the QCA under clause 9.1 (d) and 9.1 (f) is not supported by Aurizon Network

Under both clauses 9.1 (d) and 9.1 (f) of the 2014 DAU, the QCA has proposed a notification requirement on Aurizon Network relating to the Connection Milestones and connection criteria. In Aurizon Network's view, notifying the QCA in relation to these matters represents an unwarranted intervention in Aurizon Network's day to day operations. The QCA Act does not provide any basis for the QCA to require such intervention, and as such Aurizon Network does not accept this additional obligation.

In practice, Aurizon Network and the PIO are in constant dialogue as to the identification and achievement of milestones in the negotiation of connections. The iterative nature of this dialogue would imply frequent notifications and corrections to the QCA, should the QCA's proposal be adopted.

9.4 Unreasonable delays and failure to enter into agreements

(QCA DRAFT DECISION 9.1 (b))

The QCA, in its Draft Decision, has sought to address, '*.....Aurizon Network's ability to use its unique position and delay the connection process.*'⁵⁴ In addition, the QCA's has attempted to '*.....remove any incentive Aurizon Network may have to use the negotiation process to delay connection....*'⁵⁵ None of the stakeholder submissions to which the QCA has referred in its Draft Decision share the QCA's concern at Aurizon Network's incentive to delay connections.⁵⁶

Aurizon Network has a vested interest in facilitating the connection of new private infrastructure as this ultimately allows for the operation of revenue services which enter and exit the network from the private infrastructure. The additional revenue from the provision of the regulated services is much more enticing for Aurizon Network than undertaking any action to frustrate the process of a new player joining the system.

⁵² QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 183.

⁵³ Anglo American, 2014, Submission to the QCA on Aurizon Network's 2014 DAU, sub.no. 7:57-60; sub.no.11; Asciano, 2014, Submission to the QCA in Relation to the Resubmitted 2014 DAU, sub.no.22:41-42; 125-126; QRC, 2014, Main Submission on the 2014 DAU, sub.no.42:50; sub.no.36.

⁵⁴ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 182.

⁵⁵ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 185.

⁵⁶ Anglo American, 2014, Submission to the QCA on Aurizon Network's 2014 DAU, sub.no. 7:57-60; sub.no.11; Asciano, 2014, Submission to the QCA in Relation to the Resubmitted 2014 DAU, sub.no.22:41-42; 125-126; QRC, 2014, Main Submission on the 2014 DAU, sub.no.42:50; sub.no.36

Neither the QCA nor any stakeholder has demonstrated an actual delay caused by Aurizon Network associated with any private infrastructure connection to the network. To date there have been three such connections to the network with connecting infrastructure delivered in line with schedule on all three occasions. Indeed, on two of the three connections Aurizon Network worked cooperatively with the PIO to remedy a delay to schedule that had been caused not by Aurizon Network but by the PIO's contractors.

Despite this, the QCA proposes to mitigate their perceived risk by requiring Aurizon Network to pay for the loss suffered by PIOs, Access Seekers or Access Holders by virtue of Aurizon Network submitting to its purported incentive to delay a connection.⁵⁷ The QCA proposes that Aurizon Network be subjected to traditional market based mechanisms in respect of delay remedies but then denies Aurizon Network the opportunity to price such risk, by insisting Aurizon Network be paid its direct costs only excluding any and all profit, margin or overhead. Aurizon Network does not agree with this position, and does not volunteer to accept it.

The QCA position allocates risks to Aurizon Network that it does not wish to assume, effectively inhibiting our capacity to protect our legitimate business interests.

9.5 Construction Matters

The QCA proposes that matters relevant to the negotiation of the construction of connecting infrastructure to be within the scope of the access undertaking, including the SRCA⁵⁸. The Authority is in effect attempting to broaden the scope of the AU to include design and construction matters. Aurizon Network does not agree that matters relevant to the negotiation of the design and construction of connecting infrastructure falls within the scope of the Access Undertaking and considers it beyond the powers of the QCA provided by the QCA Act to dictate the contractual terms for performance of design and construction contractors.

The QCA has also sought comment on the suitability or otherwise of the SUFA construction agreement as a basis for a connecting infrastructure construction agreement.⁵⁹ The QCA is also seeking comment on what if any amendments should be proposed to the SUFA construction agreement in order to make it appropriate as a construction contract for connecting infrastructure.

Embarking on such a task by the QCA is in Aurizon Network's view, apart from being beyond the scope of the QCA Act, unnecessary and a further illustration of excessive regulation driving up transaction costs and complexity for industry. The SUFA construction contract (and indeed the related suite of agreements which underpin a SUFA transaction) are extensive documents that were developed in a far more complex regulatory and commercial setting. Specifically, the SUFA construction contract is premised on Aurizon Network receiving commercial returns for taking on commercial risk in the context of large rail construction projects such as Wiggins Island Rail Project or the Goonyella to Abbot Point Expansion.

Aurizon Network does not volunteer to include matters relating to design and construction of connecting infrastructure, or inclusion of a standard construction agreement within the framework of the Access Undertaking

9.6 Coal Loss Mitigation Provisions - better align with CDMP

The QCA proposes the implementation of coal loss prevention measures by PIOs should be subject to limiting factors⁶⁰. Limiting factors include, but are not limited to, prevailing business conditions at the time of any decision to implement a mitigation strategy. Aurizon Network does not agree the implementation of coal loss prevention measures by PIOs should be subject to any limiting factors. In Aurizon Network's view the obligation on PIO's to prevent coal loss should be absolute.

The QCA further proposes a weakening of Customer's obligations to prevent coal loss during the loading of coal wagons. In particular, the QCA proposes to remove an obligation on a PIO to comply with Aurizon Network's requirements to prevent coal loss during the loading of coal wagons.⁶¹

⁵⁷ QCA, 2015, Draft Decision: Volume I – Governance & Access, Section 9, p. 185.

⁵⁸ QCA, 2015, Draft Decision: Volume I – Governance & Access, p. 186.

⁵⁹ Ibid.

⁶⁰ QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Section J, p. 528.

⁶¹ QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Section J, p. 536.

Subjecting Aurizon Network to ultimately be responsible for implementing coal loss mitigation strategies:

- Disadvantages existing network users whom have an absolute obligation to prevent coal loss, regardless of prevailing economic conditions;
- is inconsistent with a requirement for all persons to comply with all laws including environmental laws; and
- transfers to Aurizon Network the risk of coal loss mitigation strategies not being implemented, despite Aurizon Network having little capacity to manage that risk. That is, where the PIO justifies not implementing coal loss mitigation strategies due to “prevailing business conditions” and the network reliability is diminished through coal fouling, Aurizon Network would be left to rectify derogation with no compensation to do so or ability to prevent that risk from arising.

The QCA also proposes to remove an obligation on the PIO to comply with requirements not to overload coal and to prevent spillage of excess coal from wagons.⁶² Aurizon Network does not agree with this position as:

- The PIO owner controls, or is in a position to require trains loaded on the PI be loaded in a safe manner. Aurizon Network does not have this ability. Removing this requirement increases the potential of over loaded trains operating and therefore increases the likelihood of an unsafe event occurring and increases the amount of wear and tear on Aurizon Network’s infrastructure; and
- Removing the requirement to prevent spillage of excess coal from wagons increases the likelihood of coal fouling to the network which in turn transfers risk of poor loading practice to Aurizon Network. Coal spillage results in coal fouling to the network and in turn asset degradation. Aurizon Network is not compensated for this risk and is not positioned to otherwise prevent such coal spillage.

9.7 Standard Rail Connection Agreement

Aurizon Network has volunteered to include in the suite of standard agreements under the Access Undertaking a Standard Rail Connection Agreement (SCRA). In its Draft Decision the QCA proposes a number of changes to the recently approved SRCA. Aurizon Network notes the very clear view of stakeholders that they see no reason to renegotiate the SRCA. With the exception of the introduction of Coal Loss Mitigation provisions, Aurizon Network agrees with stakeholders that the SRCA does not need further amendment.

Aurizon Network does not agree with the QCA’s proposed changes to the SRCA. In Aurizon Network’s view the proposal by the QCA to effectively renegotiate the SRCA is another stark illustration of the QCA’s tendency to over regulate, operator outside of its powers granted by the QCA Act and increase both complexity and costs for both Aurizon Network and Customers.

9.7.1 Provide greater clarity (without changing the intent)

The QCA proposes that where the PIO is responsible for the design and construction of connecting infrastructure, the PIO also be responsible for the planning of works to be undertaken⁶³.

Aurizon Network does not agree with this position as Aurizon Network is obliged to maintain its responsibility for the mainline network to which this private infrastructure will connect. Connecting infrastructure forms part of the rail network, associated construction activities require cut in works to be undertaken to the mainline network, such works require closures of the sections of network the PI connects to. Closures of this nature effect mainline traffic and Aurizon Networks ability to deliver existing contractual obligations. The PIO does not have access to sensitive commercial information, nor should it, related to Aurizon network’s contractual commitments. In addition the PIO has a potential conflict of interest with existing users of the network. For these reasons it is not practical to hand over responsibility for planning of CI construction works to the PIO.

⁶² QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Section J, p. 538.

⁶³ QCA, 2015, Draft Decision – Draft Standard Rail Connection Agreement, p. 14.

10 Baseline Capacity and Supply Chain Alignment

10.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals regarding its role in coal chain supply coordination. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft to require Aurizon Network to:</p> <ul style="list-style-type: none"> (a) participate in supply chain groups where the cost of involvement is recoverable under the undertaking (b) participate in supply chain groups in a non-discriminatory manner to ensure no supply chain has priority over another supply chain in the delivery of contracted capacity (c) participate in any coal supply chain group's master plan, review coal supply chain groups' capacity options and investigate operational capacity enhancing improvements with the aim of maximising the utilisation of its existing rail infrastructure. 	10.1	<p>Disagree with the undertaking requiring participation in supply chain groups further than volunteered in our submission. This is outside of the power of the QCA. Aurizon Network will continue to participate in supply chain groups on a voluntary basis.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU capacity review proposal. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <ul style="list-style-type: none"> (a) within six months of the approval of the undertaking, Aurizon Network should undertake a baseline capacity review of the CQCR (b) the review must outline: <ul style="list-style-type: none"> (i) operation, maintenance and construction planning assumptions (ii) NMP, SOP and System Rules assumptions (iii) existing capacity, committed capacity and available capacity. (c) Aurizon Network should submit the baseline capacity review to the QCA for approval within six months of the approval of the 2014 DAU—if approval cannot be obtained, the QCA will have the ability to appoint an independent expert to undertake a baseline capacity review and Aurizon Network must accept the outcome of that review. (d) at a minimum, Aurizon Network should undertake an annual capacity review to demonstrate whether existing capacity can deliver committed capacity. 	10.2	<ul style="list-style-type: none"> (a) agree (b) agree subject to further clarification in the definition of capacity and how the NMP and system rules feed into the SOP. (c) Disagree. Propose alternate expert review process. (d) agree subject to the baseline and annual capacity review process being the same. There is no need for separate processes as the output of these reviews is the same
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals for addressing capacity deficits for existing capacity. Instead, we consider it</p>	10.3	<ul style="list-style-type: none"> (a) Disagree with the provision of a capacity deficit guarantee but is prepared to consider on a case by

Draft Decision	Reference	Aurizon Network Position
<p>appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network should provide a capacity/performance guarantee to access holders in the form of a capacity deficit guarantee</p> <p>(b) where a capacity assessment identifies a capacity deficit on existing contractual entitlements, Aurizon Network should:</p> <p>(i) review all NMP, SOPs, System Rules, asset management and maintenance plans to identify whether amendments to its operating assumptions would address the capacity shortfall</p> <p>(ii) consult with access holders, coal chain groups, train operators and terminal operators about whether there are efficient supply chain capacity options and/or expansion that will align existing capacity to the committed capacity of the CQCR</p> <p>(iii) submit a report to the QCA which identifies the outcome of the capacity review, results of coal chain consultation process and a project plan for addressing any misalignment between existing and committed capacity</p> <p>(c) where amendments to existing practices and SOP cannot be identified and the most prudent and efficient solution to addressing the capacity deficit is an expansion, Aurizon Network should promptly undertake and fund that expansion to deliver the additional capacity needed to address the capacity deficit.</p>		<p>case basis.</p> <p>(b) Agree noting the need to clarify the definitions</p> <p>(c) Disagree with the QCA's position on Aurizon Network being obliged to undertake and fund an expansion. Aurizon Network will consider such funding on a case by case basis</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposals in relation to the information provision obligations regarding the assumptions and methodological approaches underpinning the assessment of capacity. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network should consult with all access holders, end customers and supply chain groups on all capacity and operating assumptions which will underpin Aurizon Network's baseline review of existing capacity</p> <p>(b) Aurizon Network should include its track possession protocols and TSE calculation methodology in its baseline capacity assessment.</p>	10.4	<p>Disagree - the SOP definition needs to be clarified.</p> <p>(a) Within the consultation process, Ringfencing and confidentiality obligations need to be considered and understood by all parties.</p> <p>(b) There needs to be better clarity within the assessment process (on SOP, BCR, STP, MTP etc). As aspects such as track possession protocols are not relevant to the time/space requirements of the model. For example the SOP takes TSE as an input from contracts.</p>
<p>Our Draft Decision is to refuse to accept Aurizon Network's 2014 DAU proposals regarding the NDP. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) the overarching objective of the NDP should be to identify the medium-term capacity alternatives that will meet future demand for access in each coal system and include options for developing or improving the operational performance, capacity and cost of throughput on</p>	10.5	<p>(a) The NDP should be focused on a medium to long term outlook that is aligned to the natural progression of port expansion. This empowers the supply chain to proceed with a strategic approach to the developments that facilitate increased efficiency.</p> <p>b) Disagree with dynamic modelling for the purpose of the NDP.</p> <p>(c) Disagree, we propose to continue engaging stakeholders through the current process.</p>

Draft Decision	Reference	Aurizon Network Position
<p>the CQCR</p> <p>(b) an NDP should provide all supply chain participants with</p> <ul style="list-style-type: none"> (i) a dynamic and static capacity review in a five-year planning horizon (ii) three growth scenarios within each coal system linking to a port optimisation project (iii) scope, standard and preliminary costs of proposed expansion projects under investigation through funding agreements <p>(c) a draft NDP should be provided to all relevant supply chain participants who can then make submissions to Aurizon Network on the draft NDP</p> <p>(d) Aurizon Network should be obliged to take the views into account in finalising the NDP</p> <p>(e) stakeholders who consider their views have not been adequately addressed by Aurizon Network should be able to take the NDP to the QCA for dispute resolution.</p>		<p>d) Disagree, while Aurizon Network are willing to consider submissions, but should be able to decide if and how it incorporates those views</p> <p>e) The NDP is a voluntary document – it is unclear what would form grounds for dispute or what the resolution process would ultimately achieve for stakeholders.</p>

10.2 Summary of Aurizon Network’s Response

Supply Chain Groups

Aurizon Network agrees there is benefit from involvement with supply chain groups and seeking to improve the efficiency of all supply chains we are involved in. Aurizon Network currently participates with a number of groups on a voluntary basis. Aurizon Network agrees to continue to participate on a voluntary basis, however it is beyond the QCA’s power to require Aurizon Network to be involved, or to have to accept directions/outcomes from the supply chain groups. Aurizon Network proposes the undertaking should revert to the volunteered participation in our 2014DAU.

Capacity Review

The capacity review should be undertaken on an annual basis or when significant changes are made to the System Operating Parameters. Aurizon Network will assess capacity using the Central Queensland Supply Chain Model using input parameters specified in the System Operating Parameters. Where the outcome of the capacity review is disputed Aurizon Network will engage an independent expert to determine whether the capacity review is correct.

Aurizon Network does not agree to provide a capacity performance guarantee. It is beyond the power of the QCA to require Aurizon Network to fund expansions. Aurizon Network does agree to consider funding expansions to overcome Capacity Deficits on a case by case basis. Aurizon Network also agrees to explore non-expansion options for overcoming Capacity Deficits including supply chain options, review of operations and resumption of unused capacity.

Aurizon Network supports identification of Available Capacity but is concerned that any informal indication of an estimated available capacity could lead to a misconception by access seekers that there is no requirement to build additional infrastructure and they may well proceed to erroneously develop their own project assumptions without testing this through the appropriate access process.

Aurizon Network believes that there is more value in access seekers using the formal access requests to understand what is required to support their access needs. This approach would enable a more robust and informative answer to be provided to each access seeker and would need to be replicated if an access seeker sought access in any event.

System Operating Parameters (SOP)

Aurizon Network agrees with the QCA that clarity on the content of the System Operating Parameters (SOP), the relationship with other planning documents and how they are incorporated into the SOP is of significant benefit to the Supply Chain in better understanding capacity. Aurizon Network agrees to consult with stakeholders on the content of the SOP. This consultation can be wider to the extent the owners of confidential information agree to the sharing of such information and the undertaking allows such provision of information.

Much of the detail in the SOPs is drawn from negotiated Access Agreements, where it is the Access Holder that provides the information. The proposed role of the QCA in reviewing and approving SOPs would be superfluous and inefficient, and potentially causing Aurizon Network to breach its customer agreements. Aurizon Network contends the direct engagement it proposes provides the Supply Chain with the information required without an additional level of administration.

Network Development Plan (NDP)

Aurizon Network does not agree to narrow the objective of the NDP as proposed by the QCA. The NDP must be considered integrally with the expansion process and between them they provide high level general capacity enhancement information, followed by specific detailed information suitable for investment decisions.

Aurizon Network does not agree with undertaking dynamic capacity analysis as a part of the NDP process. Dynamic capacity analysis would require speculative definition of detailed variables as the input parameters are not of an appropriate level of certainty at that stage of development. This would take time, impose cost and not provide outcomes of any greater certainty.

Aurizon Network recognises that consumers, and operators, need clarity on the potential rail infrastructure requirements for new and expanded mines. It is important to note, however, that the information contained in the NDP is not sufficient to identify the precise investment requirements or tariff implications of any proposed development.

Aurizon Network proposes to continue with our voluntary engagement with supply chain members as a key input into the NDP development. It is not appropriate for the access undertaking to prescribe a detailed engagement process. While Aurizon Network will consider submissions made, it is for it to decide if and when such views are incorporated into the NDP. It is unclear what would be achieved through dispute resolution on matters associated with the NDP, which is simply a planning document. The NDP informs the expansion process on options available to expand capacity. Decisions made around specific expansions are dealt with in the expansion process with appropriate dispute resolution,

NDP should not be restricted to the consideration of current operational paradigms (e.g. SOPs) as this limits the ability to consider the most efficient options to expand the network and could funnel decisions toward capital investment in infrastructure imposing a massive and possibly unnecessary cost to access seekers and holders.

10.3 Supply Chain groups

Aurizon Network agrees there is benefit from involvement with supply chain groups and seeking to improve the efficiency of all supply chains it is involved in. Aurizon Network currently participates with a number of groups on a voluntary basis. Aurizon Network agrees to continue to participate on a voluntary basis, however it is beyond the QCA's power to require Aurizon Network to be involved or to have to accept directions/outcomes from the supply chain groups.

There is nothing within the QCA power which goes to the efficiency of the wider coal chain. Section 69E discusses "the efficient operation of, use of and investment in, significant infrastructure by which services are provided". The service is access to the railway to run trains and the infrastructure which provides these services is below rail infrastructure. It is not appropriate for the Aurizon Network to be required to include provisions in the undertaking to consider the efficiency of anything wider than the declared service. .

Aurizon Network has volunteered some high level obligations relating to the wider supply chain in our submitted DAU and the QCA's decision should not widen or expand on those provisions.

10.4 Capacity Review (baseline and annual)

10 UT Drafting: 7A.4 (previously 8.11.3)

10 Draft decision section 10.4

The purpose of the capacity review is to ascertain whether there is sufficient capacity to provide the access specified to be made available in Access Agreements.

10.4.1 Frequency

The capacity review should be undertaken on an annual basis or when significant changes are made to the System operating Parameters (SOP), (and published within 3 months of SOPs being agreed). This reflects the existing process whereby Aurizon Network performs a capacity review annually for all contracted arrangements throughout CQCR. Against this, Aurizon Network assesses Access Requests as and when they arise to determine if capacity exists or additional capacity provisions need to be made in order to provide the requested capacity. In effect each access request including access transfers represents a change to the SOP so therefore require assessment using the same methodology as the capacity review.

10.4.2 Approach

The Capacity Review is a methodological review of capacity in the period (covering the next two financial years) using input parameters specified in the System Operating Parameters (SOP) and undertaken in the Central Queensland Supply Chain Model (CQSCM).

Aurizon Network believes the level of rigour and transparency for each capacity review should be consistent. For example, if a baseline capacity review is required within 6 months of the start of the Undertaking, then the process for doing so should be the same as an ordinary capacity review. Aurizon Network therefore proposes single drafting for baseline and annual capacity reviews.

Aurizon Network will undertake this review and provide to the QCA. Where the QCA chooses, an independent capacity review can be undertaken in accordance with the terms of reference below.

Modelling methodologies and platforms can vary significantly and can generate statistically significant variations in capacity outcomes. Further to modelling certain discretionary decisions are required, such as the level of probability utilised. For example, a modelling approach may be adopted which seeks to ensure that there is a very high probability of providing the required capacity.

Accordingly an independent expert should be limited to reviewing the application of the SOP and ensuring that these are applied utilising the Aurizon Network's modelling approach. Aurizon Network proposes the following mechanism around the completion of an expert review of the capacity reports. Aurizon Network has discussed this mechanism in principle with the QRC and reached a high level of agreement.

Capacity Review Terms of Reference

- (i) If the QCA chooses to undertake an independent Capacity Review, Aurizon Network will (acting reasonably) engage an objective and independent expert to determine:
 - (A) whether the Capacity determined for each Coal System by Aurizon Network is a correct assessment of the capacity of each Coal System; and
 - (B) if the expert concludes that Aurizon Network's capacity assessment is not correct, the correct Capacity including reasons for that determination;
- (ii) the expert must comply with the following requirements (collectively 'Capacity Review Parameters') that it must:
 - (A) act independently;
 - (B) not be an employee of Aurizon Network or a Related Party of Aurizon Network;

- (C) have no interest or duty which conflicts or may conflict with its function as expert;
 - (D) acknowledge a duty to Aurizon Network, the Access Seekers and Access Holders and the QCA to act independently;
 - (E) have appropriate qualifications and practical experience to properly perform its capacity-related assignment;
 - (F) have regard to the provisions of this Undertaking and consider all submissions made to it by Aurizon Network, any Access Seeker or any Access Holder on a timely basis;
 - (G) reach its conclusions on the basis of the application of Aurizon Network's capacity model and associated modelling methodology, and may request Aurizon Network to run any scenarios that the expert reasonably considers it necessary to assess;
 - (H) assumptions modelled must comply with Aurizon Network's latest published SOPs, provided that if expansion capacity is to be created by means of SOP modifications, the assumptions modelled must comply with Aurizon Network's latest published SOPs as adjusted to reflect those modifications;
 - (I) provide a draft report to Aurizon Network in respect of the expert's capacity-related assignment and discuss with Aurizon Network any disagreements between the expert's view and Aurizon Network's view in a good faith attempt to reduce any disagreement;
 - (J) provide a final report to Aurizon Network in respect of the expert's capacity assignment within a reasonable time after their appointment (but not disclosing any confidential information including Protected Information); and
 - (K) may be required to undertake to keep confidential, and not use for another purpose, all matters coming to its knowledge by reason of its appointment and performance of its capacity-related assignment ;
- (iii) Aurizon Network will provide to the expert any information that is reasonably necessary for the expert to perform its capacity-related assignment;
 - (iv) Aurizon Network must run all scenarios requested by the expert under item (ii)(G) and provide the expert with transparency as to Aurizon Network's capacity model, the associated modelling methodology and the outcomes of all of these scenarios; and
 - (v) Aurizon Network will promptly provide the expert's report to the QCA after receiving the expert's report.
- (b) If the expert concludes in their final report that Aurizon Network's capacity assessment is not correct, Aurizon Network's Capacity shall be deemed to be the Capacity that is stated in that final report to be the correct Capacity.
 - (c) If a Capacity Review reveals that there is a deficit in the Capacity for a Coal System at a particular point in time (**Deficit**), then Aurizon Network will:
 - (i) have regard to that Deficit prior to executing an Access Agreement that would increase the size of that Deficit and prior to constructing any relevant Expansion for that Coal System; and
 - (ii) assess the effects of the Deficit (if any) on existing Access Rights and identify potential solutions to address the Deficit.

The QCA is seeking to maximise the transparency to stakeholders but acknowledges that there may be a need to aggregate information (see Clause 7A.4.1(c)(i)). Aurizon Network agrees with the principle of transparency however there are currently restrictions where it would breach any existing duty of confidentiality we have under any agreement or the undertaking. These restrictions could be overcome as discussed in Part 12.16.10 of this submission. In the absence of such changes to confidentiality obligations Aurizon Network questions the value that would be available to stakeholders apart from a summarised statement of capacity. The detailed report available to the QCA and any expert would provide all that is required for detailed consideration of the capacity assessment.

The output of the Capacity Review is a report verifying whether there is sufficient Network Capacity to meet Contracted Capacity against the performance criteria specified in the Access Agreements and Undertaking.

10.4.3 Available Capacity

The QCA has suggested that through the baseline capacity assessment and annual capacity review an outcome of the process should be providing an indication to access seekers and access holders of what is available capacity.

On the face of it, the concept of available capacity appears to offer access seekers an early view of the ability of the network to support additional access without the need for expansions. We have reservations regarding the value of any outcome of an available capacity process derived from capacity modelling due to the input assumptions and process used.

Our reservations to Available Capacity include:

- Available capacity would be based on a continuation of the cycles operating during the Capacity Review providing a percentage increase in TSEs provided (or some other form of nominal assessment). This figure may not reflect the requirements of the access seeker,
- Input maintenance plans used in Capacity Review modelling are derived from the GTKs and NTKs used in providing the access as per access agreements. Additional capacity requires additional maintenance, therefore any outcome will have been assessed against a conservative maintenance regime and may not actually be available.

Aurizon Network believes that there is more value in access seekers using the mechanism available through access requests to understand what is required to support their access needs. This approach would enable a more robust and informative answer to be provided to each access seeker and would need to be replicated if an access seeker sought access in any event. Aurizon Network contends that any declaration of an estimated available capacity may lead to misconception by access seekers that there is no requirement to build additional infrastructure and may well proceed to develop their own project assumptions without testing this through the appropriate access process.

10.5 Capacity Deficit

UT Drafting: 7A.4 (previously 8.11.3)

Draft decision section 10.4.3

Aurizon Network

- disagrees with the QCA's position on the provision of a general capacity/performance guarantee, but is prepared to consider on a case by case basis subject to conditions as set out below (Draft Decision 10.3(a))
- agrees with the QCA's position on the assessment of supply chain options and/or expansions in the event of any capacity deficit, and notes various consequences as set out below (Draft Decision 10.3(b))
- disagrees with the QCA's position on Aurizon Network being obliged to undertake and fund an expansion.. Aurizon Network will consider such funding on a case by case basis subject to conditions as set out below (Draft Decision 10.3(c))

Aurizon Network notes that under the QCA-proposed UT4, Aurizon Network would have, in certain circumstances, an obligation to fund an expansion in respect of a capacity deficit. For reasons that Aurizon Network stated in its January 2015 response to the SUFA draft decision, as cited below, Aurizon Network contends that the QCA cannot make a decision requiring Aurizon Network to fund an expansion, whether in connection with a capacity deficit or otherwise:

'Consistent with the QCA Act, Aurizon Network may volunteer to accept risks and costs of expanding its network; however, it cannot be compelled to do so. Consequently, Aurizon Network's willingness to accept certain costs or risks is not an indication that it is willing to accept other costs or risks (even if it were proposed that it would receive a reward or be otherwise compensated for doing so).'

Nonetheless Aurizon Network is prepared to consider the funding of any expansion to overcome a capacity deficit on a case by case basis at the time the deficit is identified. Any voluntary funding in respect of expansions to overcome a capacity deficit will require the circumstances set out in this section [10.6] to be satisfied.

Aurizon Network, notwithstanding its agreement with the QCA's position on the assessment of supply chain options and/or expansions, notes that the implementation of supply chain options other than expansions may require the resolution of significant business issues. For example, if the preferred supply chain option entails changes to contractual entitlements of access customers, then the option can only be implemented if the customers agree to those changes. Similarly, if the preferred supply chain option entails changes to the business practices of another coal supply chain party, such as a coal terminal, that party's agreement to those changes is a pre-condition to implementation. Also, where a supply chain option entails changes to matters within Aurizon Network's sole control, such as the magnitude and nature of the possessions regime during which maintenance is conducted, there may be a material effect on operating costs arising from that option, and this effect would need to be addressed in a change to Aurizon Network's regulatory allowance for operating costs.

A further option to be considered to overcome a deficit should be a resumption of capacity from existing access holders where those parties agree to the resumption. This may be a more suitable solution than including more costs in the RAB where access holders would prefer to reduce capacity than pay more for greater certainty.

Aurizon Network's consideration to undertake and fund any expansion in response to a capacity deficit identified by the capacity assessment must satisfy the following:

- (1) be limited to the infrastructure scope required to address the element of that capacity deficit that relates to 'Aurizon Network cause items', as detailed in the following paragraph,
- (2) be conditional upon at least 60%, as measured on the basis of the proportion of contracted train paths, of the access holders affected by that capacity deficit electing that the expansion outlined in item (1) be undertaken;
- (3) be conditional on the expansion outlined in item (1) satisfying the requirements under the QCA-proposed UT4 as set out in section 8.2.1 and safeguarding Aurizon Network's legitimate business interests as discussed elsewhere in this response in connection with draft decision 12.1;
- (4) be conditional upon the expansion outlined in item (1) being pre-approved by the QCA; and
- (5) be conditional upon the QCA determining at or about the same time as it makes that pre-approval that the expansion assets to be funded by Aurizon Network will be included in the base pool of assets of the relevant coal system; and

As stated above in item (1), Aurizon Network will consider funding the rectification of not the entire capacity deficit, but rather the portion of it that relates to 'Aurizon Network cause items'. (However, if all the deficit is due solely to 'Aurizon Network cause items', then of course Aurizon Network would consider funding all of the deficit.) 'Aurizon Network cause items' are items where Aurizon Network has not complied with an access agreement or its undertaking.

Aurizon Network would not be responsible for the portion of the deficit that relates to matters that are either

- under the control of other supply chain participants, or
- not controlled by any supply chain participant, such as a change of law or a change in safety practice.

Also, should there be an improvement in Aurizon Network's capacity modelling methodology and that improvement contributes to a capacity deficit, that portion of the deficit would not be Aurizon Network cause.

Aurizon Network notes that any decision to undertake and fund expansions would require changes to the study funding provisions of Part 8 of the QCA-proposed UT4.

10.6 System Operating Parameters

UT Drafting: 7A.5 (previously 8.11.2)

Draft decision section 10.5

10.6.1 Context

System Operating Parameters (SOP) are the input parameters used by Aurizon Network (AN) in operating the dynamic capacity model. They reflect the commercial agreements in the provision of train paths available for operators to use (Train Service Entitlements) and supply chain variables that influence the reliability, availability and utilisation of network capacity.

Aurizon Network agree with the QCA that clarity on the content of the SOP, the relationship with other planning documents and how they are incorporated into the SOP is of significant benefit to the Supply Chain in better understanding capacity. The Draft Decision provided by the QCA, however, does not appear to clearly understand the relationship between the SOP, Capacity review and other capacity processes that Aurizon Network undertakes.

10.6.2 Transparency

The perceived lack of transparency in the SOP is a result of the document largely reflecting interfaces between Aurizon Network and Access Holders. While we support the clear benefits of increased transparency, there are currently restrictions where Aurizon Network would breach any existing duty of confidentiality we have under any agreement or the undertaking. These restrictions could be overcome as discussed in Part 12.16.10 of this submission.

Parameters defined in the SOP that are not related to the commercial interests of our customers are published on the Aurizon Network website each year. Additionally the full SOP containing the commercial interests of the particular customer are available to each access holder.

10.6.3 Content

The prescriptive nature of the documents and processes the QCA has proposed fails to appreciate the different inputs and assumptions used within the planning process. Aurizon Network believes that a collaborative engagement with our access holders is the appropriate means by which the content of the SOP should be clarified and developed.

Aurizon Network believes that a series of engagements with the Supply Chain will be of more value than the immediate direct publication of SOPs. The SOP should only be published following this initial consultation so that responses can be provided from an informed position.

Due to the direct relationship of the SOP and the contract terms it is highly likely that any negotiated changes will require an update to the corresponding access agreement. These changes are subject to agreement with counterparties and they may not form part of the current SOP until such contracted changes are agreed. Where the change increases capacity consumption they may also require an agreed reduction in TSE's.

It is not appropriate for the SOP to include the definition of TSE's and how they are calculated. As Aurizon Network contracts TSE's through an access request process the requested tonnes are converted to TSE's using a range of parameters including payloads and operational performance characteristics. This calculated number of TSE's is then used to assess the capacity as a measure of Aurizon Network's ability to service the contractual requirements.

10.6.4 QCA review and approval

The proposed role of the QCA in reviewing and approving SOP's appears somewhat unnecessary. Aurizon Network contends the direct engagement we propose provides the Supply Chain with the information required

without an additional level of administration. A dispute process is provided within the undertaking if access holders and seekers wish to dispute the outcomes.

In all instances, as the SOP's describe how Aurizon Network and Access Holders operate and their commercial agreements, Aurizon Network does not believe that the SOP's in themselves should be subject to QCA approval as part of the baseline capacity analysis. As previously stated it is of value for Access holders and Supply Chain participants to be involved in the review of SOP's on a voluntary basis.

10.7 Network Development Plan

10.7.1 NDP objective

The Network Development Plan provides a strategic view on the most efficient way to develop the CQCR supply chain over the medium to long term. This strategic view provides the basis upon which short to medium term enhancements can be evaluated (through detailed investigation under the expansion process), with visibility of the potential longer term efficiencies that a holistic network strategy can provide.

In contrast, the QCA propose to narrow the NDP to a "dynamic medium term snapshot" which will tend to focus primarily on impending projects which may or may not eventuate. Similarly, a dynamic analysis would require detailed modelling of scenarios that will be difficult to define as many of the variables would be speculative. This is contrary to the principles of effective network planning, which is a core responsibility of, and thereby should be determined by, Aurizon Network as the regulated service provider. To narrow the scope of the NDP reduces its effectiveness and would work against the s.69E objective of promoting the economic efficiency of investment in the coal supply chain.

The NDP was designed to replace the suboptimal CRIMP process that operated under UT3, to create a long-term strategic planning tool that would inform the detailed analysis of projects assessed through the expansion process presented in DAU2014. That is the NDP should be perceived as one important element of a capital planning and assessment process that is supplemented by the targeted analysis of specific and tangible investment proposals under the Expansion process.

The CRIMP process under UT3 was a high level review of network growth which tended to focus on a collation of medium to long term proposals. It was a hangover of the traditional government capital works wishlist approach, and lacked a holistic, system-wide perspective. CRIMP acted as a means of gaining pre-approval of the scope for a proposed project, presenting to users a shopping list of capital works, and constituting the first leg of the prudency test under UT3. System users/customers felt that scope approving of specific projects through the CRIMP was pre-emptive, however, as it dealt mainly with engineering and costing considerations, but did not address the commercial variables, particularly the pricing of services.

With the advent of user funding as the predominant method of financing expansion infrastructure, the commercial thresholds that would need to be met by investors required the detailed feasibility analysis that the Expansion process provides. In contrast projects that emerged from the CRIMP were generally socialised across the system.

Aurizon Network's proposal for the NDP, should be appraised in combination with the detailed feasibility assessments that would occur under the Expansion process. Together these tools allow the thorough examination of the commercial parameters necessary to ensure potential investors can make an informed decision to the satisfaction of their Board, shareholders and financiers.

In contrast the CRIMP was abandoned as it was not sufficiently high level and its project analysis was inadequate for the purposes of making an investment decision. Due to its nature and requirement to predetermine key planning and operating assumptions the vast amount of planning and design works were wasted imposing upon the Supply Chain and AN significant cost for no real value.

The level of analysis implied in the QCA approach is difficult to disseminate to all interested stakeholders, as much of the information is invariably confidential to the particular proponents. For example, the Galilee proposal could not meaningfully be included in the NDP, without contravening Galilee proponent's expectations of confidentiality.

10.7.2 Rail Infrastructure requirements

Aurizon Network recognise that consumers, and operators, need clarity on the potential rail infrastructure requirements for new and expanded mines. It is important to note, however, that the information contained in the NDP is not sufficient to identify the precise investment requirements or tariff implications of any proposed development. For example, depending upon the sequence of mine development, the infrastructure required by a particular mine may have already been constructed to support a prior access seeker. This is appropriately determined by the selection processes for study funders in Part 8 of the 2014DAU.

These commercial implications for a proponent can only be deduced through a specific feasibility investigation as provided for under the Expansion Process.

Aurizon Network firmly believes that the access request process is a more robust means by which this information can be sought and provided, rather than simply relying upon the NDP which is designed to be a long-term system wide planning tool. Any greater level or detail or accuracy provided at this stage in the absence of an access request specifying the actual capacity sought and an expansion process to select the study funders would provide a misleading perception of certainty.

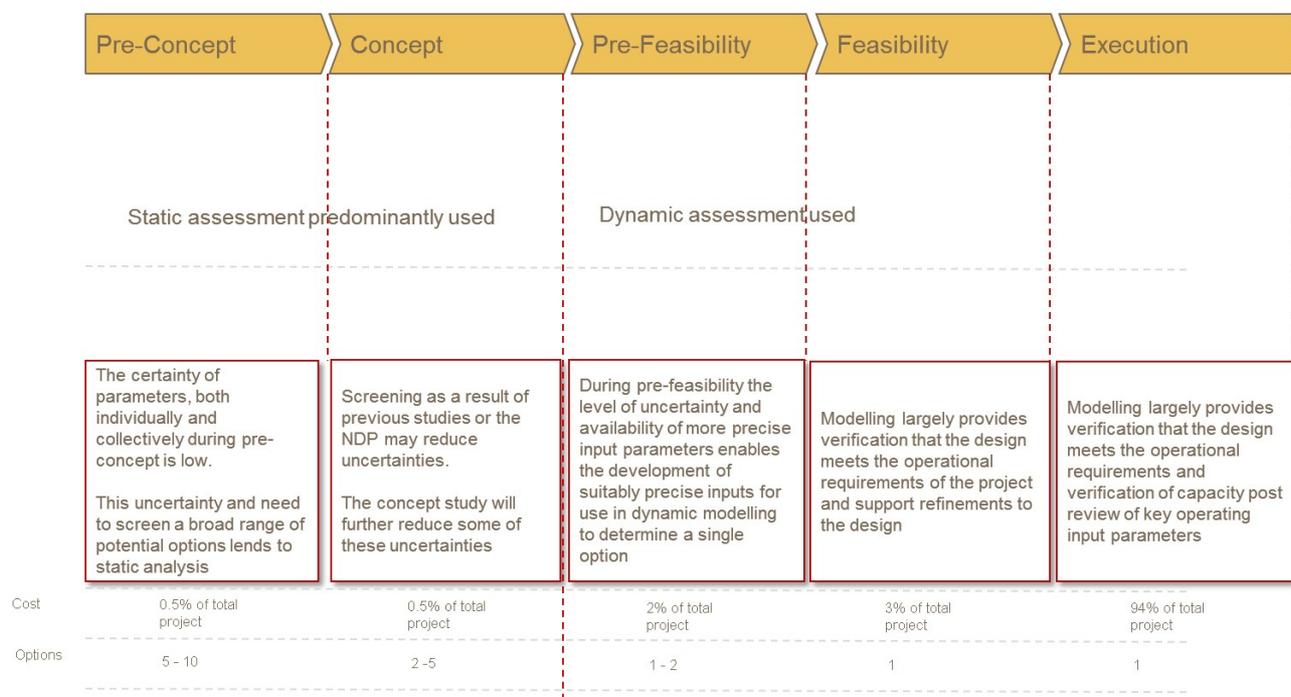
10.7.3 Modelling approach

The strategic focus of the NDP involves the utilisation of modelling parameters which may be significantly different from the (typically contracted) parameters that currently apply under the existing operating paradigm. As a consequence, the outputs of the NDP would not be suitable for use in any dynamic modelling exercise, as the QCA has suggested in their proposed changes to the NDP. Binding the NDP to current planning paradigms (such as SOP) would limit the flexibility in supply chain development that Aurizon Network are seeking to pursue to improve efficiency across the CQCR, and therefore to so bind the NDP would conflict with a primary Object of the Access Regime.

Aurizon Network's approach to development of a project and the modelling required to be undertaken is presented in Figure 10.1 below.

Figure 10.1 – Lifecycle diagram of Project Assessment process

The precision required for each phase of the project lifecycle is matched to the resources required to develop the input parameters



While it is possible to spend more time, effort and cost in the preparation of the NDP, the quality of any analysis that would emerge from the QCA’s proposed NDP approach is also highly questionable. Aurizon Network believes that it would be incongruous to promote modelling outcomes from a dynamic simulation if the input parameters are not of an appropriate level of certainty. To develop the detailed assumptions necessary for dynamic modelling to be undertaken would involve considerable additional time and expense for Aurizon Network, while still not providing outcomes of any greater certainty than those that would be described in the NDP as it is currently designed.

10.7.4 Supply Chain review

In developing the 2013 and 2014 NDP, Aurizon Network has voluntarily engaged with supply chain members, both individually and as part of supply chain groups. We support this engagement on a voluntary basis but do not believe that we should be bound by the inputs of these consultative processes.

While Aurizon Network values the perspectives that could be drawn from a voluntary consultative process, a formal dispute resolution mechanism for what is a voluntary document would not add any value to the efficiency of the supply chain. Any rigid obligation to accommodate the views of supply chain participants in developing an NDP will add time, cost and unnecessarily complicate the process.

10.7.5 Other elements from the redrafted undertaking

The proposed capacity assessment in clause 7A.6(b) should be aligned to the periodic capacity assessment in 7A.4.2. Currently these provide parallel mechanisms to achieve virtually the same outcomes.

The NDP should not be required to be consistent with the Supply Chain Master Plan (SCMP) as included in 7A.6(d)(i). The SCMP is a document prepared by another organisation which Aurizon Network may have some influence on. The party developing the SCMP is not bound by this undertaking and the SCMP may not be

consistent with the requirement of this undertaking. There may be more than one SCMP applying to any one coal system and they may be inconsistent – hence Aurizon network can not align with both. Rather than align with any SCMP, Aurizon network proposes to consider any SCMP in the development of the NDP.

11 Available Capacity Allocation and Management

11.1 QCA’s Draft Decision

Draft Decision	Reference	Aurizon Network Position
Our Draft Decision is to refuse to approve Aurizon Network’s proposed capacity allocation criteria. Instead, we would approve queuing provisions based on those from UT3 being reinstated in the 2014 DAU.	11.1	Disagree. The proposed capacity allocation criteria were developed by Aurizon Network, in consultation with industry, as a result of identified administrative inefficiencies and a lack of clarity in the current UT3 process. Aurizon Network is of the view that its’ proposed capacity allocation criteria is an improvement on the current provisions which advances the interests of access seekers under s138 (e) of the QCA Act. Aurizon Network could support the reinsertion of the queuing mechanism subject to there being workable criteria for the reordering of the queue. Aurizon Network is committed to working through specific concerns raised by the QCA and industry with the proposed capacity allocation criteria..
Our Draft Decision is to refuse to approve Aurizon Network’s proposed removal of the capacity notification register and the committed capacity register. We would approve the provisions relating to the capacity registers from UT3 being reinstated in the 2014 DAU.	11.2	Disagree. In consultation with industry, the proposed changes to the capacity notification register and the committed capacity register were developed by Aurizon Network, as a result of identified administrative inefficiencies and a lack of clarity in the current UT3 process. Aurizon Network is of the view that its’ proposed changes are an improvement to the current provisions which advances the interests of access seekers under s138 (e) of the QCA Act. Aurizon Network is committed to working through specific concerns raised by the QCA and industry with the proposed changes.
It is our Draft Decision to refuse to approve Aurizon Network’s proposed treatment of force majeure as drafted in the Standard Access Agreements. We would approve moving force majeure provisions in the access undertaking as per our proposed drafting.	11.3	<p>Disagree. Aurizon Network’s position continues to be that Force Majeure clauses should remain in the Access Agreement.</p> <p>Aurizon Network agrees there should be standard provisions in relation to specific matters which act as a safe harbour where the access seeker and Aurizon Network do not or cannot agree, but disagrees with the QCA proposal that certain provisions of the AU be incorporated by reference into the AA and TOD in order to ensure that certain terms are applied consistently across all access holders. Refer to Part 8.3 of this Response for detailed commentary in relation to this issue.</p> <p>With respect to the QCA’s proposed drafting:</p> <ul style="list-style-type: none"> (a) Aurizon Network considers that the inclusion of clause 7.7.1(c) in the force majeure provisions is unnecessary as the scheduling of Train Services in circumstances in which there is a shortfall in capacity is already dealt with in Schedule G – Network Management Principles; and (b) Aurizon Network also has concerns about the time period within which a force majeure

Draft Decision	Reference	Aurizon Network Position
		notice must be provided under clause 7.7.
Our Draft Decision is to refuse to approve Aurizon Network's proposed amendments to the renewal provisions. We would approve the provisions giving renewal applications priority in the queue from UT3 being re-inserted in the 2014 DAU.	11.4	Disagree. The proposed amendments to the renewal provisions were developed by Aurizon Network to clarify and ultimately assist in the administration of these provisions. Aurizon Network rejects the re-insertion of UT3 provisions excepts for any provisions to which give renewal applications priority in the queue.
Our Draft Decision is to refuse to approve Aurizon Network's proposed provisions respecting treatment of renewal applications. Instead, we would approve the 2014 DAU being amended to reinstate the provisions from UT3.	11.5	Disagree. The proposed amendments to the renewal provisions were developed by Aurizon Network to clarify and ultimately assist in the administration of these provisions. Aurizon Network disagrees with the re-insertion of UT3 Renewal application provisions. Aurizon Network has several concerns regarding the QCA's amended drafting of these provisions which are inconsistent with UT3.
Our Draft Decision is to refuse to approve Aurizon Network's proposed amendment to the replacement mine concept. Instead, we would approve provisions from UT3 being reinstated until such time as more supporting information is provided.	11.6	Disagree. The proposed changes to the replacement mine concept was developed by Aurizon Network, in response to a request from stakeholders, in order to more clearly define the boundaries for a replacement mine. Aurizon Network is of the view that its' proposed replacement mine concept is an improvement on the current provisions which advances the interests of access seekers under s138 (e) of the QCA Act. Aurizon Network notes that the revised concept has support from the Queensland Resources Council.
Our Draft Decision is to refuse to approve Aurizon Network's proposed amendments to provisions relating to transfers and relinquishments. Instead, we would approve provisions from UT3 being reinstated until such time as a transfer mechanism has been agreed.	11.7	<p>As stated in the QCA's Draft Decision, the QCA has requested further feedback from stakeholders on Aurizon Network's proposed short term transfer mechanism⁶⁴ and we will therefore await the QCA outcome from this feedback.</p> <p>However, the short term transfer mechanism is separate to the existing Transfer and Relinquishment process under the SAAs. Clarity is required from the QCA as to whether its Draft Decision 11.7 actually refers to Aurizon Network's proposed short term transfer mechanism and not the SAA Transfer and Relinquishment provisions.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed amendments to its calculation of transfer and relinquishment fees. We would approve of a process where Aurizon Network provides an access holder with information detailing:</p> <ul style="list-style-type: none"> (a) how it calculated the relinquishment fee, and how that meets with the relevant provisions of the access undertaking (b) all assumptions used in the calculation and why those assumptions are reasonable assumptions to make. 	11.8	<p>Disagree on the substantive point, with acceptance of suggestions for more information.</p> <p>Aurizon Network agrees there should be standard provisions in relation to specific matters which act as a safe harbour where the access seeker and Aurizon Network do not or cannot agree but disagrees with the QCA proposal that certain provisions of the AU be incorporated by reference into the AA and TOD in order to ensure that certain terms are applied consistently across all access holders.</p> <p>Refer to [Part 8.3 of this Response] for detailed commentary in relation to this issue.</p> <p>With respect to the relinquishment fee provisions, Aurizon Network believes that an amendment is required to the current provisions so that the waiver of relinquishment fees can be permitted in certain circumstances where operator efficiency improvements lead to greater commercial and economic efficiency in</p>

⁶⁴ Aurizon Network, 2014, Discussion Paper on Potential Short Term Transfer Mechanism.

Draft Decision	Reference	Aurizon Network Position
		<p>the network. For example, the operation of longer consists in the system creates an increase in available capacity in the network by moving the same amount of coal utilising fewer train paths.</p> <p>.</p> <p>Aurizon Network can accept the QCA's suggestion to include provisions as per the Draft Decision 11.8 (a) and (b). This information is already voluntarily provided to Access Holders by Aurizon Network.</p>
Our Draft Decision is to refuse to approve Aurizon Network's proposed change to the provisions relating to customer initiated transfers. We would approve provisions relating to customer initiated transfers being reinstated in the 2014 DAU as drafted in Part 7 of UT3.	11.9	Disagree. Aurizon Network's proposed changes to the provisions relating to customer initiated transfers were developed in response to industry feedback seeking a streamlined transfer process. Aurizon Network's position is that customer initiated transfer provisions should be included in the AA in order to provide contractual certainty to Aurizon Network and the Access Holder, and assist in the administration of these provisions.
Our Draft Decision is to refuse to approve Aurizon Network's proposed resumption provisions. We would approve retention of existing 2010 AU resumption provisions.	11.10	<p>Aurizon Network disagrees with the QCA's removal of (i) Aurizon Network's right to resume train paths for failure to hold or have the benefit of Supply Chain Rights and (ii) the provisions dealing with Reduction in Nominated Monthly Train Services. Aurizon Network is of the view these provisions are required for the efficient utilisation of capacity, particularly in the short term. Removal of the provisions also results in a higher likelihood of Take or Pay triggering in a given system due to Access Holders holding onto rights that they cannot utilise. Aurizon Network does not consider this to be a desirable outcome for the Supply Chain.</p> <p>Refer to the commentary in Part 8.4.1 of this Response in relation to this issue.</p>

11.2 Summary of Aurizon Network's Response

Aurizon Network is very concerned at the series of additional restrictions on Aurizon Network's capability to effectively manage the capacity of the CQCR network proposed by the QCA, which go beyond or effectively distort the provisions of the 2010AU.

Aurizon Network has serious concerns that some of the fundamental elements necessary to achieve an effective access regime are jeopardised by these proposals. The list of concerns below could demonstrably work against the legitimate business interests of Aurizon Network [s.138 (2) (b)], while also frustrating the legitimate aspirations of a qualified access seeker [s.138 (2) (e)], with the potential to conflict with the public interest of having competition in markets [s.138 (d)].

Specifically, the QCA is proposing to:

- constrain Aurizon Network from preventing capacity hoarding and other anti-competitive behaviour by its customers;
- force Aurizon Network to entertain any party that has an interest in existing Access Rights irrespective of their capacity or genuine intent to do so and prioritise their request simply on the basis of it being received at an earlier time to another access seeker;

- frustrate Aurizon Network's ability to respond promptly in instances where it is clear that the access holder is not able to utilise the access rights.
- remove Aurizon Network's ability to withdraw a renewal application if the ability of the party is not demonstrated;
- remove Aurizon Network's discretion to prioritise an Access Seeker who is ready and willing to enter into an access agreement;
- maintain a lumpy, mechanistic and inflexible approach to treatment of applications within the capacity queue.

It is difficult to see how constraining Aurizon Network from actively exploring opportunities to optimise the economically efficient operation of the CQCR would not detract from the Object of the access regime set out in s.69E of the QCA Act.

Aurizon Network's proposed capacity allocation criteria and process have been developed upon identified opportunities for improvements to the administrative efficiency of the current 2010AU provisions. Although Aurizon Network's position remains that its capacity allocation criteria and process should be approved as it satisfies the QCA's objective in s.138(2) of the QCA Act, and rejects the Authority's Draft Decision to re-instate the current provisions from UT3. Aurizon Network could agree to the re-inclusion of the queue on the basis that there are clear and effective criteria to allow for reordering of the queue to ensure the efficient allocation of access rights.

Aurizon Network's position is that the Force Majeure provisions and transfer, relinquishment and resumption provisions remain in the Access Agreements, consistent with a general position that contractual certainty is enhanced by the retention of key clauses in Access Agreements.

Aurizon Network's proposed renewal provisions were developed to improve clarity and ultimately assist in the administration of these provisions. Although Aurizon Network's position remains that its renewal provisions should be approved as they advance the interests of access seekers consistent with s.138 (e) of the QCA Act, Aurizon Network and the QRC agreed detailed changes to the drafting for the process of renewals, and as such Aurizon Network would agree to amend the 2014 DAU to include these changes.

11.3 Capacity Allocation criteria and process

Aurizon Network's proposed capacity allocation criteria and process have been developed as a result of identified administrative efficiency improvements to the current UT3 provisions. Although Aurizon Network's position remains that its capacity allocation criteria and process should be approved as it better satisfies the QCA's objective in s.138 (2) (a) of the QCA Act. Despite this, Aurizon Network is could accept the re-inclusion of the capacity queue, subject to there being clear and effective criteria as submitted by Aurizon Network to allow for reordering of the queue to ensure the efficient allocation of access rights. .

Furthermore, Aurizon Network notes that the actual drafting provided with the QCA's Draft Decision is inconsistent with UT3 as set out below. .

11.3.1 Capacity Allocation and Registers

Clause 7.2.1 sets out the criteria that Aurizon Network can use to assess an Access Seekers ability to use the requested access rights before entering into an Access Agreement. The QCA's amended drafting in 7.2.1(a) (ii) has excluded Railway Operators from being required to demonstrate that they are reasonably likely to secure the rail haulage agreement. This is a departure from UT3 and Aurizon Network views this as an important provision to strengthen its ability to prevent capacity hoarding and other anti-competitive behaviour which would conflict with s138 (2) of the QCA Act. Aurizon Network requests that the QCA re-instates this provision.

11.3.2 Committed Capacity Register

Clause 7.2.3 provides the conditions to which Aurizon Network must maintain the Committed Capacity Register. The QCA has amended clause 7.2.3(a) (ii) to include 'DTMR in respect of its Committed Capacity'. It has also amended clause 7.2.3(a) (iii) to impose a requirement for any party that has an interest in existing Access Rights to be included on the Committed Capacity Register. Aurizon Network views these requirements as an unnecessary administrative burden and does not understand how they contribute towards the purpose of the Committed Capacity Register, or assist the QCA in satisfying its objective in s69E. Aurizon Network requests that the QCA removes these provisions.

11.4 Force Majeure

As noted in Part [8.3] above, Aurizon Network disagrees with the QCA's approach of incorporating by reference provisions of the UT into the AA/TOD. Aurizon Network's comments in Part [8.3] extend to the incorporation by reference of the force majeure provisions in the UT into the AA/TOD. Force majeure events is rightly a contractual issue.

The QCA has proposed in clause 7.7.1(c) of its redrafted Undertaking that if more than one Access Holder is affected by a force majeure event, the obligation to provide access rights should be suspended proportionally between those Access Holders in the manner contemplated in that clause. Aurizon Network considers that the inclusion of that clause in the force majeure provisions is unnecessary as the scheduling of Train Services in circumstances in which there is a shortfall in capacity is already dealt with in Schedule G – Network Management Principles. The Network Management Principles include a Contested Train Path process to allocate available capacity between Access Holders. Aurizon Network proposes that this clause should be removed to avoid any inconsistency with the Network Management Principles.

Aurizon Network also has concerns about the time period within which a force majeure notice must be provided under clause 7.7.

The QCA's proposed clause 7.7.3 requires Aurizon Network to bear the cost of replacing damaged or destroyed infrastructure resulting from a force majeure event. Aurizon Network considers this obligation to be beyond the QCA's power to impose and does not accept this provision.

11.5 Renewal of Access Rights

Aurizon Network's proposed renewal provisions were developed to improve clarity and ultimately assist in the administration of these provisions. Aurizon Network's position remains that its renewal provisions should be approved as they advance the interests of access seekers consistent with s.138 (e) of the QCA Act, and rejects the authority's draft decision to re-instate the provisions in UT3. Furthermore, Aurizon Network notes that the actual drafting provided with the QCA's Draft Decision has some inconsistencies with UT3 that Aurizon Network does not accept as set out below.

11.5.1 Renewal Criteria

Clause 7.3 sets out the criteria that Aurizon Network can use to renew an Access Holders Access Rights. The QCA's amended drafting in 7.3(j) removes Aurizon Network's ability to withdraw a renewal application under Part 4 of the draft Access Undertaking. This effectively removes Aurizon Network's ability to request additional information, or request the demonstration of supply chain rights for a renewal. Aurizon Network notes that our position is supported by industry⁶⁵ and should be reinstated.

The amendment of this provision by the QCA is, in our view, a significant issue that could ultimately lead to the misalignment of port and rail capacity. It is essential that the Renewing Access Seeker be able to demonstrate that

⁶⁵ Aurizon Network, 2014, Support of other stakeholder submission to the Queensland Competition Authority (QCA), Item 49, p. 11.

they have supply chain rights, and if not, Aurizon Network must be able to cease their access application. Aurizon Network requests that the QCA re-inserts provisions that allow Aurizon Network to cease a renewal application in accordance with Part 4.

11.5.2 Renewal on the same terms

The QCA has amended clause 7.3(h) so that it appears that Aurizon Network must continue to renew access rights on the same terms as currently contracted, except in some circumstances outside of its control. This is a reversal of UT3 provisions where Renewing Access Seekers negotiate terms based on the standard access agreement(s) in place at the time of renewal. In addition, this appears to be beyond the scope that the QCA can require as Aurizon Network and an access seeker are permitted to negotiate and agree any form of access agreement in accordance with s.100 of the QCA Act.

Aurizon Network notes that this position has not been included in the Draft Decision, and queries the reason for the change, as it would appear to contradict the stated desire of the QCA to have all access holders on the same terms and conditions. We note that our position not to be required to renew access rights on the same terms is supported by industry⁶⁶. Aurizon Network is of the view that the terms to be negotiated with an Access Seeker should be based on the Standard Access Agreement(s) and requests that the QCA revert to Aurizon Network's proposed drafting of 7.3(h).

11.5.3 Mutually Exclusive Access Applications

Aurizon Network notes that there have been several material amendments made by the QCA to the provisions for Mutually Exclusive Access Applications that have not been included in the Draft Decision. Aurizon Network does not accept these changes as set out below

- In 7.5.2(j) the QCA has removed Aurizon Network's ability to prioritise an Access Seeker who is ready and willing to enter into an access agreement in accordance with a set of criteria (such as length of term, promotion of efficient investment in the infrastructure, community concerns, health and safety)). By removing this discretion, Aurizon Network may be obliged to enter into an inefficient agreement over another that would have improved the economically efficient operation of the system. Removing this provision would demonstrably be against the legitimate business interests of Aurizon Network, while also frustrating the legitimate aspirations of a qualified access seeker. Aurizon Network maintains that it should have the ability to reorder the capacity queue according to who is best placed to sign up access rights and contribute to the system. Aurizon Network requests that the original provisions of 7.5.2(i) are re-inserted.
- In 7.5.2(j) the QCA has imposed an obligation on Aurizon Network not to enter into negotiations with an Access Seeker that is lower in the queue than another, without the written permission of the higher placed entity. Aurizon Network believes these provisions are inefficient and create an administrative burden, while also providing an opportunity for a higher placed applicant to game the system to the disadvantage of their competitors. Aurizon Network may have capacity that can satisfy more than one party in the queue. In circumstances such as this, it is impractical and unreasonable to expect one negotiation to finish before entering into another. There are also confidentiality issues around how another Access Seeker may grant this permission. Aurizon Network regards that the new provisions are in conflict with the public interest of having competition in markets (s138(d) of the QCA Act) and request that the original drafting be reinstated.
- The QCA has deleted clause 7.5.2(j) (i) (previously numbered clause 7.5.2(c)(i) in Aurizon Network's 2014DAU) which allowed Aurizon Network to allocate Available Capacity in accordance with its Passenger Priority Obligations or Preserved Train Path Obligations. Aurizon Network does not accept this amendment as, under section 266 of the *Transport Infrastructure Act 1994* (Qld), Aurizon Network has obligations in allocating train paths to give priority to regularly

⁶⁶ Aurizon Network, 2014, Support of other stakeholder submission to the Queensland Competition Authority (QCA), Item 56, p. 12.

scheduled passenger services which are⁶⁷ Preserved Paths. As such, any request to use these Preserved Paths should not be subject to the capacity queue. The proposed deletion is also inconsistent with the overarching provision in clause 2.5(d) of the QCA's draft Undertaking (which mirrors the drafting of clause 2.3(c) of Aurizon Network's 2014DAU) which provides that "Nothing in this Undertaking can require Aurizon Network to act in a way that is inconsistent with its Passenger Priority Obligations or Preserved Train Path Obligations."

11.6 Transfer and Relinquishment

As noted in Part 8.3 above, Aurizon Network disagrees with the QCA's approach of incorporating, by reference, provisions of the Undertaking into the AA/TOD. Aurizon Network's comments in Part 8.3 extend to the incorporation by reference of the transfer and relinquishment provisions in the Undertaking into the AA/TOD.

11.6.1 Short Term Transfers

Following Aurizon Network's separate submission to the QCA regarding our proposed Short Term Transfer mechanism⁶⁸, we note that the QCA has requested further feedback from stakeholders before making a decision. Aurizon Network awaits the QCA's decision in relation to this matter.

11.6.2 Deterrent to efficiency improvements

We note that the QCA has rejected, in its Draft Decision, Aurizon Operations' submission to the QCA⁶⁹ that relinquishment fees discourage train operators from pursuing efficiency improvements on the basis that:

- "Relinquishment fees are designed as an exit fee, to capture the fixed costs of providing access to an access holder";⁷⁰
- "Waiving relinquishment fees appears to be a concern where there is no alternative demand – which means costs would transfer to other access holders;"⁷¹ and
- Aurizon Operations' proposal to waive relinquishment fees "would have the effect of shifting a portion of costs of making efficiency gains on to the network at a time of low demand."⁷²

Access Holders contract access rights based on the number of train 'paths' required to transport a level of tonnes to be unloaded. The unloading rights are contracted with the end user based on tonnes. Operator efficiency improvements have resulted in longer train consists which are able to transport a greater number of tonnes using less train paths. The net result of this misalignment between port and rail is that the Access Holder may have contracted train paths which it is unable to use, leading to inefficient use of the rail infrastructure.

The relinquishment fee is designed as an exit fee to prevent an access holder from passing on costs to the network as a result of its decision to exit the market. The purpose of the relinquishment fee is distorted when it prevents an Access Holder from improving efficiency due to structural changes driven by advances in technology and operational process. The waiver of relinquishment should be permitted in certain circumstances where operator efficiency improvements lead to greater commercial and economic efficiency in the network. For example, the operation of longer consists in the system creates an increase in available capacity in the network by moving the same amount of coal utilising fewer train paths.

⁶⁷ *Transport Infrastructure Act 1994* (QLD) s 266A

⁶⁸ Aurizon Network, 2014, Discussion Paper on Potential Short Term Transfer Mechanism.

⁶⁹ Aurizon Operations, 2014, Response to Aurizon Network's 2014 DAU, sub. No.26:2-3.

⁷⁰ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, p. 234.

⁷¹ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, p. 235.

⁷² *Ibid.*

If there was an ability to waive the relinquishment fee in these circumstances, then the net cost of operating longer trains, that being the cost of unused access rights⁷³, would be borne by all Access Holders in the system, and would form an important natural market incentive to drive further system efficiency. As the same net tonnes are transported, the key impact to the reference tariff paid by the access holder is a reduction in train paths. Therefore only a small portion of the access charge is not recovered (AT2), with the upside realised as an increase in available capacity for use by Access Holders or access seekers.

In periods of low alternative demand, it becomes difficult for Access Holders to transfer access rights, which they are not able to utilise, to an Access Seeker. However in periods of high demand, it is feasible that Access Holders may be incentivised to hold on to access rights which they have no ability or need to utilise. Capacity hoarding may lead to price distortion and discouragement of new competition into the market. While current UT3 resumption provisions give Aurizon Network some ability to protect access holders from this scenario, we do not believe that this is sufficient.

It is Aurizon Network's view that a change is required to the current relinquishment fee provisions to help facilitate operator efficiency improvements. In accordance with s 138(2) of the QCA Act, the legitimate business interests of Aurizon Network, the public interest and the object of Part 5 of the QCA Act are best served by the efficient use of the asset, that is, contracted capacity is aligned with those access holders who are best placed to use it. Those objectives within the Act are not advanced where an Operator is penalised for pursuing efficiency.

11.7 Retention of Contracted Capacity

11.7.1 Supply Chain Rights

As noted in Part [8.4] in this response, Aurizon Network disagrees with the QCA's approach of not allowing Aurizon Network to resume Access Rights on a forward looking basis if the Access Holder does not have the ability to utilise the Access Rights (including because the Access Holder ceases to hold, or have the benefit of, Supply Chain Rights).

11.7.2 Resumptions

The QCA has removed provisions from the access agreement relating to resumptions in favour of including these in the access undertaking. Aurizon Network considers it inappropriate for these provisions to be included in the access undertaking. In addition, the QCA has amended the provisions to include elements which would appear to be beyond the power attributed to the QCA under the Act.

In UT3, Aurizon Network had a limited capacity to resume train paths for underutilisation. In particular, this did not allow Aurizon Network to resume capacity in instances where it was clear that the access holder would no longer have the capacity to utilise those access rights. A clear example of this would be the failure to continue to hold Supply Chain Rights or a mine closure. To address this in UT4, Aurizon Network sought to include resumption of capacity where an event or circumstance results in an access holder not being able to use that capacity. This policy decision was on the basis that the UT3 resumption rights did not provide Aurizon Network with the ability to proactively respond and allocate capacity to those access holders most likely to utilise the capacity, particularly in the short term.

In its Draft Decision, the QCA has reverted to the UT3 position and rejected Aurizon Network's right to resume on a forward looking basis.

Aurizon Network is of the view that the ability to resume for failure to hold or have the benefit of Supply Chain Rights promotes the efficient utilisation of the Network, particularly in the short term. Resumption for failure to hold or have the benefit of Supply Chain Rights, in addition to the concept of an Underutilisation Event, should be reinstated in the AA and TOD.

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In the absence of the Access Holder transferring that capacity to another Access Holder that does have Supply Chain Rights, Aurizon Network must rely on the existing resumption provisions which require that the Access Holder not use at least 85% of its contracted Train Service Entitlements for four consecutive quarters. This does not allow Aurizon Network to effectively manage and allocate capacity to access holders who are most likely to utilise and be able to utilise that capacity.

The result from this could be that Aurizon Network is required to undertake an expansion of capacity which is clearly not consistent with s.69E when the system has capacity but it is not available due to hoarding.

Furthermore, it is to the benefit of the supply chain that capacity is utilised in the short term, as opposed to individual access holders being subject to take or pay arrangements, as it minimises the likelihood of Take or Pay triggering in the particular system. If existing resumption provisions were to continue, the economically efficient operation of the CQCR would be not be optimised, detracting from the Object of the access regime set out in s.69E of the QCA Act.

Relying on Take or Pay provisions and not giving Aurizon Network the ability to resume access rights which are not required or needed to be used by an access holder is potentially anti-competitive as it favours those access holders that have the ability to pay and hold onto such capacity. This may also require Aurizon Network to create capacity through expansions where such additional capacity is not actually required and results in higher below rail infrastructure costs, in the form of reference tariffs, than would otherwise be paid if capacity was resumed by Aurizon Network from the hoarder and passed to the access seeker..

There are sufficient safeguards incorporated into the resumption provisions to adequately protect Access Holders against resumption of access rights which the Access Holder has an ability and need to utilise. For example, in Aurizon Network's proposed draft of the AA, the Access Holder is given the opportunity to demonstrate that there is a reasonable likelihood that it is able to utilise and has a need to utilise the access rights that are proposed to be resumed. Aurizon Network must show that there is a sustained alternative demand for those access rights and there is an opportunity to dispute Aurizon Network's position in relation to resumable access rights.

This has been provided for in Aurizon Network's August 2014 draft EUAA (refer to clause 6.3) and Aurizon Network proposes that this be reinstated.

In addition, Aurizon Network agrees with the QCA that Access Holders should be given the opportunity to transfer or relinquish their access rights prior to any resumption taking place. It is proposed that the existing resumption provisions be amended to provide that on the occurrence of a Resumption Trigger Event, the Access Holder first be given the opportunity to seek a transfer or relinquishment of those access rights.

The QCA has failed to explain why this is a preferred position. If Aurizon Network is forced to retain the resumption rights purely through the 85% utilisation test it will allow the capacity hoarder to leverage the time (potentially 18 months) it would take it to resume, to unreasonably force the access seeker to pay a premium for them to transfer the right to them. Aurizon Network cannot comprehend why the QCA would support a position which enhances third parties' ability to profit from trading of regulated train paths and require access seekers to pay more than the regulated price.

12 Network Development and Expansion Process

12.1 The QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of its legitimate business interests.</p> <p>Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner we have indicated in our proposed draft to remove all references, direct or indirect, to Aurizon Network's legitimate business interests from the expansion process in Part 8 of the 2014 DAU.</p>	12.1	Aurizon Network disagrees with this position, as Aurizon Network requires protection in respect of its legitimate business interests should it extend or permit the expansion of its network
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of its demand assessment included in the expansion process. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) strengthen the role that information regarding supply chain dynamics plays in the demand assessment process, with Aurizon Network obliged to account for this</p> <p>(b) exclude any expressions of interest process conducted by Aurizon Network from the list of relevant information for undertaking a demand assessment</p> <p>(c) strengthen the confidentiality provisions, so that information is aggregated to a level sufficient to ensure that it cannot be associated with specific companies</p> <p>(d) include specific provisions to allow the demand assessment report to consider differing capacity options in the branch lines</p> <p>(e) restrict the demand assessment report to ensure that it does not cover the possibility of a demand assessment on the mainline exceeding the out-loading capacity being sought at a coal terminal</p> <p>(f) exclude information regarding the status of coal reserves/coal resources, mining tenure and key approvals from the demand assessment process.</p>	12.2	<p>(a) Aurizon Network agrees with this position</p> <p>(b) Aurizon Network disagrees with this position, as it is important to base the demand assessment on the best information available which should include consideration of any EOI process</p> <p>(c) Aurizon Network agrees with this position</p> <p>(d) Aurizon Network agrees with this position</p> <p>(e) Aurizon Network agrees with this position</p> <p>(f) Aurizon Network disagrees with this position, as it is important to consider the extent to which the demand is reasonable and the development status of the proposed mines is relevant to this consideration</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of efficient financing and its</p>	12.3	

Draft Decision	Reference	Aurizon Network Position
<p>obligation to fund. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network should notify access seekers and funders of its decision to fund the project, or otherwise, at the regulated rate of return at the commencement of the pre-feasibility study.</p> <p>(b) Aurizon Network should remove the concept of 'commercial terms' from the 2014 DAU, reintroduce a form of access conditions and require that access conditions be approved by the QCA.</p>		<p>(a) Aurizon Network disagrees with this position. It is unreasonable to require an entity to commit to funding a project which is not yet scoped or valued.</p> <p>(b) Aurizon Network disagrees with this position as it could result in unreasonable delays in a project development agreement for an Aurizon Network-funded project becoming unconditional. Also the QCA approval requirement unreasonably prejudices Aurizon Network's ability to compete in the market for funding expansions.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of addressing users and financiers' needs in the expansion process. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) ensure concept study reports are provided to all stakeholders by being included in the next updated network development plan</p> <p>(b) propose an alternative SFA that reflects a more appropriate allocation of risk as attached to this Draft Decision</p> <p>(c) strengthen the study scope criteria, timelines and outputs requirements</p> <p>(d) provide that step-in rights can be activated by access seekers and third party funders if an executable SFA, study scope criteria, timelines and outputs are not delivered</p> <p>(e) ensure study proponents execute confidentiality agreements with Aurizon Network and relevant stakeholders</p> <p>(f) require third-party study proponents to comply with the undertaking as if they are Aurizon Network</p> <p>(g) require that all processes and decisions made with</p>	12.4	<p>(a) Aurizon Network agrees with this position.</p> <p>(b) Aurizon Network disagrees with this position, as it allocates to Aurizon Network risks that it does not volunteer to assume</p> <p>(c) Aurizon Network disagrees with this position, as the output requirements are too inflexible, the study funding agreement scopes are vague and the specification of the feasibility study scope is flawed</p> <p>(d) Aurizon Network agrees with this position, subject to conditions about information supply, compliance obligations and the standard of the nominee's study</p> <p>(e) Aurizon Network agrees with this position</p> <p>(f) Aurizon Network agrees with this position</p> <p>(g) Aurizon Network agrees with this</p>

Draft Decision	Reference	Aurizon Network Position
<p>respect to the expansion process are subject to our Draft Decision regarding the dispute resolution mechanism in Part 11 of the 2014 DAU.</p>		<p>position, subject to four conditions about the operation of dispute resolution</p>
<p>12.5 Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of the scope of participation in the expansion process.</p> <p>Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft so that Aurizon Network cooperates with any rail expansion study for a third party who is willing to fund such a study.</p>	12.5	<p>Aurizon Network disagrees with this position, as Aurizon Network should only be required to cooperate with an access seeker or customer</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of addressing infrastructure investment studies. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <ul style="list-style-type: none"> (a) Aurizon Network should manage studies and deliver scope and output within the study scope and timeframes (b) study funders should be able to trigger the study step-in rights if a studies scope or timeframes are not met by Aurizon Network. 	12.6	<ul style="list-style-type: none"> (a) Aurizon Network agrees with this position (b) Aurizon Network agrees with this position
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of the participation of parties in the expansion process. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft so that Aurizon Network:</p> <ul style="list-style-type: none"> (a) cooperate with study funders, relevant supply chain participants and terminal operators to reduce the scope of the rail expansion and attain a lower overall cost of delivery for new capacity increments to the CQCR (b) cooperate with study funders, access seekers, rail operators, access holders, supply chain groups and terminal operators in undertaking each study stage and provide copies of the final report at each stage in the expansion process (c) investigate a number of alternative supply chain capacity enhancements to reduce the scope of the rail expansion in each study process (d) execute confidentiality agreements with all study participants. 	12.7	<ul style="list-style-type: none"> (a) Aurizon Network disagrees with this position as reduction of scope is not an appropriate objective (b) Aurizon Network agrees with this position (c) Aurizon Network disagrees with this position in respect of feasibility studies, since each feasibility study should focus on a single option (d) Aurizon Network agrees with this position, subject to those agreements providing Aurizon Network with sufficient disclosure rights
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of study funding arrangements in the expansion process. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft to:</p> <ul style="list-style-type: none"> (a) include a clear, comprehensive and precise definition of study scope and deliverables for concept, pre-feasibility and feasibility studies 	12.8	<ul style="list-style-type: none"> (a) Aurizon Network disagrees with this position as the output requirements are too inflexible, the study funding agreement scopes are vague and the specification of

Draft Decision	Reference	Aurizon Network Position
<p>(b) enable step-in rights to be activated by access holders, access seekers or study funders if Aurizon Network delays execution of a SFA or release of a final report</p> <p>(i) SFA rights to audit study costs to ensure Aurizon Network efficiently manages the costs of each study process</p> <p>(ii) SFA rights to include termination clauses with the obligation on Aurizon Network to mitigate damages.</p>		<p>the feasibility study scope is flawed</p> <p>(b) Aurizon Network agrees with this position</p> <p>(i) Aurizon Network disagrees with this position as the auditing process should be confined to an assessment of whether costs have been incurred in accordance with the SFA</p> <p>(ii) Aurizon Network agrees with this position on the condition that a study can only be terminated for convenience by all study funders, rather than any study funder.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of the allocation principles used to identify eligible study funders. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network to identify eligible SFA funders with reference to objective allocation criteria</p> <p>(b) the QCA dispute mechanism in Part 11 to be available for the querying of the application of allocation rules for determining eligible SFA funders.</p>	12.9	<p>(a) Aurizon Network agrees with this position, but disagrees with the QCA's rejection of allocation criteria proposed by Aurizon Network</p> <p>(b) Aurizon Network agrees with this position</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect to commercial terms for funding an expansion.</p> <p>Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft so that Aurizon Network makes a voluntary funding commitment.</p>	12.10	<p>Aurizon Network disagrees with this position as it is unreasonable to require any commercial enterprise to be prepared to make an investment regardless of its business case or the state of the enterprise's finances.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of the application of the expansion process. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network should be required to extend or permit the extension of the CQCR</p> <p>(b) all Aurizon Network funded expansion projects should be required to go through the same investment stage-gate process as user funded expansion projects.</p>	12.11	<p>(a) Aurizon Network agrees with this position, subject to Aurizon Network being protected in respect of its legitimate business interests</p> <p>(b) Aurizon Network agrees with this position, subject to the study outputs/deliverables being amended as proposed elsewhere</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect of the application of the SUFA framework. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p>	12.12	

Draft Decision	Reference	Aurizon Network Position
<p>(a) replace the suite of SUFA agreements included in the 2014 DAU by those applicable to the 2013 SUFA DAAU process</p> <p>(b) include a QCA review process to ensure the SUFA structure can be amended over time should specific concerns be raised with respect to its credibility, workability and bankability.</p>		<p>(a) Aurizon Network agrees with this position</p> <p>(b) Aurizon Network disagrees with this position as sufficient reset triggers have already been included</p>
<p>We consider it appropriate for Aurizon Network to amend the 2014 DAU to require Aurizon Network to commit to developing a suite of tax efficient financing options to be made available to access seekers and third-party financiers for small/medium expansion projects, as set out in our proposed draft.</p>	12.13	<p>Aurizon Network disagrees with this position as the current trust-based model was the only suitable structuring option that was identified during the rigorous and multi-disciplinary process of investigating user funding options and developing a user funding template transaction. Hence there is little merit in continuing this work. It should be noted SUFA is available for all projects.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's 2014 DAU proposal in respect to managing a shortfall in capacity following an expansion. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network to provide access holders with an expansion capacity guarantee</p> <p>(i) Aurizon Network will fund a shortfall expansion where it is required to bring the expansion to the agreed level of reliability</p> <p>(ii) Access seekers and financiers will fund a shortfall expansion where it wishes to bring the expansion to a higher level of reliability</p> <p>(iii) Any capacity shortfall attributable to Aurizon Cause will be funded by Aurizon Network</p> <p>(b) compression of provisional access rights to be proportional according to funding contribution unless otherwise agreed in access agreements.</p>	12.14	<p>(a) Aurizon Network agrees with this position subject to its response in respect of (i), (ii) and (iii) below</p> <p>(i) Aurizon Network agrees with this position, subject to conditions about the cause and the remedy of that shortfall</p> <p>(ii) Aurizon Network agrees with this position</p> <p>(iii) Aurizon Network agrees with this position, subject to conditions about the remedy of that shortfall</p> <p>(b) Aurizon Network disagrees with this position as compression should be pro rata on the basis of train paths</p>

12.2 Summary of Aurizon Network's Response

Part 8 of the 2014 DAU (Network Development and Expansions) was developed by Aurizon Network as a result of an extensive process of engagement with the QRC over its principles and drafting. During this engagement process Aurizon Network and the QRC reached agreement on the expansion process principles and most of the drafting required to reflect those principles.

In its October 2014 submission to the QCA on the 2014 DAU the QRC stated:

*'The QRC has engaged in consultation with Aurizon Network in respect of the Expansion Process since Aurizon Network's submission of the 2013 DAU. Through that engagement, Aurizon Network and the QRC have reached an agreed position in relation to the Expansion Process, except to the extent of Aurizon Network's funding obligations.'*⁷⁴

The QRC did go further to indicate a desire for '*minor mark-up*'.

The QRC also indicated a need for '*some aspects of the expansion process section that will need to be modified*'⁷⁵ in relation to changes needed to take account of SUFA. Aurizon Network agrees that provisions in addition to Part 8 in the 2014 DAU are needed to be included to facilitate SUFA developments.

Other stakeholders have indicated they have concerns with Part 8 of the 2014 DAU despite the agreement between Aurizon Network and the QRC.

Given the extent of stakeholder agreement and the limited number of outstanding issues, Aurizon Network was surprised that the QCA's UT4 Draft Decision contained such a wholesale revision of Part 8 of the 2014 DAU. Although some elements of the changes are of a stylistic nature, many others are substantive and make fundamental changes to the principles agreed with the QRC. Indeed it is questionable why any stylistic drafting changes have been made as they simply add to the already substantial workload that stakeholders face in responding to the QCA's Draft Decision when all parties are striving to resolve this Undertaking within tight timelines. Such stylistic changes also appear inconsistent with s138(5) of the QCA Act.

In Aurizon Network's view it would have been more pragmatic for the QCA to limit its consideration of Part 8 to:

- SUFA related inclusions, and
- key issues raised by other stakeholders

Given the extent of agreement with QRC, it is unclear why Part 8 in the 2014 DAU needed to be extensively revised as part of the UT4 process, rather than allowing it to be "road-tested" as part of UT4. If this course of action had been adopted, all stakeholders would have been well-placed to further consider the expansion process for future access undertakings in the light of experience with the UT4 expansion process.

The QCA has not provided a compelling argument that the extent of changes that it has made were necessary to satisfy s138(2) of the QCA Act. That is, there is no clear explanation as to why the proposed Part 8 was not appropriate under the terms of the QCA Act.

Notwithstanding these concerns, Aurizon Network has fully addressed in Part 12 of this submission the expansion process proposed by the QCA in its Draft Decision. Part 12 provides Aurizon Network's responses to

- each of the QCA's draft decisions on Part 8 of the 2014 DAU
- key issues included in the redrafted Undertaking that were not reflected in each of the QCA's draft decisions on Part 8 of the 2014 DAU
- key issues in the QCA-proposed SFA

12.3 Legitimate Business Interests (Draft Decision 12.1)

Under s119 of the QCA Act the QCA may only make an 'access determination' (as defined in that act) that requires Aurizon Network to extend, or permit the extension of, the CQCR if, among other things, the QCA is satisfied that the legitimate business interests of Aurizon Network are protected. Upon UT4 being approved and becoming effective, any extension of the CQCR would be addressed under the terms of UT4 and the legitimate business interests protection of s119 of the QCA Act would not apply in respect of that extension.

A key principle that underpins s119 of the QCA Act is that the legitimate business interests of the owner and operator of the existing network should be safeguarded in respect of extensions that arise under the regulatory

⁷⁴ QRC, 2014, Main Submission on the 2014 DAU, Part 8, Section 3, p. 39.

⁷⁵ QRC, 2014, Main Submission on the 2014 DAU, Part 8, Section 3.2, p. 46.

process. It is a matter of business reality that expansion/ extension projects can and do have a material adverse effect on the assets and business activities of the 'base business' – the intent of the Queensland Parliament was to ensure that the base business was to be protected from any such effects. Aurizon Network strongly supports this principle and considers it should apply under UT4. To give effect to this view, Aurizon Network specified, in its 2014 DAU, that the QCA, when acting in a dispute resolution capacity under Part 8 of the Undertaking, must have regard to Aurizon Network's legitimate business interests.

Prior to submitting the 2014 DAU Aurizon Network had given considerable thought to how it should document the Undertaking in a manner which reflects the protections provided under s119 of the Act. Initially Aurizon Network had intended to include a requirement that an extension must not adversely affect its legitimate business interests as one of the conditions (in section 8.2.1(c) of UT4) to Aurizon Network's obligation to construct or permit an expansion. However after discussions with the QRC, Aurizon Network agreed to restrict the application of the 'legitimate business interests' protection to the dispute resolution mechanism.

The 'legitimate business interests' requirement that the QCA is seeking to remove from the restrictions on the QCA's dispute resolution powers actually reflects the key principle cited that underpins s119 of the QCA Act.

Aurizon Network is concerned that the QCA is seeking to require Aurizon Network to put in place an access undertaking which would entitle the QCA, in its dispute resolution capacity, to make decisions that it could not make, in the form of an access determination, due to s119 (and particularly s119 (4B)(b)). Aurizon Network submits that the QCA's UT4 draft decision is seeking to establish powers for the QCA that are inconsistent with a fundamental principle of the QCA Act.

In its discussions with the QRC Aurizon Network agreed to include (in section 8.2.1(f) of the 2014 DAU) examples of the matters which constituted its legitimate business interests. Aurizon Network has no concerns over the QCA's deletion of these examples.

Aurizon Network notes that the QCA is critical in its UT4 draft decision of Aurizon Network for not seeking to balance its legitimate business interests with those of other parties. Aurizon Network has no objections to the QCA balancing the interests of various parties, including Aurizon Network, when deliberating on whether to approve UT4, which addresses numerous matters other than expansions, in accordance with s138(2) of the QCA Act. However s119 of the QCA Act does not require any balancing of Aurizon Network's interests with those of any other parties. It is a necessary, but not a sufficient, condition of any 'access determination' that extends, or permits the extension of, the CQCR that the QCA is satisfied the legitimate business interests of Aurizon Network, as the owner/operator of the 'base business', are protected. Therefore any reflection of this principle in the undertaking should similarly not require balancing of interests.

Accordingly Aurizon Network proposes that the QCA adopt in the Undertaking a protection of Aurizon Network's legitimate business interests that is consistent with the protection of those interests as set out in the Undertaking in the 2014 DAU.

12.4 Demand Assessment (Draft Decision 12.2)

Aurizon Network disagrees with some parts of the QCA's position and agrees with others, as set out in the table above.

When conducting a demand assessment Aurizon Network should use all information available to it to identify potential demand for incremental access capacity and the likelihood that this demand will occur. It should then decide the extent of this demand that is reasonably likely to continue to be in place following all necessary coal supply chain investigations up to and including successful negotiation of development agreements ('true demand'), and the timeframe for the commencement of that 'true demand'. The status of the coal reserves/ resources, mining tenure and development approvals of proposed mines will facilitate this assessment of 'true demand'.

Aurizon Network agrees that analysis or advice on demand from participants in supply chain groups is a relevant source of information in preparing demand assessments. Nevertheless, Aurizon Network considers that the results of any Aurizon Network expression of interest process or other market intelligence of Aurizon Network should be able to be taken into account in any demand assessment. Furthermore, Aurizon Network cannot comprehend why the QCA considers that Aurizon Network:

- should be able to rely on a supply chain group reporting that a miner has a specific demand for incremental access capacity, but

- should not be able to rely on that miner advising Aurizon Network in a bilateral meeting as to its specific demand for incremental access capacity.

Aurizon Network considers that any demand assessment should consider the access needs of new participants, as well as existing participants, in the coal industry. Exclusive reliance on supply chain groups, within which established participants are likely to have a dominant role, may result in an under-assessment of the access needs of new participants.

Aurizon Network acknowledges that an aggregation of potential demand from prospective users is quite different from an assessment of 'true demand'. 'True demand' needs to be decided in light of the reasonable expectation of the use of access capacity. This decision should take into account the likelihood that the necessary mine loading capacity, terminal un-loading capacity and above rail capacity will be developed. Aurizon Network therefore agrees with the QCA's position that the outcome of any demand assessment should not exceed the expected terminal un-loading capacity.

In conducting a demand assessment, Aurizon Network also needs to take into account the likelihood that other coal supply chain assets will be available on a timely basis consistent with the proposed incremental access capacity. As part of that assessment Aurizon Network should consider whether other supply chain investments are mutually exclusive – for example one port expansion may not occur if another port commits to its expansion.

Aurizon Network proposes to consider all relevant information from varied sources and determine a demand assessment outcome that specifies the 'true demand' and its applicable timeframe. Aurizon Network acknowledge that there may be alternative views on this outcome and Part 8 of the Undertaking provides for a dispute resolution process should any party disagree with Aurizon Network's demand assessment. When the QCA resolves any such dispute, it should have access to all the information available to Aurizon Network.

A demand assessment should consider potential mine specific access needs as well as potential mainline access needs. Such an assessment will therefore consider a range of capacity alternatives for branch-lines and Aurizon Network agrees with the QCA's decision on this matter.

The QCA proposes that the demand assessment report should provide information in an aggregated form so that it cannot be associated with specific companies. Depending on the location of existing and potential mines and the railway's layout, it may prove difficult to aggregate the information so that it cannot be associated with specific companies. For example if there are two companies seeking capacity on a section of the track Aurizon Network could not provide aggregated information for that section, as doing so would allow each of those parties to know what the other party is seeking. Accordingly a demand assessment report may be highly aggregated (i.e. across the system as a whole), and consequently the resulting report may be of limited value.

Aurizon Network notes that the QCA has not included in the redrafted Undertaking any requirement that each concept study must provide aggregated information as set out above, and considers that the proposed aggregation obligation is inconsistent with the QCA's general position on transparency. Aurizon Network is supportive of demand assessment reports being transparent.

Accordingly Aurizon Network disagrees with the QCA's position on aggregation of information in each demand assessment report.

12.5 Aurizon Network Funding

(Draft Decision 12.3)

12.5.1 Notification of funding intention when pre-feasibility study commences (Draft Decision 12.3(a))

Like any other major corporate entity, Aurizon Network employs appropriate governance controls over commitment to investment. These controls ensure that the risks and benefits of any investment are appropriately known when the commitment is made (usually with the quality of understanding about that investment available from a completed feasibility study) as well as an assessment of the funding available to Aurizon Network and the alternative uses of such funds.

At the commencement of the prefeasibility study there will be multiple access seekers and potentially multiple unloading facilities. The total volume of capacity to be created may not be known (for example it may not be clear if it is for one or 2 unloaders, equivalent to 30 or 60Mtpa of coal throughput). The amount of access sought by access seekers will exceed the unloading capacity (e.g. for a 30Mtpa unloader there is likely to be perhaps 50 to 100Mtpa of mine developments being considered). The scope of what needs to be constructed is only based on concept study outcomes, so even for a given capacity outcome the level of understanding of the ultimate project's scope, capital cost, program and risk profile at this point in the project lifecycle is quite low. Furthermore the status of external conditions, such as the markets for equity/debt finance, coal and construction services, and internal conditions, such as the strength of Aurizon Network's balance sheet, as at the point of project commitment will be unknown.

With all this uncertainty Aurizon Network will not be in a position to notify access seekers whether it will be funding the expansion at the regulated rate of return at that early stage of the project development lifecycle. It is unreasonable for the QCA to expect Aurizon Network to make a funding notification as doing so would fall outside any reasonable definition of acceptable corporate governance, and would be against its legitimate business interests. Aurizon Network disagrees that such a significant adverse impact on Aurizon Network's interests could be seen to be balanced by consideration of other interests under s138(2) of the QCA Act.

12.5.2 Access conditions (Draft Decision 12.3(b))

This draft decision seeks to establish (in section 6.13 of the redrafted Undertaking) an access conditions regime. This regime would extend to any proposed access agreement that includes conditions required to mitigate exposure of Aurizon Network or an access seeker to cost or risk that is

- associated with providing access, and
- is not reflected in the reference tariff.

Each such proposed access agreement is to be submitted to the QCA for approval **whether or not** that access agreement is linked to CQCR expansion funding by Aurizon Network.

Aurizon Network disagrees with this position. In Part 16.4 of this submission Aurizon Network responds to the proposed application of the access conditions regime to a proposed access agreement that is not linked to CQCR expansion funding by Aurizon Network.

The balance of this Part [12.4.2] sets out Aurizon Network's two concerns about the application of the access conditions regime to a proposed access agreement that is linked to CQCR expansion funding by Aurizon Network.

Risk to development schedule

Aurizon Network considers that the access conditions regime proposed by the QCA poses an unacceptable risk to the development schedule of a below-rail project funded by Aurizon Network and the equivalent schedules for related coal supply chain projects.

Below-rail expansions usually form part of wider coal chain expansions. There will also be mine development agreements, un-loader/port development agreements, rolling-stock purchase agreements, above rail facility development agreements and various construction agreements (including below rail expansion construction agreements) which are interdependent and only become unconditional when all others do so. This QCA approval requirement therefore means that all other coal chain development agreements must be put on hold for the period the QCA considers the arrangements and are subject to the risk of QCA non-approval. Should QCA approval be withheld alternative rail funding arrangements would need to be identified urgently or else all other supply chain development agreements may fall over and parties will be subject to the associated costs and delays. Aurizon Network is not aware how long it would take to obtain QCA approval under UT4, but notes that the process of QCA approval of access conditions during the 2010AU took in excess of 8 months.

This QCA approval threshold could not reasonably be seen to be promoting the "...economically efficient ... investment in..." the CQCR in accordance with section 69E of the QCA Act.

Adverse effect on Aurizon Network's ability to finance expansions

Aurizon Network is competing to finance expansion projects with other funders who utilise the SUFA model. These funders have no need for any condition precedent of regulatory approval and therefore do not face the risk of QCA

non-approval. This asymmetric regulatory requirement would result in such a material disadvantage for Aurizon Network funding that it would be uncompetitive. Hence this access conditions approval requirement smothers the potential for effective competition within the market for financing of coal chain developments.

This requirement is clearly not in Aurizon Network's legitimate business interests. If Aurizon Network has tabled an attractive financing deal and the access seekers are keen to contract with Aurizon Network on that basis, then this requirement is also not in the access seekers' business interests. It is hard to see how such a delay in progressing substantial coal chain growth could be in the public interest.

In this light it is unclear to Aurizon Network which item of s138(2) of the QCA Act has been applied to reach the conclusion that the inclusion of the access conditions provisions is necessary and justifiable.

12.6 Addressing users' and financiers' needs in the expansion process (Draft Decision 12.4)

12.6.1 Allocation of risk in the SFA (Draft Decision 12.4(b))

Aurizon Network disagrees with the QCA position because it allocates to Aurizon Network risks that it does not volunteer to assume and thereby constrains its right to exercise its commercial judgment. Aurizon Network's position is consistent with the following principle as set out in its January 2015 response to the 2013 SUFA DAAU draft decision:

'Consistent with the QCA Act, Aurizon Network may volunteer to accept risks and costs of expanding its network; however, it cannot be compelled to do so. Consequently, Aurizon Network's willingness to accept certain costs or risks is not an indication that it is willing to accept other costs or risks (even if it were proposed that it would receive a reward or be otherwise compensated for doing so).'

This principle is applicable to the risks and costs of studying expansions just as much as it applies to the risks and costs of constructing expansions, since both sets of costs and risks form part of the risks and costs of expanding the network.

Aurizon Network proposes that the QCA adopt a form of SFA consistent with the risk profile that Aurizon Network volunteers to accept. Further details of Aurizon Network's views on the allocation of particular risks under the redrafted SFA are set out in Part 12.16 of this submission.

12.6.2 Study scope criteria, timelines and outputs requirements (Draft Decision 12.4(c))

Aurizon Network disagrees with the QCA's position for several reasons.

Inflexibility of output requirements

Aurizon Network does not consider that the output requirements for different types of studies should be 'hard-wired' in UT4 and therefore apply in all circumstances. Such an approach is inconsistent with good project governance practice in large commercial enterprises, which retain flexibility over output requirements for studies to reflect unknown future business circumstances. This flexibility will be of value to access seekers in order to meet their business objectives, since it will enable them to develop the optimal project investigation strategy with respect to capital cost, schedule (or program) and risk. Three examples illustrate this point.

An example is when investment in a major coal terminal project is being considered and its deadline for commitment is fixed. By assumption a below-rail feasibility study that offers +/-10% cost accuracy (the 'heavy option') would take at least 6 months longer to prepare than a below-rail feasibility study that offers +/-20% accuracy (the 'light option'), and that the heavy option will result in the access seekers being unable to meet the terminal project's deadline for commitment. By assumption, also that the cost of the below-rail project is ~15% of the aggregate cost of all the projects across the supply chain, and that the access seekers have financing

strategies to manage the below-rail cost risk arising from the adoption of a light option feasibility study. In this situation the access seekers may wish to adopt the light option, since for them timeliness is more important than cost accuracy.

Another example arises where access seekers wish to fund a development on the SUFA model from their corporate financial resources, such as funds raised from equity or corporate debt markets. Following project completion the access seekers could ‘sell down’ their SUFA interests to passive investors (and of course retain their access rights). This arrangement, which is akin to practices commonly adopted by commercial property developers, would allow the access seekers to adopt the light option and assume a higher level of cost uncertainty over the below-rail development than is proposed by the QCA. Aurizon Network notes in this regard that the Queensland coal industry is characterised by its significant representation of global mining companies that have strong balance sheets and a high degree of financial capability.

As a third example, assume that the expansion is a minor project such as a \$10m passing loop, and Aurizon Network has current experience in delivering successfully similar passing loops on the applicable rail system. The project risks, in respect of cost, schedule and incremental capacity output, would self-evidently be very much lower than those project risks in respect of a \$1 billion expansion, and therefore the access seekers and Aurizon Network may wish to commit to the minor project after a lower level of investigation than they would seek for the \$1 billion project.

The QCA’s approach to study requirements would prevent Aurizon Network and the relevant study funders from adopting the light option in the circumstances set out in these examples, even when all of those parties are willing to do so on the basis of a mutually acceptable study funding agreement. Under the QCA-proposed approach, the parties are not allowed to modify a study’s output requirements on the basis of what suits the study funders’ business circumstances.

Aurizon Network does not understand the basis on which the QCA has determined that the output requirements of pre-feasibility studies and feasibility studies should be ‘hard-wired’, as those requirements

- do not promote the ‘*economically efficient...investment in*’ the CQCR in accordance with section 69E of the QCA Act, and
- are not consistent with ‘best for supply chain’ decision-making

Aurizon Network proposes that the output requirements for each pre-feasibility study or feasibility study should be determined by Aurizon Network and the applicable proposed study funders on a project specific basis. For simplicity and in accordance with good project governance practice Aurizon Network proposes that UT4 should define a set of different ‘classes’ of study deliverables that are the result of different levels of project investigation. For example, Class 1, as detailed in the table below, is the highest (i.e. most rigorous) class of study deliverables and Class 5, as detailed in the same table, is the lowest class of study deliverables.

Table 12.1: Key Characteristics of study Classes

Estimate Class	Class 5	Class 4	Class 3	Class 2	Class 1
Typical Estimate Accuracy	+50% -30%	+35% -25%	+25% -15%	+15% -10%	+10% -5%
Typical Design Definition	0% to 2%	1% to 15%	10% to 40%	30% to 75%	65% to 100%
Estimating Methodology	Parametrically using benchmarks, Allowances	Parametrically using benchmarks,	Priced Assembly level Bill Of Materials for significant cost	Deterministic estimating method, with forced take offs of undefined areas.	Fully defined, deterministic estimating.

Estimate Class	Class 5	Class 4	Class 3	Class 2	Class 1
	for Key Cost Drivers	assembly driven models	areas. Parametrically and assembly driven models for less significant areas.		
Vendor Selection	None	None	Identified for Major Variables	Selected for Major Variables	Finalised
Exit Fees	None	None	None	For Major Variables	Major Variables & Systems

In addition Aurizon Network proposes that a reference Class of study deliverables should be set in UT4 for each of a concept study, a pre-feasibility study and a feasibility study. Aurizon Network proposes that the reference Classes should be:

- Concept Study – Class 5 (as a minimum)
- Pre-feasibility Study – Class 4 (as a minimum)
- Feasibility Study – Class 3 (as a minimum)

The proposed reference requirements for a pre-feasibility study and a feasibility study have been set at the lower end of the normal range that applies within large commercial enterprises. Should all of the proposed study funders for a particular pre-feasibility study or feasibility study seek a Class of deliverables for a particular study that is a higher (ie a more rigorous) Class than the applicable reference Class, the study funders would be free to nominate that Class (and Aurizon Network would not dispute that nomination). Conversely if Aurizon Network seeks a Class of deliverables for a particular study that is a higher Class than the applicable reference Class, then the study funders would not be able to dispute that nomination. These two provisions taken together ensure that the Class of a study will always be the higher of

- the Class required by study funders, and
- the Class required by Aurizon Network.

Once a Class has been set for a particular pre-feasibility study or feasibility study, a classification process which expressly should not be subject to dispute resolution, then the usual dispute resolution mechanism of the Undertaking would apply to the completion of study schedules.

The Class for a concept study would normally be its reference Class, but may be a higher (ie a more rigorous) Class if considered appropriate by Aurizon Network.

Vagueness of study scope

Aurizon Network considers that the template SFA has been modified by the QCA so as to render the study scope of a project specific study funding agreement unacceptably vague for such a substantial professional services

agreement (often requiring a commitment in the tens of millions of dollars). In particular the template SFA does not allow the scope of works of a project specific study funding agreement to specify

- the access requirements of the agreement's study funders, or
- the project scope requirements/ constraints for that study.

An example of the project scope (as distinct from study scope) requirements/ constraints required for a pre-feasibility study is a listing of the technical options identified in the NDP and/or the associated concept study that are to be studied. An example for a feasibility study is the technical solution recommended in the pre-feasibility study as it applies to the access requirements of the feasibility study's funders. Another example for a feasibility study is the staging of the access capacity required (for example, the first half of the capacity may be required 18 months ahead of the second half).

Aurizon Network considers that good contracting practice requires a clear specification of contract specific requirements to be documented in the contract as at the time of its execution. The absence of such a specification is likely to lead to disputes and would render the scope of works variation provision unworkable.

Aurizon Network therefore proposes that the scope of works for a project specific study funding agreement should specify

- the access requirements of the agreement's study funders,
- the Class of deliverables (eg Class 4) required of that study, and
- the project scope requirements/ constraints for that study,

and that the template SFA should make suitable provision for these study scope details to be documented on a project specific basis.

Flawed specification of feasibility study scope

The definition of feasibility study in the redrafted Undertaking requires that the preferred alternative from the pre-feasibility study be studied (see item (a) of that definition in Part 12 of the redrafted Undertaking). Aurizon Network considers that this specification of study scope is fundamentally flawed.

In a pre-feasibility study a number of 'building blocks' of incremental infrastructure assets will be considered to match a set of access requirements, even though it is expected by all parties that the feasibility study will neither address the delivery of capacity to meet all of the access requirements nor consider all of those building blocks.

For example, the aggregate capacity requirements of all of the building blocks in a pre-feasibility study may be 70mtpa, even though the feasibility study is expected to be for an aggregate capacity of 30mtpa due to the sizing of the associated out-loading project. The pre-feasibility study will not decide or even specify the project configuration that will be adopted in the feasibility study. Following the completion of the pre-feasibility study the feasibility funders will be selected and the feasibility study scope of works will address their access requirements and the associated building blocks. There is no need for the feasibility study scope of works to address either the access requirements of the pre-feasibility funders who were not selected as feasibility funders or the associated building blocks for those parties, whether or not they form part of the preferred alternative of the pre-feasibility study.

Aurizon Network proposes that the scope of the feasibility study should not be mechanically taken from the pre-feasibility study. The feasibility study should be decided by the proposed feasibility funders and Aurizon Network on the basis of business circumstances at the time as well as the pre-feasibility study's conclusions. Such an

approach is consistent with good project governance practice in large commercial enterprises, which retain flexibility over specification of study scope as a project progresses through successive investigation phases.

12.6.3 Step-in rights (Draft Decision 12.4(d))

Aurizon Network agrees with the QCA's position that a nominee should be able to conduct a 'step-in' study should Aurizon Network fail to enter a study funding agreement or a delay in the completion of the applicable is expected, as set out in section 8.6 of the redrafted Undertaking. This agreement is subject to three qualifications:

- Aurizon Network's obligation to provide reasonable assistance to that nominee is conditional upon that nominee entering into an 'information supply' agreement with Aurizon Network to compensate for the costs it incurs in providing that assistance. The charging arrangements in that nominee/Aurizon Network agreement should be the same as the charging arrangements under the form of the SFA, except that no project management fee shall be payable.
- Aurizon Network's obligation to provide reasonable assistance under this information supply agreement should be expressly restricted to assistance that Aurizon Network may lawfully provide without breaching the terms of the Undertaking or any confidentiality agreement to which Aurizon Network is a party
- the nominee must be required to perform a study with the scope, and to the standard, that would, in the absence of the 'step-in' arrangements, be required from Aurizon Network under a study funding agreement

However Aurizon Network does not agree with the concept that, in circumstances where Aurizon Network is prepared to enter a study funding agreement that complies with the requirements of Part 8 of the Undertaking, that a nominee may instead be appointed to conduct the investigation and design of an Extension, as set out in section 8.2.1(l) of the redrafted Undertaking. Aurizon Network does not understand the basis on which the QCA has determined under s138(2) of the QCA Act that the availability of such a nominee arrangement is necessary, particularly as the arrangement was not included in the expansion process agreed by Aurizon Network and the QRC.

Aurizon Network has numerous concerns about the nominee arrangement set out in section 8.2.1(l) of the redrafted Undertaking. These include:

- there could be a sizeable number of nominees and nominee-managed studies as each access seeker is entitled to put forward its own nominee, which would place an unreasonable burden on Aurizon Network
- in a situation where some access seekers want to enter into a study funding agreement (that provides for reimbursement of profit, margin or overhead) with Aurizon Network and other access seekers do not, there

could be one or more nominee studies being conducted in parallel with the study being conducted by Aurizon Network, which would again place an unreasonable burden of duplication on Aurizon Network

- there is no requirement for any nominee to enter into a confidentiality, use of information and protection of intellectual property undertaking in favour of Aurizon Network
- there is no requirement for Aurizon Network to be compensated by each nominee for the costs Aurizon Network incurs in cooperating with that nominee
- there is no requirement for a nominee to be appropriately qualified and experienced, whereas this requirement is featured in the nominee 'step-in' arrangements of the QCA's redrafted Undertaking (see section 8.6(b))
- there is no requirement for a nominee, or the access seeker that nominated it, to provide a copy of the nominee's report or any other information about the nominee's 'investigation and design' to Aurizon Network, or to consult with Aurizon Network about that 'investigation and design'
- the purpose of each nominee conducting 'investigation and design' is unclear, since the balance of Part 8 of the redrafted Undertaking does not specify how the outcome of each nominee's 'investigation and design' is to be applied or otherwise used
- there is no requirement for a nominee to conduct its 'investigation and design' to the standard that would be required of Aurizon Network if it were to conduct a pre-feasibility study or feasibility study in accordance with Part 8 of the redrafted Undertaking
- there is no requirement for a nominee to conduct its 'investigation and design' in respect of the project specific scope (e.g. the access capacity requirements) of the study that would be required of Aurizon Network if it were to conduct a pre-feasibility study or feasibility study in accordance with Part 8 of the redrafted Undertaking
- there is no provision for Aurizon Network to dispute the conclusions of a nominee-conducted study, whereas Aurizon Network has this right in the nominee 'step-in' arrangements of the QCA-proposed UT4 (see section 8.6(d))

Aurizon Network proposes that, in circumstances where Aurizon Network is prepared to enter a study funding agreement that complies with the requirements of Part 8 of the redrafted Undertaking, Aurizon Network should be the only party responsible for investigation and design of an Expansion, other than in circumstances where the 'step-in' provisions of section 8.6 of the redrafted Undertaking apply.

12.6.4 Ensuring study proponents enter confidentiality agreements (Draft Decision 12.4(e))

Aurizon Network agrees with the QCA's position.

From the context of this draft decision Aurizon Network understands the reference to 'study proponents' to be a reference to a nominee of the relevant customers under section 8.6 of the redrafted Undertaking. As Aurizon Network does not engage the nominee, Aurizon Network is unable to ensure that the nominee enters into any confidentiality agreements.

Aurizon Network notes that section 8.6(c)(ii) of the redrafted Undertaking provides that the nominee must enter into a confidentiality undertaking to Aurizon Network. It is unclear how this provision would operate since the nominee is not governed under the Undertaking. Also the contemplated confidentiality undertaking is restricted to information the disclosure, or use, of which could result in a breach of Aurizon Network's ring fencing obligations. A nominee would be free to place in the public domain, or use for its own purposes, any information provided by Aurizon Network, provided that doing so would not result in a ring fencing breach. Furthermore the contemplated

confidentiality undertaking does not address the confidentiality of information of 'relevant stakeholders' or the protection of Aurizon Network's intellectual property rights in respect of matters such as capacity modelling.

Aurizon Network proposes that the confidentiality outcomes sought by the QCA should be achieved by stating that a party's entry into a suitable confidentiality, use of information and intellectual property undertaking in favour of Aurizon Network should be a pre-condition to that party's appointment as the nominee (i.e the third party nominee that is taking over the study). The confidentiality undertaking should prevent the nominee from disclosing information except in accordance with Aurizon Network's requirements as advised at that time, and should also prohibit the use by the nominee of Aurizon Network-provided information for any purpose other than the conduct of the step-in study. This undertaking could form part of the information supply agreement contemplated in Part [12.5.3] of this submission.

If the QCA wishes to protect the confidentiality of information of 'relevant stakeholders', then the nominee's entry into suitable confidentiality and use of information obligations in favour of them could be another pre-condition of the nominee's appointment.

The broader issue of information disclosure under the expansion process is discussed in greater detail in Part [12.16.10] of this submission.

12.6.5 'Third party study proponents' to comply with the undertaking as if they are Aurizon Network (Draft Decision 12.4(f))

Aurizon Network agrees with the QCA's position in principle.

12.6.6 All processes made with respect to the expansion process are subject to the dispute resolution mechanism in Part 11 of the 2014 DAU (Draft Decision 12.4(g))

Aurizon Network agrees with the QCA's position, subject to five conditions:

- Where the parties to a proposed study funding agreement or a proposed SUFA agreement (or deed) cannot agree on the terms of that agreement (or deed) following a negotiation process, the scope of the binding dispute resolution should be limited to the 'completion' of the applicable template agreement (or deed) under UT4. In this context, 'Completion' means the insertion of project specific information as is expressly contemplated in the form of the QCA-approved template agreement (or deed). The base or generic provisions of template agreements (or deeds) should only be modified if the modifications are mutually acceptable to the contractual parties, and a dispute resolution mechanism should not be available if the modifications are not mutually acceptable. The absence of agreement on modifications to base or generic provisions should not permit any party to refer that matter to binding dispute resolution under Part 11 of the Undertaking.
- Where a dispute resolution mechanism is available under any agreement (or deed) entered into by Aurizon Network and a party, the 'double jeopardy' of QCA dispute resolution under Part 11 of the Undertaking should not be available. In other words, that party to one or more agreements (or deeds) with Aurizon Network should only be able to use the dispute resolution mechanism under Part 11 of the Undertaking in respect of a matter if and to the extent that the party is unable to invoke the contractual dispute resolution mechanism in respect of that matter under any of these agreements (or deeds). When the QCA is determining a dispute in respect of a SUFA construction agreement, the QCA must do so in accordance with UT4 dispute guidance requirements in respect of scope, risk allocation, pricing and other project specific matters. These requirements are to apply solely to that particular type of dispute
- When the QCA determines a dispute in respect of a SUFA construction agreement by making a reduction in the standard of infrastructure from the standard proposed by Aurizon Network, that reduction is conditional

upon Aurizon Network's certification that the reduced standard would comply with its safety management system as the CQCR's accredited railway manager.

- For any dispute in respect of capacity assessment for the purpose of negotiating project specific schedules for a study funding agreement (whether for a pre-feasibility or feasibility study) or a SUFA agreement (or deed), the capacity review parameters similar to those set out in Part 10.6.2 of this submission must be applied

Scope of binding dispute resolution

. The QCA's view is that any dispute over an expansion process matter, including the base provisions of template agreements, should be capable of being referred to binding dispute resolution by the QCA.⁷⁶

Aurizon Network volunteers to accept cost and risk in respect of the expansion process as set out in this submission. It does not volunteer to accept any other cost or risk. If Aurizon Network were to accept in the Undertaking the concept of any dispute over an expansion process matter being subject to binding dispute resolution, then Aurizon Network would face the risk that it would be obliged to accept a cost or risk against its will. In order to prevent such a cost or risk outcome arising, Aurizon Network considers that the dispute resolution mechanism of Part 8 of the Undertaking would only apply to a dispute over the terms of a proposed study funding agreement or a proposed SUFA agreement (or deed) to the extent of completion of the relevant template agreement (or deed) under UT4.

Dispute guidance for SUFA construction agreements

Aurizon Network considers that appropriate dispute guidance requirements should be adopted so that the outcomes of any such dispute, in respect of pricing, risk allocation or any other project specific matter, in respect of any SUFA construction agreement are consistent with standard construction industry market practice at the time that the dispute is resolved.

Aurizon Network notes, since the concept of a SUFA construction agreement (or 'CA') was first proposed by the QCA, it has consistently stated that it is seeking a 'market norm' position as contractor under that agreement. For example in its July 2014 response to the QCA's May 2014 SUFA Position Paper, Aurizon Network stated that:

'The template construction contract should be consistent with normal contracting practice for private sector principals undertaking comparable projects. When the template is converted into a construction contract for a particular SUFA project, that contract's risk/reward profile should reflect industry-standard risks and rewards for similar projects.'

Aurizon Network reinforced that position in its January 2015 response to the draft decision on the 2013 SUFA DAAU:

'Aurizon Network continues to hold the view that the CA for each SUFA transaction should be priced in line with construction industry norms as the time of entry of that CA, and believes that this 'consistent with market practice' principle should be incorporated into the Expansion Process appropriately to govern the formulation of the CA for

⁷⁶ QCA's responses to questions #1 and #2 in the QCA's 23 March 2015 responses to Aurizon Network's 3 March 2015 clarification questions

each SUFA transaction. Aurizon Network considers that this principle should also apply to the formulation of LD rates and caps.'

Aurizon Network considers that all disputes on the completion of SUFA construction agreements should be determined by application of the following guidance principles:

- Each matter under dispute shall be determined by reference to the 'central position', adopted in respect of that matter in 'relevant construction contracts', for 'comparable projects' and 'comparable counterparties', (see definitions below)
- A 'relevant construction contract' is a construction contract in the Australian construction industry that
 - was entered into after the date that is 12 months before the commencement of the dispute process
 - relates to substantially all of the construction works required by the applicable project
- 'Comparable projects' means projects of a cost, level of complexity, brownfield nature and schedule similar to that of the project to which the proposed SUFA construction agreement relates
- 'Comparable counterparties' means
 - in the case of the principal, a private sector entity (other than the proposed principal of the SUFA construction agreement) that is contracting for the delivery of a 'comparable project', and
 - in the case of the contractor, a construction contractor (other than Aurizon Network) experienced in the delivery of 'comparable projects'
- 'Central position' in respect of a matter means the most likely, 'mid-point' or 'market average' position adopted by 'comparable counterparties' in 'relevant construction contracts' for 'comparable projects'
- The determination shall be conducted on the basis of consideration solely of construction contracts entered into on a competitive basis, i.e. contracts in respect of which the principal was free to conduct a construction market engagement process and then select on an arm's length basis its preferred contractor from alternative potential contractors

Reduction in standard arising from dispute resolution

As the CQCR's accredited railway manager, Aurizon Network has a duty under rail safety legislation to ensure the CQCR's safe operation. The basis of Aurizon Network's accreditation is its safety management system, which addresses all safety risks. A critical part of that safety management system is the specification of the required standard of CQCR assets, including assets that are to be constructed.

Aurizon Network should not be obliged, as an outcome of a dispute resolution process over a SUFA construction agreement, to accept a standard of infrastructure that fails to comply with its safety management system, since such an obligation could result in Aurizon Network failing to meet its legal duty as the CQCR's accredited railway manager.

In addition to these legal considerations, Aurizon Network contends that, as a result of its development and management of the CQCR over many years, it is by far the party with the best qualifications and experience in technical, operational and safety disciplines to determine the infrastructure standard of new CQCR assets.

DA dispute resolution process that could result in Aurizon Network being required to accept an infrastructure standard that did not comply with its safety management system is fundamentally flawed, as that outcome could be

against the public interest and the interests of existing access customers, access seekers and Aurizon Network. Accordingly appropriate safeguards in respect of infrastructure standard should be included in that process.

Aurizon Network proposes the following procedure:

- his procedure would apply if and only if a dispute resolution process in respect of a SUFA construction agreement results in Ha reduction in infrastructure standard, being a reduction from the standard proposed by Aurizon Network during that process
- Following the outcome of such a dispute resolution process, Aurizon Network would promptly certify as to whether that reduction in standard is compliant with its safety management system
- If Aurizon Network issues a certificate of compliance, the reduced standard is adopted
- If Aurizon Network issues a certificate of non-compliance, the reduced standard would not be adopted, subject to the outcome of the review mechanism set out below

Aurizon Network considers that its judgment as the CQCR's accredited railway manager as to whether an infrastructure standard complies with its safety management system should prevail. Nonetheless, and in order to facilitate SUFA as a viable project funding model, Aurizon Network volunteers to accept a review mechanism that may be applied to each certificate of non-compliance.

This review mechanism would operate as follows:

- eThe relevant access seekers may elect to refer any certificate of non-compliance to an expert for its review
- If the expert takes the view that the certificate was not 'unreasonable', where 'unreasonable' means that no reasonable person in the position of Aurizon Network could have made the determination in that certificate, then it would stand and the reduction in standard would not be adopted.
- If the expert took the view that the certificate was 'unreasonable', then Aurizon Network would be obliged to reconsider the relevant reduction in infrastructure standard in the light of the expert's review, and then issue an updated certificate as to the reduction's compliance with its safety management system.
- TThis updated certificate would have the consequences set out above in respect of the original certificate.

This consideration of a reduction in infrastructure standard arising from dispute resolution has addressed dispute resolution in respect of a SUFA construction agreement. Similar issues may arise in respect of study funding agreements, in that the outcome of dispute resolution over study scope may require Aurizon Network to study a standard of infrastructure that Aurizon Network considers to be non-compliant with its safety management system.

Direct reference of disputes to the QCA

Aurizon Network notes that section 8.2.2 of the redrafted Undertaking calls for all disputes in respect of Part 8 of the Undertaking to be referred directly to the QCA, rather than, as is implied by the QCA's draft decision, to be addressed under the standard staged method (i.e. CEO resolution, mediation, expert determination and QCA determination) set out in Part 11 of the Undertaking. Aurizon Network assumes that the QCA's position is that disputes that fall under Part 8 of the Undertaking should be referred directly to the QCA. Aurizon Network considers that direct reference to the QCA is a superior approach to addressing these disputes than the application of the standard staged method.

12.7 Cooperation with any third party willing to fund a study (Draft Decision 12.5)

Aurizon Network disagrees with the QCA's position as it would expose Aurizon Network to an obligation to collaborate with any party that is prepared to fund a study. The access application process is a critical mechanism to ensure that rigorous and efficient studies are undertaken. Aurizon Network proposes that, in connection with a

concept study, pre-feasibility study or feasibility study, Aurizon Network should only be required to cooperate with a bona fide access seeker or customer.

Aurizon Network cannot identify the legal basis on which the QCA has determined that Aurizon Network must cooperate with parties other than access seekers or customers.

Pre-feasibility and feasibility studies

In the 2014 UT4 DAU, Aurizon Network proposed that the study funders for pre-feasibility studies and feasibility studies should be selected from access seekers (or as applicable their customers). The position was taken because a pre-feasibility study or a feasibility study cannot be conducted in the absence of specific information about the nature of the below rail capacity required – this information is provided to Aurizon Network by an access seeker as part of its access application. Aurizon Network is not in a position to conduct a pre-feasibility study or a feasibility study unless it has this specific access information for each study funder.

In its explanation for this draft decision the QCA states that Part 8 of the Undertaking should be available to *'new entrants and all supply chain participants in the relevant coal system'*. The QCA also states that *'[t]hird parties may want to investigate new business opportunities within upstream and downstream markets'*. Aurizon Network agrees with the QCA on this policy position.

However Aurizon Network considers that a bona fide new entrant, supply chain participant or other third party (the 'third party') that wished to investigate a new business opportunity should either

- submit an access application directly to Aurizon Network, in which case the third party would become an access seeker, or
- enter into suitable arrangements with a rail operator, which would submit an access application to Aurizon Network, in which case the third party would become a customer and the rail operator would become an access seeker

Aurizon Network is unclear why the QCA considers that Aurizon Network should be required to cooperate with a third party in connection with a pre-feasibility study or a feasibility study when that party has not submitted, or procured the submission of, an access application. Aurizon Network would have extreme difficulty in cooperating with a third party in connection with a study if Aurizon Network is not formally advised of that third party's access requirements, or how Aurizon Network can develop the scope of a study for which access seekers or their customers are potential participants without the appropriate set of information being provided by or for the third party. This is a key function of the access application process.

Aurizon Network cannot make an informed decision about whether to select a third party as a proposed pre-feasibility funder or a proposed feasibility funder when Aurizon Network is unaware of that party's access requirements. Furthermore the participation in the study and study selection processes of Part 8 of a third party whose access requirements are not available would, in Aurizon Network's view, be prejudicial to the business interests of access seekers and/or customers who are seeking to participate in the applicable studies on a bona fide basis.

Concept studies

As set out in Part [12.15.5] of this submission, Aurizon Network considers that a concept study should only be initiated as a result of a demand assessment. Concept studies would generally be funded by Aurizon Network, though an access seeker or a customer may agree with Aurizon Network to fund a concept study, as is provided in

Section 8.4.1(a)(i) of the redrafted Undertaking. Accordingly the question of Aurizon Network cooperating with any third party willing to fund a concept study does not arise.

12.8 Participation of parties in the expansion process (Draft Decision 12.7)

Aurizon Network does not agree with the QCA's position in respect of draft decisions 12.7(a) and 12.7(c), and agrees with its position in respect of draft decision 12.7(d) subject to a condition.

12.8.1 Cooperation to reduce the rail scope and attain a lower cost of rail capacity increments (Draft Decision 12.7(a))

Aurizon Network does not agree that it should always seek to '*reduce the scope of the rail expansion*'. It is not axiomatic that a reduced scope of expansion will lead to greater economic efficiency (which presumably is the justification of this particular requirement). Reducing capital cost is not the only means of achieving economic optimality. For example, increasing capital expenditure can lead to lower operating expenses or greater reliability and/or availability. Furthermore projects need to be considered on a 'whole of supply chain' basis – higher capital expenditure on below-rail assets may be justifiable due to favourable operational or capital outcomes in other parts of the coal supply chain.

For similar reasons it is not axiomatic that attaining '*a lower overall cost of delivery for new capacity increments to the CQCR*' will lead to greater economic efficiency.

Each of the 'reduced scope' and 'lowered cost' objectives proposed by the QCA is comparative in nature, and only has any meaning if a reference point is proposed. Since the QCA has not proposed a reference point in either case, Aurizon Network considers that both objectives are meaningless.

For these reasons Aurizon Network believes that it should not be obliged in the Undertaking either to '*reduce the scope of the expansion*' or to '*attain a lower overall cost of delivery for new capacity increments to the CQCR*'.

12.8.2 Investigation of multiple enhancements (Draft Decision 12.7(c))

Aurizon Network has three concerns over the requirement that it should '*investigate a number of supply chain capacity enhancements to reduce the scope of the rail expansion in each study process*'.

Requirement to investigate....supply chain capacity enhancements

Aurizon Network does not agree that it should be required to investigate supply chain projects that would modify or supplement the assets controlled by other coal supply chain parties. Aurizon Network does not control these assets and does not have access to them for the purpose of conducting studies.

Aurizon Network considers that it should apply its project investigation capability to below-rail projects, coal miners should study mine-related projects, coal terminal operators should study terminal projects and above-rail operators should study above-rail projects.

It is acknowledged that pre-feasibility studies and feasibility studies should not be conducted in isolation from studies of other parts of the coal supply chain. Aurizon Network considers that it and the study funders, which will be either access seekers or customers, will be well placed to take a 'whole of supply chain' view when deciding, on a study specific basis, the scope for a particular study funding agreement. The need for this flexibility underscores

Aurizon Network's position, as set out in Part 12.5.3 of this submission, that the scope of the feasibility study should not be mechanically taken from the pre-feasibility study.

Aurizon Network proposes that it should only be required to investigate below-rail projects. As a matter of practice Aurizon Network may be prepared to investigate other coal supply chain enhancements in collaboration with other parties, for example where another supply chain operator wishes Aurizon Network to assume this investigation role, but it is not in a position to assume an obligation under UT4 to investigate coal supply chain projects that are not below-rail in nature.

Should Aurizon Network elect to investigate coal supply chain enhancements other than below-rail projects, its study costs should be treated, for the purpose of Part 8 of the Undertaking, in the same way as its study costs for below-rail projects.

Requirement to reduce the scope of the expansion

This concern is addressed in Part [12.7.1] of this submission.

Requirement to investigate a number of.....capacity enhancements....in each study process

Aurizon Network does not agree with the QCA's view that it should investigate a number of alternative supply chain capacity enhancements at the feasibility study stage. Doing so is inconsistent with good project governance practice, which calls for one option to be studied at the feasibility study stage. The Concept Stage is the appropriate point at which alternatives should be considered. The QCA's approach would also result in an unreasonable cost burden to be borne by feasibility study funders and an unreasonable period of time for the feasibility study to be completed.

12.8.3 Execution of confidentiality agreements with all study participants (Draft Decision 12.7(d))

Aurizon Network considers that the form of confidentiality agreements must permit Aurizon Network to disclose all information required in order to comply with the Undertaking. For example, Aurizon Network will be required, as a result of draft decision 12.7(b), to disclose final pre-feasibility and feasibility reports to all relevant 'access seekers, rail operators, access holders, supply chain groups and terminal operators' as well as the study funders.

In addition Aurizon Network could be required to disclose detailed access requirement information about study participants (i.e study funders) for the purpose of capacity reviews, as discussed in greater length in Part [12.15.10] of this submission.

Aurizon Network notes that the extension of disclosure required to comply with draft decision 12.7(b) would effectively place the disclosed reports in the public domain, given the potential number of recipients.

12.9 Changes to study funding agreements (Draft Decision 12.8)

Aurizon Network disagrees with the QCA's positions in respect of study scope/ deliverables, the auditing arrangement and SFA termination/mitigation of damages, and agrees with the QCA's position on availability of step-in rights.

12.9.1 Study scope & deliverables (Draft Decision 12.8(a))

For reasons set out in Part [12.5.2] of this submission, Aurizon Network disagrees with the QCA's view that its proposed definitions of study scope and deliverables are clear, comprehensive and precise.

Aurizon Network does not understand why the QCA considers that the need for mining companies and financiers to obtain board approvals justifies its changes to the deliverables for concept studies and pre-feasibility studies.

These studies are not usually taken to boards for approval as financiers' commitment to fund and miners' commitment to invest are generally premised on the basis of feasibility studies.

Aurizon Network proposes that the study scope and deliverables should be documented as set out in Part 12.5.3.

12.9.2 Auditing to ensure efficient management of costs (Draft Decision 12.8(i))

Aurizon Network does not agree with the QCA's position on cost recovery being limited to reasonable costs for reasons set out in Part [12.16.2] of this submission. Accordingly Aurizon Network does not agree that the auditing process should assess whether costs have been incurred reasonably, and considers that the auditing process should be confined to an assessment of whether costs have been incurred in accordance with the study funding agreement.

12.9.3 SFA termination/mitigation of damages (Draft Decision 12.8(ii))

The QCA states that it has amended '*SFA rights to include termination clauses with the obligation on Aurizon Network to mitigate damages*'. The only change to the termination provisions in the SFA that forms part of the draft decision is the insertion of a termination for convenience right for the study funder. For reasons set out in Part 12.16.6 of this submission, Aurizon Network opposes the adoption of this unilateral termination for convenience right.

Aurizon Network has no objection to being obliged under the SFA to mitigate the costs associated with the termination of a study should all study funders elect to terminate their study funding agreements.

Aurizon Network considers that

- any termination for convenience right for a study funder under the SFA should only be capable of being exercised by all study funders for the applicable study, and
- should such a study termination occur, Aurizon Network should be obliged under the SFA to mitigate the costs of terminating that study.

12.10 Allocation principles (Draft Decision 12.9)

Aurizon Network agrees with the QCA's position, but disagrees with the QCA's deletion of two allocation criteria in its redrafted Undertaking and the associated analysis in section 12.4.3 of the QCA's draft decision.

Aurizon Network notes that the QCA has not made any amendment of substance to the principles governing the selection of potential pre-feasibility funders. Accordingly Aurizon Network agrees with the QCA's position in respect of the allocation criteria for the pre-feasibility study.

The QCA's material amendments of allocation criteria provisions relate only to a more critical selection process, namely the selection of potential feasibility funders. Aurizon Network and the QRC had agreed, as was documented in the form of the expansion process in the 2014 DAU, that feasibility study funders should be chosen on the basis of, among other things, the maximisation of the allocation of capacity and the maximisation of the duration of the expected access needs. The QCA has stated that these two maximisation criteria should be deleted. Given the QRC's acceptance of these maximisation criteria in that form of the expansion process, it is difficult to comprehend why the QCA has the view that they should not be used.

Aurizon Network continues to consider that these two criteria are important in order to promote the '*economically efficient operation, use of, and investment in*' the CQCR in accordance with section 69E of the QCA Act.

Assume a scenario where most of the potential feasibility funders are 'standout candidates' that would be selected on any plausible set of selection criteria, and there is a balance of 100 train paths/year available from the proposed project that are not (notionally) allocated to those 'standout candidates'. Assume further that Aurizon Network needs to select another potential feasibility funder, and that there are only two 'candidates' to become that potential feasibility funder, namely Miner X and Miner Y. By assumption Miner X's operating plan requires 50 train

paths/year, and Miner Y's operating plan requires 100 train paths/year, and that the two miners rank equally on all selection criteria other than the 'maximisation of the allocation of capacity' criterion.

In this scenario Aurizon Network considers that it should be entitled to choose Miner Y in preference to Miner X by application of the 'maximisation of the allocation of capacity' criterion. Aurizon Network considers that the adoption of this criterion would promote the '*economically efficient operation, use of, and investment in*' the CQCR in accordance with section 69E of the QCA Act, as it would result in the greatest utilisation of available capacity.

Assume another scenario under which Aurizon Network needs to select the final potential feasibility funder from two 'candidates' - Miner S and Miner T. Assume that Miner S has 'Marketable Coal Reserves' (as defined by UT4) equal to 20 years of the capacity that would be made available to it should it become the final potential study funder, whereas Miner T has Marketable Coal Reserves equal to 10 years of that capacity, and that the two miners rank equally on all selection criteria other than the 'maximisation of the duration of access' criterion.

In this scenario Aurizon Network considers that it should be entitled to choose Miner S in preference to Miner T by application of the 'maximisation of the duration of access' criterion. Aurizon Network considers that the adoption of this criterion would promote the '*economically efficient operation, use of, and investment in*' the CQCR in accordance with section 69E of the QCA Act, as it would be expected, all other things being equal, to result in the available capacity being utilised for a longer period of time.

It is unreasonable of the QCA to imply that the two maximisation criteria that it has excluded from the redrafted Undertaking are not 'objective allocation criteria'. Whether Miners X and Y would achieve different coal transportation outcomes is a business judgment directly informed by their operating plans. Similarly the extent of Marketable Coal Reserves of Miner S and Miner T is a business judgment directly informed by the reserve information provided to Aurizon Network by the two miners.

Aurizon Network considers that these business judgements are no less objective than Aurizon Network's assessment of the degree to which

- the potential feasibility funder's mine development is credible, or
- the potential feasibility funder is diligently developing its mine in accordance with that program,

which are two selection criteria proposed by Aurizon Network, agreed with the QRC and not amended by the QCA. Aurizon Network disagrees with the QCA's view that the retention of these two maximisation criteria would result in Aurizon Network having '*unfettered discretion*' over the selection of potential feasibility funders. Part 8 of the 2014 DAU provided (in section 8.5(j)) unambiguously and without qualification that any access seeker that is seeking to become a potential feasibility funder is free to dispute Aurizon Network's selection of the potential feasibility funders. This dispute right is clearly a fetter on the discretion of Aurizon Network.

12.11 Aurizon Network Voluntary Funding Commitment (Draft Decision 12.10)

Aurizon Network disagrees with the QCA's position that Aurizon Network should make a voluntary funding commitment.

The QCA correctly observes that "*as the QCA Act stands, we consider that there are complications in imposing any obligation upon Aurizon Network*".⁷⁷ The QCA also stated that there would need to be an amendment of that Act for such an obligation to be imposed on Aurizon Network.

Aurizon Network considers making a draft decision that requires a subsequent change of law to be valid extends beyond the powers of the QCA by definition. In this regard Aurizon Network notes that the QCA has not specified the legal basis on which it considers it has the legal power to refuse to accept the 2014 DAU due to its omission of a voluntary funding commitment. Consistent with Part 2.4 of this submission, Aurizon Network considers that the refusal

⁷⁷ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, Section 12.5.3, p. 269.

to accept the 2014 DAU on this basis demonstrates that the QCA has misunderstood its functions and powers under the QCA Act.

In Aurizon Network's view it is entirely appropriate that the QCA Act does not allow imposition of such an obligation because it is clearly unreasonable to place any commercial enterprise in the position that it must make any investment regardless of its business case or the state of the enterprise's finances.

Aurizon Network will work collaboratively in seeking economic gain for the CQCR coal supply chain. However Aurizon Network should be able to do so in the same manner as any other proponent of the chain will do so, namely by considering each investment opportunity on its merits. In addition, Aurizon Network has provided for the expansion of its network even when it does not choose to fund, so the expansion of the CQCR and the wider coal supply chain would not be blocked by Aurizon Network's commercial decision not to invest. Aurizon Network, however, does not agree with the QCA's requirement that it volunteer a funding obligation of unknown size for unknown projects with unknown timing in unknown circumstances.

Aurizon Network should be allowed to consider each investment on its merits at the time when appropriate studies have been completed. The full circumstances of the individual investment project, the economic conditions at the time, alternative uses of available funding and Aurizon Network's financial position can then be considered in making an investment decision as a commercial enterprise.

12.12 Application of the expansion process

(Draft Decision 12.11)

Aurizon Network agrees with the QCA's position, subject to conditions.

The proposed obligation that Aurizon Network should be required to extend or permit the extension of the CQCR is acceptable to Aurizon Network on the condition that its obligation to permit the extension is subject to the legitimate business interests protection, as set out in Part 12.3 of this submission.

The QCA's proposal that all Aurizon Network funded expansion projects should undergo the investment stage gate process is acceptable to Aurizon Network on the conditions that:

- Aurizon Network's position on study timelines/output requirements in Part 12.6.3 of this submission is accepted, and
- the scope of Part 8 of the 2014 DAU is confined to expansions with the primary purpose of the creation of incremental below-rail capacity on any mainline, branch line or spur line, and does not extend to projects that have the primary purpose of replacing life-expired assets or obtaining better operational outcomes.

Aurizon Network considers that capital expenditure on replacing life-expired assets or obtaining better operational outcomes should not be considered an expansion for the purpose of Part 8 of the Undertaking. This type of capital expenditures is not of a nature for which user funding could apply, and the level of studies undertaken and governance processes for that expenditure are matters solely for Aurizon Network and should not be prescribed by UT4. Should Aurizon Network elect to investigate and, if appropriate, commit to any such project, it would of course be taking regulatory risk on the inclusion of the associated costs in the RAB.

12.13 SUFA framework

(Draft Decision 12.12)

Aurizon Network agrees with adopting the suite of SUFA agreements approved through the 2013 SUFA DAAU process subject to minor changes as required to align with UT4. Aurizon Network disagrees with the inclusion in UT4 of a general QCA provision for reviewing the SUFA model.

SUFA has been developed as a result of substantive consultation with both the QCA and the coal industry. At the completion of the 2013 SUFA DAAU process there will be an approved form of each SUFA template document that represents the outcome of this process.

Although Aurizon Network does not consider that the SUFA template documents taken as a whole will constitute a perfect model arrangement, it sees no merit in reopening issues which have recently been considered in exhaustive detail.

The review process set out in the 2014 DAU required a review of the SUFA model in the event of either of two 'review triggers', namely that a SUFA project has been entered into or where parties have been unable to agree SUFA documentation for execution within a defined period. These review triggers would allow for a process of taking into account any lessons learned from the implementation, or the proposed implementation, of the SUFA model for a specific project.

Aurizon Network and the QRC had agreed that these should be the only review triggers, while the QCA's decision is to include two others:

- Any request from the QCA, with no restrictions on when the QCA can request or guidance on how such decision should be made; and
- Where the Australian Tax Office (ATO) requires amendments to SUFA, or indicates matters that should be amended, in order to obtain a desirable administratively binding advice

The adoption of the first additional review trigger would allow the QCA to require a reopening of a highly complex template transaction at any time for any reason at an unknown cost to Aurizon Network and stakeholders. Aurizon Network believes this trigger to be an unreasonable requirement.

The second additional review trigger is probably unworkable in the form in which it is currently proposed by the QCA. A detailed review process would be required in the event that the ATO required or suggested amendments to SUFA. The QCA has provided no guidance to how such a process and its outcomes should be managed in order to avoid unintended consequences. For example, the ATO may require or suggest reasonable and lawful amendments to SUFA, but the commercial changes to give effect to those amendments may be entirely inconsistent with s138(2) or s119 of the QCA Act and/ or give rise to an outcome which the QCA has no power to enforce (for example where such a decision causes Aurizon Network to incur costs or risks associated with an expansion). As another example, the ATO may require or suggest changes to the terms of the template infrastructure lease from the State infrastructure lessors that are unacceptable to them.

It is noted that Schedule J to the 2010AU, which was the catalyst for the development of SUFA, provided clear guidance about the structuring constraints inherent in a SUFA transaction. Aurizon Network considers that favourable consideration should be given to the inclusion in UT4 of similar guidance as to any SUFA review process.

As the process of reviewing SUFA is a significant task, it should only be undertaken where there is sufficient benefit to warrant the time and cost to be incurred by all stakeholders. Aurizon Network contends that the trigger events agreed with the QRC and included in the 2014 DAU are sufficient and should not be broadened. Of course, there is also the opportunity to consider the SUFA model as a part of any future regulatory renewal process for future undertakings or by Aurizon Network submitting a DAAU.

Aurizon Network proposes that neither of these additional review triggers proposed by the QCA be included in UT4.

12.14 Suite of tax effective financing options

(Draft Decision 12.13)

Aurizon Network disagree with the QCA's position.

As a part of developing SUFA, Aurizon Network and its professional advisers have considered a wide range of potential options for suitable tax effective third party financing options. Other stakeholders (and their tax advisors) also considered suitable structures and could not identify a simpler or more effective alternative that was

acceptable to them. The work undertaken in developing SUFA was substantial and it is questionable what any further consideration of the matter will generate.

The argument put forward by some stakeholders is that SUFA is too complex for lower value expansions. SUFA was not intentionally developed to be a complex structure, but rather it is the only structure identified by any stakeholder that effectively manages the various structuring matters to be considered. Aurizon Network had submitted to the QCA a much simpler user funding model in December 2010, but as a part of SUFA's development it was agreed this model was not suitable. If a simpler structure existed for small/medium expansion projects it would be adopted for SUFA as well. If a simpler structure is identified in future it can be considered as a part of a future regulatory process as a variation to, or a replacement of, of the current SUFA model.

The inclusion of a requirement to develop a suite of tax effective financing options would commit Aurizon Network and its stakeholders to making significant expenditure on the pursuit of an outcome that has not been identified, let alone specified in any detail, during a rigorous multi-year transaction development process. Given the likelihood of expansion projects occurring over the short to medium term, Aurizon Network considers that there is not a sound business case for this expenditure. In the absence of any suggested workable alternative this option development requirement is unreasonable and unwarranted.

Notwithstanding this view, if Aurizon Network were to accept this option development requirement, it would only do so on the basis that before it commences any work, appropriate cost recovery arrangements in respect of its external costs, such as advisers' fees, and internal costs, such as staff costs, are put in place. Given Aurizon Network's strongly held view that these costs would not be prudent or be reasonably incurred, these arrangements would need to provide that Aurizon Network faced no regulatory risk over cost recovery.

Aurizon Network is very supportive of tax law reform that would facilitate the development of a simpler user funding model, and is willing to collaborate with stakeholders such as the QRC and the QCA in seeking to bring about this outcome. However Aurizon Network does not consider it appropriate for UT4 to impose any obligations on it in respect of seeking a change of law.

12.15 Shortfall Capacity

(Draft Decision 12.14)

Aurizon Network agrees with some of the QCA's positions on capacity shortfall, but disagrees with the others.

12.15.1 Issues raised in Aurizon Network's response to the draft decision on the 2013 SUFA DAAU

Aurizon Network has raised two key issues in relation to capacity guarantees in its response to the draft decision on the 2013 SUFA DAAU. In particular:

- Aurizon Network queried why the capacity guarantee was required to be adopted for SUFA projects⁷⁸
- Aurizon Network does not volunteer to take capacity risk as proposed by the QCA⁷⁹

Aurizon Network continues to hold the views expressed in its response to the draft decision on the 2013 SUFA DAAU and its positions on capacity issues in that response should be considered as responses to the UT4 draft decision on the 2014 DAU.

⁷⁸ Aurizon Network, 2015, Response to the QCA's Draft Decision on the 2013 SUFA DAAU, Section 5.2(k), p. 22.

⁷⁹ Aurizon Network, 2015, Response to the QCA's Draft Decision on the 2013 SUFA DAAU, Section 5.2(k), p. 23.

12.15.2 Aurizon Network's obligations to fund expansions to overcome capacity shortfalls

The QCA has now provided further detail around the application of the guarantees and these warrant further discussion. The scope of works to provide capacity is determined through the study phases:

- The concept study identifies multiple preliminary options to deliver a broadly defined capacity (because for this study the precise origins and destinations are not known and the total size of the expansion may not be known)
- The study scope of a pre-feasibility study is framed around a clearer understanding of what capacity is required to be delivered, but the origins/destinations and quantum of access requirements required for the eventual expansion project are still not known. However both the concept study and pre-feasibility study consider options to deliver access capacity and this initial work is relied upon in assessing the study scope to be included in the feasibility study.
- Between the completion of the pre-feasibility study and the commencement of the feasibility study the access seekers for the eventual expansion project (and thereby, the capacity requirements for that project) are determined as part of the selection of feasibility study funders. This allows the project scope for the eventual project (and the study scope for the feasibility study) to be derived from the work performed during the pre-feasibility study.

In conclusion, the project scope within the feasibility study's scope is a product of the work performed in the concept and prefeasibility studies and is determined either by agreement or through dispute resolution.

As a part of the negotiation of the pre-feasibility and feasibility study funding agreements, Aurizon Network will propose a study scope that will specify, among other things, the proposed project scope. To the extent the study scope is not agreed and is set by dispute resolution, Aurizon Network does not have any comfort the proposed project scope in that study scope will be adequate to avoid a capacity shortfall. If the study scope is set by dispute resolution for a feasibility study, then Aurizon Network's proposal will nevertheless be a clear reference point for any subsequent assessment of an 'AN Shortfall' (as defined in section 8.9.3(c) of the redrafted Undertaking), if any. If the study scope is set by dispute resolution for a pre-feasibility study, however, then Aurizon Network may be unable to propose on a fully informed basis the study scope for a feasibility study as the applicable pre-feasibility study might not have studied sufficient project scope. Notwithstanding this information problem, Aurizon Network should be able to specify scope not studied at the pre-feasibility stage for the purpose of specifying a reference point for any subsequent assessment of an AN Shortfall.

Should the QCA still be seeking a capacity guarantee after consideration of Aurizon Network's issues raised in the SUFA DD response, then in the circumstances where there is an AN Shortfall, Aurizon Network agrees to volunteer to fund further expansions to overcome any AN Shortfall, subject to:

- Such further expansions satisfying the requirements under section 8.2.1, and in particular section 8.2.1(c), of the form of UT4 in the 2014 DAU (including the 'legitimate business interest' protection as discussed above in Part 12.3 of this submission);
- The AN Shortfall and any scope required to overcome that shortfall have been agreed or, where they are determined through dispute resolution, the capacity review element of that resolution has taken place in accordance with the capacity review parameters set out in Part 12.6.2 of this submission;
- Where the AN Shortfall is less than the capacity shortfall, the affected access holders have elected to fund an expansion to overcome that shortfall;
- The expansion to be funded by Aurizon Network is pre-approved; and
- The assets that overcome the AN Shortfall will be included in the same pool of assets in the applicable coal system as the assets of the expansion to which the AN Shortfall relates

Where Aurizon Network is replaced as the party undertaking a study then Aurizon Network will have limited input into the determination of scope. If Aurizon Network is replaced during the feasibility study, then the proposal of scope made by Aurizon Network at the start of the feasibility study process can reasonably be used to determine Aurizon Network's proposal for the purpose of determining any AN Shortfall. If Aurizon Network is replaced during the pre-feasibility study, then Aurizon Network has insufficient involvement in the study process to be held

accountable for any capacity shortfall outcome. In these circumstances Aurizon Network considers that it should have no obligation to fund any capacity shortfall.

The QCA has included a new section 8.9.4(a)(ii)(A) of the redrafted Undertaking that appears to be implementing in part section (a)(iii) of the QCA's draft decision 12.14, namely that Aurizon Network should fund any capacity shortfall attributable to 'Aurizon Cause', as that defined term is used (but not defined) in the draft decision. However section 8.9.4(a)(ii)(A) addresses the situation where Aurizon Network fails to deliver the agreed, determined or approved scope of work for a SUFA project. Under a SUFA project's construction agreement Aurizon Network as constructor will be contractually obliged to deliver the contracted scope of work. Any failure to deliver this scope of work will be dealt with under that agreement.

Aurizon Network acknowledges its obligations under any SUFA construction agreement, and sees no need to deal with a default of a contractual obligation as an Undertaking matter. This is consistent with Aurizon Network's position in Part [12.6.6] of this submission that the 'double jeopardy' of overlapping contractual and Undertaking mechanisms should be avoided.

Any funding by Aurizon Network to rectify an AN Shortfall must relate to a 'standalone' project that rectifies solely that AN Shortfall. It is not possible for a single shortfall rectification project, which addresses AN Shortfall in addition to either any other capacity shortfall or a further expansion or both, to be funded by both Aurizon Network and access seekers on a 'hybrid funding' basis as Aurizon Network is not willing to provide funding on the basis of the SUFA template documents. Aurizon Network therefore also proposes a range of changes to the Undertaking to remove any hybrid funding obligations – for example section 8.9.4 (a)(i)(B) of the redrafted Undertaking.

12.15.3 Access seekers' and financiers' obligations to fund expansions to overcome capacity shortfalls

Aurizon Network agrees with the position that affected access holders may choose to remain compressed or choose to fund further expansions to overcome the shortfall. Aurizon Network is unclear why financiers are included in this obligation in the QCA decision as it is expected that their role is simply to fund the agreed scope. Affected access holders would arrange for any additional funding required for any expansion required to overcome shortfalls. This may, but does not necessarily, require the involvement of the initial funders. This is a commercial matter to be decided by the access seekers prior to entry into a SUFA transaction and does not need to be prescribed in the Undertaking.

12.15.4 Capacity reliability and cost options

The QCA has included in Box 5 an example of the capacity options concept very similar to the one included in its draft decision on the 2013 SUFA DAAU⁸⁰. Aurizon Network provided a response to that issue on its response to that draft decision⁸¹.

Aurizon Network has further considered the interests of access seekers and funders in relation to this issue, and considers that the adoption of capacity options as proposed by the QCA should not be a part of the project study process within UT4.

For this reason this submission is framed elsewhere on the basis that capacity options will not be considered for any type of study under the expansion process.

12.15.5 Compression to be proportional to funding contribution

Aurizon Network disagrees with the proposal in draft decision 12.14(b). Aurizon Network notes that no access holder has a funding contribution under any project development model set out in the redrafted Undertaking –

⁸⁰ QCA, 2014, Draft Decision - 2013 SUFA DAAU, Section 5.4.5, Figure 5, p. 41.

⁸¹ Aurizon Network, 2015, Response to the QCA's Draft Decision on the 2013 SUFA DAAU, Section 5.2(k)(2), pp. 23 – 25.

under the SUFA model the funders of a project are to be separate entities from the access holders of that project unless the latter elect to be the former also.

Funding contribution The ratio of

- the portion of a project's costs that corresponds to a particular access seeker to
- the project costs as a whole

would not be an appropriate mechanism of allocating compression to that access seeker, whereas the ratio of an access seeker's contracted train paths to all access seekers' contracted train paths would be an appropriate mechanism.

Aurizon Network acknowledges that the redrafted Undertaking provides for allocation of compression on a 'pro-rated' basis by reference to train paths rather than funding contribution, and Aurizon Network agrees with this compression allocation mechanism. However Aurizon Network disagrees with compression being effected under the Undertaking and considers rather that it should be conducted under the applicable access agreements. The documentation of compression within access agreements would result in the relevant access seekers gaining certainty over their compression risk at an earlier point in the project lifecycle than would apply if compression were to be documented in the Undertaking.

12.15.6 Capacity priority for affected access seekers

The intention of the 2014DAU was that access seekers that have experienced compression would have a priority allocation of capacity in an existing or future process for the scoping and funding of a related expansion⁸². Aurizon Network intended that these parties could "jump the queue" when Aurizon Network is selecting the pre-feasibility or feasibility funders. Aurizon Network did not intend that any provisional capacity allocation made to a feasibility funder should or could be reallocated to these parties. Furthermore Aurizon Network did not intend that it would be required to reallocate to these parties capacity currently under construction at the expense of other access seekers who have contingent rights to use that capacity upon its creation.

All of these intentions were agreed with the QRC in developing the form of the expansion process set out in the 2014 DAU.

In the redrafted Undertaking the QCA has restructured the capacity priority arrangement. It now provides that Aurizon Network should give the Affected Access Holders a priority allocation of capacity arising out of an expansion. In addition the QCA has included that Aurizon Network will not breach the Undertaking by giving that priority allocation in accordance with that obligation.

Aurizon Network considers that the capacity priority arrangement provisions should be clarified to establish that there is no requirement (or right) for Aurizon Network to reprioritise provisional capacity allocations or capacity contracted in respect of expansions under construction.

12.16 Other matters arising from the QCA redrafting – not specifically included in any Draft Decision

12.16.1 Obligation to replace assets

The QCA has broadened section 8.2.1(e) in of the redrafted Undertaking, which consequently contemplates that Aurizon Network's asset replacement work may arise due to its obligations under the Undertaking as well as its obligations under access agreements. Aurizon Network considers that there should be no obligation in the Undertaking that requires Aurizon Network to replace assets.

⁸² Aurizon Network, 2014, 2014 Draft Access Undertaking, Clause 8.10.2 (e)(v).

Where it is necessary to replace assets in order for Aurizon Network to provide the access contracted under its access agreements, Aurizon Network is contractually required to replace those assets. There should not be an additional obligation in the Undertaking that requires asset replacement.

Aurizon Network considers any obligation on it to incur asset replacement expenditure in the absence of any access agreements that necessitate such expenditure would not promote “...economically efficient ... investment in...” the CQCR in accordance with section 69E of the QCA Act, as that expenditure could be imprudent.

Aurizon Network notes that the QCA has not included in the redrafted Undertaking any obligation on Aurizon Network to undertake and fund asset replacement. Furthermore, the QCA has not amended Aurizon Network’s proposed definition in the 2014DAU of Asset Replacement Expenditure which refers to “*expenditure required for Aurizon Network to meet its existing contractual obligations under Access Agreements*”.

Section 8.2.1(e) of the Undertaking should be reinstated to Aurizon Network’s proposed position in the 2014DAU, so that Aurizon Network’s responsibility to undertake and fund asset replacement expenditure only arises due to its obligations under access agreements.

12.16.2 Aurizon Network’s pre-feasibility costs

In section 8.4.2(b)(ii) of the redrafted Undertaking the QCA provides that any costs incurred by Aurizon Network in funding a pre-feasibility study should not be included in the Regulated Asset Base (RAB) except to the extent the associated expansion is subsequently developed. Aurizon Network does not agree with this ‘only if expansion occurs’ condition on RAB inclusion of the costs of pre-feasibility studies as the condition would apply only to studies funded by Aurizon Network.

If Aurizon Network funds a pre-feasibility study and subsequently a feasibility study is conducted, Aurizon Network should be able to recover the costs of the pre-feasibility study from the feasibility study’s funders in the same way any other funders of a pre-feasibility study could do so. The ‘recover pre-feasibility study costs from feasibility study funders’ mechanism, which is documented in section 8.4.4(a)(ii) of the redrafted Undertaking, should therefore apply to Aurizon Network-funded pre-feasibility studies.

Where this repayment occurs the pre-feasibility study costs will then flow through to feasibility study funders on the same basis as for any other pre-feasibility study and will only be included in the RAB should the feasibility study result in a project being developed.

12.16.3 Reduced ability for Aurizon Network to manage Provisional Capacity Allocation

In sections 8.5(d), 8.5(e)(i) and 8.5(f) of the redrafted Undertaking the QCA has modified the provisions governing withdrawal of provisional capacity allocation:

- Section 8.5(d) of the redrafted Undertaking weakens one of the trigger events
- Section 8.5(e)(i) of the redrafted Undertaking increases the ‘show cause’ period for the feasibility funder and therefore delays the withdrawal of provisional capacity allocation
- Section 8.5(f) of the redrafted Undertaking provides that Aurizon Network’s notice following the ‘show cause’ process takes effect 10 business days after that notice, which further delays the withdrawal of provisional capacity allocation

Aurizon Network disagrees with these modifications.

Aurizon Network’s original capacity withdrawal provisions sought to manage the interests of all access seekers in a fair and balanced way, which is consistent with s138(2)(e) of the QCA Act. Where one feasibility funder is not expected to be able to use its capacity in future, this creates a concern for other feasibility funders, as well as Aurizon Network. The most appropriate course of action for other feasibility funders is the timely replacement of the feasibility funder concerned by another access seeker that is seeking capacity on a bona fide basis. Aurizon Network’s only interest in this replacement process is its desire to promote network development and to be able to replace an unviable feasibility funder with a viable feasibility funder.

Given that the capacity withdrawal process balances the interests of access seekers and their customers, it was a key issue in Aurizon Network's discussions with the QRC over the expansion process. The position on capacity withdrawal set out in the 2014 DAU was agreed with the QRC.

The QCA has provided no explanation of why it considers that this agreed position needed to be modified by the QCA with no prior consultation with Aurizon Network. There is no statement as to which part of s138(2) of the QCA Act is relied upon by the QCA to justify this modification of the Undertaking. The QCA's position provides greater protection of a feasibility funder doing the wrong thing at the expense of other feasibility funders doing the right thing and other access seekers with genuine expansion needs. While the QCA's changes are in the interests of some access seekers, they are clearly against the interests of others. The QRC considered this trade-off and agreed with the position submitted by Aurizon Network in its 2014 DAU.

Aurizon Network proposes that these modifications be reversed.

12.16.4 Replacement Feasibility Funder

In section 8.5(i) of the redrafted Undertaking the QCA includes an obligation on a replacement feasibility funder to refund the exiting feasibility funder all costs that it had incurred on that feasibility study. Aurizon Network disagrees with this position.

As set out in Part 12.16.3 of this submission, Aurizon Network's original capacity withdrawal provisions sought to manage the interests of all access seekers in a fair and balanced way. Aurizon Network does not consider that the interests of the unviable feasibility funder should be protected in this manner. The exiting feasibility funder has failed a test under section 8.5(d) of the redrafted Undertaking - for example it may have ceased development of its mine. Also some of the work conducted for the original feasibility study may be redundant as a result of the exit of one feasibility funder and the entry of a replacement feasibility funder due to differences between their access requirements. The ongoing feasibility funders would naturally expect the replacement feasibility funder to fund any additional study costs associated with the incoming feasibility funder's access requirements. It is unreasonable in these circumstances to expect the replacement feasibility funder to reimburse the exiting feasibility funder in addition.

In a situation where a feasibility funder needs to be replaced, there is a significant risk to the overall expansion project proceeding. It is in the interests of the viable feasibility funders that Aurizon Network is not overly constrained in its ability to replace an unviable feasibility funder. This position was supported by the QRC.

Aurizon Network proposes that this modification be reversed.

12.16.5 Obligation to deliver Concept Studies

Section 8.3.1 of the redrafted Undertaking provides that Aurizon Network must promptly undertake a concept study requested by anyone, provided that a sufficient concept study is not already underway or completed. This obligation to prepare a concept study is in addition to Aurizon Network's obligation to prepare a concept study where it is justified by a demand assessment. Section 8.2.6 of the redrafted Undertaking provides that Aurizon Network must meet its obligations under Part 8 of the redrafted Undertaking in respect of concept studies regardless of resource constraints.

The QCA is seeking to impose on Aurizon Network an open-ended obligation to perform concept studies over and above what is required from demand assessments, irrespective of the number of such additional concept studies. Aurizon Network and the QRC have agreed that Aurizon Network should only be obliged to conduct a concept study that is justified by a demand assessment. Aurizon Network does not consider that any party should have the right to require Aurizon Network to perform a concept study that is not justified by a demand assessment.

12.16.6 Obligation to commence pre-feasibility study and feasibility study

Section 8.3.2(a) of the redrafted Undertaking provides that Aurizon Network must immediately commence a pre-feasibility study if one or more potential pre-feasibility funders give notice that it or they will fund the pre-feasibility study for an amount sufficient for that study. In section 8.3.3(a) of the redrafted Undertaking there is a similar provision in respect of a feasibility study. Aurizon Network has two concerns, one relating to its certainty of cost recovery and the other relating to the imprecise study scope, that arise from these provisions.

In respect of the certainty of cost recovery concern, it is good commercial practice for a principal that wishes to receive services from a service provider to enter into a binding service provision agreement before the provision of the services commences. A notice of intention to enter into a service provision agreement is rarely adequate for a service provider to commence provision of its services, since the service provider would assume the risk that the service provision agreement is not subsequently entered into.

Aurizon Network does not understand the basis on which the QCA reached the decision that, contrary to good commercial practice, Aurizon Network should be required, on the basis of a notice of intention, to commence a study, incur material costs and assume the risk that these costs will not be recovered.

In respect of the imprecise study scope concern, the study scope of each pre-feasibility study and feasibility study should include specifics of the access capacity requirements of each study funder, as set out in Part [12.5.3] of this submission. Aurizon Network is not in a position to commence a pre-feasibility study or a feasibility study until these study specific details are specified and agreed (or determined). If Aurizon Network were to commence a study without these details, as is proposed by the QCA, Aurizon Network could conduct activities and incur costs that could be subsequently be deemed to be unreasonable. It is good project study management practice to know exactly what one is studying before a study commences.

Aurizon Network proposes that, in line with good commercial practice, its obligation to commence a pre-feasibility or a feasibility study should only arise once the applicable study funding agreement has been entered into and become unconditional.

12.16.7 Aurizon Network to fund any shortfall in pre-feasibility study or feasibility study

Clause 8.4.4(a) of the redrafted Undertaking provides that Aurizon Network must fund a shortfall in a study for which there are multiple study funders in the event of any default by a study funder. This arrangement would entail Aurizon Network taking the funding risk of such a default and the regulatory risk of that amount being included in the RAB.

Aurizon Network does not volunteer to assume the risks that arise from underwriting the funding shortfall in a study's funding that arises from a study funder's default. This position is consistent with the position on acceptance of cost and risk set out in Part 12.17.2 of this submission.

Aurizon Network proposes that any funding shortfall arising from a study funder's default should be funded by the other study funders if they wish the study to continue. In order to minimise the exposure of the continuing study funders, Aurizon Network proposes that all study funders be required to provide a bank guarantee in accordance with the SFA form.

12.16.8 Obligation to fund an Expansion

Section 8.7.1(a) of the redrafted Undertaking provides that Aurizon Network must agree to allow an access seeker to fund its share of an expansion under various scenarios regarding Aurizon Network's willingness to fund. Aurizon Network has three significant concerns with the QCA's proposal.

Any decision by Aurizon Network to fund without commercial terms must prevail

Aurizon Network considers that where it elects pursuant to section 8.7.1(c)(ii) of the QCA-proposed UT4 to fund an expansion without commercial terms, that election should prevail and access seekers should not have the option to fund the expansion.

However, if Aurizon Network elects to offer to fund an expansion with commercial terms, access seekers should be free to investigate funding alternatives and adopt the best option, as they see fit.

The QCA has not substantiated the statutory basis upon which it can refuse to approve the 2014 DAU in order to ensure that an access seeker has the right to fund an extension to rail infrastructure even though Aurizon Network is willing to fund that extension on terms approved by the QCA.

In Aurizon Network's view, the QCA's position constitutes a proposed expropriation of Aurizon Network's intrinsic property rights without just compensation. In this regard, the High Court relevantly notes that in relation to property rights:

'....it may be helpful to speak of property as a "bundle of rights". At other times it may be more useful to identify property as "a legally endorsed concentration of power over things and resources". Seldom will it be useful to use the word "property" as referring only to the subject matter of that legally endorsed concentration of power⁸³.'

The infrastructure leases entered into between Aurizon Network and its Queensland government lessors for the CQCR rail infrastructure confer on Aurizon Network substantially all of the normal commercial rights associated with ownership. This bundle of rights also extends to the right to expand the rail infrastructure and to enjoy the rights and interests associated with that expansion.

This view is consistent with the Queensland Government's response to the Productivity Commission's draft inquiry report on the National Access Regime in relation to the funding of extensions:

*'Queensland considers that it is a strong principle that extensions to facilities are commercially negotiated between parties, rather than being imposed by the regulator. Queensland will consider the Commission's analysis of this issue but considers that any recommended changes must not compromise the legitimate business interests of the service provider or inappropriately interfere with their **private property rights** (emphasis added).⁸⁴*

Furthermore, s119(2)(b) of the QCA Act does not permit the QCA to make an access determination which would:

'result in the access seeker, or someone else, becoming the owner, or 1 of the owners, of the facility, without the existing owner's agreement;'

Aurizon Network submits that ownership can and should be read as both legal and economic ownership. In this regard, the 2014 DAU outlines the relevant circumstances where Aurizon Network agrees to an access seeker (or its nominee user funder) becoming the economic owner of an extension. However, Aurizon Network has not agreed, and does not agree, to an access seeker (or its nominee user funder) having the right to fund an expansion where Aurizon Network is willing to do so on terms approved by the QCA. In this regard Aurizon Network cannot identify the legal basis on which the QCA considers it has the power to require parties other than Aurizon Network to become owners of part of the facility without Aurizon Network's agreement.

In addition, the QCA has not explained the economic basis for its position that an access seeker should be free to fund, or arrange the funding of, an expansion project when Aurizon Network is prepared to do so on regulatory terms. If an access seeker were able to obtain funding from another party on more favourable terms than is available from Aurizon Network on regulatory terms, the use of that other party's funding would not result in a more economically efficient operation of, use of and investment in rail infrastructure. This is because the price of access is determined independently of funding costs. In other words the price of access to access seekers will be the same whether the expansion project has:

- funding from, or arranged by, access seekers, or

⁸³ Telstra Corporation Limited v The Commonwealth (2008) HCA 7, para 44.

⁸⁴ Queensland Government, 2013, Submission to the Productivity Commission Draft Report on the National Access Regime, p.6.

- funding from Aurizon Network.

Aurizon Network submits that permitting access seekers to reject Aurizon Network's intent to invest on regulatory terms could result in Aurizon Network incurring an opportunity loss because it is constrained from making an investment it is willing to undertake. Aurizon Network notes that the redrafted Undertaking does not provide for any compensation to be paid to Aurizon Network in respect of any loss it may incur as a result of being denied the opportunity to make such an investment. It is also noted that the form of the expansion process agreed with the QRC and included in the 2014 DAU did not include the option for access seekers to be able to fund when Aurizon Network offered on a timely basis to fund without commercial terms.

Aurizon Network proposes that if it elects on a timely basis to fund an expansion on regulatory terms, that election should bind both Aurizon Network and the access seekers. Accordingly access seekers should have no funding alternative in the event of such an election by Aurizon Network.

Internal inconsistency in the Undertaking

As discussed above, section 8.7.1(a) of the redrafted Undertaking requires Aurizon Network to agree to an access seeker funding its portion of an expansion's costs even if Aurizon Network is obliged to fund the expansion. If Aurizon Network is obliged in the Undertaking to fund the expansion itself, it is inconsistent for Aurizon Network to be obliged to allow an access seeker to fund its portion of the cost, since Aurizon Network can only comply with the second obligation by being in breach of the first obligation.

Aurizon Network contends that it should not be required by the QCA to breach an obligation under its Undertaking should an eventuality beyond Aurizon Network's control, such as an election by an access seeker that it wishes to fund its portion of an expansion's cost, occur.

Election by less than all of the access seekers

Section 8.7.1(a) of the redrafted Undertaking also provides that Aurizon Network must agree to an access seeker funding its portion of an expansion's costs even if other access seekers do not elect to fund their respective portions of these costs.

Aurizon Network considers that one access seeker electing to fund its portion of the cost of an expansion should be of no relevance unless the access seekers, taken as a whole, agree to fund 100% of that cost.

12.16.9 Obligation to negotiate with expansion funders

Section 8.8.1(b) of the redrafted Undertaking provides that Aurizon Network must negotiate with an 'expansion funder', which is expressly defined to include a user funding investor where it is not an access seeker. Section 8.2.2(a) establishes dispute rights in respect of 'expansion funders'.

Aurizon Network is regulated in respect of access provision, not investment in regulated assets, and considers that all of its negotiations throughout the expansion process should be held exclusively with access seekers (or their customers). Aurizon Network should not be required under UT4 to engage with 'expansion funders' other than access seekers or customers. Access seekers or their customers should take into account the requirements of the would-be user funding investors in their negotiations with Aurizon Network.

Aurizon Network considers that it would be placed in an unreasonable position if it was required to negotiate with proposed user funders and separately with access seekers, since their commercial interests are very different. If Aurizon Network reached agreement with one group on some or all user funding documentation, then the other group may elect to dispute that outcome with the QCA. A superior commercial arrangement is for the access seekers, which are the parties arranging the participation of third user funders to suit the commercial interests of the access seekers, to negotiate all user funding documentation.

Aurizon Network proposes that UT4 should not establish under the expansion process any role or any rights for 'expansion funders' other than access seekers or customers.

12.16.10 Confidentiality of access requirements

Aurizon Network considers that the expansion process in the QCA's redrafted Undertaking can only be implemented if and to the extent that Aurizon Network has the right to make the disclosures contemplated by the Undertaking.

Disclosure of access seekers' access requirements in study funding agreements

As stated in Part [12.6.2] of this submission, the study scope within a study funding agreement of each pre-feasibility study and feasibility study needs to include the detailed access requirements of each study funder. As a consequence, the development of, and subsequent entry into, a study funding agreement will entail disclosure to each study funder of the access requirement of each other study funder for that study. This is because the study scope for a given study is the same in each of the bilateral study funding agreements between Aurizon Network and each study funder for that study.

The ring-fencing obligations of the Undertaking prohibit Aurizon Network from making such disclosures. In addition, if Aurizon Network has entered into a confidentiality deed with a proposed study funder (as an access seeker), that deed would prevent Aurizon Network from disclosing that party's access requirements without its consent, unless (among other exceptions) Aurizon Network is 'required or compelled' to do so by a notice from an authority, such as the QCA.

Aurizon Network's approach to addressing these restrictions is set out in the 'New Disclosure Regime Required' section below.

Disclosure of access requirements in capacity analysis

The redrafted Undertaking contemplates that, in the event of disputes about the proposed project specific schedules for a study funding agreement or a user funding agreement, Aurizon Network will need to disclose to an external party, such as the QCA, a capacity reviewer or an expert responsible for dispute resolution, the capacity analysis that Aurizon Network has conducted.

Such disclosures will extend to:

- (i) access rights information, including origin/ destination, access quantum, period of access rights and the operating plan, for each access holder under each access agreement in respect of each coal system affected by the proposed expansion;
- (ii) the access requirements of those incremental access seekers; and
- (iii) similar access information in respect of access requests by access seekers where those access requests have reached a later stage in the project lifecycle than the access requests of the incremental access seekers in question but not yet reached the point of being consummated by means of entry into access agreements. These access requests may relate to access seekers who either are already funding a feasibility study or have already entered into a project development agreement to create additional capacity.

In respect of items (ii) and (iii) Aurizon Network's ability to make disclosures in respect of capacity analysis is fettered for the reasons set out above in respect of disclosure under study funding agreements. In addition, Aurizon Network has confidentiality obligations under existing access agreements referred to in item (i) above and may only disclose without its customer's consent the relevant information to any party, such as the QCA, a capacity reviewer or an expert responsible for dispute resolution, where that disclosure is 'required or compelled' by a notice from an authority.

Aurizon Network's approach to addressing these restrictions is set out in the 'New disclosure regime required' section below.

New disclosure regime required

Aurizon Network endorses the principle of transparency where disclosure is required under the Undertaking. However Aurizon Network is subject to Undertaking and contractual restrictions that limit Aurizon Network's ability

to implement this principle. The balance of this section addresses how these restrictions can be overcome to achieve the required transparency.

Aurizon Network considers that the QCA should expressly provide, as part of its final decision on the 2014 DAU, that Aurizon Network is authorised under the Undertaking to make all disclosures required to give effect to the expansion process. In other words, where its ring fencing and disclosure obligations are in conflict, the disclosure obligation should override the ring fencing obligation.

Aurizon Network also considers that the QCA should overcome the contractual restrictions under its existing and subsequent confidentiality deeds and/or access agreements with access seekers/holders on Aurizon Network's right to disclose its contractual counterparties' access information without their consent. This outcome can best be achieved, in Aurizon Network's view, by the QCA serving a valid notice on Aurizon Network that requires it to disclose all access information if and to the extent that disclosure is required or otherwise contemplated, in Aurizon Network's reasonable opinion, under the Undertaking. That notice should be of an indefinite term and should apply in respect of all Aurizon Network agreements and deeds that contain confidentiality obligations. The 'otherwise contemplated' feature of the proposed disclosure notice is necessary since it would result in Aurizon Network providing information, such as capacity analysis, as part of a dispute resolution process, as Aurizon Network is not required under the Undertaking to provide any information in this circumstance.

Aurizon Network considers that this 'notice to require disclosure' mechanism is the best course of action for the QCA to achieve the information disclosure it is seeking since all of the various forms of contractual confidentiality obligations assumed by Aurizon Network from UT1 onwards feature a provision that entitles the recipient of confidential information to disclose it without the consent of the information supplier when the information recipient is required or compelled by an authority to make that disclosure.

Without a new disclosure regime of the nature proposed, Aurizon Network would be unable to comply with the information disclosure obligations proposed by the QCA in its draft decision on the 2014 DAU and in the redrafted Undertaking.

12.16.11 Inclusion of expansion cost in Regulated Asset Base (RAB)

In section 8.7.2 of the redrafted Undertaking the QCA includes obligations regarding the inclusion of expansion costs into the RAB. Aurizon Network disagrees with some elements of this position.

Parties that may seek pre-approval

The decision of whether to seek a pre-approval of an expansion should rest solely with Aurizon Network, where it funds that expansion, or the access seekers, where the expansion is to be user-funded, if that party (or parties) wishes to do so. Where access seekers or their nominees are funding an expansion, Aurizon Network should seek pre-approval if it has a request to that effect from the access seekers and has received all required information from them.

Aurizon Network sees no requirement for section 8.7.2(b) of the redrafted Undertaking as section 8.7.2(c) provides the obligation on Aurizon Network to seek pre-approval when requested by an 'Expansion Funder' (in Aurizon Network's view this should be a reference to the access seekers, since Aurizon Network should not have a commercial nexus with parties other than access seekers or customers prior to entry into a user funding transaction). Section 8.7.2(c) of the redrafted Undertaking should be modified so that the pre-approval request submitted to Aurizon Network is only effective when submitted by, or on behalf of, all relevant access seekers.

RAB inclusion mechanism

Aurizon Network's response to the draft decision on the 2013 SUFA DAAU provided some detail about how a final inclusion of the costs of a user-funded expansion into the RAB would best work.⁸⁵ That response recognised that the full cost of a user funding project will include costs of which Aurizon Network is unaware so the SUFA trustee

⁸⁵ Aurizon Network, 2015, Response to the QCA's Draft Decision on the 2013 SUFA DAAU, Section 14.2(a), pp. 57 – 59.

(as the expansion funder) should prepare the final inclusion information which will be incorporated into Aurizon Network's submission to the QCA.

The QCA's drafting of the obligation to seek RAB inclusion is split between Clause 8.7.2 of the redrafted Undertaking and Clause 2.1 of Schedule E. Aurizon Network considers that the RAB inclusion drafting should be documented in one location, being Schedule E of the Undertaking.

Aurizon Network does not agree with clause 2.1 (d)(i) and (iii) of Schedule E. These provisions allow access seekers, their customers and interested participants to require preapproval of RAB inclusion of project costs. Aurizon Network considers that

- Aurizon Network, where it funds that expansion, or
 - the access seekers, where the expansion is to be user-funded,
- and no other party should have control over whether to seek pre-approval or not.

Section 8.7.2(f) of the redrafted Undertaking is an abbreviated version of a contractual obligation in a SUFA template document, the Expansion Project Agreement (EPA), and applies only to user funded projects. The EPA obligation proposed by Aurizon Network includes much more detail and conditions. Aurizon Network considers it inappropriate to document one obligation in two documents, namely the Undertaking and the EPA, in two different ways. Therefore section 8.7.2(f) of the redrafted Undertaking should be deleted.

Conditions applicable to RAB inclusion

In Schedule E, clause 2.2(c) the QCA indicates that any pre-approval may be subject to conditions. The greater the extent of these conditions, the less benefit will be provided to an expansion funder by that pre-approval. Aurizon Network encourages the QCA to reconsider and make the pre-approval as unconditional as possible.

Aurizon Network has particular concerns about clause 2.2(c)(i) of Schedule E. It implies that any excess above the amount pre-approved will not be included in the RAB if the cost to construct, the time for completion or the capacity outcomes of the expansion are not consistent with the assumptions tabled at the time of pre-approval. This is unfair and unreasonable. Addressing each in turn:

- (a) It is unclear how the preapproval would be conditional on the time for completion. Whether the expansion is completed early or late may be caused by funder of that expansion or its construction contractor(s) or that time outcome may be a result of circumstances beyond the control of these parties (for example extended wet periods). The construction agreement to be entered where a SUFA trustee is the expansion funder, and any construction agreement likely to be entered by Aurizon Network as principal when it is the expansion funder, are expected to include liquidated damages for delay, which reduce the net amount payable under the construction contract in the event of delay due to the contractor.
- (b) It is unclear whether the QCA intends that, if delivered capacity is less than assumed capacity, not all of the cost of the expansion will be included in the RAB. Capacity shortfalls are specifically addressed in section 8.9.3 and 8.9.4 of the redrafted Undertaking, where there are no adverse consequences for user funders, as the obligation to fund a capacity shortfall (other than an 'AN Shortfall') is borne by the access holders. If there is an adverse consequence intended for user funders in the event of a capacity shortfall, then it should be documented in the capacity shortfall section of the Undertaking, rather than being documented in the preapproval clause. Aurizon Network does not support the introduction of an adverse consequence for user funders in the event of a capacity shortfall as it would erode the attractiveness of the role of being a user funder and make it more difficult to attract third party financing.
- (c) It is unclear whether the QCA intends that, if delivered capacity exceeds assumed capacity, not all of the cost of the expansion will be included in the RAB. The expansion scope has been set after a thorough study process involving the access seekers and the project scope is agreed between these parties or, should a dispute arise, determined by the QCA. In these circumstances it seems unreasonable for the user funder to be at risk should delivered capacity exceed assumed capacity. Here too Aurizon Network does not support an adverse consequence for user funders for the reasons set out in item (b) above.

In the QCA's SUFA draft decision there was a detailed section on pre-approval (section 5.4.6 of that draft decision). Aurizon Network provided a detailed position on pre-approval in section 5.2(l) of its January 2015 response to that

draft decision. There were several pre-approval issues discussed in those documents that are absent from the draft decision. It is unclear whether the QCA now does not support its previous treatment of those issues or whether there is more time needed to address their complexity.

These elements include:

- (i) The QCA required a report from an independent engineer/expert advisor to be provided by Aurizon Network, and that the engineer/expert was to be responsible solely to the QCA⁸⁶. This does not feature in the draft decision, and there is little guidance as to how the QCA will consider pre-approval, and in particular its consideration of the outcome of any voting process and the feasibility study's outcomes). Aurizon Network believes the role of the independent engineer/expert added value and should be included in the process.
- (ii) There is no discussion in the draft decision about the proposed contingency fund⁸⁷, whereas that fund featured prominently in both the QCA's May 2014 SUFA position paper and its SUFA draft decision. Regardless of whether a contingency fund is adopted or not, where the pre-approved amount is insufficient to cover all project delivery costs, the expansion funder will be exposed to risk over the RAB inclusion of the 'excess'. In order for the pre-approval process to achieve its stated aim of providing greater certainty to all relevant parties, Aurizon Network considers that the QCA should address this risk.
- (iii) In its January 2015 response to the QCA's SUFA draft decision Aurizon Network disagreed with the QCA that an up-front capacity commitment was essential for the QCA to be able to commit to pre-approval⁸⁸. Aurizon Network continues to hold this view. It is unclear whether the QCA continues to hold this view.

Provision of draft and final decisions

The 2014 DAU incorporated a 'must' obligation on the QCA to provide a draft decision, including a statement of reasons, when the QCA intends to refuse to approve RAB inclusion⁸⁹. Any QCA refusal to approve RAB inclusion is a very material risk for an expansion funder and it is a reasonable process step for affected parties to have the opportunity to provide further argument or information for the QCA's consideration prior to a final decision being made. In the redrafted Undertaking the QCA 'may' provide a draft decision, leaving it at the discretion of the QCA. Aurizon Network does not agree with this change.

The 2014 DAU also incorporated a 'must' obligation on the QCA to provide its final decision on RAB inclusion (along with a statement of reasons)⁹⁰. Again this obligation has been changed from a 'must' to a 'may'. For the QCA not to be obliged to provide the outcome of its decision process along with reasons contravenes basic principles of natural justice in administrative law. Aurizon Network is not aware of any precedent for a regulator, where it has made a decision that is materially adverse to the business interests of the regulated entity, to be free not to notify that entity of that decision.

12.16.12 Tax ruling process

Aurizon Network considers that the tax ruling process (in section 8.8.3 of the redrafted Undertaking) should expressly permit it to withhold from other SUFA parties commercially sensitive or confidential information in respect of the group of companies of which Aurizon Network forms part.

12.17 Study Funding Agreement Issues

The draft decision included a mark-up of the study funding agreement ('SFA'). No stakeholder provided comments on the form of the SFA in the 2014 DAU.

⁸⁶ QCA, 2014, Draft Decision - 2013 SUFA DAAU, Section 5.4.6, p. 44.

⁸⁷ Ibid.

⁸⁸ Aurizon Network, 2015, Response to the QCA's Draft Decision on the 2013 SUFA DAAU, Section 5.2(i)(1), p. 26.

⁸⁹ Aurizon Network, 2014, 2014 Draft Access Undertaking, Schedule E, Clause 2.3(d)(i).

⁹⁰ Aurizon Network, 2014, 2014 Draft Access Undertaking, Schedule E, Clause 2.3(e).

The QCA mentions the QRC's submission of its form of the SFA⁹¹. From a regulatory process perspective, Aurizon Network does not understand why the QCA has considered this submission for the purpose of the draft decision as that submission was not made as a response to the 2014 DAU, and the QRC did not comment on the form of SFA in the 2014 DAU.

Aurizon Network reviewed the form of the SFA in the QRC's submission on the 2013 DAU and incorporated some elements of it into the form of the SFA in the 2014 DAU. That SFA form also included significant simplification in the allocation of costs, even though that is slightly less accurate.

Aurizon Network does not agree with several aspects of the form of SFA in the draft decision and they are addressed below.

For convenience, all references to the SFA in the balance of Part 12.17 of this submission are to the form of the SFA that formed part of the draft decision, unless otherwise stated.

12.17.1 Consequential loss

The QCA has modified the definition of consequential loss to be substantially the same as that proposed in the QCA's draft decision on Aurizon Network's 2013 SUFA DAAU. Aurizon Network disagrees with this position.

Consistent with Aurizon Network's position in its response to the QCA's draft decision on the 2014 SUFA DAAU⁹², Aurizon Network does not volunteer to assume the risks and costs that would arise from the QCA's proposed changes to the consequential loss definition.

12.17.2 Recovery of reasonable costs

Aurizon Network is only entitled under the form of SFA in the draft decision to recover its reasonable costs (see clause 11.1(a) of that SFA form). Accordingly Aurizon Network would be required to take the risk that some costs would be deemed unreasonable after they have been incurred, even if the study has been completed satisfactorily within the specified time and cost targets, and Aurizon Network would be unable to recover those costs. Aurizon Network disagrees with this position.

The SFA in the draft decision does not allow Aurizon Network to price into the SFA's terms and conditions its risk of being unable to recover costs. The only charges 'hard-wired' into the SFA that do not constitute direct cost recovery, being the 8% margin for 'Internal Costs' and the 1% margin for 'External Costs', are in lieu of indirect costs, such as overhead and working capital costs, incurred by Aurizon Network in performing the study.

As stated in Aurizon Network's 16 January 2015 response to the draft decision on the 2013 SUFA DAAU, *'it is standard business practice for commercial enterprises in a market economy to charge for the acceptance of risk'*. Aurizon Network does not understand the QCA's view that Aurizon Network's assumption of the risk of cost recovery without any associated compensation is *'a more appropriate allocation of risk'*⁹³ than Aurizon Network's proposed risk allocation, which was that it would bear no risk of cost recovery (and of course receive no compensation for risk assumption).

Aurizon Network does not volunteer to assume the risk of failing to recover study costs deemed unreasonable.

12.17.3 Revision of study funder's study percentage for pre-feasibility studies

The QCA has added sub-clauses in clause 2.7 of the SFA that provide for 'hair trigger' termination of pre-feasibility study funding agreements. Aurizon Network disagrees with this position.

⁹¹ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, Section 12.3.2, Table 54, p. 253.

⁹² Aurizon Network, 2015, Response to the QCA's Draft Decision on the 2013 SUFA DAAU, Section 13.2(c), p. 54.

⁹³ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, Section 12.3.3, p. 260.

Clause 2.7 of the SFA provides for a study funder's study percentage to be re-determined upon satisfaction of the last condition. If each study funder satisfies its financial condition precedent (i.e. the provision of its bank guarantee) then each study funder's study percentage will be unchanged. To the extent one or more other study funders fail to satisfy this condition precedent, then the study percentage of each continuing study funder will be increased, subject to a limit as discussed below, so that the full cost of the study will be borne by the continuing study funders.

The QCA has added clause 2.7(c) to the SFA - it allows any study funder to terminate its study funding agreement if that study funder's study percentage increases. If any study funder exercises this right then clause 2.7(d) of the SFA, another insertion by the QCA, requires Aurizon Network to terminate all other study funding agreements as a result.

The net effect of these arrangements is that if any one study funder for a pre-feasibility study defaults in providing its bank guarantee then all study funding agreements can terminate. This could be the outcome even if the increase in the study percentage of each continuing study funder would be small. Termination of study funding agreements can lead to material delays in a below-rail project's development and in the development of associated coal supply chain assets, and these delays could increase the risk of projects failing to proceed at all.

When it developed the form of SFA that it submitted in the 2014 DAU, Aurizon Network built into the pre-feasibility study provisions a suitable compromise between:

- not delaying studies when some study funders drop out; and
- not exposing a continuing pre-feasibility study funder to substantial increases in their study funding obligations

This compromise, which was agreed with the QRC, kept in place the study funding agreement for each continuing pre-feasibility study funder provided that its study funding obligation increased by no more than a limit of 15% as a result of other study funders failing to meet their bank guarantee condition precedent. If that limit were to be exceeded for any study funder, its study funder agreement would automatically terminate through the mechanism in Condition 5 in Schedule 1.

The QCA has also included new subclauses in clause 2.6 of the SFA which apply only to feasibility studies. Aurizon Network considers that they should only apply to pre-feasibility studies, since the best course of action in response to the 'dropping out' of a feasibility funder from a funding agreement is to seek a replacement feasibility funder. The continued delivery of a study for a lesser quantum of access capacity than is needed to utilise fully the relevant terminal un-loading project would generally be an inferior course of action. The new clauses 2.6(c)(i) and (d) of the SFA provide for 'hair-trigger' termination in exactly the same circumstances as is provided by the new clauses 2.7(c) and (d) discussed above and the comments above apply here also.

Aurizon Network disagrees that the QCA position appropriately balances the interests of all parties.

12.17.4 Funding requirements in excess of the target study cost

The form of SFA in the draft decision appears, on the basis of ambiguous drafting in clause 5.2(c) of the SFA, to cap the study funder's payment obligation to its share of the target study costs. In the event that actual study costs exceed the target study costs, that cap appears to operate so that Aurizon Network is unable to recover the excess. Accordingly Aurizon Network would be required to assume the risk of actual study costs exceeding the target study costs. Aurizon Network disagrees with this position.

The form of SFA submitted by Aurizon Network in the 2014 DAU (in clauses 5.1 and 5.3, and Schedule 4) provided that a study funder is required to pay its specified proportion of actual study costs up to a maximum dollar amount set as at entry into the SFA at an amount equal to that proportion

- of 125% of the estimated costs of a pre-feasibility study, and
- of 115% of the estimated costs of a feasibility study.

The SFA includes a project management fee, which is an incentive for Aurizon Network to manage costs effectively. In situations where either of the funding caps mentioned above would result in a study's funding costs

exceeding the total study commitment, that study would only be continued if sufficient additional funding commitments were made by study funders.

Aurizon Network disagrees that the arrangements proposed by the QCA adequately address the risk of funding requirements in excess of the target study cost and does not volunteer to accept the risk of funding any such 'excess'.

12.17.5 Study Scope Variation

The QCA has made extensive changes to the study scope variation mechanism in clauses 9 and 10 of the SFA. Aurizon Network disagrees with this position.

Other than where a scope change event occurs, being an event beyond Aurizon Network's control, any change to a study's scope during its delivery under study funding agreements must be agreed by all study funders and Aurizon Network. Any failure to agree a scope change should not be directed to any dispute resolution, but should be treated as a 'no change' event.

Each pre-feasibility study and feasibility study is a study to expand Aurizon Network's assets and modify its existing business. Aurizon Network is not a professional services provider providing services to the study funders as its infrastructure principal. Aurizon Network is the owner/operator of the railway and has a very substantial business interest in what is studied and ultimately delivered. Also Aurizon Network may turn out to be the funder of any eventual expansion. There should be no discretionary scope change without Aurizon Network's agreement. Accordingly Aurizon Network should have absolute discretion (in clause 9.7 of the SFA) over whether to initiate a discretionary scope change.

However, where either

- a discretionary scope change is agreed by the parties to the study funding agreements, or
- a scope change event occurs as specified in an applicable notice to that effect from Aurizon Network and the parties do not agree any associated variations to time and cost targets, those time and cost variations should be determined through a dispute resolution mechanism.

Other matters on which Aurizon Network disagrees with the QCA's position on study scope variation are:

- The change to the deeming arrangement from no response being a deemed approval to being a deemed non-approval. There should be an incentive for study funders to actively participate so the applicable study is not delayed.
- There is no need for the proposed meeting in Clause 9.4(c) of the SFA in order to consider how to continue the study when the parties do not agree to a discretionary variation. If such a variation is not agreed, work continues on the basis of the current study scope. Accordingly clause 9.5 of the SFA is not required either.
- There is no need for the inclusion of clause 10.1(c). An Adjustment Event simply triggers a change in target cost and time. Where this is an increase in study cost to a total amount less than the total study commitment, then the study will continue with the study funders providing in aggregate more funding than the target study cost, but less than the total study commitment. Where the increase is to an amount greater than the 'Total Study Commitment', clause 5.3 sets out a suitable process and there is no need for an additional process under clause 10.1(c).

12.17.6 Termination for convenience

The form of the SFA provided as part of the draft decision requires Aurizon Network to underwrite part of the cost of the completion of a study if one, or some, but not all, of the parties to the associated study funding agreements elect to terminate its or their study funding agreements for convenience (clause 17.2). Furthermore Aurizon Network is required to assume the risk that the study costs it has been required to underwrite as a result of any such termination for convenience will not be included in the RAB. Aurizon Network disagrees with this position and does not volunteer to assume the risk of underwriting the costs of a pre-feasibility study or feasibility study.

To illustrate by example:

- Study Funder M agrees to fund 20% of a \$10m study under one study funding agreement
- Study Funder N agrees to fund the other 80% of that study under another study funding agreement
- Immediately after the two study funding agreements become unconditional, Study Funder N elects to terminate for convenience its study funding agreement

In this example Aurizon Network is contractually obliged under its study funding agreement with Study Funder M to complete the \$10m study even though Aurizon Network's only source of funding is from Study Funder M, which is required to contribute only \$2m.

Aurizon Network does not agree with the QCA's view that is a '*a more appropriate allocation of risk*'⁹⁴ that Aurizon Network must underwrite (and then take regulatory risk of RAB inclusion of) part of the costs of a pre-feasibility study or feasibility study without any compensation for doing so in order to allow a study funder to terminate its study funding agreement for convenience. In Aurizon Network's view the risk that a study funder will change its mind over participation in a study is a risk that is more appropriately allocated to that study funder than to Aurizon Network. It is customary in commercial contracts for principals to take the risk of changing their minds about the services that they require, rather for service providers to take this risk.

Studies are relatively short-term arrangements (generally for ~12 months in duration under Aurizon Network's current project development practices) and their termination or suspension may delay the development of the associated coal supply chain. The flexibility provided by one study funder's right to terminate for convenience needs to be balanced against the adverse cost outcomes for other parties. Aurizon Network has no objection should the QCA decide that the non-terminating study funders, rather than Aurizon Network, should be required to underwrite the funding gap created as a result of a study funder terminating for convenience, even though this form of free underwriting is likely to prove as unattractive to study funders as it is to Aurizon Network.

Aurizon Network proposes that the QCA modify the termination for convenience right for a study funder within the SFA so that the right can only be exercised on a simultaneous basis by all study funders for the applicable study. If however a unilateral termination right for a study funder is to be retained, then the SFA form should be modified so that either

- the other study funders promptly commit to provide additional funding to overcome the funding gap resulting from the exit of the terminating study funder, in which case they would be required to increase their bank guarantees promptly, or
- in the absence of that funding commitment, Aurizon Network is entitled to terminate all other study funding agreements for the study concerned, with suitable rights to recover all costs of terminating the study from all study funders.

12.17.7 AN Assignment

The QCA has varied clause 19.2 of the SFA to restrict Aurizon Network's ability to assign the SFA by requiring the study funders' consent to that assignment. Aurizon Network disagrees with this position.

Aurizon Network has many agreements (entered under regulatory approved templates and otherwise) which deal with obligations around the operation of the below-rail business comprising the CQCR. An inclusion of assignment clauses which require consent from counterparties would unreasonably fetter Aurizon Network's ability to manage its commercial affairs. The assignment clause proposed by Aurizon Network already included an obligation on the assignee to covenant to be bound by and perform obligations under the SFA.

⁹⁴ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, Section 12.3.3, p. 260.

12.17.8 Capacity review process

Clause 11.5(f) of the form of the SFA in the UT4 draft decision provides that a capacity reviewer may conduct a capacity review upon a completed pre-feasibility or feasibility study. If that review indicates that the capacity modelling is incorrect, Aurizon Network must revise the study report. Aurizon Network disagrees with the QCA position and has five significant concerns.

- Aurizon Network considers that the capacity reviewer should be required to comply with the capacity review parameters described in Part 10.6.2 of this submission. There is a need for a consistent approach toward the conduct of capacity reviews on matters such as the required level of certainty and allowances for possessions.
- The SFA provides that the capacity reviewer's determination is manifestly correct if it differs to any extent and for any reason from Aurizon Network's own assessment. As Aurizon Network considers that as a result of its systems, personnel and experience, it is better placed and equipped to assess expected capacity outcomes than any external reviewer, it is inappropriate to conclude that the external capacity reviewer's assessment would automatically be superior. Should the capacity reviewer reach a different conclusion from Aurizon Network, the first step should be engagement between the capacity experts at Aurizon Network and those of the capacity reviewer to seek to close the gap.
- If the capacity reviewer concludes that there is insufficient project scope, there may be significant study works required to evaluate the additional project scope to address the capacity reviewer's concerns. This may entail site investigation, engineering design of alternative or additional expansion options, environment approvals and other location specific investigation. As a practical matter it would be impossible for Aurizon Network to conduct these works and submit a revised study report within 10 business days. If the capacity reviewer concludes that there is excessive project scope, then the task of revising the study report is more manageable. However there will still need to be changes to the budget, the program, the capacity analysis and various study plans in the study report. In accordance with good project investigation practice, each study report will be a controlled document, requiring a structured review and approval process for all changes from the previous version before the next version is released to the study funders. Aurizon Network does not consider that a resubmission deadline of 10 business days is appropriate even if project scope is to be removed.
- If the capacity reviewer considers that project scope can be removed from a study report, and that change is then made to the study, Aurizon Network will not accept risk over any shortfall arising, to the extent of the removed project scope. Accordingly the reference point for any subsequent assessment of an 'AN Shortfall' (as discussed further in Part 12.14.2 of this submission) would in this instance be the project scope proposed by Aurizon Network in its original study report, and not the project scope included by Aurizon Network in the replacement study report as a result of the capacity reviewer's view that the project scope proposed by Aurizon Network is excessive.
- Aurizon Network is concerned that the capacity review process proposed by the QCA could result in material delays after the issue of the original study report. Aurizon Network considers that any capacity review may be conducted well in advance of the completion of that report. This review could commence soon after Aurizon Network has applied its own capacity analysis and, with inputs from other technical functions, determined the optimal project scope. This occurs early in the study process.

Aurizon Network proposes that the capacity review provisions in the SFA should follow the principles set out below:

- Under each SFA Aurizon Network will issue an interim study report that provides a capacity analysis of the proposed project scope that forms part of that SFA's study scope (for clarity, this interim study report would be provided whether or not the capacity review provisions of the SFA are utilised by the study funders)
- Following receipt of that interim study report, all of the study funders may elect to arrange the conduct of a capacity review. The rest of these principles assume that they elect to do so.
- The nominated capacity reviewer must apply capacity review parameters that are similar to those set out in Part 10.6.2 of this submission
- If the capacity reviewer opines in its initial review that the proposed project scope will result in a capacity outcome that is materially different from the capacity outcome expected by Aurizon Network in its interim

report, the capacity reviewer and Aurizon Network shall engage at the technical expert level to reconcile their differences as much as possible. (If the capacity reviewer's opinion in its initial review that the capacity outcome will not be materially different from the capacity outcome expected by Aurizon Network, then the capacity review process will terminate at this point.)

- Following this reconciliation process, Aurizon Network, to the extent that it agrees with the capacity reviewer that there is too much or too little project scope, will promptly revise its interim study report accordingly and issue that revised report to study funders as soon as practicable. To the extent that the study scope needs to be amended to give effect to that change in project scope, Aurizon Network will notify the study funders of the modified study scope, which will apply under the study funding agreements from the date of notification (i.e. dispute resolution will not apply). If Aurizon Network does not agree with the capacity reviewer that there is too much or too little project scope, it will promptly inform the study funders accordingly.
- Following Aurizon Network's response to its initial review, the capacity reviewer shall issue a follow-up review that takes into account that response
- If all study funders elect to modify the SFA's study scope in accordance with the follow-up review, Aurizon Network will accept that election (i.e. dispute resolution will not apply).
- If the SFA's study scope is modified either by Aurizon Network as part of its response to the initial review or by the study funders following their receipt of the follow-up review, the SFA parties should negotiate suitable changes to the target cost and target date. If these changes are not agreed, the SFA's dispute resolution mechanism would apply.
- The capacity reviewer should provide Aurizon Network with a copy of each report that it submits to its clients

12.17.9 Modification of cost recovery arrangements to provide for contractor engagement

The QCA's definition of a feasibility study, which includes among other things the requirement for a project cost estimate within a +/-10% margin, could require Aurizon Network to incur costs that cannot be recovered under the form of the SFA in the draft decision. This outcome would arise because a project cost estimate to that level of accuracy can only be achieved following a process of commercial and technical engagement with construction service providers for some or all of the major components of the expansion, such as earthworks and track. This process of engagement could take the form of tendering or 'early contractor involvement'.

Both tendering and early contractor involvement would require the contractors involved to incur considerable expense. Given that the expansion project may not proceed for reasons unrelated to the contractors, it is unreasonable to expect that they should bear their bid, or early contractor involvement, costs without receiving some compensation from the principal. Market practice is that principals who seek pricing from contractors prior to commitment of the underlying project generally offer compensation to those contractors that is payable should that project not proceed. However the form of the SFA in the draft decision does not allow for Aurizon Network to recover from the feasibility study funders any payments by Aurizon Network to construction contractors as compensation. This is because this particular type of study cost was not envisaged when Aurizon Network first drafted the SFA.

Although Aurizon Network does not agree with the QCA that a feasibility study should always require a depth of study sufficient to prepare a project cost estimate to a +/-10% margin, Aurizon Network does leave open in Part 12.6.3 of this submission the potential for a study to a very high level of rigour to be conducted at the election of access seekers or Aurizon Network.

Aurizon Network proposes the modification of the form of the SFA so that it provides for Aurizon Network to recover from study funders Aurizon Network's costs in providing compensation to construction contractors as discussed above.

13 Network Management Principles

13.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
Our Draft Decision is to refuse to approve Aurizon Network's NMP included in Schedule G of the 2014 DAU. We would approve NMP with amendments to increase transparency and availability of train plans as set out in the marked changes to this Draft Decision.	13.1	Agree with amendment
Our Draft Decision is to refuse to approve Aurizon Network's NMP included in Schedule G of the 2014 DAU. We would approve NMP with amendments to the STP to: <ul style="list-style-type: none"> (a) include a deadline to submit initial STP (b) specify to whom the STP will be submitted each year (c) include additional details in the contents of the STP (d) include an obligation for an annual preparation of the STP by coal system and in aggregate (e) to provide for the QCA to require the STP be reviewed by an independent expert and audited as set out in the marked changes attached to this Draft Decision. 	13.2	Agree with amendment
Our Draft Decision is to refuse to approve Aurizon Network's NMP included in Schedule G of the 2014 DAU. We would approve NMP with to the MTP, to: <ul style="list-style-type: none"> (a) require the MTP to cover a period of at least one month (b) include the factors considered in preparing the MTP (c) specify all types of traffics and train paths to be identified on the MTP (d) set out which assumptions were made by Aurizon Network in preparing the MTP (e) publish the MTP on Aurizon's website every month as set out in the marked changes to Schedule G (cl. 3) attached to this Draft Decision. 	13.3	Agree with amendment
Our Draft Decision is to refuse to approve Aurizon Network's NMP included in Schedule G of the 2014 DAU. We would approve NMP with amendments to the ITP to specify the train paths to be identified and to whom copies should be provided, as set out in the marked changes to this Draft Decision.	13.4	Agree with amendment
Our Draft Decision is to refuse to approve Aurizon Network's proposed NMP included in Schedule G of the 2014 DAU. We would approve NMP with amendments to provide full transparency of train paths allocated to maintenance as set out in the marked changes to this Draft Decision.	13.5	Agree with amendment

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's NMP included in Schedule G of the 2014 DAU. We would approve NMP with amendments to:</p> <ul style="list-style-type: none"> (a) increase availability of information to end users and access holders' customers (b) publish a monthly aggregate TSE reconciliation report by system (c) provide additional information in TSE reconciliation report <p>as set out in the marked changes attached to this Draft Decision.</p>	13.6	Agree with amendment
<p>Our Draft Decision is to refuse to approve clause 7.6 of the 2014 DAU. We would approve a clause 7A.2 with amendments to:</p> <ul style="list-style-type: none"> (a) require Aurizon Network to develop initial system rules within set timelines (b) set out a process for the QCA's approval of system rules (c) require Aurizon Network to review system rules at least annually or if certain triggers are met (d) require Aurizon Network to notify access holders and the QCA of the outcomes of a system rules review as set out in the marked changes attached to this Draft Decision. 	13.7	<p>Disagree</p> <p>Alternative to remove system rules and revert to including this detail within Schedule G</p>

13.2 Summary of Aurizon Network's Response

Aurizon Network supports the QCA's intent of ensuring transparency in the application of the Network Management Principles, however, we do have concerns about the workability of some of the QCA's proposals.

For example, Aurizon Network considers that it should not bear the onus of ensuring Access Holders agree to the disclosure of their confidential information to other Access Holders, Access Seekers and the general public. This would entail a laborious process which will frustrate the timely provision of information, and the ultimate goal of greater transparency. Recent attempts by Aurizon Network to share information among access holders proved to be highly time consuming and eventually unsuccessful.

Furthermore, some changes proposed by the QCA are not agreed as they have the real potential to constrain Aurizon Network's capacity to meet our responsibility for efficient operation of the CQCR Network. For example, Aurizon Network reserves the right to adjust the Daily Train Plan after its finalisation to maintain its prerogative to facilitate efficient operations on any day.

The requirement to take direction from Supply Chain Groups on the determination of Train Paths Efficiency similarly undermines Aurizon Networks authority to manage the infrastructure service efficiently. What the Supply Chain wants and what is efficient can be two different things.

13.3 Available Capacity

Aurizon Network has outlined its concerns regarding the provision of an indicative Available Capacity in section 10.5 of this response document. In essence, the best way for a customer to understand the amount of available capacity there is on the Aurizon Network infrastructure is to become an access seeker through the negotiations process provided in Part 4 of the 2014 DAU. This process allows the individual requirements of access seekers to be modelled by Aurizon Network to assess their specific capacity needs and where necessary, implement any identified efficiency to facilitate that demand.

The QCA has requested the identification of available Train Paths on Train Plans, in the form of a System Path (or origin to destination “round trip path”). Aurizon Network could make assumptions about potential demand which might arise, for example by extrapolating existing contracts up to the point where 100% of capacity is assumed. Aurizon Network doubts the value of this exercise for potential access seekers, however, as it may not correspond with the particular service which they are wishing to operate. The best way for access seekers to get an understanding of whether there is capacity available for their service is to submit an Access Request via the Part 4 process, and Aurizon Network does not agree to include speculation on available capacity in any of the four levels of Train Plans.

13.4 Transparency and content of Train Plans

The QCA has outlined in its draft decision the requirement for full disclosure of the STP, MTP, ITP and DTP to Access Holders and Access Seekers in order to improve transparency and accountability and to increase information generally available to improve supply chain coordination. In addition, the QCA has proposed amendments to address the content of Train Plans, including:

- Revealing where there may be some spare capacity which can be used, thus promoting a more efficient use of the network
- Improve information symmetry among access holders and stimulate competition in above rail markets
- Provide sufficient information to assist with supply chain coordination and
- Demonstrate Aurizon Network has sufficient capacity in each system to meet contracted entitlements⁹⁵

Aurizon agrees in principle with the provision of un-redacted train plans to all relevant access holders. However, Aurizon Network has a number of concerns about the workability of this proposal.

For example, the QCA in its draft decision notes that “*any confidentiality agreement modelled in UT1, UT2 or UT3 standard agreements will already permit such disclosures to be made by Aurizon Network*”⁹⁶. While this may be accurate, Aurizon Network believes that on execution of these access agreements, the Access Holder would not have anticipated that it would be signing up for the level of transparency now being proposed by the QCA. Hence, including an obligation at this point changes the risk profile which Access Holders accepted at the time of execution of their agreements. As such, Aurizon Network expects Access Holders to have concerns with the proposal.

Outlined below are the key concerns and suggested amendments to the QCA’s positions in regards to transparency and content of Train Plans.

13.4.1 Strategic Train Plan

(a) include a deadline to submit initial STP

Aurizon Network agrees to the requirement for the development of the initial Strategic Train Plan. However, as the Strategic Train Plan is an output of a capacity assessment, the timeframe of 3 months does not align with the requirement to complete the baseline capacity assessment within 6 months after the commencement of UT4⁹⁷.

Aurizon Network proposes aligning the timeframe with the baseline capacity assessment.

⁹⁵ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, p. 284.

⁹⁶ Ibid.

⁹⁷ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, p. 203.

(b) specify to whom the STP will be submitted each year

The QCA requires the STP to be provided in full to the QCA and all Access Holders and to Access Seekers who request it. Aurizon Network supports the QCA's position on transparency of the STP for the QCA and Access Holders, and will facilitate the provision of these documents. Aurizon Network nevertheless considers it should not bear the onus of ensuring Access Holders agree to the disclosure of their confidential information to other Access Holders and Access Seekers. Aurizon Network would also like to ensure the provision of these documents is not in violation of any obligations on Aurizon Network under the Ringfencing provisions in Part 3 of the DAU.

(c) include additional details in the contents of the STP

Aurizon Network agrees there is benefit for customers of more clearly specifying the content of the STP. There are particular aspects which have been requested by the QCA that Aurizon Network is currently unable to accommodate, however.

In developing the STP to determine whether there will be sufficient capacity to meet Train Service Entitlements for the period, Aurizon Network will make an allowance for Operational Constraints using assumptions based on past operating experience. . This Operational Constraints allowance cannot be presented as an explicit output, as it really is just a modelling adjustment which accounts for random events which cannot be known in advance (for example, speed restrictions).

As addressed above in 0, Aurizon Network does not see the benefit of including in the STP an estimate of available capacity.

The QCA has proposed that Aurizon Network must outline in the STP the material assumptions made during its preparation. This would seem to duplicate the process of consultation with customers and the website publication of the System Operating Parameters which are generally used in the development of the STP.

(d) include an obligation for an annual preparation of the STP by coal system and in aggregate

Aurizon Network supports this position.

(e) to provide for the QCA to require the STP be reviewed by an independent expert and audited as set out in the marked changes attached to this Draft Decision.

Aurizon Network supports the idea of having an independent party review the STP to ensure the accuracy of its development. However, given the potential implications for Aurizon Network's business, it does not agree to be obliged to accept, unquestioningly, amendments to the STP proposed by the independent expert. Aurizon Network has proposed a number of considerations which any external reviewer should adhere to when completing a review of Aurizon Network's capacity outcomes at [section 10.5](#) of this response. These parameters should also be applied to a review of the STP.

Similar to Aurizon Network's concerns in general about the provision of a capacity guarantee and rectification of a capacity deficit (refer to [section 10.6](#) of this response), the imposition of an outcome from an external party represents an uncompensated risk on Aurizon Network. This is particularly concerning if the reason for there being a capacity deficit is not in the control of Aurizon Network.

In addition, Aurizon Network believes the QCA should not have the power to complete an audit of the STP when it has already been reviewed by an independent expert. Having two processes to scrutinise the same STP would be an inefficient use of resources and add additional costs to the business.

13.4.2 Master Train Plan

(a) require the MTP to cover a period of at least one month

Aurizon Network supports this position.

(b) include the factors considered in preparing the MTP

In preparing the MTP, the QCA requires Aurizon Network to consider a number of factors. Where possible, Aurizon Network supports the articulation of these factors to aid transparency and understanding for customers. However, Aurizon Network does not agree with the inclusion of the obligation to give consideration to “any planned system outages”⁹⁸ as this goes beyond what Aurizon Network may know at the time of preparing the MTP. While in practice Aurizon Network does consider supply chain matters, including outages for loading and unloading terminals, their inclusion should not be governed by the Access Undertaking. Aurizon Network agrees the MTP will display any known ‘below rail’ planned possessions, but beyond that Aurizon Network considers the inclusion of this obligation is in conflict with the purpose of the MTP, which is to “*demonstrate how Aurizon Network plans to deliver Train Service Entitlements in each Coal System...*”⁹⁹.

Aurizon Network therefore agrees to the inclusion of the new factors for consideration except for planned system outages.

(c) specify all types of traffics and train paths to be identified on the MTP

Aurizon Network supports this position in principle. As discussed in 0, Aurizon Network does not see any benefit in including system paths which remain available after scheduling all contracted services, on the MTP.

The QCA has requested that the MTP be in the form of a timetable. Aurizon Network would like to understand what the QCA considers to be included in a timetable prior to providing any additional comments.

(d) set out which assumptions were made by Aurizon Network in preparing the MTP

Aurizon Network supports this position.

(e) publish the MTP on Aurizon's website every month as set out in the marked changes to Schedule G (cl. 3) attached to this Draft Decision.

The QCA requires the MTP to be published on Aurizon’s website every month. Aurizon Network supports the QCA’s position on transparency of the MTP, and will facilitate the provision of these documents. However, Aurizon Network considers it should not bear the onus of ensuring Access Holders agree to the disclosure of their confidential information to other Access Holders, Access Seekers and the general public. Aurizon Network would also like to ensure the publication of the MTP on the website is not in violation of any obligations on Aurizon Network under the Ringfencing provisions in Part 3 of the DAU.

13.4.3 Intermediate Train Plan

(a) QCA would approve NMP with amendments required to the ITP to specify the train paths to be identified and to whom copies should be provided, as set out in the marked changes to this Draft Decision.

As discussed previously in section 0, Aurizon Network does not see any benefit in providing for available system paths on any Train Plans, including the ITP.

Aurizon Network already displays available mainline paths connected to an unloading terminal slot. By displaying this information it enables Access Holders to contact Aurizon Network to negotiate the scheduling of additional Train Services.

The QCA requires the ITP to be provided to all Access Holders and their customers. Aurizon Network supports the QCA’s position on transparency of the ITP, and will facilitate the provision of these documents. However, Aurizon Network considers it should not bear the onus of ensuring Access Holders agree to the disclosure of their confidential information to other Access Holders, and their customers. Aurizon Network would also like to ensure

⁹⁸ QCA, 2015, Draft Decision: Draft Access Undertaking, Schedule G, Clause 3.1(c)(ii).

⁹⁹ QCA, 2015, Draft Decision: Draft Access Undertaking, Schedule G, Clause 3.1(a).

the distribution of the ITP is not in violation of any obligations on Aurizon Network under the Ringfencing provisions in Part 3 of the DAU.

(b) QCA would approve NMP with amendments to provide full transparency of train paths allocated to maintenance as set out in the marked changes to this Draft Decision.

The QCA proposes that the ITP should specify all Train Paths allocated to maintenance. Aurizon Network supports this, and it currently provides the allocated maintenance paths to access holders via the Scheduling Summary report. The QCA highlights that currently the method of sharing the ITP with Access Holders is via the Network Operations Pathing Planner (NOPP) software¹⁰⁰. In order to allow the maintenance paths to be displayed via the NOPP, Aurizon Network will need to undertake IT changes to amend both the NOPP and the ViziRail software (as required) to enable this.

(c) Contested Train Path decision making process

The QCA has proposed a number of changes which impact on the application of the Contested Train Path (CTP) decision making process. These changes include:

- 1) removing the ability for an Access Holder to “pool” Train Service Entitlements within a coal system¹⁰¹.
- 2) Providing for a Supply Chain Group to dictate scheduling of Train Services

(1) The pooling concept was introduced through the System Rules consultation process which Aurizon Network conducted with customers, specifically those in the Goonyella System. The intention of Pooled Entitlements is to enable an Access Holder to manage variability in railings from week to week. Without Pooled Entitlements, if an Access Holder places Train Orders which exceed the indicative weekly Train Service Entitlement for that Train Service, the extra services would be treated as ad hoc and would be given a lower level of priority in the scheduling process. With the Pooled Entitlement, as long as the Train Orders requested by the Access Holder fall within the total Train Service Entitlement, by pooling they are able to schedule services as required by customers and not be disadvantaged.

Aurizon Network notes that Asciano supports the concept of pooling Train Service Entitlements¹⁰² and the benefits this has for Access Holders in improving the flexible use of Access Rights.

Aurizon Network is unclear as to why the QCA would remove this flexible arrangement which Stakeholders support, as there has been no reference by any of these stakeholders to remove this process. Therefore Aurizon Network disagrees with the removal of Pooled Entitlements and would like this reinstated.

(2) The QCA has proposed the addition of a new third step in determining allocation of Train Paths where multiple Access Holders are seeking to use the particular path. This provides that where a Supply Chain Group has been established to manage or oversee Supply Chain logistics for multiple Access Holders, Aurizon Network should allocate the Train Path in accordance with the direction of the Supply Chain Group¹⁰³.

Aurizon Network does not support this proposal for a number of reasons, including:

- The Supply Chain Group will not look after all Access Holders’ interests, which would result in an unfair bias to Access Holders who are members of that Supply Chain Group. For example, Goonyella may have a Supply Chain Group for Dalrymple Bay Coal Terminal that is not active for Train Services which travel to Hay Point Services Coal Terminal
- If there are multiple Supply Chain Groups within a Coal System which have competing objectives, how does Aurizon Network then prioritise between the competing Supply Chain Group directives?
- Aurizon Network may be held liable under an Access Agreement with an Access Holder for not making sufficient Train Paths available during the month. Where Aurizon Network is not in control

¹⁰⁰ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, Table 78, p. 336..

¹⁰¹ QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Schedule G, Clause 8.2(c)(iii) and deleted Clause 8.3(a)(iv).

¹⁰² Asciano, 2015, Response to the QCA in Relation to an Aurizon Network Discussion Paper on a Potential Short Term Transfers Mechanism.

¹⁰³ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 8.3(a)(iii).

of the allocation of Train Paths to Access Holders it should not then be held liable for non-provision of access.

- Moreover, Aurizon Network has no contractual arrangements with a supply chain group. If the supply chain acts in a discriminatory way, an Access Holder could then lodge a dispute with AN and it could be liable under the UHCD.

Aurizon Network disagrees with the inclusion of the Supply Chain Group in the CTP principles, as it constrains our capacity to meet our responsibility for efficient operation of the Network, and would like this removed.

13.4.4 Daily Train Plan

The QCA has removed from the draft 2014 DAU provisions which allow for variations to be made to the DTP following its finalisation where these variations can be made without impact to other Access Holders¹⁰⁴. Variations to the DTP occur due to variations and events during the day of operations such as crewing issues and delays.

Aurizon Network cannot identify any rationale for removal of these provisions. These are long standing provisions and provide both Aurizon Network and Access Holders with additional flexibility to amend Train Services prior to the actual commencement of the service.

Aurizon Network disagrees with the removal of our right to make variations beyond the finalisation of the DTP, as it constrains our capacity to meet our responsibility for efficient operation of the Network, and would like this reinstated.

13.4.5 Day of Operations

The QCA has included a new objective in the Network Control Principles which requires Aurizon Network to take directions from the unloading terminal when determining train sequencing into that terminal¹⁰⁵. Aurizon Network is concerned that such a regimented framework will reduce the flexibility of Aurizon Network to efficiently manage its operations for the benefit of all access holders.

In practice, Aurizon Network will consult with the unloading terminal and give consideration to the requirement of the terminal for the sequence of trains. However this is not the only consideration in making that determination. For example:

- rail operators may be resource constrained and not be able to adjust a train's running to meet a terminal's preferred sequencing
- re-sequencing a train may cause additional congestion on the network and result in flow on impacts of upstream components of the supply chain

Aurizon Network considers current procedures in the day of operations to manage "out of course" running and provide for recovery to the DTP are sufficient to allow for the unloading facility to be involved in decision making.

Currently four-hourly hook ups occur between all operators and attending ports. This process allows Aurizon Network to consider the requirements of each participant in addition to any other unload terminals. For example Hay Point and DBCT share the same Network Capacity to meet their preferred sequencing. Accepting direction from one terminal on sequencing may affect another unload terminal.

Aurizon Network therefore believes that the new clause should be removed, or if not removed amended such that the requirement from the unloading facility is only a consideration, not a direction.

The Network Control Principles provides that Aurizon Network may depart from the Traffic Management Decision Making Matrix (TMDMM) in a number of circumstances, including to restore the network to normal operations. The QCA has proposed placing a time limit of 24 hours on the departure from the TMDMM¹⁰⁶.

¹⁰⁴ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, deleted Clause 5.5(b).

¹⁰⁵ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 7.3(a)(v).

¹⁰⁶ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 7.4(c)iv(B).

Aurizon Network considers the inclusion of this arbitrary timeframe is not in the best interests of the Supply Chain. Depending on the nature of an incident on the network, (for example, a cyclone) the timeframe for recovery needs to be considered on a case by case basis. In some instances, Aurizon Network may not be able to commence network recovery within the 24 hour period as it needs to wait for railway operators to carry out actions prior to it being able to continue. Given that Aurizon Network already has obligations to recover the network as soon as reasonably practicable, the addition of an arbitrary timeframe for departure from the TMDMM constitutes an unnecessary and inflexible burden.

Aurizon Network would therefore request the timeframe to be removed.

13.5 Reporting

(a) increase availability of information to end users and access holders' customers

The QCA requires the Monthly Train Service Entitlement notice and the TSE Reconciliation Report to be provided to all Access Holders and their customers. Aurizon Network supports the QCA's position on transparency of these reports, and will facilitate the provision of these documents. However, Aurizon Network considers it should not bear the onus of ensuring Access Holders agree to the disclosure of their confidential information to other Access Holders, and their customers. Aurizon Network would also like to ensure the distribution of these reports is not in violation of any obligations on Aurizon Network under the Ringfencing provisions in Part 3 of the DAU.

(b) publish a monthly aggregate TSE reconciliation report by system

Aurizon Network proposed the Monthly Train Service Entitlement (TSE) notice with the intention of improving transparency for Access Holders with regards to utilisation of TSEs against plan¹⁰⁷. While the QCA's Draft Decision refers to this information being provided in the monthly aggregate TSE reconciliation reports, we note that the redrafted Undertaking (correctly) identified the appropriate report as the monthly TSE notice. Aurizon Network supports the drafting, (as opposed to the Draft Decision) as it identifies the appropriate vehicle for this information.¹⁰⁸

The QCA has included reporting of planned services in the ITP and DTP in relation to each TSE on a monthly basis. Completing this report in particular for the DTP will be resource intensive, and may require changes to IT systems to facilitate the compilation of data to be included in the report. Given that an Access Holder's TSEs are a monthly entitlement and the increased resource requirements this additional reporting will entail, Aurizon Network sees limited benefit for the Access Holder of receiving a report which considers the ITP and DTP. However, if this is required, Aurizon Network will facilitate the compilation of these reports, under the assumption that the additional resource requirements will be recognised in the MAR.

To better align the Monthly TSE notice with the content of the MTP, ITP and DTP which has been proposed by the QCA, Aurizon Network proposes that rather than reporting on the number of Train Paths, this report refers to the number of System Paths for all the measures included in the report.

(c) provide additional information in TSE reconciliation report

(1) Monthly TSE notice

The QCA has proposed inclusion in the Monthly TSE reconciliation report the number of cancellations and reasons for cancellations. Determination of the reasons for cancellations each month is an iterative process which involves consultation with Access Holders to confirm the reasons for cancellation e.g. mine, port, above rail, below rail. This information is already shared with Access Holders. Aurizon Network therefore agrees to include this information in the Monthly TSE notice, on the basis that the timeframe required to distribute the notice to customers allows for the consultation process at month end to be finalised prior to issuing the notice.

¹⁰⁷ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 7.6.

¹⁰⁸ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 8.2.

The QCA has requested that the Monthly TSE notice contain information regarding year to date TSE position and projection to Year end¹⁰⁹. Aurizon Network can easily provide the year to date TSE position, and currently does this through a number of different channels for Access Holders. Aurizon Network would have difficulty providing a projection to Year end, however. To complete this, without being provided sufficient information from the Access Holder regarding its forecast railings to year end, Aurizon Network would have to make assumptions about how it thinks the Access Holder will use its TSE in the future. Aurizon Network does not see the benefit in providing this speculative information. The Access Holder is in a better position to determine this for themselves.

(2) TSE Reconciliation Report

As discussed above in section 0, the QCA has proposed the removal of the Pooled Entitlements concept from the CTP principles¹¹⁰. Aurizon Network considers this concept should be reinstated. However if it is not Aurizon Network considers the content of the TSE reconciliation report should be amended to remove the Pooled Entitlement calculations¹¹¹.

If the Pooled Entitlement concept is retained, and the provisions in the TSE reconciliation report therefore apply, Aurizon Network disagrees with the changes proposed by the QCA to remove the references to Coal Systems and Mainline Paths. While Aurizon network agrees that there should be flexibility for Access Holders in using their TSEs, this needs to be done in a way that considers the network's capacity and ability to deliver this flexibility. The Coal System and Mainline Paths concepts ensure there are no negative capacity impacts on the below rail network.

(d) Application of DTP to performance targets

The QCA proposed that the DTP will be used as base information for performance monitoring including under quarterly reports in accordance with Part 10¹¹². Aurizon Network assumes this would be for the monthly reports, which is proposed by the QCA to replace the quarterly report. As discussed in section 5.7 there are currently significant IT system constraints on our ability to audit reports compiled on a monthly basis, and the detail of investigations and incidents may not be complete. In addition, Aurizon Network provides operational reporting to access holders on a monthly basis, which from a timeliness perspective is more useful than the proposed regulatory reports. Our December 2014 submission on MAR did not include an allowance for any costs arising from the introduction of new IT capacity to accommodate this proposed requirement.

13.6 System Rules governance

When Aurizon Network proposed the development of system rules under UT3, one of the benefits was to be to enable greater flexibility for application of the Network Management Principles to suit the relevant supply chain. Part of this flexibility related to an ability to update the system rules in a timely manner to reflect changes in operations of the coal system. The process of having system rules approved under UT3 has been drawn out, and it is Aurizon Network understanding that a Draft Decision on the Northern Bowne Basin System rules will not be forthcoming until June 2015.

The QCA has proposed the inclusion of a greater level of detail into the Network Management Principles contained in Schedule G of the 2014 DAU. This includes for example:

- Frequency of and content for the MTP
- Calculation of TSEs
- Reporting requirements
- Distribution of Train Plans

¹⁰⁹ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 7.6(a)(vi).

¹¹⁰ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, deleted Clause 8.3(a)(iv)

¹¹¹ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 8.2(c)(iii).

¹¹² QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 5.3.

Much of this information was originally intended to be included in the system rules documents. The value in maintaining a separate document has therefore diminished under UT4.

On top of this the proposal to have all system rules documents approved by the QCA will remove some of the flexibility and responsiveness that was anticipated by having these processes contained outside of the Access Undertaking. In addition, the length of time it takes the QCA to make decisions on these matters adds additional uncertainty and regulatory risks to Aurizon Network operations and its potential costs that may not be included in any operating allowances.

Aurizon Network understands and supports the desire of stakeholders and the QCA to have these processes overseen by the QCA.

Given the change in positioning and purpose for the system rules, Aurizon Network proposes to remove the obligation to have system rules, and as an alternative to include the relevant details which would be provided in the system rules into the Network Management Principles. This achieves the following:

- One source of truth for scheduling and operation of Train Services
- Regulatory oversight of the Network Management Principles and scheduling processes
- Removes the possibility for conflicts between the Network Management Principles and system rules
- Use of existing DAAU process with the QCA where changes are proposed to the Network Management Principles

In order to give effect to the principles regarding dispute resolution currently contained in the approved Capricornia System Rules, Aurizon Network will seek to ensure specific dispute principles are included in Schedule G to resolve any specific scheduling concerns.

Aurizon Network therefore does not accept the changes proposed by the QCA to the 2014 DAU¹¹³, and alternatively proposes to delete these provisions and amend Schedule G to contain the information out of the system rules.

13.7 Matters not addressed in the QCA's draft decision

In the QCA's mark-up of the 2014 DAU, it has proposed amendments relating to the ability to amend both the MTP and the DTP and the process applied for these amendments¹¹⁴.

For the MTP, for example, it appears the QCA has removed the ability for Aurizon Network to include changes in the MTP to reflect amendments to contractual entitlements without consultation with all parties even where there is no impact on parties. Aurizon Network believes these provisions diverge from the objective of efficient operation of the network. In addition, the QCA has proposed that any changes made to the MTP must be agreed in writing by all parties. Current processes between Aurizon Network and access holders allows for amendments to be agreed verbally through various operational forums. Changing this process to require in writing agreements will add administrative burden and costs to the scheduling process.

Similarly, the QCA has removed provisions relating to changes to the DTP after finalisation of the plan but prior to commencement of services. The QCA has not provided any justification for this recommendation. Aurizon Network believes it is in the interest of efficiency of operation of the network to be able to vary planning documents to suit requests of an access holder where they do not have a negative impact on other users.

¹¹³ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Part 7A, Clause 7A.2.

¹¹⁴ QCA, 2015, Draft Decision: Mark-up Draft Access Undertaking, Schedule G, Clause 3.2 and 5.5.

14 Regulatory Asset Base and Customer Voting

14.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposal in respect of capital expenditure approval process for the 2014 DAU.</p> <p>Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU in the manner indicated in our proposed draft to be consistent with the proposals outlined in Table 66 and as set up in our amended drafting of the 2014 DAU's Schedule F.</p>	14.1	<p>Agree.</p> <p>Aurizon Network wishes to discuss the proposed capital expenditure review process further with the QCA prior to and following the Final Decision</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposal to remove demand deterioration in the 2014 DAU as a reason for adjusting the RAB. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows, in the manner we have indicated in our proposed draft to require Aurizon Network to:</p> <ul style="list-style-type: none"> (a) reinstate demand deterioration as a reason for adjusting the RAB (b) clarify that this only applies when the QCA determines that demand deterioration is long-term and sustained. 	14.2	<p>Disagree.</p> <p>Aurizon Network wishes to discuss these matters further with the QCA prior to the Final Decision.</p>
<p>Our Draft Decision is to approve Aurizon Network's proposal to remove threat of actual bypass as a reason for adjusting the RAB.</p>	14.3	<p>Agree.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposal to remove the link between condition based assessment and the RAB in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft to the effect that:</p> <ul style="list-style-type: none"> (a) if the rail infrastructure has deteriorated by more than would have been the case had good operating practice and prudent and effective maintenance and asset replacement policies had been pursued; and (b) the QCA determines that deterioration is long term and sustained the RAB may be reduced. 	14.4	<p>Agree.</p>
<p>Our Draft Decision is not to include in the 2014 DAU a process regarding the subsequent re-setting of the RAB after it has been adjusted.</p>	14.5	<p>Disagree.</p> <p>Aurizon Network wishes to discuss this matter further with the QCA prior to the Final Decision.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's AMP proposals in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in a manner we have indicated in our proposed draft, to allow Aurizon Network to:</p> <ul style="list-style-type: none"> (a) provide the QCA with an AMP (b) request that the QCA accept the capital expenditure for asset replacement and renewal in the AMP as prudent and efficient. Any such request will be subject to the capital expenditure approval process set 	14.6	<p>Disagree.</p> <p>Aurizon Network wishes to discuss this matter further with the QCA prior to the Final Decision.</p>

Draft Decision	Reference	Aurizon Network Position
out in the undertaking.		
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposals for equity raising costs in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in a manner we have indicated in our draft to require:</p> <ul style="list-style-type: none"> (a) equity raising costs to be incurred up-front costs with little or no ongoing cost over the life of the asset (b) equity raising costs to be prudent and efficient in terms of investment in the Rail Infrastructure (c) the assessment of whether equity raising costs should be included in the RAB to be undertaken on an historic basis, to take place at the end of a regulatory period and to adopt a case-by-case approach (d) the assessment to apply to both Aurizon Network and other investors in Rail Infrastructure (e) any equity raising costs included in the RAB for a given regulatory period to be apportioned across the coal systems of the CQCR, in proportion to the capital expenditure incurred in each coal system for the regulatory period. 	14.7	Agree, subject to clarification of the QCA's position on a case-by-case approach including consistency of approach between Aurizon Network funded and SUFA funded investments.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed approach to asset disposals in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft to require that if Aurizon Network disposes of an asset:</p> <ul style="list-style-type: none"> (a) during a year of the regulatory period, the value of the asset recorded in the RAB will be removed from the RAB, unless Aurizon Network can demonstrate to the QCA's satisfaction that less than that amount should be removed from the regulatory asset base; in which case the amount approved by the QCA will be removed from the RAB. 	14.8	Agree.
Our Draft Decision is to include the voting process in Schedule E.	14.9	Aurizon Network agrees with this position.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed approach with respect to the purpose and application of the customer voting process in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have in our proposed draft:</p> <ul style="list-style-type: none"> (a) Aurizon Network must include a process that encompasses standard, scope, cost and the capacity implications of any capital project, rather than just scope (b) the voting proposal must be in relation to either: <ul style="list-style-type: none"> (i) the prudence and efficiency of the scope, standard and cost, and identify the capacity implications of the capital project (ii) a material change to scope, standard, cost or capacity implications of a capital project previously accepted by Interested Participants. (c) there should be a requirement that a customer vote can only take place for a capital project for which there is a completed feasibility study, the results of which have been provided to the QCA and Interested Participants (d) Aurizon Network should promptly notify the QCA if it is seeking a vote and inform the QCA of the outcome of that vote 	14.10	<ul style="list-style-type: none"> (a) Aurizon Network disagrees with this position. There should be flexibility to undertake voting on scope alone. (b)(i) Aurizon Network disagrees with this position. There should be flexibility to undertake voting on scope alone. (b)(ii) Aurizon Network disagrees with this position. There should be flexibility to undertake voting on scope alone. (c) Aurizon Network disagrees with this position. There should be flexibility to do earlier. A later vote has potential to delay projects or weaken the benefit of a vote.

Draft Decision	Reference	Aurizon Network Position
<p>(e) an access seeker (or its customer), an expansion funder or Interested Participant should have the ability to require Aurizon Network to undertake a vote for a capital project for which a feasibility study exists</p> <p>(f) if Interested Participants accept a voting proposal, Aurizon Network should promptly seek the approval of the QCA to include the relevant capital expenditure into the RAB</p> <p>(g) Aurizon Network should remove clause 8.13.2(d) of the 2014 DAU.</p>		<p>(d) Aurizon Network agrees with this position.</p> <p>(e) Aurizon Network disagrees with this position. Only funders should be able to require this.</p> <p>(f) Aurizon Network disagrees with this position. There should be flexibility of whether to seek pre approval or not.</p> <p>(g) Aurizon Network disagrees with this position as there is still a benefit to this clarity.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed approach to the identification of Interested Participants in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft to require that Aurizon Network:</p> <p>(a) should include in the definition of 'Interested Participants' customers, access holders and access seekers without customers where the proposed capital expenditure will impact on the person's contracted capacity or train paths</p> <p>(b) require any person who believes they are entitled to be an Interested Participant but has not been classified as such, to notify the QCA as well as Aurizon Network</p> <p>(c) require Aurizon Network should promptly notify the person and the QCA as to whether or not they will be treated as an Interested Participant.</p>	14.11	<p>(a) Aurizon Network disagrees with this position. Expanding the network does not impact on any existing contract or the capacity included in those contracts.</p> <p>(b) Aurizon Network agrees with this position.</p> <p>(c) Aurizon Network agrees with this position.</p>
<p>Our Draft Decision is to accept Aurizon Network's proposed approach to the identification of Interested Participants voting rights, subject to minor amendments.</p>	14.12	Aurizon Network agrees with this position.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed approach to the voting acceptance process in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft to:</p> <p>(a) delete of clauses 8.13.5(d),(f) and (g) of the 2014 DAU</p> <p>(b) require that if an Interested Participant votes 'no' it must provide reasons for that vote in sufficient detail that the QCA may understand its reasons</p> <p>(c) require Aurizon Network, when providing information, conducting forums and engaging in discussions with Interested Participants in relation to a voting proposal at the request of Interested Participants, to adopt a 'best endeavours' approach.</p>	14.13	<p>(a) Aurizon Network disagrees with this position. There should be clarity around how votes with insufficient detail or inappropriate reasons are dealt with.</p> <p>(b) Aurizon Network agrees with this position.</p> <p>(c) Aurizon Network disagrees with this position. Aurizon Network should not be required to do whatever is sought regardless of cost.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed approach to information provision for Interested</p>	14.14	

Draft Decision	Reference	Aurizon Network Position
<p>Participants in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) Aurizon Network must make available to Interested Participants and the QCA information on the relevant capital expenditure project, including the report prepared as a result of the feasibility study for the relevant capital expenditure project</p> <p>(b) Aurizon Network may require an Interested Participant to sign a confidentiality agreement substantially in the form set out in Schedule I prior to providing information in relation to a customer vote on a voting proposal.</p>		<p>(a) Aurizon Network DISAGREES with this position. There should be flexibility to do earlier than completion of Feasibility.</p> <p>(b) Aurizon Network DISAGREES with this position. The other Interested Participants (in the QCA's wide definition) are among the parties that an access seeker is likely to not want to see confidential information which is included in the feasibility study. So an obligation not to pass it on to others does not overcome their concerns</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed approach for compliance with, and audit of, the customer voting process in the 2014 DAU. Instead, we consider it appropriate for Aurizon Network to amend the 2014 DAU as follows in the manner we have indicated in our proposed draft:</p> <p>(a) removal of clauses 8.13.7(b),(f) and (g) from the 2014 DAU</p> <p>(b) requirement for Interested Participants to notify Aurizon Network and the QCA , in writing, of any concerns regarding non-compliance with the voting process including providing reasons or other information in support of those concerns prior to the end of the voting period</p> <p>(c) requirement for Aurizon Network to take whatever action is reasonably required to comply with the customer voting process in response to such concerns</p> <p>(d) requirement for Aurizon Network to redo the voting process if the auditor identifies a flaw in the vote of Interested Participants</p> <p>(e) clarification that an accepted voting proposal that successfully passes an audit does not infer QCA "acceptance" that a capital expenditure project is prudent and efficient.</p>	14.15	<p>(a) Aurizon Network agrees with this position.</p> <p>(b) Aurizon Network agrees with this position.</p> <p>(c) Aurizon Network agrees with this position.</p> <p>(d) Aurizon Network disagrees with this position.</p> <p>(e) Aurizon Network disagrees with this position. This devalues the voting process – if the QCA is not obliged to accept its outcome, then the preapproval process is expected to be the preferred initial course of action</p>

14.2 Summary of Aurizon Network's Response

The QCA's Draft Decision is to refuse Aurizon Network's proposed capital approval process and instead propose an alternative process for assessing Aurizon Network's annual capital expenditure submission.

Aurizon Network believes that some guidance on an alternative, 'holistic' framework is appropriate to provide certainty around investment proposals and to assist with the preparation of the annual capital expenditure claim.

In view of the above, Aurizon Network accepts the Draft Decision on the basis that the test of "prudence and efficiency" is broadly equivalent to the prudence of standard, scope and cost set out in Schedule E of the 2014DAU. Aurizon Network is willing to work with the QCA, both before and after the Final Decision, to develop a new capital expenditure review process which is reasonable for both parties and balances the QCA's preference of a holistic framework with Aurizon Network's need for investment certainty.

The QCA refuses to approve Aurizon Network's proposals and instead to reinstate and modify UT3 drafting which allows the QCA to reduce the RAB value where demand has reduced. The QCA accepts Aurizon Network's

proposal to remove the threat of by-pass of the relevant RAB assets as the basis for a RAB reduction. Aurizon Network disagrees with reduction of RAB due to demand and supports removal of the threat of by-pass, as:

- these optimisation 'events' are more efficiently addressed in Schedule F of Aurizon Network's proposed 2014DAU;
- Draft Decision 14.2 raises the issue of compensation for Aurizon Network investors (in the form of a higher WACC) which is not addressed in the QCA's discussion of the Draft Decision; and
- the issue of compensation for Aurizon Network investors can be avoided by approving the proposed 2014DAU.

The 2014 DAU had proposed the removal of the link between Condition Based Assessments (CBAs) and the RAB which was introduced in the 2010AU. Aurizon Network considers that the uncertainty around a reduction of RAB is sufficiently reduced by the QCA's proposal to limit any reduction to avoidable and long-term deterioration, its endorsement of Aurizon Network's proposal for an end of term CBA and Aurizon Network's intention to submit an Asset Management Plan for QCA approval, and therefore is prepared to accept the Draft Decision.

Aurizon Network welcomes the general endorsement of the QCA and stakeholders of a separate claim for equity raising costs. As indicated in the UT4 submission, such claims are consistent with regulatory precedent including decisions by the Australian Energy Regulator (AER) and also the QCA in relation to the Dalrymple Bay Coal Terminal (DBCT). Aurizon Network seeks clarification by the QCA regarding its application of "a case-by-case approach" including achieving a consistent approach between Aurizon Network-funded and SUFA-funded investments.

The QCA refuses to approve Aurizon Network's proposed approach for the voting process, and has instead proposed its own process as Schedule E in its redrafted Undertaking. Aurizon Network disagrees with this Draft Decision as there is no basis upon which the process proposed by Aurizon Network is not appropriate, as it is designed to improve the efficiency of investment in the system and was supported by stakeholders.

It would be more efficient for the Undertaking to provide flexibility around the voting process allowing votes earlier than the point of completion of the Feasibility Study and also allowing for votes for scope, standard and costs separately or together.

The QCA's position also raises fundamental issues about the rights and obligations of various parties in the project development process. Aurizon Network would submit that it is the funder that should be deciding on whether or not to seek a vote or preapproval.

Similarly it should solely be at the election of the funder whether or not to seek pre-approval of a project after a vote has been held. The Undertaking should not prescribe this as a requirement, nor should it impose an obligation on Aurizon Network to fund a project simply because a study may find it feasible.

Furthermore, only Access Seekers engaged in a project should have a right to vote, existing Access Holders should not be afforded such a right as their interests may be advanced by impeding the development of the project.

The key benefit of the vote to a funder of a project is that it provides an option to fast track the QCA's acceptance of the project as 'prudent'. If the QCA reserves the right not to accept a positive vote, it would obviate the voting process which would be of little value to feasibility funders. Given the time pressures on a project at this stage of its analysis it would be expected that they would want Aurizon Network to bypass the voting process and seek QCA approval under Schedule E.

14.3 Capital Expenditure and Approvals Process

The QCA's Draft Decision 14.1 is to refuse Aurizon Network's proposed capital approval process and instead propose an alternative process for assessing Aurizon's annual Capital Expenditure submission.

Aurizon Network believes that some guidance on an alternative, 'holistic' framework is appropriate to provide certainty around investment proposals and to assist with the preparation of the annual capital expenditure claim.

In view of the above, Aurizon Network:

- accepts the Draft Decision on the basis that the test of “prudence and efficiency” is broadly equivalent to the prudence of standard, scope and cost set out in clauses 3, 4 and 5, Schedule E of the 2014DAU; and
- is willing to work with the QCA, both before and after the Final Decision, to develop a new capital expenditure review process which is reasonable for both parties and balances the QCA’s preference of a holistic framework with Aurizon Network’s need for investment certainty.

Until a new review process is agreed (and in particular for the FY2015 capital expenditure claim due for submission by 30 September 2015), Aurizon Network will continue to prepare its annual capital expenditure claim to address the UT3 prudence tests.

14.4 Reducing the Value of the RAB

Aurizon Network had proposed the removal of provisions relating to selected circumstances in which the value of the RAB would be adjusted downwards (RAB reductions), being where:

- demand had deteriorated to an extent that regulated tariffs on an ‘un-optimised’ asset would result in a further decline in demand; and
- there is a possibility of actual by-pass

. There were two rationales for these proposals:

1. A RAB reduction was not necessary in these circumstances, as the annual Reference Tariff variation process afforded an alternative opportunity for allowable revenues to be optimised; and
2. Schedule E did not contain provisions for the reinstatement of the RAB after it has been adjusted, in the event that the circumstances giving rise to the original reduction are no longer present (for example, if demand had recovered to a level where the original RAB value could be sustained).

Draft Decision 14.2 is to refuse to approve Aurizon Network’s proposals and instead to reinstate and modify UT3 drafting which allows the QCA to reduce the RAB value where demand has reduced. Draft Decision 14.3 is to accept Aurizon Network’s proposal to remove the threat of by-pass of the relevant RAB assets as the basis for a RAB reduction.

Aurizon Network requires clarification as to why the QCA’s intent should be different in respect of events which could be addressed via the same approach (that is, a Reference Tariff variation, either as required or annually). In both cases, it is no longer necessary to optimise RAB values as Schedule F (Part 5) provisions now exist for allowable revenues to be optimised for the circumstances described above.

Aurizon Network recognises the QCA’s proposals to clarify that any deterioration in demand must be long-term and sustained, and that the RAB reduction would be subject to the QCA Act requirements including consultation with affected stakeholders including Aurizon Network. Aurizon Network also recognises that any RAB reinstatement would be subject to the same requirements. The annual Reference Tariff variation process is already subject to the same QCA Act requirements, however. The QCA’s proposals will therefore create unnecessary complexity as an efficient alternative already exists.

In addition, reduction of the RAB due to demand deterioration also violates the regulatory principle that assets will only be optimised once when entering the RAB. Currently, Aurizon Network does not receive any compensation (either through cash flow in the form of self-insurance premium or through the regulated rate of return [WACC]) in relation to asset stranding risk. Consequently, it is unreasonable for the QCA to confirm reductions in the RAB value without considering compensation for the approach. More detailed discussion on Asset Stranding Risk is included in Appendix 1.

The QCA recognised this principle in a workshop paper on the Blackwater Electric Traction Pricing DAAU:

*The weighted average cost of capital for Aurizon Network is currently set on the assumption that assets will only be optimised once, at the time the asset enters the asset base...If the current approach is changed to allow for subsequent optimisation of the asset base, the WACC may have to be reviewed (upward).*¹¹⁵

¹¹⁵ QCA, 2013, Discussion Paper: Workshop on the Electric Infrastructure Tariff (AT5), p. 3.

While the QCA's Final Decision is to re-instate its ability to reduce the value of the RAB for demand deterioration, in doing so the QCA also needs to consider compensation for Aurizon Network investors (in the form of a higher WACC) associated with this stranding risk. Aurizon Network's UT4 proposal to remove the RAB reduction was in recognition that:

- the WACC currently does not compensate Aurizon Network for asset stranding risk; and
- the proposal provided that the same outcome (for Reference Tariffs to set at a sustainable level) to be achieved without raising investor concerns around the recovery of invested capital subject to a RAB reduction due to demand deterioration.

In conclusion, Aurizon Network disagrees with Draft Decision 14.2 and supports Draft Decision 14.3, as:

- these optimisation 'events' are more efficiently addressed in Schedule F of Aurizon Network's proposed 2014DAU;
- Draft Decision 14.2 raises the issue of compensation for Aurizon Network investors (in the form of a higher WACC) which is not addressed in the QCA's discussion of the Draft Decision; and
- the issue of compensation for Aurizon Network investors can be avoided by approving the proposed 2014DAU.

Aurizon Network wishes to discuss these matters further with the QCA prior to the Final Decision.

14.5 Re-setting the Value of the RAB

Draft Decision 14.5 is to refuse to approve Aurizon Network's proposed revised process for re-setting the value of the RAB (RAB re-settings) in circumstances where it has been reduced.

Aurizon Network acknowledges the QCA's statements that¹¹⁶:

- RAB reductions for demand deterioration are likely to be in response to specific events, and as such reduction should be reviewed adopting a case-by-case approach given the relevant circumstances at the time; and
- Aurizon Network can provide a submission to reset the value of the RAB at any time, which the QCA must consider in accordance with the QCA Act.

However, if the QCA was to support Aurizon Network's proposals with respect to RAB reductions (that is, that revenues would be optimised) then provisions around RAB re-settings would not be necessary. Consistent with this approach, re-setting allowable revenues previously optimised would be best addressed via the Reference Tariff variation process. This process would be subject to the same QCA Act requirements as for RAB reductions including consultation with affected stakeholders.

In view of the above and consistent with the response to Draft Decisions 14.2 and 14.3, Aurizon Network disagrees with the QCA's Draft Decision 14.5 on the basis that RAB reductions and RAB re-settings are best addressed via the Schedule F process for Reference Tariff variations.

If the QCA's Final Decision is to confirm Draft Decision 14.5, Aurizon Network seeks clarity around how the QCA would allow a RAB re-setting "on a case-by-case basis given the relevant circumstances at the time"¹¹⁷.

Since the commencement of UT3, asset stranding risk has become a more material issue for Aurizon Network's investors and lenders. It is also particularly relevant for potential lenders, and investors in, SUFA assets. Changes in the sustainability of selected mines, and the introduction of the SUFA process requires consideration of how optimisation will occur between assets funded by Aurizon Network and SUFA investors.

Specific issues on which clarity is required include:

¹¹⁶ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, p.312.

¹¹⁷ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, p.312.

- The specific number of years that would be considered as “long term and sustained” in testing if the demand deterioration should trigger a RAB reduction;
- The extent of demand deterioration that would trigger a RAB reduction;
- Where demand deteriorates on a branch but port capacity for the affected miner(s) on that system is re-allocated to one or more miners in another location;
- Where demand deteriorates in one system but the port capacity for the affected miners in that system is re-allocated to miners in another system;
- Where demand deteriorates in a system with Aurizon Network and SUFA assets, particularly where the cause of the relevant event is skewed towards an existing or an expansion customer; and
- Where rolling stock is re-deployed such that one system obtains an operating or price advantage at the expense of another system.

Aurizon Network believes that clarity would be best provided via an ‘objects clause’ which sets out a clear process for the basis for reduction and resetting of the value of the RAB. An ‘objects clause’ would also provide greater clarity on mitigations for stranding risk for:

- Aurizon Network assets, for which Aurizon Network is not compensated in the WACC; and
- SUFA assets.

The clause would also mitigate the risk that Aurizon Network and SUFA funders may seek compensation or mitigation outside the regulated arrangements, increasing expansion costs for new customers.

Alternatively, clarity could be provided in the QCA’s discussion on this issue in the Final Decision. The discussion would need to be sufficiently clear such that it can be relied upon for any subsequent submission on a re-setting of the value of the RAB by Aurizon Network and/or SUFA investors.

Aurizon Network wishes to discuss this matter further with the QCA prior to its Final Decision.

14.6 Condition-Based Assessment

The QCA’s Draft Decision 14.4 is to refuse to approve Aurizon Network’s proposal to remove the link between Condition Based Assessments (CBAs) and the RAB in the 2014DAU.

The 2014 DAU had proposed the removal of this link which was introduced in the UT3 period. The UT3 arrangements prescribed an annual CBA which, in practice, proved unworkable. Aurizon Network did arrange for the preparation of a CBA at the end of the UT3 period which confirmed no specific deterioration in asset condition across a range of asset classes.

Aurizon Network acknowledges the QCA’s proposal that any RAB reduction to be only to the effect that:

- asset condition has deteriorated by more than would have been the case had good operating practice and prudent and effective maintenance and asset replacement policies been pursued; and
- the QCA determines that the deterioration is long term and sustained.

Aurizon Network also notes the QCA’s endorsement of the CBA being conducted only at the end of the relevant regulatory period, and confirms its intention to submit to the QCA for approval an Asset Management Plan (refer response below to Draft Decision 14.6).

Aurizon Network considers that the QCA’s proposal, its endorsement of Aurizon Network’s proposal for an end of term CBA and Aurizon Network’s intention to submit an AMP for QCA approval to sufficiently reduce the uncertainty around the RAB reduction, and therefore is prepared to accept the Draft Decision.

14.7 Asset Management Plan

Draft Decision 14.6 is to refuse to approve Aurizon Network’s proposals for the Asset Management Plan (AMP) and instead provide revised proposals regarding the submission and acceptance of an AMP, and the impacts of an approved AMP, on the QCA’s review of capital expenditure.

Aurizon Network proposes to submit an AMP to the QCA for approval as soon as possible after the final 2014DAU is approved by the QCA. Aurizon Network is concerned however that the proposed drafting provides no guidance with regard to the review process of the submitted AMP nor allows for minor adjustments to the AMP following the QCA's approval. Aurizon Network is also concerned about the link between the drafting and the alignment between Asset Replacement and Renewals Expenditure and the QCA's approval process when that expenditure is consistent with the AMP.

Given these uncertainties, Aurizon Network disagrees with the Draft Decision and proposes that the 2014DAU proposals are approved. However, Aurizon Network is willing to discuss these concerns with the QCA and is prepared to accept the QCA's proposals if the concerns can be addressed.

14.8 Equity Raising Costs

Draft Decision 14.7 is to refuse to approve Aurizon Network's proposal for the allowance of equity raising costs.

Aurizon Network is prepared to accept the QCA's proposed amendments, represented by clause 1.4 of its mark-up of the 2014DAU, subject to clarification by the QCA regarding its application of "a case-by-case approach" including achieving a consistent approach between Aurizon Network-funded and SUFA-funded investments.

Aurizon Network welcomes the general endorsement of the QCA and stakeholders of a separate claim for equity raising costs. As indicated in the UT4 submission, such claims are consistent with regulatory precedent including decisions by the Australian Energy Regulator (AER) and also the QCA in relation to the Dalrymple Bay Coal Terminal (DBCT).

Aurizon Network's comments on each of the sub-elements of the Draft Decision are provided below.

(a) equity raising costs to be incurred up-front costs with little or no ongoing cost over the life of the asset

Aurizon Network agrees with the QCA.

(b) equity raising costs to be prudent and efficient in terms of investment in the Rail Infrastructure

Aurizon Network agrees with the QCA.

(c) the assessment of whether equity raising costs should be included in the RAB to be undertaken on a historic cost basis, to take place at the end of a regulatory period and adopt a case-by-case approach

Aurizon Network is prepared to accept the deletion of clause 1.5(b) of the 2014DAU in relation to the automatic inclusion of equity raising costs based on a pre-determined benchmark. Aurizon Network is also willing to provide a submission at the end of the relevant regulatory period claiming an amount for equity raising costs on a historic cost basis.

The claim would be:

- consistent with a standalone investor in the Rail Infrastructure
- consistent with costs allowed by the AER for other regulated businesses;
- consistent with costs allowed by the QCA with respect to DBCT; and
- reconcilable to costs incurred by the Aurizon Group.

Aurizon Network notes the QCA comments regarding the potential for Aurizon Network customers to subsidise Aurizon Group investments. It is unlikely that such subsidisation would occur if the costs allowed by the QCA are based on a prudent and efficient investment by a standalone, efficient investor and linked to regulatory precedent.

However, the costs should also be reconcilable to (but not the same as) the equity raising costs of the Aurizon Group. These costs represent the closest benchmark "in terms of investment in the Rail Infrastructure" as there is no comparable Australian public company with such an investment profile.

Aurizon Network is willing to discuss clarification of the QCA's position with respect to applying a "case-by-case approach" prior to the Final Decision. Aurizon Network requests that such clarification is also provided in the Final Decision to provide certainty for Aurizon Group lenders and investors.

(d) the assessment to apply to both Aurizon Network and other investors in Rail Infrastructure

Aurizon Network agrees with the QCA that the assessment should apply to both Aurizon Network and other investors including SUFA investors.

Aurizon Network expects that in the event that a SUFA funded asset is included in the RAB, any equity raising costs allowed will be consistent with the matters raised in the response to (c) above including costs incurred by the Aurizon Group.

As part of the discussions with the QCA around the matters raised in (c) above, Aurizon Network also wishes to discuss how the QCA will apply a case-by-case approach to SUFA funded investments in the circumstance where a funding structure is established which is materially different to the structure deemed prudent and efficient for Aurizon Network investments.

- (e) *any equity raising costs included in the RAB for a given regulatory period to be apportioned across the coal systems of the CQCR, in proportion to the capital expenditure incurred in each coal system for the regulatory period*

Aurizon Network agrees with the QCA that approved costs be apportioned across the CQCR coal systems in proportion to the capital expenditure incurred for the regulatory period.

Aurizon Network assumes that “capital expenditure incurred” is consistent with the capital expenditure approved by the QCA for the relevant period in accordance with Schedule E. Aurizon Network requests that the QCA confirms this intent in its Final Decision.

As part of the discussions with the QCA around the matters raised in (c) and (d) above, Aurizon Network wishes to discuss whether the QCA’s same apportionment will also be applied between Aurizon Network funded and SUFA funded expenditure, and for the QCA’s position to be confirmed in the Final Decision.

14.9 Asset Disposal

Draft Decision 14.8 is to refuse to approve Aurizon Network’s proposal for a ‘net process’ approach for determining the amount to be subtracted from the RAB due to asset disposals.

This provision only related to the disposal of assets that provided a financial return on their sale. This is a rare occurrence for Aurizon Network as the majority of assets are replaced at, near to, or after their design lives, and any disposals are therefore for negligible value.

Nevertheless, there may be circumstances where Aurizon Network invests in new assets, which are included in the RAB but disposed of before their full value is recovered. For example, assets which are damaged and subsequently disposed of as a result of a flood event or a derailment. In such instances, the residual RAB value would be high, but the disposal value would be negligible. Accordingly, it would be inappropriate to deduct the residual value of the asset from the RAB.

The QCA draft decision provides an alternative mechanism for Aurizon Network to seek to retain the gains from a sale of assets on a case by case basis through an annual process. As such events are expected to continue to be rare and for negligible value, Aurizon Network accepts the Draft Decision.

14.10 Purpose and application of voting process

Draft Decisions 14.9 and 14.10 are to include the voting process in Schedule E and to refuse to approve Aurizon Network’s proposed approach for the voting process. Aurizon Network disagrees with the QCA’s decision.

14.10.1 Timing of the voting process

The QCA’s draft decision requires a project to have completed a Feasibility study prior to seeking a vote and then seeking a vote on scope, standard and cost at the same time. This will require a vote to be undertaken no earlier than the end of the Feasibility Study.

Aurizon Network disagrees with this position, as the decision may delay the implementation of the expansion..

At the end of the Feasibility study time will be critical for a project.

- In some cases where greater certainty of cost is sought (e.g. for +/- 10%, class one estimates) there will be some elements of the construction subject to firm quotes which will only be held for a

limited period – for example a civil works constructor might have quoted \$200M for some works and will only hold that price for 4 months. It is quite normal for these periods to be limited with contractors reluctant to lock in for longer (and the longer they lock price in the more expensive it will be).

- Other parts of the coal chain (ports, mines and above rail) will also be seeking to reach financial close at the same time as the below rail works.
- The parties to the below rail expansion (be it funders and Aurizon Network, or Aurizon Network and Access Seekers) will be seeking to progress negotiations in a time critical fashion

There would be advantage in addressing as much of the approval process in advance of this period to reduce the time taken between the end of feasibility and unconditional commitment to the expansion. This can be facilitated by:

- (a) Seeking approval of scope in advance of cost. The exact access rights and the scope are known at the time of entry into the Feasibility study. This approval can be progressed in parallel with the Feasibility Study and reduce time taken after the Feasibility Study;
- (b) considering approval of standard at the same time as scope.

Pre-approval of cost based on the best estimate prior to construction is best done with the knowledge from the Feasibility study – therefore it is better done separately from the scope and standard approvals.

It would be more efficient for the undertaking to provide flexibility around the voting process allowing votes earlier than the point of completion of the Feasibility Study and also allowing for votes for scope, standard and costs separately or together.

14.10.2 Parties relying on a vote

The QCA's decision provided for access seekers, expansion funders or interested participants to require a vote be undertaken. Aurizon Network disagrees with this position

The voting process and any preapproval process, provides comfort for the party funding an asset that the asset will be included in the RAB at the completion of construction. It should be solely at the election of the funder whether or not to seek a vote or pre-approval.

While there are other parties interested in what asset values are included in the RAB, they have the comfort that whether:

- a vote is held;
- there is pre-approval; and/or
- approval is not sought until after construction is complete

they will have the benefit of an appropriate process of consideration by the QCA which will allow them input if appropriate.

In particular we see no reason why an Interested Participant who is not an Access Seeker in relation to the expansion should have any right to force a vote where the funder does not so require.

It is the funder that should be deciding on whether or not to seek a vote or preapproval. A funder may seek greater comfort in advance of committing to the funding of an asset. They can consider this benefit and trade it off against other factors including time delays.

Similarly it should solely be at the election of the funder whether or not to seek pre-approval of a project after a vote has been held. The Undertaking should not prescribe this as a requirement.

14.10.3 No obligation to construct an approved project

The QCA Draft Decision is to remove clause 8.13.2(d) of Aurizon Network's submitted undertaking. Aurizon Network disagrees with this position

While Aurizon Network agrees with the QCA that it is unclear how the customer voting process can be interpreted as providing an obligation to construct¹¹⁸, our experience is that stakeholders do get confused about this, or at least form a view that we should be obligated to construct and become frustrated when we do not.

For example, as recently as January this year (2015) in their response to the 2013 SUFA DAAU Draft Decision, Vale expressed concern that Blackwater duplications considered under the 2008 CRIMP process were not constructed in response to their approval under the voting process.¹¹⁹

Retaining Aurizon Network's proposed drafting is not inconsistent with the QCA's intent, and it should be retained to provide adequate clarity for all stakeholders and ensure that clear expectations are set.

14.11 Interested Participants (Draft Decision 14.11)

Aurizon Network disagrees with the QCA's decision on who should be included in Interested Participants.

14.11.1 Capacity

Constructing an expansion and including the value in the RAB does not impact any existing access agreements, other than potentially changing the reference tariff used in the determination of access charges for that agreement. There is no change to an existing access agreement in respect of contracted capacity or train paths. It is unclear why there is any need, then, for the inclusion of Schedule E, Clause 4.2(a)(ii).

Aurizon Network seeks clarification from the QCA on how contracted capacity or train paths can be impacted after construction is completed. We believe this limb of the clause should be removed.

Outside of the contracted capacity or train paths there may be stakeholders concerned with the practical impact on what trains they can run (rather than the contracted rights to run trains). There are a couple of circumstances where this could occur:

- (a) Where a system has lower available capacity after the allocation of additional capacity created through the expansion, a stakeholder may argue there is a detrimental impact in their flexibility in operating train services.

While this may be true, it is a virtuous happenstance of the supply conditions at the time, and it should not reduce Aurizon Network's ability to contract further capacity in a manner which reduces available capacity. It also should not afford the impacted Access Holder (or their Customer) a right to negotiate on the expansion, provided the expansion and additional capacity commitments do not reduce the capacity available to them— see point (b) below.

- (b) There is potential that the sum of available capacity and capacity created by the expansion may not be sufficient to provide all of the incremental capacity provided to incremental access seekers. This could lead to a disadvantage to existing access holders where the total system capacity is insufficient to satisfy contracted capacity.

For this reason Aurizon Network had included a "compression" mechanism in conditional access agreements which links with an obligation in the undertaking to assess the capacity created. This reduces the capacity included in conditional access agreements such that the total capacity contracted can be provided by the total system capacity. The QCA has retained this concept, in clause 8.9.5 of the Undertaking rather than the Access Agreement.

This mechanism ensures that where insufficient capacity is created the existing Access Holder (or their Customer) will not be disadvantaged as the incremental capacity of the Access Holder(s) (or their Customer(s)) are compressed.

¹¹⁸ QCA, 2015, Draft Decision: Volume II – Capacity & Expansions, Section 14.8.3, p. 325.

¹¹⁹ Vale, 2015, Response to QCA's Draft Decision on 2013 SUFA DAAU, p. 2.

Therefore, even in respect of the practical ability to deliver capacity, Aurizon Network does not support the requirement to include existing Access Holder (or their Customer) in the list of Interested Participants.

14.11.2 Access Charges

Earlier in the Part it is acknowledged that an existing Access Holder (or their Customer) can be impacted through their Access Charges being varied due to the operation of reference tariffs. This variation can involve a reduction or increase in Access Charges.

- (a) Where there is a reduction, there is clearly a benefit to the existing Access Holder (or their Customer). Aurizon Network does not agree this should provide such parties with a right to be included in a voting process. Any debate would only be about whether the reduction is as great as they would like.
- (b) Where the combined impact of the increased RAB and increased contracted capacity leads to an increase in the average price, the matter of socialisation will be considered. This socialisation treatment will mean that the existing Access Holder (or their Customer)s are either:
 - (i) Not impacted in relation to access charges; or
 - (ii) Impacted only to a nominal amount (Aurizon Network's proposed threshold).

Either way there is no apparent reason why this should afford such parties a vote as the detrimental effect is either nil or nominal.

In light of this discussion an existing Access Holder (or their Customer) should not be included as Interested Participants on the basis of Schedule E, Clause 4.2(a)(i).

14.11.3 Access Seekers

Clearly the Access Seekers (or their Customers) who are conditional Access Holders with provisional capacity allocation that is dependent on this expansion should be included in the vote. These parties are directly impacted by the expansion works and have been parties to the studies which have developed the expansion.

The drafting of Schedule E, Clause 4.2(a)(i) also includes

- Access Seekers (or their Customers) who are at an earlier stage of their expansion studies and sit behind the conditional Access Holder's in priority for capacity; or
- Access seekers who have provisional capacity allocation, but have yet to gain unconditional access rights (that is, who are at a later stage in their expansion but are yet to be access holders).

This could include a substantial number of Access Seekers at prefeasibility stage and mine developers at early stages of development who potentially have contradictory interests in respect of the timing of the conditional Access Holder's expansion.

Aurizon Network does not support the requirement to include these Access Seekers (or their Customers) in the list of Interested Participants.

14.11.4 Weighting

The conditional Access Holders (or their Customers) have the most interest in whether:

- the expansion goes ahead (without it they do not have a mining project);
- the expansion provides sufficient capacity (as they are subject to compression if it does not); and
- the expansion is prudent in scope, standard and cost as their access charges (including whether or not they will be socialised) are directly linked to this.

They are best placed to balance the inherent conflicts between those drivers.

Other potential Interested Participants (being other Access Holders, Access Seekers or their Customers), are only influenced by some or none of these issues. In addition these other potential Interested Participants may also have an incentive to hinder the development of competing coal supplies to influence that related market.

It is surprising that the QCA's draft decision appears to place greater emphasis on the interests of existing mining participants over new incoming mining participants, as this could constrain the economically efficient investment in the rail network (see s.69E). Aurizon network's Access Undertaking should not act to fetter competition in other markets.

14.12 Treatment of Votes (Draft Decision 14.13)

Aurizon Network disagrees with the QCA's decision on treatment of votes.

The QCA has retained the obligation on a "no" voter to provide sufficient detail of their position to ensure parties can understand the Interested Participants rationale. Aurizon Network agrees with retaining this requirement. Aurizon Network believes that the spirit of this requirement should extend to ensure that a "no" vote without sufficient good reason should not be allowed to stand. To allow such a vote has the potential to foster anti-competitive outcomes. For example if an Interested Participant voted "no" because they did not want increased competition in the supply of coal, then such a vote should not be counted as a no vote. Although it should not be expected that such an Interested Participant will be so candid, a "no" vote could be interpreted as being for this reason if the Interested Participants could not provide any other sufficiently good reason.

Aurizon Network would prefer the retention of our original clauses, as it would obviate the potential for this risk to arise. We would accept a mechanism where the QCA must consider whether sufficient good reason has been provided and then should exclude votes where this has not been provided.

The QCA also requires Aurizon Network to adopt a 'best endeavours' approach when providing information, conducting forums and engaging in discussions with Interested Participants. Aurizon Network had volunteered a 'reasonable endeavours' approach. The QCA has not indicated the different behaviour they are seeking from Aurizon Network under a 'best endeavours' versus a 'reasonable endeavours' commitment.

Aurizon Network is not seeking to avoid an appropriate level of engagement, but remains concerned that the requirement to use 'best endeavours' may extend to doing "all things possible, regardless of cost or other constraint", "leave no stone unturned" or subordinate our interests to those of the Interested Participants. Whereas 'reasonable endeavours' is more likely to allow the balancing of our interests against those of the Interested Participants. On this basis reasonable endeavours seems to best fit the requirements of S138(2) of the Act as it provides for a balance of interests.

Undertaking 'best endeavours' may also require Aurizon Network to spend imprudent amounts and resource its team to a ridiculously high level in order to leave no stone unturned. The QCA has not approved regulatory allowances to fund this level of endeavour. For these reasons 'reasonable endeavours' appears to better reflect the requirement for prudence on Aurizon Network.

14.13 Information Provision (Draft Decision 14.14)

Aurizon Network disagrees with the QCA's decision on information provision.

The QCA requires that the information provided include the report prepared as a result of the feasibility study for the relevant capital expenditure project. As discussed above in response to Draft Decision 14.10 Aurizon Network believes there should be flexibility to seek a vote on scope earlier than the end of the Feasibility Study. In such

circumstances this information would not be available. Aurizon Network proposes the level of information be flexible and not prescribed to allow the timing flexibility.

The QCA provides that the Interested Participant sign a confidentiality agreement prior to receiving the information. Aurizon Network agrees with this but notes the other Interested Participants are likely to be coal producers in competition with the Customers of the conditional access seekers. These are precisely the parties to whom the coal producers do not wish to expose their information on proposed developments. An assurance that such parties do not supply the information to anyone else would not overcome the concern that those competitor parties have the information in the first place. .

14.14 QCA Approval (Draft Decision 14.15)

Aurizon Network disagrees with the QCA's decision that an accepted voting proposal is not automatically approved as prudent.

In the response to Draft Decision 14.10 above we identified that timing will be critical after the Feasibility Study is completed. The proposed process of a detailed voting process (including extensions of time where sought by Interested Participants) which must then be followed by a QCA consideration under Schedule E, Clause 2 represents a significant time burden and risk.

Under Aurizon Network's 2010 Access Undertaking Schedule A Clause 3.1.1 (a)(ii), the QCA accepts scope as prudent where there is a positive customer vote. The QCA has not provided any reason why this position is jettisoned in this Draft Decision. The QCA has only stated that a positive vote does not infer their acceptance. This is not in the interests of the funder, access holders, access seekers or Aurizon Network.

It is noted that in Schedule E Clause 2.2(e)(ii) and (f)(iii) there are provisions indicating the QCA may/must take the vote into account when approving whether the capital expenditure is prudent and efficient. It seems incongruous that there are two provisions where one is 'may' and the other 'must'. The 2010 access undertaking is much clearer, and Aurizon Network believes that QCA must continue take the vote into account.

The key benefit of the vote to a funder of a project was that it provided an option to fast track the acceptance of prudence. With this option removed, the voting process is of little value to feasibility funders and given the time pressures on a project at this stage it would be expected that they would want Aurizon Network to bypass the voting process and seek QCA approval under Schedule E.

15 Pricing Frameworks for Rail Access

15.1.QCA’s Draft Decision

No Draft Decisions have been issued in this section.

Aurizon Network acknowledges the remarks made by the QCA in this chapter regarding a review of pricing arrangements for the CQCR prior to the commencement of UT5, and is willing to participate in the QCA’s consultation process.

15.2.Introduction

Aurizon Network operates under a revenue cap form of regulation. Within this framework, allowable revenues are recovered from Access Holders through a combination of:

- Access Charges, based on the AT₁ to AT₅ Reference Tariff components, which are collected following the end of the relevant month based on Train Services operated;
- Take or Pay amounts, based on the AT₂ to AT₄ components, which are collected following the end of the relevant financial year based on Train Services not operated (subject to deductions for Aurizon Network cause and system caps); and
- Revenue Cap Adjustment Amounts, based on the AT₂ to AT₅ components, which are calculated following the end of financial year are based on the difference between actual including Take or Pay and allowable revenues for the relevant year, and collected in the 2nd year following the relevant year.

In the Draft Decision¹²⁰ the QCA has stated that:

“We consider there is merit in simplifying the pricing arrangements and making individual users more accountable for their use of contracted capacity. This would also complement the implementation of more flexible trading mechanisms for access rights.

We consider that simplification of the existing pricing structures and take-or-pay will need further development and consultation. In this context, we consider a more strategic approach, supported by full stakeholder consultation, should be pursued for UT5. This will allow for a clear understanding of customer impacts of any proposed changes and the development of transitional arrangements to deal with potential impacts.

This longer-term timeframe should also coincide with the majority of users moving to post-UT2 access agreements.”

Aurizon Network agrees with these statements. Aurizon Network therefore looks forward to participating in a review of access pricing in the CQCR, either as a standalone process or as part of the development of a new Access Undertaking for UT5.

Aurizon Network notes that the QCA has:

- for UT4, proposed alignment of the expansion pricing arrangements with the two-part pricing structure in use in the Hunter Valley Coal Network (HVCN); and
- for UT5, suggested re-alignment of the existing pricing arrangements with the HVCN.

Aurizon Network agrees that a pricing structure more closely aligned with the HVCN arrangements may be more appropriate for the CQCR.

¹²⁰ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, p. 348.

However, Aurizon Network cautions against the strict application of HVCN to the CQCR. Aurizon Network's position is based on three propositions:

1. that HVCN access charge arrangements are not significantly simpler than for the CQCR;
2. that the pricing methodology for the development of Reference Tariffs in the CQCR remains sound (although does require review), and that a two part pricing structure would not provide a more efficient outcome (particularly for the electric access charge [AT₅]); and
3. The recovery of allowable revenues and the presentation of Access Charges could nevertheless draw upon the principles of the HVCN arrangements, and other arrangements under a revenue cap form of regulation, in a manner which retains the existing, efficient price signals.

Each of these propositions is discussed further below.

15.3. Simplicity of Arrangements

As indicated by the QCA, the HVCN applies a two part pricing structure, compared with a five part pricing structure for each system in the CQCR.

The HVCN schedule of Access Charges is contained on the ARTC web-site¹²¹. The Access Charge schedule:

- is 5 pages in length;
- provides for a two part tariff, but for three pricing zones;
- for pricing zone 1, there are 15 variants of the two part tariff based on differing service characteristics;
- requires no electric tariff as the system is diesel hauled.

The HVCN is comparable in size to the Goonyella system. Currently, the Goonyella pricing schedule:

- is less than one page in length (the entire CQCR pricing schedule is presented on one page¹²²);
- for non-electric infrastructure, provides for a four part tariff across one pricing zone;
- for electric infrastructure, provides a single tariff across one pricing zone;
- has no variants (a base service characteristic – the Reference Train – is assumed).

On this basis alone, the HVCN pricing arrangements are not necessarily simpler than for the CQCR.

15.4. A More Efficient Outcome

The five-part pricing structure for the CQCR has been in place since the commencement of 2001 Access Undertaking. As recognised by the QCA in its Draft Decision¹²³, the current structure achieves a number of objectives:

- links charges explicitly to specific cost drivers, ensuring that users pay Access Charges according to costs they impose on the system;
- provides signals for efficient use of capacity;
- ensures that Aurizon Network recovers its efficient costs; and
- encourages development of the Queensland mining industry.

Aurizon Network's proposals for the 2014DAU recognised that both the incremental maintenance tariff (AT₁) and the incremental capacity tariff (AT₂) require review.

- For AT₁, Aurizon Network proposed that AT₁ actual and allowable revenues would be incorporated within the revenue cap arrangements (recognising the difference between short and long run variable costs).

¹²¹ http://www.artc.com.au/library/HVAccess_Charges_2015.pdf

¹²² <http://www.aurizon.com.au/Downloads/Aurizon%20Network%20Reference%20Tariffs%2001072014%20to%2030062015.pdf>

¹²³ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, p.339.

- For AT₂, Aurizon Network sought to align the component with current benchmarks of incremental capacity costs.

Aurizon Network agrees with the QCA that it is appropriate to review the determination of these components, however believes that the basic principle – being to provide efficient price signals associated with the incremental costs that are caused on the CQCR – remains valid and should be continued.

Equally, the basic principle around the allocation of residual allowable revenues between AT₃ and AT₄, in a way that preserves the distance taper, remains valid. This is particularly important for longer systems such as Blackwater and Goonyella where there is a large variance in the length of infrastructure required by the respective mines. Strict application of a two part structure would alter the balance in contribution between long and short haul mines and may result in significant revenues transferring between end customers.

On this basis alone, the HVCN charging arrangements are not necessarily more efficient than for the CQCR.

15.5.Pricing Arrangements for Electric Train Services (AT₅)

In December 2011, Aurizon Network submitted to the QCA a Draft Amending Access Undertaking (DAAU), which sought to establish a sustainable pricing arrangement for Electric Traction.

The DAAU focused on three key elements, including:

- network pricing;
- maximising asset utilisation; and the
- treatment of Revenue Cap adjustments.

These elements were discussed in detail with stakeholders as part of a series of QCA-initiated workshops, which focussed on finding an efficient pricing mechanism for electric traction.

As a result of these workshops, the QCA recognised that the current methodology for setting the AT₅ Reference Tariff is inefficient, and made it clear that it will not allow user-endorsed infrastructure to be stranded. As noted in its January 2013 letter to the QCA¹²⁴, Aurizon Network withdrew its Electric Traction DAAU as a sign of good faith and its willingness to work with stakeholders to develop an efficient and sustainable solution.

The QCA's Draft Decision does not make any explicit reference to the establishment of sustainable pricing arrangements for electric traction in the Blackwater and Goonyella systems. Aurizon Network reiterates the importance of developing an efficient and sustainable pricing solution for electric traction as a matter of priority. Nevertheless, appropriate transitional arrangements will also need to be addressed prior to the application of any revised pricing structure.

15.6 Recovery of Allowable Revenues and Presentation of Access Charges

As indicated above, Aurizon Network recovers allowable revenues through a mix of Reference Tariffs, Take or Pay and reconciliation with the revenue cap. The timing of these recoveries ranges from one month following the day of railings, to two years.

Aurizon Network agrees with the QCA that simplification of these arrangements, particularly with the expiration of UT1 Access Agreements, is warranted. Equally, Aurizon Network agrees that the Access Charges could be implemented so as to preserve the current pricing methodology while providing a more transparent, simple and timely basis for Access Charges.

An alternative model to the HVCN and CQCR for the recovery of revenues is the Dalrymple Bay Coal Terminal (DBCT) model. Under these arrangements, allowable revenues are simply recovered in proportion to contracted

¹²⁴ Available at www.qca.org.au

tonnages levied in monthly instalments of one-twelfth of the annual entitlement. A revenue cap operates at the end of the relevant year to ensure that revenues from utilisation of ad hoc entitlements are returned to DBCT's contracted customers. An advantage of the DBCT approach is that revenues are collected on an even basis over the year with no end-of-year recoveries and a reconciliation method which is mechanistic and relatively small in value.

However, there are a number of key differences:

- application of a simple \$ per net tonne rate reflects the fact that at the terminal there is no difference in 'access' between a short haul and a long haul traffic. Whilst this is appropriate for DBCT, it is not appropriate for the CQCR.
- There is no deduction against Access Charges for access not provided due to a network cause (unless the cause is related to breach of an access agreement or negligence). While this could be implemented in the CQCR (most impacts attributable to Aurizon Network are at a system level) it is unlikely to be acceptable to stakeholders.

In view of the above, Aurizon Network believes that a 'hybrid' arrangement, incorporating features of the HVCN and DBCT arrangements, may provide an improved outcome for all stakeholders.

While the current five part structure remains valid, transforming the five part tariff structure into a three part structure is possible in a way that would preserve the current pricing methodology and retain the Reference Train concept. Note that to preserve the distance taper an Access Charge would need to be published for each origin/destination pair. While this does not necessarily represent a simpler approach, it would provide transparency for end customers as the Reference Tariff schedule would specify an Access Charge for individual operations (rather than requiring the customer to calculate their own charge).

A possible structure is as follows:

- A non-Take or Pay charge, AT₁ (or combining AT₁ and AT₂);
- A Take or Pay charge, combining AT₂, AT₃ and AT₄ (or AT₃ and AT₄); and
- An AT₅ charge.

Consistent with the QCA's proposal for expansion tariffs and as for DBCT, Access Charges could be applied in proportion to contracted entitlements. These could be expressed on a \$ per gtk basis (consistent with the HVCN) or \$ per net tonne (consistent with DBCT).

In order to protect Aurizon Network's legitimate business interests, the following arrangements would need to be included:

- all of the above Access Charges (including any non-Take or Pay components including AT₁) would need to be included in the revenue cap framework. Adjustments for the incremental costs continue to be relevant, and in this regard Aurizon Network's proposal for the Short Run Variable Cost (SRVC) should be considered for UT5.
- separate arrangements would need to be agreed for AT₅ as there is currently no contractual entitlement associated with the use of electric infrastructure.

Finally, revenue reductions for cancellations attributable to Aurizon Network (Aurizon Network cause), which are currently recovered via the revenue cap mechanism, would need to be addressed through one of the following:

- Uplifting the Access Charge equivalent to an expected level of Aurizon Network cause, with variations between actual and forecast to be addressed through revenue cap;
- Levying one-twelfth of the Access Charge each month irrespective of the actual level of Aurizon Network cause;
- Recovering the Revenue Adjustment Amounts, including revenues associated with Aurizon Network cause, as a bullet payment following the end of the relevant year.

Aurizon Network is willing to discuss these potential proposals further with the QCA and coal industry stakeholders as part of the QCA's consultation process. In contemplating any change, Aurizon Network would require there to be appropriate transitional arrangements to allow an orderly implementation of a new regime.

16 Pricing Principles

16.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Part 6 of Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make the following adjustments:</p> <p>(a) include an express prohibition of Aurizon Network establishing access charges for train services that discriminate in favour of any Related Operator, Related Competitor or Third Party that has commercial arrangements with a Related Competitor</p> <p>(b) enable an access holder to have its access charge amended in the event that Aurizon Network breached the price differentiation principle in the 2014 DAU when developing access charges for an access seeker.</p>	16.1	<p>(a) Agree, with amendment.</p> <p>(b) Agree.</p>
<p>Our Draft Decision is to refuse to approve Part 6 of Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make the following adjustments:</p> <p>(a) reinstate and expand the UT3 access condition provisions (with appropriate refinements to better balance the interests of various stakeholders) to require non-standard terms that have cost and risk implications to Aurizon Network to be subject to our approval</p> <p>(b) require Aurizon Network to provide us with a copy of any non-standard agreement within five business days of signing.</p>	16.2	<p>(a) Disagree</p> <p>(b) Agree with amendment</p>
<p>Our Draft Decision is to refuse to approve Part 6 of Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make the following adjustments:</p> <p>(a) remove the reference to Aurizon Network's assessment from the definition of a 'change in market circumstances'</p> <p>(b) require Aurizon Network to demonstrate the available capacity on the CQCR is limited, and any expansion is commercially infeasible, before it can quote the Maximum Access Charge to non-coal access seekers.</p>	16.3	<p>(a) Agree.</p> <p>(b) Agree with amendment.</p>
<p>Our Draft Decision is to refuse to approve Part 6 of Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU so that the RAB value is used for all circumstances, except where it is unavailable, in which case the DORC value can be adopted.</p>	16.4	Disagree.
<p>Our Draft Decision is to refuse to approve Part 6 of Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon</p>	16.5	Disagree.

Draft Decision	Reference	Aurizon Network Position
<p>Network to amend its 2014 DAU to require it to apply both price differentiation and pricing limits principles when establishing access charges, as long as they do not contradict each other.</p>		
<p>Our preliminary view, as set out in this Draft Decision is to accept Aurizon Network's proposal that:</p> <p>(a) the user(s) requiring the expansion should generally pay an access charge that reflects at least the full incremental costs (capital and operating) of access</p> <p>(b) existing users should not experience a material increase in tariffs due to an expansion triggered by access seekers</p> <p>(c) if new/expanding users face a higher cost than existing users, a zero contribution to common costs from expanding users is generally acceptable</p> <p>(d) an allocation of expansion costs to existing users may be appropriate where an expansion has clear benefits to those users.</p>	16.6	(a) – (d) Agree
<p>Our preliminary view, as set out in this Draft Decision is to refuse to approve Aurizon Network's proposed expansion pricing framework. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make the following adjustments:</p> <p>(a) A separate expansion tariff, based on contracted volumes, will be established in the event that an expansion is triggered.</p> <p>(b) Aurizon Network is required to implement a 'fixed cost' regime, based on contracted volumes, for users paying an expansion tariff—each user will pay an access charge with a fixed component (defined as AT2 to AT4 tariffs, and AT5 if an expansion involves electric infrastructure) that does not vary with its actual usage, except in the event of Aurizon Network Cause.</p> <p>(c) If the incremental costs associated with providing access for expanding users are lower on a NT basis than the system Reference Tariff, a positive common cost contribution will be included in the expansion tariff, to ensure that the expansion tariff aligns with the system reference tariff on a NT basis. Otherwise, users paying an expansion tariff will not be required to make any contribution to common cost.</p> <p>(d) In the event where there is an existing expansion tariff and another expansion is triggered, socialisation between the two expansions is appropriate if it complies with the approved form of socialisation test.</p>	16.7	<p>(a) Disagree</p> <p>(b) Disagree</p> <p>(c) Agree with amendment.</p> <p>(d) Agree with amendment.</p>
<p>Our Draft Decision is refuse to approve Aurizon Network's proposed five per cent criterion for socialisation. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make the following adjustments:</p> <p>(a) If socialisation of a new expansion with the</p>	16.8	<p>(a) Agree with amendment.</p> <p>(b) Disagree.</p>

Draft Decision	Reference	Aurizon Network Position
<p>'Highest Expansion Tariff' (the existing expansion tariff that is highest on the NT basis) leads to lower tariff on a unit basis, these costs will be socialised.</p> <p>(b) If socialisation leads to an increase in the 'Highest Expansion Tariff', the QCA will consider on a case-by-case basis whether to socialise or to establish a separate expansion tariff for this new expansion.</p>		
<p>Our Draft Decision is to refuse to approve the 10-year expiration of expansion tariffs as proposed in the 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU to require it to undertake an annual review, by re-running the socialisation test based on latest information, to determine if expansion tariffs should be socialised where more than one expansion tariff exists for a system.</p>	16.9	Agree with amendment.
<p>Our Draft Decision is to approve Aurizon Network's proposal that, where a system has multiple reference tariffs (due to previous expansions), the reference tariff used to establish access charges for new access seekers should be the existing reference tariff that is highest on a NT basis.</p>	16.10	Agree
<p>Our Draft Decision is to refuse to approve the provisions with respect to Pricing Proposal. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make adjustments, for:</p> <p>(a) Aurizon Network to provide Pricing Proposal as part of the feasibility study report for an expansion.</p> <p>(b) a Pricing Proposal to contain information regarding the allocation of the expansion costs between existing and expanding users, the results of the socialisation test (in the event that there is an existing expansion tariff), the proposed pricing arrangements for the expansion, as well as indicative tariffs consistent with the proposed pricing arrangements.</p> <p>(c) the Pricing Proposal, the socialisation test (if applicable) to be calculated based on forecast costs and forecast volumes as set out in the feasibility study. The QCA is allowed to revise any decisions with respect to pricing arrangements for an expansion if there is a material change in circumstances.</p> <p>(d) upon the QCA's approval of a Pricing Proposal, Aurizon Network, where feasible, be required to submit to the QCA a DAAU, based on contracted volumes, to apply for approval of a new or varied reference tariffs.</p>	16.11	<p>(a) Disagree.</p> <p>(b) Agree with amendment.</p> <p>(c) Disagree.</p> <p>(d) Agree with amendment.</p>
<p>Our Draft Decision is to refuse to approve the 2014 DAU providing an exception to the consideration of an expansion tariff for expansions funded by Aurizon Network at the regulatory WACC. We consider it appropriate for Aurizon Network to amend its 2014 DAU so that this exception is omitted, as set out in the marked changes to Part 6 of the 2014 DAU attached to this Draft Decision.</p>	16.12	Agree, subject to Aurizon Network being exempt from any form of funding obligation.
<p>Our Draft Decision is to refuse to approve Part 6 of Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU to make amendments to:</p> <p>(a) define the MRC as 'the AT1 tariff of the applicable reference tariff plus other incremental costs (to the</p>	16.13	<p>(a) Disagree</p> <p>(b) Disagree</p> <p>(c) Agree with amendment.</p>

Draft Decision	Reference	Aurizon Network Position
<p>extent not covered by the AT1 tariff and other agreements between Aurizon Network and the access seeker) of providing access (calculated on the basis of forecast NT), excluding any reference to mine-specific spur line costs irrespective of infrastructure ownership</p> <p>(b) remove the Distance Discount—if an access seeker's MRC is above the applicable existing reference tariff, the reference tariff applicable to this access seeker will be based on its MRC. Otherwise, the existing reference tariff will be applied to this access seeker</p> <p>(c) expand the application of the MRC to all new train services as long as they do not trigger an expansion to the CQCR.</p>		
<p>Our Draft Decision is to refuse to approve the commercial term provisions in Aurizon Network's 2014 DAU. We consider it appropriate for Aurizon Network to amend its 2014 DAU to reinstate the UT3 access condition provisions, with further amendments, to:</p> <p>(a) simplify the drafting</p> <p>(b) expand its application to all non-standard terms that have cost and risk implications</p> <p>(c) provide that if the QCA refuses to approve some or all access conditions, Aurizon Network can enter into negotiations for a separate arrangement with access seekers that will be regarded as entirely outside of the scope of the access undertaking, and will be subject to Division 5 of Part 5 of the QCA Act.</p>	16.14	<p>(a) Agree</p> <p>(b) Aurizon Network disagrees with this position. Conditions relating to funding are better treated separately to varied terms of access agreements.</p> <p>(c) Aurizon Network disagrees with this position and proposes a more effective alternative.</p>

16.2 Summary of Aurizon Network's Response

The QCA seeks to create a number of pricing obligations upon Aurizon Network to address theoretical risks which have no practical evidentiary basis in the performance of Aurizon Network or its predecessors.

There are a number of instances where QCA has rejected positions agreed between Aurizon Network and the QRC, such as the expansion pricing framework and the process for calculating cross system reference tariffs.

There are also instances where provisions rolled forward from the 2010AU have been rejected without valid reason. Where proposed new arrangements are not endorsed by the QCA, it either reverted to the 2010AU model, or suggested a completely new arrangement at its discretion. This contradictory and unstructured approach results in an ad hoc series of arrangements the direction and purpose of which is difficult to discern.

The QCA is recommending a series of measures which discriminate against new Access Seekers in favour of existing Access Holders and work against the promotion of economic efficiency in the CQCR Network.

For example, the QCA requirement to establish pricing limits with reference to the value of the RAB, and not the actual stand alone cost of Access, is economically inefficient and removes the flexibility for Aurizon Network to submit more 'customer responsive' and adaptable pricing solutions to the QCA for approval.

The QCA has not provided valid reasons for many recommendations. For example, the deletion of a clause allowing access prices to be set below the 'floor' price, provided other Access Seekers with similar Train Services are treated in the same manner. In order to address a general unsubstantiated concern about the potential for

cross-subsidisation, this Draft Decision will create uncertainty and unnecessary complexity when setting access charges within the CQCR Network.

Aurizon Network acknowledges the challenge of finding an appropriate and fair balance between the interests of existing and expansion users, and had materially agreed the 2014DAU expansion pricing framework with the QRC. The QCA's Draft Decision on expansion pricing has many elements that appear heavily skewed in favour of existing users, however, including:

- the quarantining of expansions with no explicit contemplation that, in certain circumstances, it may be reasonable to socialise expansions with the existing system within a materiality threshold¹²⁵
- the requirement for a separate tariff for each expansion, based on an inflexible fixed cost regime
- an asymmetric approach to common costs and volume risk
- the removal of the 'minimum contribution to common cost' element from the Minimum Revenue Contribution (MRC) calculation, and
- the removal of a distance discount mechanism.

The QCA's Draft Decision appears to be inconsistent with the position of the coal industry on how the balance between existing and expansion users should be achieved.

Establishing a separate expansion tariff is generally appropriate where the expanding customers are the only ones utilising the infrastructure. Where an expansion/enhancement occurs on the common mainline corridor, and will be utilised by both expanding and existing users, however, the distribution of benefits becomes obfuscated, creating myriad opportunities for existing users to gain operational benefits without contributing to the costs of, or risks associated with, achieving those benefits.

Aurizon Network firmly believe in the principle of avoiding unfair differentiation, and the Undertaking should not require all expansions to be automatically isolated from the broader system for an indefinite period. The pricing arrangement for expansions, including an assessment of whether socialisation with the existing system is appropriate, should be assessed by the QCA on a case-by-case basis.

In Aurizon Network's view, the expansion pricing proposals of the QCA will not promote efficient investment in the network and will limit potential competition in the upstream market for coal. The QCA's proposals therefore fail to take proper regard of the objectives in s.69E and s.138(2)(d)&(e) of the QCA Act.

16.3 Price Differentiation Provisions

Draft Decision 16.1 (a) is to reinstate the express prohibition of Aurizon Network establishing access charges for train services which discriminate in favour of a related party.

Aurizon Network accepts the QCA's Draft Decision on the basis that it does not purposefully behave in a way which discriminates in favour of its related party. The 2014DAU already includes a number of protections against discriminatory behaviour including non-discrimination provisions (Part 2), Dispute Resolution processes (Part 11) and prescriptive pricing rules (Part 6), all of which are subject to QCA's oversight. Aurizon Network considers that including this drafting in Part 6 of the 2014DAU as well as the Standard Access Agreement is unnecessary duplication.

The Pricing Principles outlined in section 168A of the QCA Act allows for "*price discrimination when it aids efficiency*".¹²⁶ Aurizon Network reiterates that price differentiation is appropriate where the cost or risk of providing access for a coal carrying train service varies from the Reference Train. This principle should be applicable regardless of whether the train service in question is associated with a related party or not. Section 168A should encourage more efficient operations without penalty.

¹²⁵ Note that the concept of 'materiality' is recognised as a principle of the Expansion Pricing Framework, and has been accepted by the QCA in Draft Decision 16.6.

¹²⁶ QCA Act 1997, Section 168A, p. 139.

Access Charge Amendments

Draft Decision 16.1 (b) is to reinstate the ability for an Access Holder to seek an amendment to its access charge in the event Aurizon Network breaches the price differentiation principle when setting access charges for an Access Seeker.

Aurizon Network proposed to move these provisions from the 2014DAU into the Standard Access Agreement. Aurizon Network considers that the existing dispute resolution provisions offer Access Holders a robust process through which they can challenge their Access Charge.

Aurizon Network accepts the QCA's Draft Decision on the basis that it has an immaterial impact. Aurizon Network notes that the inclusion of this drafting in Part 6 of the 2014DAU creates unnecessary duplication and confusion over which dispute resolution mechanism will apply.

16.4 Access Conditions

Draft Decision 16.2 (a) is to reinstate and expand the UT3 Access Condition provisions such that they apply to any 'non-standard' term.

The 2010AU featured Access Conditions provisions to address circumstances where Aurizon Network sought greater reward or varied terms and conditions as a condition for providing funding for an expansion. These were also the only circumstances addressed by the commercial terms provisions in Aurizon Network's 2014DAU. Under the QCA's Draft Decision, the Access Conditions provisions have been expanded to deal with circumstances where there is any variation from template agreements, which have cost and risk implications for Aurizon Network, even where there is no link to any provision of funding. Aurizon Network submits that having the one mechanism to deal with both sets of circumstances is inappropriate.

Access Seekers and Access Holders already have the ability to dispute any non-standard terms via the provisions outlined in both the Undertaking and the Access Agreement. Aurizon Network considers that these mechanisms already provide the QCA with an adequate degree of oversight.

The QCA's Draft Decision to require an Access Conditions report for potentially immaterial variations to the Standard Access Agreement simply increases the amount of regulatory complexity in the Access process. This will lead to unnecessary delays when executing Access Agreements with customers. Furthermore, in circumstances where an Access Seeker requests a variation to a standard agreement, a provision such as this effectively incentivises Aurizon Network to offer only 'vanilla' standard terms.

Draft Decision 16.2 (b) requires Aurizon Network to provide the QCA with a copy of any non-standard agreement within 5 days of signing.

The QCA's reasoning for Aurizon Network to disclose this information is based on the need for stakeholders to feel confident that access arrangements satisfy the provisions of the Undertaking, particularly highlighting non-discrimination provisions. As discussed in Part 2 of this response, the requirement under the QCA Act is to ensure there is no unfair differentiation between access holders which has a material impact on their ability to compete. It is not the QCA's role to review every access agreement to ensure there is no discriminatory treatment between access holders. As such, Aurizon Network does not accept the inclusion of this obligation for disclosure of access agreements in its Access Undertaking.

In addition, as per clause 103 "Requirement to produce access agreement" of the QCA Act, the QCA may request copies of access agreements to be provided by Aurizon Network, with Aurizon Network to be given at least 14 days to respond to such written notice. If a Stakeholder felt that unfair differentiation which has a material impact on them was taking place, the QCA could use this clause under the Act to gain confidence. An Access Agreement is a contract between Aurizon Network and that particular Access Holder and the QCA does not need to oversee that process where the provisions have been negotiated and agreed between both parties. The approach within the QCA Act reflects the fact that differentiation in appropriate circumstances like the non-standard access agreement process promotes flexibility to the benefit of success seekers and holders.

16.5 Non-Coal Train Services

Draft Decision 16.3 (a) is to remove the reference to 'Aurizon Network's assessment' from the definition of a 'change in market circumstances'.

Draft Decision 16.3 (b) requires Aurizon Network to demonstrate that the available capacity on the CQCR is limited before it can quote the Maximum Access Charge to non-coal access seekers.

Aurizon Network accepts the QCA's Draft Decision as the likely impact is negligible.

16.6 Pricing Limits

Draft Decision 16.4 is to refuse to approve Aurizon Network's proposal to set the Price Limits with reference to a Depreciated Optimised Replacement Cost (DORC) asset valuation.

Aurizon Network disagrees with the QCA's Draft Decision. It is important to reiterate that Aurizon Network's proposal will not impact the Maximum Allowable Revenue (MAR) that Aurizon Network can earn. However, it may impact the allocation of MAR between Train Services, across individual years in the evaluation period or between coal systems. With respect to the latter, where a transfer of mainline capacity occurs between coal systems with a common destination (for example, between Moura and Blackwater), it would be reasonable to transfer allowable revenues associated with that capacity to the other system. By doing so the remaining users in the original system will not be required to fund the revenue shortfall associated with the transfer.

As outlined in both the 2010AU and the 2014DAU¹²⁷, pricing limits for individual train services are set at:

- no less than the expected Incremental Cost of providing Access for that Train Service; and
- no more than the level that will recover the expected Stand Alone Cost of providing Access for that Train Service.

The 'stand alone cost' represents the price at which a user is induced to bypass the service.

As discussed in the 2014DAU, 'stand alone cost' in the 2010AU is linked to Aurizon Network's Maximum Allowable Revenue (MAR), which is derived from the value of the Regulated Asset Base (RAB). The value of the RAB was set at the start of UT1 and rolled-forward on an annual basis to account for depreciation, inflation, capital expenditure, asset disposals and transfers. As construction costs have significantly changed since that time, the value of the RAB is expected to be materially below the stand alone cost of providing Access, and therefore cannot represent efficient prices, by definition. As a result, establishing pricing limits with reference to the value of the RAB is economically inefficient.

Aurizon Network's proposal will create efficient pricing limits by aligning the ceiling to the stand alone cost of the infrastructure. The practical impact of the proposal is to expand the acceptable range within which an Access Charge may be set without breaching the Pricing Limits principle. In doing so, Aurizon Network has the flexibility to submit more 'customer responsive' and adaptable pricing solutions to the QCA for approval. Examples include:

- Creation of medium-term pricing proposals to improve asset utilisation;
- Aligning revenue recovery to volume ramp-up via revenue smoothing; or
- Transfers of mainline capacity between systems where port destinations are common (e.g. Gladstone).

Aurizon Network believes this would promote the economically efficient use of and investment in the network and promote effective competition in upstream and downstream markets, consistent with the objectives outlined in s.69E of the QCA Act.

In making its Draft Decision, the QCA states that:

¹²⁷ Aurizon Network, 2014, QR Network's 2010 Access Undertaking, Part 6, Clause 6.2.2, p. 47; 2014 Draft Access Undertaking, Part 6, Clause 6.3.2, p. 67.

“...the 2014DAU provides Aurizon Network with an inappropriate level of discretion over the setting of access charges...”¹²⁸

In the documentation provided in support of the 2014DAU, Aurizon Network explicitly states that it does not intend to recalculate access charges on the basis of the DORC value.¹²⁹ Furthermore, the QCA also notes that:

“...it is unclear if the use of the DORC approach requires our approval under the 2014DAU.”¹³⁰

In no way does this proposal absolve Aurizon Network of its obligations to seek the QCA's approval for new reference tariffs, or reference tariff variations. Aurizon Network's intent is that any new or varied access charge linked to a DORC limit would be formally submitted to the QCA. The QCA would then have the discretion (subject to s138(2) of the QCA Act) to either approve or refuse to approve Aurizon Network's proposal.

In light of the above, Aurizon Network disagrees with the QCA's Draft Decision 16.4 and recommends the QCA reinstate the proposal in the 2014DAU.

16.7 Price Differentiation and Pricing Limits

Draft Decision 16.5 requires Aurizon Network to amend the 2014DAU by removing clause 6.3.2 (b). This clause would allow Aurizon Network to set a price for access below the 'floor' of the price limit range, i.e. the incremental costs of a train service.

As noted by the QCA, clause 6.3.2 (b) of the 2014DAU was provided for under the 2010AU, clause 6.2.3 (d). Aurizon Network was deemed not to have breached the pricing limit principles, so long as they did not breach the price differentiation principle when setting access charges for future access seekers with similar characteristics.¹³¹

The QCA has not provided any valid reasons as to why this clause should be deleted, other than a general concern about the potential for cross-subsidisation.

Aurizon Network currently sets reference tariffs at a 'coal system' level, with all users making a contribution towards the aggregate costs of each system. At face value, it may appear that a degree of cross-subsidisation exists under this approach. However, the five-part pricing structure for the CQCR, which has been in place since 2001, links Access Charges to specific cost drivers, ensuring that users pay Access Charges according to costs they impose on the system.

Aurizon Network considers that the QCA's Draft Decision, will create uncertainty and unnecessary complexity when setting access charges within the CQCR.

In order to implement Draft Decision 16.5, Aurizon Network understands that 'system' level reference tariffs would no longer be acceptable and would be replaced by strictly 'incremental' cost-reflective pricing arrangements. At best, this would require each system to be broken up into groups displaying similar characteristics, such as geography; a reversion to 'cluster pricing'. If interpreted literally, a separate reference tariff would be required for every Origin-Destination pair. This concept is illustrated in the figure below.

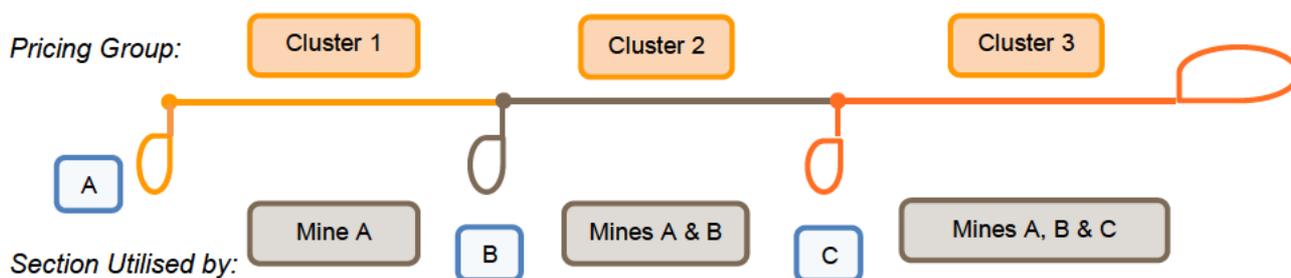
¹²⁸ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.4.3, p. 361.

¹²⁹ Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Section 9.3.3.2, p. 199.

¹³⁰ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.4.3, p. 361.

¹³¹ Ibid.

Figure 16.1 Illustration of Clusters within a Coal System.



While figure 16.1 provides an illustrative example of a 3 mine system, in practice, individual coal systems may have up to 30 mines in operation. Under the QCA's Draft Decision, each would require its own specific reference tariff. Aurizon Network would be required to calculate a separate MAR and reference tariff for each customer. This would be based on an assessment of each mine's asset utilisation and incremental costs over cluster 1, 2 and 3. Furthermore, the allocation and reporting of maintenance and operating costs becomes increasingly complex as the CQCR is increasingly fragmented for pricing purposes. For example, many assets constructed as part of the Wiggins Island Rail Project are fully integrated with the existing Blackwater and Moura coal systems. The identification of incremental costs attributable to a single user on multi-user infrastructure (cluster 2 and 3) is practically impossible. In summary, the QCA's Draft Decision creates considerable complexity relative to the current 'coal system' approach. It will also create:

- barriers to entry by penalising mines with longer hauls (Mine A); and
- considerable administrative complexity when establishing and maintaining access charges for Access Seekers.

Aurizon Network considers that this proposal demonstrably works against the efficient operation, use of and investment in the network and undermines the objectives of Part 5 of the QCA Act. Furthermore, the clause used by Aurizon Network remains unchanged from the QCA approved 2010AU, which was consistent with the Object of the Act. Aurizon Network therefore disagrees with the QCA's Draft Decision 16.5 and recommends that the QCA reinsert the drafting proposed in the 2014DAU.

16.8 Expansion Pricing

Aurizon Network has material concerns about the QCA's suggested amendments to the expansion pricing framework.

As outlined in the explanatory material provided with the 2013DAU¹³², the track access pricing regime was developed in an environment characterised by excess track capacity and low coal prices. It was specifically designed to promote mine development and investment. Mine specific investment was socialised, and the owner of a mine with a mine-specific spur was required to make a minimum contribution to common costs. The costs of mine specific infrastructure were included in the common system price.

In other words, the existing users of the CQCR became incumbents in a socialised environment where costs and risks were shared between multiple customers.

In light of existing capacity constraints within the CQCR, any substantive new growth that is incremental to the volumes currently contracted is likely to require a network expansion. Aurizon Network acknowledges the challenge of finding an appropriate and fair balance between the interests of existing and expansion users. The QCA's Draft Decision with respect to the expansion pricing framework appears heavily skewed in favour of existing users,

¹³² Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Section 9.9, p. 233.

however. As a result, it will not promote efficient investment in the network nor will it create effective competition in the market. The QCA's proposal therefore fails to take proper regard of the objectives in s.69E and s.138(2)(d)&(e) of the QCA Act.

16.9 Guiding Principles

Draft Decision 16.6 is to approve the Expansion Pricing Principles outlined in the 2014DAU.

Aurizon Network reiterates the importance of these expansion pricing principles. In particular, the idea that existing users should not experience a material increase in tariffs due to an expansion triggered by Access Seekers. Aurizon Network is concerned that the QCA's mark-up of the 2014DAU does not accurately reflect the intent of these principles, nor the Objectives of Part 5 of the QCA Act. These concerns are outlined below.

16.10 Expansion Pricing Framework

Draft Decision 16.7 is to refuse to approve Aurizon Network's proposed expansion pricing framework.

The revised framework submitted as part of the 2014DAU was the result of extensive consultation with the QRC. While consensus was not reached on all aspects of the drafting, Aurizon Network had adopted most of the QRC's suggestions.

Aurizon Network's main concerns with the QCA's Draft Decision are:

- a lack of clarity regarding the socialisation of expansions;
- the lack of a materiality threshold as part of the socialisation test, which is inconsistent with Draft Decision 16.6(b); and
- the fact that expansion users bear asymmetric volume risk. This is a result of the QCA's fixed cost expansion pricing mechanism and the requirement that expanding users never pay less than the existing users. The latter is enforced through the Contribution to Common Cost mechanism.

Aurizon Network's interpretation of the QCA's proposed expansion pricing framework is that expansions will never be socialised with the existing system, even where there is a demonstrable benefit to the existing system. While this may not be the intent of the QCA, Aurizon Network is concerned that the lack of clarity will result in the strictest interpretation of this framework.

Aurizon Network maintains that there are circumstances where it may be reasonable to socialise an expansion with the existing system, for example where maintenance and operational efficiencies are created as a result of track duplication. It is unclear whether this is permissible under the QCA's Draft Decision, but such instances should be assessed by the QCA on a case-by-case basis.

Instead the QCA proposal passes the benefit of reduced pricing through to existing users without any share of the risk or benefit of volume variations. It is unreasonable that such a "free ride" should be provided to existing users and on this basis, the QCA proposal appears discriminatory. To mitigate this, expansion users may seek their own protections, which may include:

- symmetrical volume risk, i.e. partial / full protection of expanding users from the volume risk of existing users; and
- to the extent that expanding users are quarantined from the system and pay a higher price than existing users during a ramp-up period, it would seem reasonable to allow them to receive the benefit of a lower price in the future.

As a result, the pricing framework within the CQCR would become further fragmented and complex.

While there may be a degree of uncertainty where the mine(s) requiring an expansion are not yet operating, Aurizon Network considers that there are more appropriate mechanisms to address this. These include:

- greater security requirements; and
- aligning pricing to contracted volume ramp-up profile;

It is also important to recognise that expansions may be triggered where a well-established incumbent user wishes to increase output, e.g. requiring a new passing loop. In this circumstance, the risk of 'non-performance' relative to contract would be lower, yet the same stringent expansion pricing principles would apply.

Aurizon Network has an obligation and a vested interest in promoting efficient investment in the network and effective competition in the market. The QCA's proposed amendments to the expansion pricing framework discriminate in favour of existing users, and will create significant barriers to entry for expanding users, a clear contravention of the public interest in having competitive markets.(s.138(2)(d))

It is important to note that the intent of SUFA is to provide an effective 'competitor' to Aurizon Network in terms of funding network expansions. The QCA's proposed expansion pricing framework places expansion users and funders at a significant disadvantage to existing users. As a result, it is highly unlikely that Aurizon Network or SUFA investors will invest under standard terms and conditions.

Separate Tariff for All Expansions

Draft Decision 16.7 (a) requires a separate expansion tariff, based on contracted volumes, to be established in the event that an expansion is triggered.

Aurizon Network believes the QCA's Draft Decision will create extensive fragmentation within a coal system by changing the 'rules of the game' in favour of existing customers. As noted above, the more a coal system becomes fragmented, the more complex and arbitrary the necessary cost allocations become. This is particularly relevant where an expansion is fully integrated within a multi-user coal system. In circumstances such as this, it is practically impossible to differentiate between the costs different users impose upon the common infrastructure.

Establishing a separate expansion tariff is generally appropriate where the expanding customers are the only ones utilising the infrastructure. However, where an expansion/enhancement occurs on the common mainline corridor, and will be utilised by both expanding and existing users, the distribution of benefits becomes obfuscated.

The QCA provides a worked example,¹³³ which illustrates the potential impact on an existing user, in the event that a New user under-rails relative to its forecast. The QCA's example does not consider the scenario where existing users under-rail instead of expansion users and as a result, provides an unbalanced view of the socialisation argument.

If Existing user 'A' under-rails by 50% (same magnitude as the QCA's example for an expansion user under-railing), New user 'B' will end up paying an Access Charge of \$103,050, which is equivalent to \$10.30 per NT. When compared to the pre-socialisation tariff of \$8 per NT, the New user 'B' experiences an increase of 29%. In contrast, Existing user 'A' is subsidised, and paying less than its incremental cost of \$100,000.

The key benefit of socialisation is that all users share both the ups and downs, and normalise the impacts of volume fluctuations. In a particular year, some users (existing or new) may over-rail, while others under-rail. Under-railing users benefit from the strong performers, by not paying their full incremental costs as illustrated in the above example. In future years, users who previously under-railed may outperform, and subsidise under-railing users, who may have railed strongly in previous years. Over the long run, the benefit every user receives from such a process will be roughly the same, as there is no apparent reason to believe any user will systematically under or over rail if the volume forecast is unbiased. In the event that this does happen, resumption provisions are already in place to rectify this.

While there may be higher volume uncertainty during an expansion's ramp-up period, this risk (and the impacts on non-expansion users) can be better addressed through a number of ways, for example. revenue smoothing or applying a pricing premium during this period.

¹³³ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Box 6, p. 371.

Aurizon Network does not consider that the QCA's example paints a balanced picture in the sense that it fails to consider the benefits of socialisation. That being:

- Existing user A benefiting from a reduced price in total (reduction to \$9.00 per NT); and
- the greater capacity of the system in the event that they under-rail. For example, if they only rail 6,000 NT and New user B rails at contract (10,000 NT), then Existing user A pays \$15 per NT compared to the \$16.70 per NT it would pay without New user B.

The QCA's Draft Decision does not promote competition in upstream and downstream markets. It discriminates against expansion users on the basis of timing of entry and, as currently drafted in the QCA's mark-up of the 2014DAU, appears to maintain this arrangement in perpetuity. This is inconsistent with the Objectives of Part 5 of the QCA Act.

While Aurizon Network agrees that a separate expansion tariff should be established where an expansion fails the socialisation test, it maintains that this is inappropriate where the expansion creates a demonstrable benefit for the existing system.

The Undertaking should not require all expansions to be automatically quarantined. The pricing arrangement for expansions, including an assessment of whether socialisation with the existing system is appropriate, should be assessed by the QCA on a case-by-case basis.

On the basis that pricing for expansions must nevertheless be approved by the QCA, Aurizon Network requests that the QCA reinstate the expansion pricing framework proposed in the 2014DAU, which was substantially agreed between Aurizon Network and the QRC.

Asset Stranding Risk for Expansions

The separation of expansions from the existing system, as proposed by the QCA, also creates significant asset stranding risk for expansion projects. Under the QCA proposal, expansion and existing users will operate within their own 'pricing systems', subject to separate pricing, Take-or-Pay and Revenue Cap arrangements. This increased fragmentation will create additional risks for Aurizon Network and expansion users. The QCA has not articulated how it intends to address this increased risk, nor whether Aurizon Network has the ability to do so under the QCA's redrafted Undertaking. Aurizon Network also notes that barriers to entry are further increased where expansion users are subjected to more stringent security requirements.

The issue of asset stranding risk is not only relevant to Aurizon Network, but also has implications for both the existing and expanding users, as investors will demand a higher regulated return in response to the increase in risk.

Compared to the existing system, an expansion project usually involves a smaller group of users. The volume risk is therefore co-insured among that smaller group, which is less effective. Instead, if the expansion project is socialised with existing users, the volume risk is shared on a wider basis. In this regard, the failure of a particular user (either existing or expansion user) will not have as much impact, and the asset stranding risk is reduced for both the existing system and the new expansion.

However, the proposal to have separate tariffs for all expansions will greatly reduce the benefit of socialisation in reducing asset stranding risk. Together with Draft Decision 14.2, which reinstates demand deterioration as a reason for adjusting the RAB value, investors are facing greater uncertainty in recovering their invested capital. Consequently, given the significant asset stranding risk for expansion projects, Aurizon Network or any future funder inevitably will require a return above the regulated rate to compensate for the additional risk.

The higher cost of capital imposed on the expansion users, in turn, increases the barrier to entry, in the favour of incumbents, and does not promote efficient investment in the CQCR. Regardless of whether expansion projects are quarantined or not, Aurizon Network submits that the QCA should clarify its position on asset stranding risk and provide regulatory certainty for investors in the Final Decision, as the asset stranding risk has increasingly become an issue even for some existing assets. Aurizon Network has attached a paper specifically on asset stranding risk in Appendix 1, and is open to further discussion with the QCA on this issue before the Final Decision.

Fixed Cost Regime for Expansions

Draft Decision 16.7(b) requires Aurizon Network to implement a 'fixed cost' regime based on contracted volumes for users paying an expansion tariff. Each user will pay an access charge with a fixed component (defined as AT₂ to AT₄ tariffs, and AT₅ if an expansion involves electric infrastructure) that does not vary with its actual usage, except in the event of Aurizon Network Cause.

The QCA's proposal appears to reflect the pricing approach applied for the Dalrymple Bay Coal Terminal (DBCT) and in the Hunter Valley. The key difference, between the DBCT / ARTC approach and the QCA's Draft Decision is the adjustment for Aurizon Network cause.

Aurizon Network acknowledges that there are instances where capacity has not been provided as a result of events attributable to 'Aurizon Network cause'. In setting Access Charges against forecast volumes, an allowance is made for the fact that under-railings may be attributable to Aurizon Network Cause, which can include Force Majeure events. Under a 'volume forecast' scenario, Aurizon Network will either over or under-collect Access Charges compared to its allowable revenue in a given year. These differences are then trued-up via a Revenue Cap Adjustment.

In contrast, where Access Charges are set on the basis of contracted volumes and adjusted for Aurizon Network Cause, Aurizon Network will never over-recover its allowable revenue in a given year (as there will always be some degree of Aurizon Network Cause). This effectively guarantees a Revenue Cap recovery, which may be significant (due to an unseasonal wet season event) and is collected in a subsequent year, which is contrary to Aurizon Network's legitimate business interests [s.138(2)(b)].

As outlined above, Aurizon Network is concerned that:

- the QCA's Draft Decision will create materially different outcomes between existing and expansion users and create additional barriers to entry;
- the fixed cost regime and removal of the distance taper element of the expansion pricing structure will also create material differences between expansion users with long and short hauls; and
- the proposed change from forecast to contract volumes will also create a materially different allocation of risk between Aurizon Network and expanding users.

In all, it is difficult to see how this proposed regime will not actively discourage investment in rail infrastructure supporting new mines, which would constrain the scope for increasing competition in the coal export market, and thereby contradict a fundamental tenet of the QCA's charter.

Aurizon Network disagrees with the QCA's Draft Decision 16.7(b). It is more appropriate to consider and implement such a material restructure of the pricing framework as part of the long-term pricing review suggested by the QCA.¹³⁴ Aurizon Network requests that the QCA reinstates the expansion pricing framework proposed in the 2014DAU, which was materially agreed with the QRC.

No Contribution to Common Costs (CCC) where expansion tariff is higher than the system tariff

The first part of Draft Decision 16.7 (c) is that where an expansion tariff is higher than the system reference tariff on a Net Tonne basis, users paying an expansion tariff will not be required to make any contribution to common costs.

Aurizon Network agrees with this Draft Decision. Setting the CCC to zero in this instance will:

- ensure that existing users are 'no worse off', because expansion users are expected to cover their incremental costs; and
- prevent a cross-subsidy from expansion users to existing users, which would increase the price differential and create additional barriers to entry .

¹³⁴ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 15.6, p. 348.

Contribution to Common Costs where expansion tariff is lower than the system tariff

The second element of Draft Decision 16.7(c) states that if the incremental costs associated with providing access for expanding users are lower on a \$ per NT basis than the system reference tariff, a positive common cost contribution will be included in the expansion tariff. This ensures that the expansion tariff aligns with the system reference tariff on a \$ per NT basis.

In principle, Aurizon Network agrees that a positive contribution to common costs is acceptable where an expansion tariff is lower than the system tariff.

When considered in the context of the QCA's proposed Expansion Pricing Framework, the QCA's CCC proposal is fundamentally flawed, and skewed in the interests of existing users. The practical implication of the QCA's proposal requires the average price for existing users (expressed in \$ per NT) to be calculated with reference to forecast volumes. On the other hand, the average price for expansion users is calculated with reference to contracted volumes. This results in circumstances where the CCC would be automatically triggered, even where the revenue requirement and contracted volumes of existing and expansion users are exactly the same. This results in a cross-subsidy in favour of the existing users, for no valid reason whatsoever. This is illustrated in the table below:

Table 16.1 Inequity in CCC Methodology

	Existing User	Expansion User
Revenue Requirement (\$)	5,000,000	5,000,000
Contracted Volumes (NT)	1,000,000	1,000,000
Volumes for pricing purposes		
- Forecast	900,000	
- Contract		1,000,000
Price (\$ per NT)	5.56	5.00
CCC	(263,158)	263,158
Revised Revenue Requirement (\$)	4,736,842	5,263,158
Revised Price (\$ per NT)	5.26	5.26

As mentioned previously, Aurizon Network considers that where an expansion tariff is lower than the system tariff on a \$ per Net Tonne basis, it may be appropriate to socialise the expansion within the system. This recognises the fact that the new mine is expected to improve utilisation and reduce average costs on the common mainline corridor; thus reducing Access Charges for all users.

However, Aurizon Network has a number of concerns about how a positive CCC interacts with the QCA's proposed expansion pricing framework. In light of the fact that the QCA intends to establish quarantined arrangements for each expansion, Aurizon Network understands that the quantum of the CCC will vary, such that the expansion tariff will never be lower than the system tariff.

On this basis, the QCA is quarantining existing users from volume risk associated with expansion users. On the other hand, expansion users are required to cover the full value of their incremental costs in addition to being exposed to the volume risk of existing users through the CCC.

Aurizon Network considers that this asymmetric risk allocation does not promote effective competition, or encourage efficient investment in the network. It is therefore inconsistent with the objectives outlined in Part 5 of the QCA Act.

It is important to note that expansions are not limited to mine-specific infrastructure and may be fully integrated with the common mainline corridor (for example the Blackwater Duplications undertaken for the Wiggins Island project reduces the impact of faults in that section, as an alternative line is available). In the case of the latter, the expansion infrastructure will be utilised by both existing and expanding users, but the QCA's Draft Decision means that the pricing arrangements are the sole responsibility of the expansion user(s).

In light of the above, Aurizon Network proposes the following options for addressing the asymmetric risk. These include:

- for the purpose of determining whether a CCC is payable, calculate the price (\$ per NT) for both the existing user and the expansion user with respect to contract volumes; or
- set the CCC with reference to a formula or 'unit rate', such that the expanding users liability with respect to the volumes of existing users is limited. This may mean that expanding users pay a lower price than existing users, but this is not unreasonable where expanding users cover their full incremental costs and may initially pay a higher price.

It is for these reasons that the option for socialising an expansion with the existing system within reasonable bounds should be agreed.

Socialisation between Expansions

Draft Decision 16.7 (d) states that in the event where there is an existing expansion tariff and another expansion is triggered, socialisation between the two expansions is appropriate if it complies with the approved form of the socialisation test.

Aurizon Network could agree with the QCA's Draft Decision subject to amendment. Aurizon Network agrees that where appropriate, expansions should be socialised with other expansions. However, the socialisation test should not quarantine expansions from the existing system by default.

Aurizon Network proposes an amendment to the QCA's Draft Decision 16.7 (d) which would widen the scope of the socialisation test and allow expansion tariffs to be socialised with the existing system, where it is appropriate to do so.

16.12 Materiality Threshold

Draft Decision 16.8 is to refuse to approve Aurizon Network's proposed five per cent criterion for socialisation. Draft Decision 16.8 (a) states that:

"If socialisation of a new expansion with the 'Highest Expansion Tariff'...leads to lower tariff on a unit basis, these costs will be socialised."¹³⁵

Aurizon Network could agree with Draft Decision 16.8(a) subject to widening the scope of the socialisation test to encompass the reference tariff of the existing system. To the extent that expansion provides a clear benefit (in terms of lowering average costs) to all users, it is inefficient to maintain a separate pricing arrangement for existing and expansion customers, running against the objects of Part 5 of the QCA Act.

The QCA provides a worked example,¹³⁶ which illustrates the potential impact on an existing user, in the event that a New user under-rails relative to its forecast. However, the QCA's example only tells part of the story. Aurizon Network asks the reader to also consider the following:

- As a result of socialisation, the price paid by the New user (\$9.00 per nt) is higher than the 'incremental' price of access (\$8.00 per nt);

¹³⁵ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.5.3, p. 375.

¹³⁶ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Box 6, p. 371.

- The Existing user is assumed to rail exactly to forecast. In practice, the existing user has an equal probability of under-railing. Under a socialised arrangement, the New user is also exposed to volume risk of the Existing user, which could see the New user paying above its incremental costs.
- In the QCA's example, the Existing user experiences an increase in total access charges of less than 3%, inclusive of take-or-pay. It is important to realise that where the New user rails to forecast, the Existing user could also realise a 10% decrease in total access charges as a result of socialisation.

The QCA's example is skewed towards illustrating the possible negatives of socialisation. The QCA's example also implies that existing users will face a price increase of less than 3%. This is not a material price change, and is inconsistent with the 'Guiding Principles' outlined in Draft Decision 16.6.

Consider the following alternative example. Assume \$40 million is spent on infrastructure upgrades to provide an additional 1 million tonnes per annum. Revenue is calculated with reference to a 20 year asset life and 6% real rate of return.

Table 16.1 Illustrative Example of Materiality Threshold

	Existing System	Expansion	Aggregate
Volumes (million NT)	120	1.0	121.0
Revenue (\$ million)	350	4.4	354.4
Average Price (\$ per NT)	\$2.92	\$4.40	\$2.93

Under this example, the expected incremental price is \$4.40 per NT. Alternatively, if the costs could be socialised with the existing system, the system price would increase from 2.92 to \$2.93; an increase of 0.42%.

However, with the QCA's Draft Decision to set no materiality threshold, the expanding miner decides that it is not in its interests to invest at that price. The investment does not proceed thus preventing additional competition in the market. This would not appear to the s.69E aspiration to "...promote the economically efficient ... investment in significant infrastructure...".

Aurizon Network considers the Undertaking should include express provision of a materiality threshold, which enables a reasonable degree of socialisation between an existing system and an expansion, subject to QCA approval.

Socialisation - Highest Tariff

Draft Decision 16.8 (b) states that:

"If socialisation leads to an increase in the 'Highest Expansion Tariff', the QCA will consider on a case-by-case basis whether to socialise or establish a separate expansion tariff..."¹³⁷

Aurizon Network disagrees with the QCA's Draft Decision. The Expansion Pricing Principles in Draft Decision 16.6 state that:

"existing users should not experience a material increase in tariffs due to an expansion triggered by access seekers"¹³⁸

While the QCA's Draft Decision is to approve this principle, the QCA has not defined what would constitute a 'material' increase.

¹³⁷ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.5.3, p. 375.

¹³⁸ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.5.3, p. 370.

Aurizon Network agrees with this principle, but considers that there is considerable merit in retaining a defined materiality threshold for the purpose of establishing an expansion tariff. A defined threshold will provide all stakeholders with a greater degree of transparency and certainty with respect to possible future pricing arrangements. It will also facilitate greater consistency in pricing proposals and decision making processes. It is also important to note that defining a materiality threshold would not prevent the QCA from assessing each pricing proposal on a case-by-case basis.

Aurizon Network considers that a defined materiality threshold is necessary, as it will promote economically efficient investment in the network and promote effective competition.

16.13 Expiration of Expansion Tariffs

Draft Decision 16.9 is to refuse to approve the 10-year expiration of expansion tariffs as proposed in the 2014 DAU. Aurizon Network could agree with the QCA's Draft Decision subject to amendment. Aurizon Network is prepared to remove the automatic 10-year expiration of expansion tariffs on the basis that the scope of the socialisation test be widened to allow socialisation with the existing system, where reasonable to do so. Although, it is noted that the 10-year expiration was included to balance the interests of existing and new users - a proposal that was agreed between Aurizon Network and the QRC.

As outlined above, Aurizon Network considers its Expansion Pricing Process outlined in the 2014DAU promotes transparency, and is consistent with the objectives of Part 5 of the QCA Act in the sense that it promotes the "...economically efficient operation, use of, and investment in,..." the network.

It is important to note that past track access pricing regimes were specifically designed to promote mine development and investment by 'socialising' mine-specific investment. This infrastructure became part of the RAB for the relevant coal system, and the costs were socialised among all users through the system Reference Tariff.

Aurizon Network reiterates that Expansions should not be indefinitely quarantined from the existing system. Doing so creates material discrepancies between existing and expansion customers, and exposes expansion customers to more stringent pricing conditions than the existing system, and asymmetric volume risk.

The QCA notes that it is in Aurizon Network's interest to socialise expansion tariffs after 10 years. This is not strictly correct; socialisation is primarily in the interests of the expansion funder. Where Aurizon Network is not the expansion funder, it may be in Aurizon Network's interest to reject socialisation in certain circumstances. Nevertheless, Aurizon Network believes, on balance, that it is fair and reasonable that expansion tariffs expire after 10-years, regardless of the identity of the funder. This arrangement is likely to make third party investment more attractive.

Aurizon Network agrees that the socialisation test should be re-run on an annual basis to take the latest information into account. However, consistent with the 2014DAU, Aurizon Network reiterates that the scope of the socialisation test should be widened to incorporate the existing system, not just expansion tariffs. To the extent that the annual socialisation test demonstrates a clear benefit (in terms of lowering average costs) to all users, it is inefficient to maintain separate pricing arrangements simply on the basis of timing of entry.

16.14 Multiple Reference Tariffs

Draft Decision 16.10 is to approve Aurizon Network's proposal that Access Charges for new Access Seekers should be the existing Reference Tariff which is highest on a \$ per NT basis.

Aurizon Network could agree with the QCA's Draft Decision, subject to an amendment which allows expansion tariffs to be socialised with system tariffs where doing so does not result in a material increase in price for existing users.

16.15 Pricing Proposal

Draft Decision 16.11 is to refuse to approve the provisions relating to the Pricing Proposal for expansions.

The Pricing Proposal outlined in the 2014DAU was included as a means of promoting transparency around how expansions would be treated for pricing purposes. This would be submitted to the QCA and published so that all stakeholders (including non-expanding users) have an opportunity to assess and comment on the assumptions underpinning the proposal.

The intent of Aurizon Network's proposal is to proactively seek QCA approval of the proposed pricing arrangements for the expansion. This information would be used to inform the investment and contracting decisions of Access Seekers, expansion funders and Aurizon Network. Aurizon Network considers its 2014DAU proposal to be consistent with the objectives of the QCA Act in the sense that it will promote economically efficient investment in the network. It will also promote transparency and certainty within the regulatory framework, which is in the interest of all Access Seekers and Access Holders.

While the QCA accepts the concept of the Pricing Proposal, its Draft Decision suggests a number of amendments to Aurizon Network's process. These are addressed below.

Timing of Pricing Proposal

Draft Decision 16.11(a) requires Aurizon Network to provide the Pricing Proposal as part of the feasibility study report for an expansion.

Aurizon Network acknowledges that the inputs required for any pricing analysis will change to a certain extent from the time interested parties commit to the project to when it is operationally commissioned for use. Providing indicative Access Charges and is not a new concept. In fact, it is currently a feature of the regulatory pricing framework, for example, the Capital Indicator.

One key benefit of the Pricing Proposal is that it will facilitate regulatory pre-approval of the 'methodology' by which Access Charges for the expansion will be calculated. This includes:

- the relevant pricing principles;
- allocation of capital, maintenance, operating costs between customer groups; and
- the degree to which costs are socialised between expansion and existing customers.

Indicative reference tariffs can be provided on the basis of the methodology. The QCA would be expected to make a binding decision with respect to the methodology, but the intent is that actual reference tariffs paid will reflect the final costs of the expansion.

As discussed in Part 12, a below-rail expansion is likely to align with a group of projects which comprise a whole of coal chain expansion (including port, mine and above-rail components). Potentially there will be a requirement for all of these to be conditional on each other reaching closure. For this reason, the expansion process does seek to align study phases with other key parts of the coal chain. At the time the feasibility study is completed, it can be expected that other parts of the coal chain are moving rapidly to closure and time will be of the essence. The below-rail expansion already has substantial activity at that time, including the finalisation of any commercial agreements and potentially seeking regulatory pre-approval of the expansion.

The volume of the expansion is effectively locked down when the feasibility funders are selected at the time the feasibility study becomes unconditional. The cost of the expansion will be known to a prefeasibility standard at that time. The feasibility study will deliver a more accurate cost estimate and other information required to take the project to closure.

Aurizon Network's proposed timing allows 80 business days after the volume is locked down for Aurizon Network to prepare the necessary information to be submitted. It then allows time for the QCA process to either complete or be substantially progressed prior to the hectic period after the feasibility study is completed. Updated cost estimates can be incorporated at that time, but the majority of the information will be available to be assessed, therefore supporting the efficient development of the network.

Aurizon Network's proposal provides ample time to all stakeholders to discuss the merits (or shortcomings) of any Pricing Proposal. It triggers a transparent consultation process with respect to the possible pricing outcomes, prior to any commitment being made, while minimising unnecessary delays to expansions.

The timing of this process will require Aurizon Network to make an earlier commitment to Access Seekers with respect to the funding arrangements for an expansion. It will also provide SUFA customers with more timely information, which should assist them in their efforts to attract funding. This will help to facilitate workable, bankable and credible SUFA arrangements.

Aurizon Network considers that delaying the provision of the Pricing Proposal until end of the 'feasibility' stage will create unnecessary delays in the project timeline. Accordingly, Aurizon Network disagrees with the QCA's Draft Decision, and recommends that the position outlined in the 2014DAU be reinstated.

Contents of the Pricing Proposal

Draft Decision 16.11(b) is to require the Pricing Proposal to contain information regarding the allocation of the expansion costs between existing and expanding users, the results of the socialisation test (in the event that there is an existing expansion tariff), the proposed pricing arrangements for the expansion, as well as indicative tariffs consistent with the proposed pricing arrangements.

Aurizon Network could agree with the QCA's Draft Decision, subject to amending the scope of the socialisation test to allow socialisation with the existing system, where it is reasonable to do so. Aurizon Network's position with respect to socialisation with existing system Reference Tariffs is outlined in section 16.8.2 of this response.

Socialisation Test

Draft Decision 16.11 (c) states that for the purposes of the Pricing Proposal, the socialisation test (if applicable) is to be calculated on the basis of forecast costs and forecast volumes as set out in the feasibility study. The QCA is allowed to revise any decisions with respect to pricing arrangements for an expansion if there is a material change in circumstances.

Aurizon Network reiterates the objectives of the Pricing Proposal, which are to improve transparency and create a degree of certainty around the pricing outcomes of an expansion. It achieves this through a public consultation process run as part of the QCA's assessment of the Pricing Proposal.

Aurizon Network acknowledges that the Pricing Proposal will be based on forecast parameters, which will have to be revised once 'final' costs are known. However, these should be reasonably well defined in the feasibility stage.

Aurizon Network remains concerned that the QCA reserves the right to unwind its decision with respect to the Pricing Proposal. This negates the objective of the Pricing Proposal to create certainty, and therefore is unlikely to be in the interests of Access Seekers, Aurizon Network or SUFA funders.

The Pricing Proposal assessment will be visible and transparent to all stakeholders, who also have the ability to raise concerns, assess risks and accordingly influence the QCA's decision. As such the QCA will be well placed to make an informed, binding decision.

Aurizon Network disagrees with the QCA's Draft Decision, however is prepared to discuss the 'material change' element of the Draft Decision in more detail. This Draft Decision may be acceptable to Aurizon Network if the circumstances under which the QCA can unwind its decision are limited to an agreed set of circumstances, and a materiality threshold can be clearly specified.

Submission of a DAAU

Draft Decision 16.11(d) states that upon the QCA's approval of a Pricing Proposal, Aurizon Network, where feasible, is required to submit to the QCA a DAAU, based on contracted volumes, to apply for approval of a new or varied reference tariffs.

This is not a material change from the 2014DAU. Aurizon Network could agree with the Draft Decision, subject to amendment. As outlined in section 16.8.2 of this response, Aurizon Network has concerns about the QCA's proposed 'fixed cost' approach towards expansion pricing and the asymmetric risks this creates.

Aurizon Network considers it appropriate that the DAAU reflects the assumptions of the Pricing Proposal approved by the QCA. Aurizon Network recommends that that QCA amend its Draft Decision by removing the explicit reference that the DAAU be submitted on the basis of “100% of contracted volumes”¹³⁹.

16.16 Expansions funded at Regulatory WACC

Draft Decision 16.12 is to refuse to approve the 2014DAU proposal to socialise expansions funded by Aurizon Network at the regulatory WACC.

The QCA notes that:

*“...all new investment is in Aurizon Network’s interest, as it potentially broadens the customer base for the recovery of capital expenditure ...”*¹⁴⁰

This exact argument applies equally to existing users and SUFA funders, where the MAR for a coal system is spread across a larger customer base, reducing average prices and lessening the risk of rising prices in the future.

Where Aurizon Network chooses to fund an expansion, it will be in a position to assess the risk and potential pricing outcomes of the expansion and make an informed decision on whether or not to invest. Aurizon Network does not have this option where there is an obligation to fund.

Aurizon Network could agree with Draft Decision 16.12, subject to being exempt from any form of funding obligation. The practical effect of the QCA’s Draft Decision is that Aurizon Network will no longer fund expansions under standard terms unless they can be socialised. Doing so would expose Aurizon Network to an unacceptable level of Asset Stranding and/or third-party credit risk. Aurizon Network is not compensated for these risks through the regulatory WACC, nor are they adequately mitigated by the provisions included in the QCA’s mark-up of the 2014DAU.

16.17 MRC and Distance Discount

Draft Decision 16.13 is to refuse to approve Aurizon Network’s proposal for a Minimum Revenue Contribution (MRC) and the recognition of a discount for customers who have funded their own mine specific infrastructure.

Distance Discount

Draft Decision 16.13(b) requires Aurizon Network to remove the Distance Discount. If an access seeker’s MRC is above the applicable existing reference tariff, the reference tariff applicable to this access seeker will be based on its MRC. Otherwise, the existing reference tariff will be applied to this access seeker

Aurizon Network disagrees with the QCA’s Draft Decision on the basis that it creates material price discrimination between existing and new customers.

As noted in the supporting information provided with the 2014DAU¹⁴¹, the current methodology of pricing mine-specific network infrastructure (spurs connecting the mine to the mainline network) was developed in a very different commercial environment characterised by excess track capacity and low coal prices. The track access pricing regime was specifically designed to promote mine development and investment. This involved ‘socialising’ mine-specific investment and only required the owner of a mine with a mine-specific spur to make a minimum contribution to common costs. The costs of this infrastructure have therefore been included in the common system price.

¹³⁹ QCA, 2015, Draft Decision: Draft Access Undertaking, Part 6: Pricing Principles, Clause 6.4.3 (h), p. 97.

¹⁴⁰ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.5.3, p. 377.

¹⁴¹ Aurizon Network, 2013, 2013 Draft Access Undertaking - Volume 2: The 2013 Undertaking Proposal, Section 9.9, p. 233.

The 2010AU and the 2014DAU recognise that an Access Seeker may be required to develop and own Mine Specific Infrastructure (MSI) in order to facilitate Access to the CQCR. The Access Seeker is responsible for the full value of their MSI costs, which will not be socialised within the system price.

As noted above, past track access pricing regimes required Aurizon Network to develop and own the MSI costs of Access Seekers. This infrastructure became part of the RAB for the relevant coal system, and the costs were socialised among all users through the system Reference Tariff.

Under the QCA's proposal, new Access Seekers are required to fund their own MSI costs, and make a contribution towards the MSI costs of all existing users via their Access Charges. This outcome is unlikely to promote effective competition in upstream and downstream markets and therefore be inconsistent with Part 5 of the QCA Act.

Considerations of fairness and competitive neutrality might suggest that any historical cross-subsidy policies be continued. But these considerations are equally relevant when determining a reasonable treatment for new Access Seekers. Failure to do so discriminates in favour of existing users.

The 2010AU sought to address this by recognising costs privately funded by the Access Seeker in the form of a discount to the system price. This discount was linked to the quantum of an Access Seeker's Private Incremental Costs¹⁴². The limitation of this approach was that Aurizon Network relied on the Access Seeker to provide the necessary information, but had no control over the prudence or efficiency of these costs. This could create perverse incentives where customers inflate their Private Incremental Costs in an attempt to secure a greater discount from their Access Charge.

The 2014DAU refined the methodology outlined in the 2010AU by calculating the discount with reference to the length (distance) of the MSI, rather than the costs of construction. This amendment creates more economically efficient outcomes because the discount is linked to the characteristics of the relevant rail infrastructure and is internally consistent with the 'distance taper' concept, a critical element of the Reference Tariff structure.

Aurizon Network's proposal ensures that, at the very least, new users will always be held accountable for their incremental costs. The concept of a discount to reflect private costs incurred is not new, and it encourages investments in the network and promotes market competition.

Stakeholders have not raised any material objections to the Distance Discount proposal. Aurizon Network is prepared to re-assess the spur length limits if stakeholders believe this would be appropriate.

When setting Access Charges for new Train Services, it is fair to acknowledge that existing users received some form of financial support to construct their MSI, whereas new customers are required to fund and own their MSI; and additional barrier to entry. As a result, the discount mechanism is an economically efficient and reasonable way to ensure that new customers are not unfairly discriminated against.

The QCA's Draft Decision to remove the Distance Discount is unlikely to promote effective competition, and discriminates against the interests of new Access Seekers. Accordingly, it is inconsistent with the objectives of Part 5 of the QCA Act. Furthermore, the QCA has not provided any compelling evidence to justify why they now consider that a discount (in any form) is inappropriate.

Aurizon Network disagrees with the QCA's Draft Decision 16.13(b), and recommends that the Distance Discount provisions outlined in the 2014DAU be reinstated. In the interests of promoting transparency and simplicity, Aurizon Network would like to discuss with the QCA, the possible inclusion of a 'distance discount matrix' within the 2014DAU, which would state the applicable discount (as a percentage), for a specified range of spur and mainline distances.

MRC

Draft Decision 16.13(a) requires Aurizon Network to revise the calculation of the MRC to reflect "the AT₁ tariff of the applicable reference tariff plus other incremental costs (to the extent not covered by the AT₁ tariff and other agreements between Aurizon Network and the access seeker) of providing access (calculated on the basis of forecast NT), excluding any reference to mine-specific spur line costs irrespective of infrastructure ownership."

Given Aurizon Network's position with respect to Draft Decision 16.13(b) above (i.e. reinstatement of the Distance Discount), Aurizon Network disagrees with Draft Decision 16.13(a).

¹⁴² Aurizon Network, 2014, QR Network's 2010 Access Undertaking, Schedule F, Part B, Clause 4.1.2, p. 233.

The practical impact of the QCA's Draft Decision to remove the minimum Contribution to Common Cost element (i.e. $AT_2 + 25\% AT_3 + 25\% AT_4$) from the MRC calculation, is that it is entirely possible that the MRC for a new Train Service would be limited to its incremental maintenance costs only, i.e. AT_1 in the event that the Distance Discount is triggered. Conceptually, this outcome is fundamentally flawed because it would mean that the Train Service would make no contribution to fixed costs within the system, which are committed irrespective of volume. This is also inconsistent with the QCA's CCC proposal, which requires new users to pay an element of common costs, where their incremental costs are below the system price (on a \$ per NT basis).

The 2014DAU proposal ensures at a very minimum, that a new train service should always meet its incremental maintenance costs, and make a contribution to the common costs of the system.

Aurizon Network disagrees with Draft Decision 16.13(a), and recommends that the QCA reinstate the 2014DAU proposal on MRC.

Application of MRC to New Train Services

Draft Decision 16.3(c) requires Aurizon Network to expand the application of the MRC to all new train services as long as they do not trigger an expansion to the CQCR.

Aurizon Network could agree with the QCA's Draft Decision, subject to the QCA accepting Aurizon Network's position on Draft Decision 16.3(a) and (b), that is, reinstatement of the Distance Discount and revision of the MRC formula.

16.18 Commercial Terms

Draft Decision 16.14 is to refuse to approve the commercial term provisions in Aurizon Network's 2014DAU as the QCA considers it appropriate for Aurizon Network to reinstate the 2010AU access condition provisions. The QCA has also suggested amendments to the 2010AU access conditions provisions.

Aurizon Network:

- agrees with the QCA's position on drafting (Draft Decision 16.14(a));
- disagrees with the QCA's position on the applicability of the access conditions provisions (Draft Decision 16.14(b)); and
- disagrees with some of the separate arrangements (Draft Decision 16.14(c)). As outlined below, Aurizon Network offers a more timely alternative that better meets the requirements of s138(2) of the QCA Act.

16.19 Applicability of Access Conditions

The 2010AU featured Access Conditions provisions to address circumstances where Aurizon Network sought greater reward or varied terms and conditions as a condition for providing funding for an expansion. These were also the only circumstances addressed by the commercial terms provisions in Aurizon Network's 2014DAU.

Under the QCA's UT4 Draft Decision, the Access Conditions provisions have been expanded to deal with circumstances where there is any variation from template agreements, which have cost and risk implications for Aurizon Network, even where there is no link to any provision of funding¹⁴³. The treatment of these 'unrelated to funding' variations is discussed in more detail in our response to Draft Decision 16.2 above.

Aurizon Network submits that having the one mechanism to deal with both sets of circumstances is inappropriate and that non-standard 'unrelated to funding' terms agreed between Aurizon Network and an access seeker be managed through provisions that are separate from the Access Conditions provisions.

¹⁴³ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.14(b), p. 386.

16.20 Impact on the market for funding

One objective of the 2014DAU is to provide an effective user funding mechanism that will allow for funding of expansions by parties other than Aurizon Network. While some stakeholders raise concerns about the effectiveness or lack of demonstrated implementation of the user funding regime, it has been incorporated to the best of Aurizon Network's ability. Aurizon Network's response to the user funding component of the QCA's Draft Decision is included in Section 12.

In Aurizon Network's view, the Access Conditions provisions should not hinder competition between funding sources, including Aurizon Network itself, where Aurizon Network does not volunteer to fund for regulated returns. In this situation the best interests of access seekers are served by strong competition between these funding sources.

The QCA's draft decision, as detailed below, reduces Aurizon Network's competitiveness as a funding source. It is not in the interests of Access Seekers or the public for the effectiveness of a major funding source to be significantly restricted. Furthermore, it is clearly not in the legitimate business interests of Aurizon Network for its effectiveness to be restricted.

If Access Seekers reach a mutually satisfactory funding arrangement with any funder other than Aurizon Network, the parties are free to enter into that arrangement without any regulatory approval. This funding arrangement has the benefit of certainty and timeliness. By contrast, if Access Seekers reach a mutually satisfactory funding arrangement with Aurizon Network, that arrangement is conditional upon regulatory approval. This funding arrangement would not be certain, as there would be regulatory risk, and there will be a significant period of time before that certainty may be achieved. As discussed in Aurizon Network's response to draft decision 12.3, the need to obtain this regulatory approval could cause delays for the entire coal chain. For instance, regulatory approval of access conditions for the WIRP project took more than 8 months.

The QCA raises the issue that "there will be expansions that Aurizon Network is in the best position to fund" and that there is potential to "distort the negotiation and result in outcomes that inordinately favour Aurizon Network."¹⁴⁴ Aurizon Network does not agree that where it has a reasonable advantage, such as a deep understanding of the business of investing and operating railway networks in Central Queensland, that this should be a concern to the regulator. It is customary for a business operator to take advantage of its strengths. To the extent that the QCA is seeking to address any unreasonable advantage of Aurizon Network, such concerns should be addressed by providing the best possible user funding regime.

Aurizon Network does not support the draft decision to supplement the user funding alternative with the proposed Access Conditions mechanism on the grounds that user funding is not fully effective as a competitive alternative to funding by Aurizon Network. Aurizon Network does not understand how onerous restrictions on Aurizon Network's ability to compete in the funding market provide an outcome that best meets the requirements of s138(2) of the QCA Act.

- (i) If an alternative funding source is more attractive than Aurizon Network funding, then access seekers will proceed with that alternative funder and Access Conditions are not required;
- (ii) Where Aurizon Network funding is the most attractive funding source, then access seekers will wish to proceed with Aurizon Network funding, and their business interests are best served by being able to do so without any delays or risks associated with regulatory approval;
- (iii) Where Aurizon Network funding is the most attractive funding source, QCA approval is required and that approval is granted, the access seekers will be in the same position as they would be under scenario (ii) following a period of material delay during which they face regulatory risk; and
- (iv) Where Aurizon Network funding is the most attractive funding source, QCA approval is required and that approval is not granted, then access seekers would be forced to adopt one of two less palatable courses of action, namely:
 - a. the adoption of an alternative funding source (with a less attractive funding deal or the access seekers would have adopted scenario (i)); or
 - b. the expansion does not proceed.

¹⁴⁴ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 16.7.3, p. 385.

The choice between these two courses of action could only be made after a period of material delay during which the access seekers face regulatory risk, and the adoption of course of action a. would result in further delay.

The only justification for the imposition of a QCA approval requirement is that the outcome from a decision to withhold that approval better satisfies the criteria in s138(2) of the QCA Act than the outcome that would otherwise prevail. The outcome under scenario (iv) does not meet that justification since it would result in a worse outcome for access seekers as well as Aurizon Network with no material improvement in satisfying other criteria. Aurizon Network also contends that this QCA approval requirement is inconsistent with the object, as set out in s69E of the QCA Act, of promoting the economically efficient investment in infrastructure.

16.21 Provision of Access Conditions report prior to negotiation

Notwithstanding its opposition of the QCA approval requirement, Aurizon Network does not understand why the QCA-proposed UT4 requires Aurizon Network to submit an Access Conditions report on its initial position on Access Conditions prior to the commencement of the negotiation process. All parties would be entering into any negotiation in good faith and, as is customary in any negotiation over complex matters, it is to be expected that parties will raise new issues, look to identify win/win positions and otherwise modify their positions. The Access Conditions agreed by Aurizon Network and Access Seekers would therefore differ from the Access Conditions originally proposed by Aurizon Network. Accordingly, Aurizon Network does not understand the relevance of any QCA assessment of the Access Conditions originally proposed by Aurizon Network.

Aurizon Network considers that any QCA assessment should be conducted solely on the agreed Access Conditions, so the assessment can only commence once that agreement is reached. As a consequence, obtaining that QCA approval is likely to be a material risk to the expansion of the coal supply chain, and the timing of that approval is likely to be a material risk to that expansion's schedule.

16.22 'Non-Undertaking' Option

The QCA proposes that there should be a 'Non-Undertaking Route' for negotiations over Access Conditions, but only following the QCA's refusal to approve Access Conditions proposed by Aurizon Network.

Given one outcome of the QCA not approving Access Conditions, is the option to negotiate outside of the undertaking, Aurizon Network considers that this option should be available from the start of the Access Conditions process. In other words, Aurizon Network would be free to elect, soon after the commencement of the feasibility study, to commence negotiations outside of the scope of the Access Undertaking. This results in the following:

- a) Where the access seekers do not agree with the proposed commercial terms and select an alternative funder this arrangement will not result in any different outcome to the QCA proposal.
- b) Where the commercial terms agreed with access seekers would have been approved through the current process (under clause 6.13.2(e)), the outcome will be the same for access seekers, except that they will have the advantages of no delays waiting for QCA approval and no risk of QCA approval not being granted.
- c) Where the commercial terms agreed with access seekers would not have been approved through the current process (also under clause 6.13.2(e)), the outcome will be the same, namely negotiation outside of UT4, but commencing much earlier with favourable schedule consequences for the expansion of the coal chain.

Aurizon Network considers the option to elect to negotiate outside of the undertaking from the start of the process better meets the criteria of s138(2) of the QCA Act as it will result in the same outcomes, but with less delay. The only disadvantage is that Aurizon Network forgoes the opportunity to have Access Conditions approved under UT4, but this outcome is at its election.

16.23 Application of Division 5, Part 5 of the QCA Act

The provision in the QCA-proposed 2014DAU that address access determinations in respect of the 'Non-Undertaking Route' (namely section 6.13.3(g)(iii) of the QCA-proposed 2014DAU) is unclear. It could be interpreted as:

- a) confirming for the avoidance of doubt that when the 'Non-Undertaking Route' is adopted, s119(4)(a) of the QCA Act applies; or
- b) constituting a commitment by Aurizon Network that, where the QCA makes an access determination pursuant to Division 5 of Part 5 of the QCA Act, the QCA can require Aurizon Network to fund an expansion subject to the expansion project meeting the requirements of s119(4B) of the QCA Act, notwithstanding s119(2)(c) of the QCA Act not allowing the QCA to require Aurizon Network to pay any costs of an expansion.

If interpretation (a) is intended then there is no need for the drafting and it should be deleted as it creates confusion.

If interpretation (b) is intended Aurizon Network disagrees with the QCA's position. It is beyond the QCA's powers to make a draft decision which requires Aurizon Network to fund expansions where Aurizon Network has not provided a funding commitment on a voluntary basis. In the 2014DAU, Aurizon Network does not volunteer to provide any rights for the QCA to impose an expansion funding obligation and accordingly the clause should be removed.

17 Reference Tariffs

17.1 QCA's Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed pricing matters relating to the AT2 tariffs. We would approve amendments to the 2014 DAU, to:</p> <p>(a) escalate the 2012–13 AT2 tariffs from the 2010 AU by CPI over the 2014 DAU regulatory period</p> <p>(b) remove the adjustments that were made to address the impact of the increase in AT2 tariffs as follows:</p> <p>(i) revert the calculation of the charge for cross-system train services to the 2010 AU approved approach for AT3 and AT4 tariffs</p> <p>(ii) revert the calculation of minimum contribution to common costs (CCC) to the 2010 AU approved approach</p> <p>(iii) reset the AT4 tariffs for the Newlands system to the standard calculation approach used in other systems for all years in the 2014 DAU regulatory period.</p>	17.1	<p>(a) Agree.</p> <p>(b) (i) Disagree.</p> <p>(b) (ii) Agree.</p> <p>(b) (iii) Agree.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed capacity 'diesel' multiplier. We would approve an amendment to the 2014 DAU to remove the capacity 'diesel' multiplier. We will reconsider this issue if there is evidence to support the continued use of the capacity 'diesel' multiplier.</p>	17.2	Agree with amendment.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed AT1 calculation approach. We would approve an amendment to the 2014 DAU, to escalate the AT1 according to the MCI over the 2014 DAU regulatory period.</p>	17.3	Agree.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed system discounts. We would approve an amendment to the 2014 DAU, to:</p> <p>(a) remove the system discount and revert to the rebate arrangements in place under the 2010 AU</p> <p>as set out in the marked changes to Schedule F attached to this Draft Decision.</p>	17.4	Agree with amendment.
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed pricing matters outlined in this section. We would approve amendments to the 2014 DAU, to:</p> <p>(a) remove NAPE costs from the Newlands system</p> <p>(b) create an independent NAP system with a separate reference tariff and the required access undertaking amendments to recover the tariff revenue</p> <p>(c) revise the GAP system tariff so that the AT3 and</p>	17.5	<p>(a) Agree with amendment.</p> <p>(b) Disagree.</p> <p>(c) Disagree</p>

Draft Decision	Reference	Aurizon Network Position
AT4 tariff components are calculated in a manner consistent with other CQCR reference tariffs in order to recoup the remainder of costs not recovered via the AT1 and AT2 tariffs.		
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed new reference tariff arrangements. We would approve amendments to the 2014 DAU, to:</p> <p>(a) derive an alternative reference tariff for the Middlemount to DBCT train service based on the 2010 AU pricing principles</p> <p>(b) derive the reference tariff for the Caval Ridge to HPSCT train service based on 2014 DAU pricing principles</p> <p>(c) apply an incremental cost test to Rolleston electric assets using forecast volumes rather than with reference to 85 per cent of contract volumes.</p>	17.6	<p>(a) Agree</p> <p>(b) Disagree</p> <p>(c) Disagree</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed reference train service characteristics in Schedule F of the 2014 DAU. We would approve amendments to the 2014 DAU, to:</p> <p>(a) remove the requirement for a reference train service to operate using the most direct route or provide justification for retaining this requirement</p> <p>(b) remove the requirement relating to capital costs or provide justification for retaining this requirement</p> <p>(c) amend the requirement relating to conditions of access as set out in the marked changes to Schedule F attached to this Draft Decision.</p>	17.7	<p>(a) Disagree. Multi-origin trains cannot reasonably be considered a standard Reference Train.</p> <p>(b) Agree</p> <p>(c) Agree</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed revenue cap adjustments in Schedule F of the 2014 DAU. We would approve amendments to the 2014 DAU to:</p> <p>(a) remove proposed revenue adjustments in relation to:</p> <p style="padding-left: 40px;">(i) short-run variable maintenance costs</p> <p style="padding-left: 40px;">(ii) AT1 revenue</p> <p>(b) reflect in the calculation of adjusted allowable revenue the cost of audits required under this undertaking by the QCA, but only to the extent that the QCA has approved these costs as being efficient and these costs are not recoverable elsewhere in this undertaking.</p> <p>(c) remove rebate adjustments from the calculation of adjusted allowable revenue</p> <p>(d) include overload charges and ancillary revenues in the calculation of total actual revenue</p> <p>(e) remove the increment calculation and application.</p>	17.8	<p>(a) (i) Disagree, however Aurizon Network is willing to discuss alignment of the SRVC Rate with the Draft Decision on MAR.</p> <p>(a) (ii) Disagree, but accept subject to the QCA's review of AT₁ prior to the commencement of UT5.</p> <p>(b) Agree</p> <p>(c) Disagree.</p> <p>(d) Agree with amendment.</p> <p>(e) Agree.</p>
<p>Our Draft Decision is to refuse to approve Aurizon Network's proposed suite of reference tariff variation events. We would approve reference tariff variation events in the 2014 DAU that comprise:</p> <p>(a) a change in law or relevant taxes with a 2.5 per</p>	17.9	Agree with amendment.

Draft Decision	Reference	Aurizon Network Position
cent materiality threshold		
(b) a review of the QCA levy		
(c) force majeure.		

17.2 Summary of Aurizon Network’s Response

Aurizon Network believes that the existing Reference Tariff pricing structure accurately reflects the costs a train service imposes on the network. Nevertheless, it is willing to look at better ways of presenting the information so that users can more readily comprehend the options that may be available to them within the pricing framework.

Aurizon Network is concerned that the QCA is attempting to unwind its previous determinations for new projects including Caval Ridge and GAPE. It is not appropriate to retrofit the new pricing principles of the 2014DAU to pricing agreements which were accepted in good faith on the principles existing at the time. Indeed, in its determinations on those projects, the QCA itself confirmed that a pricing agreement could only be struck on the principles that are in effect at the time of the investment.

We are also concerned that the QCA is refusing to accept positions which have been agreed between Aurizon Network and the QRC, as the representative of customers, such as the system for the calculation of cross system reference tariffs.

Aurizon Network acknowledges the merits of having a more detailed strategic review of Reference Tariffs, and is willing to proactively engage with stakeholders in that process beyond approval of UT4.

17.3 AT₂ Reference Tariffs

Draft Decision 17.1 is to refuse to approve Aurizon Network’s proposed AT₂ Reference Tariffs in Schedule F. A discussion of each of the matters raised by the QCA is provided below.

17.3.1 Escalation of the 2012/13 AT₂ Tariffs

Draft Decision 17.1 (a) requires Aurizon Network to escalate the 2012/13 AT₂ Reference Tariffs by CPI over the 2014DAU regulatory period.

Aurizon Network considers that the AT₂ Reference Tariffs proposed by the QCA do not provide an appropriate price signal of the cost of creating network capacity. However, Aurizon Network is prepared to accept the QCA’s Draft Decision 17.1(a) on the basis that it has an opportunity to reassess the AT₂ Reference Tariff as part of any future pricing structure review.

In practice, CPI will change to reflect movements in costs over time. CPI for FY2013 and FY2014 have been published by the Australian Bureau of Statistics (ABS), and can be applied to determine the AT₂ Reference Tariff for FY2014. However, CPI is uncertain for the remaining years of the 2014DAU regulatory period.

For the purposes of escalating AT₂ Reference Tariffs, Aurizon Network proposes that for the remaining years of the 2014DAU regulatory period, CPI should be fixed at the mid-point of the Reserve Bank of Australia’s target rate of inflation, i.e. 2.5%. These rates are summarised in the table below:

Table 17.1 Proposed CPI Escalation

Year	CPI
FY2014	3.22%
FY2015	2.50%
FY2016	2.50%
FY2017	2.50%

* Source: www.abs.gov.au; www.rba.gov.au

Setting a constant escalation rate for Reference Tariffs will address two issues, namely:

- 'actual' CPI for year $t-1$ will not be published by the ABS until after the commencement of year t . As a result, Aurizon Network would be unable to finalise Reference Tariffs for year t as part of the 'Annual Review of Reference Tariff' process¹⁴⁵; and
- applying retrospective amendments to tariff escalation rates would require a complex adjustment charge process to be run in order to capture immaterial price changes between Access Holders.

17.3.2 Reference Tariffs for Cross System Train Services

Draft Decision 17.1 (b) (i) requires Aurizon Network to revert the calculation of Access Charges for Cross-System Train Services to the 2010AU approach for AT₃ and AT₄ Reference Tariffs.

The 2014DAU proposal for calculating Cross System Reference Tariffs was amended by Aurizon Network at the request of the QRC. The QCA has not provided any compelling reason as to why it should refuse to approve this position.

The intent of Aurizon Network's change was to improve consistency in terms of how Cross-System Reference Tariffs were derived, and how revenue earned from Cross-System Train Services would be allocated between systems. The approach under the 2010AU and the proposed 2014DAU are summarised in the table below:

¹⁴⁵ The Annual Review of Reference Tariffs is to be submitted to the QCA by 28 February of year $t-1$.

Table 17.2 Cross System Pricing Rules and Revenue allocations

Cross System	2010AU (Schedule F; Clause 4.2)		2014DAU proposal	
	Tariff calculated as:	Revenue allocated to:	Tariff calculated as:	Revenue allocated to:
AT ₁	Average of Origin & Destination system tariff, weighted by GTK	Split between Origin and Destination system	Average of Origin & Destination system tariff, weighted by GTK	Split between Origin & Destination system
AT ₂	Destination system tariff ^	Destination system	Destination system	Destination system
AT ₃	Higher of Origin or Destination system tariff	50% * (Destination AT ₃ tariff * Destination NTK). Remaining revenue (if any) allocated to Origin system.	Average of Origin & Destination system tariff, weighted by NTK	50% * (Destination AT ₃ tariff * Destination NTK). Remaining revenue (if any) allocated to Origin system.
AT ₄	Higher of Origin or Destination system tariff	Origin system	Origin system	Origin system
AT ₅	Average of Origin & Destination system tariff, weighted by eGTK	Split between Origin & Destination system	Average of Origin & Destination system tariff, weighted by eGTK	Split between Origin & Destination system

[^] Unless the Origin system is capacity constrained, in which case, the Cross System AT₂ Reference Tariff is equivalent to the the sum of the Origin AND Destination system AT₂ Reference Tariffs.

* Source: Aurizon Network's 2010 Access Undertaking; Aurizon Network's 2014 Draft Access Undertaking;

Aurizon Network disagrees with the QCA's Draft Decision 17.1(b)(i) for the following reasons:

The 2010 AU approach sets AT₃ and AT₄ Reference Tariffs for Cross-System Train Services at the maximum applicable tariff for all systems traversed by the Train Service. Consider the example of a Cross-System Train Service railing across the Blackwater and Goonyella systems. If the AT₃ Reference Tariff was \$1.00 in the Blackwater system and \$2.00 in the Goonyella system, the AT₃ Reference Tariff for the Cross-System Train Service will be set at \$2.00.

Aurizon Network's 2014DAU proposed changes to the way in which AT₃ and AT₄ Reference Tariffs were set for Cross-System Train Services. The changes were proposed to address inconsistencies within the Cross-System Reference Tariff structure, by aligning the Cross-System Reference Tariffs to the Cross-System revenue allocations specified in the Undertaking¹⁴⁶.

These included:

- Calculating AT₃ as the average AT₃ in each system, weighted in accordance with the distance travelled.
- Setting AT₄ equal to the applicable Reference Tariff of the Origin system.

Under the 2010AU, the AT₃ Cross- System Reference Tariff is levied on a 'distance' basis, i.e. \$ per NTK, where NTK incorporates the distance travelled by the relevant Train Service. The level of the AT₃ tariff itself, however, is not calculated with reference to the distance travelled. As such, it is the only Cross-System Reference Tariff levied on a 'distance' basis, which does not take the distance travelled into consideration when deriving the tariff. Aurizon Network's proposal addresses this inconsistency.

The change to AT₄ was proposed because Access Charges recovered through this Reference Tariff are always allocated to the Origin system. To the extent that the AT₄ Reference Tariff of the Destination system exceeded that of the Origin system the Destination Reference Tariff would be charged, although the Destination system would receive no allocation of this revenue.

¹⁴⁶ Aurizon Network, 2014, QR Network's 2010 Access Undertaking, Schedule F, Part B, Clause 4.2 (g); 2014 Draft Access Undertaking, Schedule F, Clause 4.2 (b).

Aurizon Network considers that its proposed changes to the AT₃ and AT₄ Cross-System Reference Tariffs promote the economically efficient operation and use of the CQCR. Accordingly, Aurizon Network disagrees with the QCA Draft Decision 17.1(b)(i) and requests that the QCA reinstate the 2014DAU proposal.

17.3.3 Calculating minimum Contribution to Common Cost

The 2014DAU proposed that the Contribution to Common Cost (CCC) applicable to existing (UT3) hauls be converted to a unit rate, and escalated annually for the period of the 2014DAU. Draft Decision 17.1 (b) (ii) requires Aurizon Network to revert the Contribution to Common Cost (CCC) calculation to the 2010 AU approach.

Aurizon Network agrees with the QCA's Draft Decision for UT4. It will reassess the CCC as part of any future pricing structure review.

17.3.4 Newlands AT₄ Reference Tariff

Draft Decision 17.1 (b) (iii) requires Aurizon Network to reinstate the AT₄ Reference Tariff for the Newlands System.

In light of the QCA's Draft Decision on the AT₂ Reference Tariffs, Aurizon Network accepts the QCA's Draft Decision.

17.4 Capacity Multiplier

Draft Decision 17.2 is to refuse to accept the application of a capacity 'diesel' multiplier to the AT₂ Reference Tariff. Aurizon Network notes that there is no 'diesel' multiplier; only a capacity multiplier, which is applicable to train services independent of traction choice. For example, where the train configuration nominated by an Access Holder in their Access Agreement differs from the Reference Train. A capacity multiplier should apply where the nominated train configuration is unable to meet the Section Run Times published for the relevant coal system and as a result, consumes more network capacity.

A capacity multiplier is currently provided for through the 'Reference Train Paths (rtp)' provisions within the 2010AU (Schedule F, Part A, 3.2) and the 2014DAU (CI 6.2.2). Accordingly, the application of a capacity multiplier should not constitute a 'non-standard' term which would trigger the Access Conditions provisions.

Any existing customer can dispute the application of a capacity multiplier in accordance with the relevant provisions of their Access Agreement. Access Seekers can submit a dispute in accordance with the provisions in Part 11 of the 2014DAU.

17.5 AT₁ Reference Tariff escalation

Draft Decision 17.3 is to refuse to approve the rate of escalation rate which Aurizon Network applies to the AT₁ Reference Tariffs within the 2014DAU regulatory period.

Aurizon Network agrees with the QCA's Draft Decision on the basis that it has an opportunity to reassess the AT₁ Reference Tariff and the applicable escalation rate as part of any future pricing structure review.

This Draft Decision requires Aurizon Network to escalate the AT₁ Reference Tariffs from year-to-year in accordance with the forecast Maintenance Cost Index (MCI). In practice, the 'actual' MCI will change annually to reflect movements in the relevant cost indices over time.

Aurizon Network understands that, for the 2014DAU regulatory period, the QCA intends to set the rate of escalation applied to AT₁ Reference Tariffs equivalent to the annual change in forecast MCI change (in nominal terms). The forecast MCI will be confirmed by the QCA upon finalisation of the 2014DAU process.

It is important to note that Aurizon Network may be exposed to additional volume risk as a result of this proposal. To the extent that the actual MCI decreases relative to forecast, deductions would be made from Aurizon Network's nominal maintenance cost allowance, while a higher proportion of Aurizon Network's Allowable Revenue would be excluded from the revenue cap. While in isolation this could be viewed as an immaterial risk, it should not be discounted and will be considered as part of any future pricing review.

17.6 Rebates and System Discounts

The QCA's Draft Decision 17.4 is to refuse to approve proposed discounts to the relevant system Reference Tariff for holders of Access Facilitation Deeds (AFDs) with Aurizon Network (AFD holders). Aurizon Network agrees with this Draft Decision subject to amendment.

Aurizon Network's proposed drafting in the 2014DAU achieved the following issues relative to the UT3 arrangements:

1. Resolving the lack of clarity regarding the treatment of rebates in Take or Pay amounts, by ensuring that Take or Pay amounts were net of rebates; and
2. Removing most rebate variations from revenue cap adjustments by expressing Reference Tariffs for AFD holders as a 'net' access charge (thereby ensuring that Total Actual Revenues are also expressed net of rebates).

With respect to the 1st issue, Aurizon Network acknowledges that the effect of the proposal would have been to make the presentation (but not the application) of system Reference Tariffs more complicated. Aurizon Network notes however that selected mines currently have premiums or discounts applied under the UT3 pricing principles (e.g. Rolleston and Minerva) or for legacy reasons (e.g. Stanwell). Separate Reference Tariffs will also be mandated in respect of expansions (per Draft Decision 16.7). Accordingly, Aurizon Network does not believe that the application of further variations in Reference Tariffs to facilitate the rebate variations will be unduly onerous or confusing for AFD holders or other system users.

Aurizon Network agrees with the QCA that the effect of the Draft Decision is that in order for any rebates implicit in Take or Pay to be paid back to the AFD holder, amendments to selected AFDs will be required. The failure of AFD holders to agree such amendments will result in those AFD holders overpaying Take or Pay amounts which are socialised with other system users through the revenue cap mechanism (i.e. Aurizon Network is neutral to the QCA's position). Accordingly, the QCA's position should be of concern only to those AFD holders.

Aurizon Network considers that the proposed 'system discount' approach promotes effective competition in upstream and downstream markets and better reflects the QCA's position with respect to AFD arrangements. Nevertheless, Aurizon Network accepts this Draft Decision, and as such will address the Take or Pay issue directly with the AFD holders, on the basis that the Draft Decision is neutral for Aurizon Network and that AFD holders will be incentivised to resolve the issue directly with Aurizon Network.

With respect to the 2nd issue, Draft Decision 17.8(c) is to refuse to accept proposed revenue cap adjustments in relation to the rebate variations. Aurizon Network's disagreement with this Draft Decision is explained in Section 17.10.3 below.

17.7 GAPE and NAPE Arrangements

Draft Decision 17.5 is to refuse to approve Aurizon Network's proposed arrangements for the Goonyella to Abbot Point Expansion (GAPE).

The GAPE was one of the largest rail infrastructure projects undertaken in Queensland's history. It was mooted for many decades, but only came about after careful development of a commercial business case by the old QR Board. The scope of the GAPE project included:

- construction of 69km of greenfield railway linking the Goonyella and Newlands coal systems (the Northern Missing Link (NML));
- extensive upgrades, asset renewals and partial duplication of the Newlands coal system; and
- infrastructure enhancements in the Goonyella system.

Additional information with respect to the specific works undertaken can be found in Aurizon Network's GAPE Draft Amending Access Undertaking (DAAU)¹⁴⁷, and its Capital Expenditure Claim for FY2012¹⁴⁸.

In April 2013, Aurizon Network submitted a DAAU seeking the approval of Reference Tariffs for the GAPE. The DAAU included a proposal for allocating capital expenditure between expansion users who had entered into GAPE or Newlands to Abbot Point (NAPE) Deeds. With one exception¹⁴⁹, a GAPE Access Seeker was located in the Goonyella system, and required access to the port at Abbot Point, via the NML. A NAPE Access Seeker was located in the Newlands system, and did not utilise the NML.

It is important to note, that Access rights created by the assets constructed as per the GAPE and NAPE Deeds (which related to the project funding arrangements) were conditional on the construction of an Access Seeker's mine specific infrastructure (where required).

Capital cost allocations were proposed on the basis of asset utilisation and with respect to total volumes sought under GAPE or NAPE arrangements. These allocations are described below:

GAPE Deed customers:

- 100% of the NML capital costs;
- 81% of Newlands system upgrade costs; and
- 100% of the Goonyella system upgrade costs.

NAPE Deed customers:

- 0% of the NML capital costs;
- 13% of Newlands system upgrade costs; and
- 0% of the Goonyella system upgrade costs.

Existing Newlands customers:

- 6% of Newlands system upgrade costs, which reflected:
 - capital expenditure incurred as part of the GAPE project costs, that was required for the Newlands system, irrespective of the whether or not the GAPE project went ahead; and
 - benefits to existing customers in the Newlands system, which included the ability to run larger trains and the avoidance of some asset replacements that were undertaken as part of the project.
- It is important to reiterate that:
 - an allowance for these costs were included in the UT3 Capital Indicator; and
 - these costs are not associated with 'NAPE' customers. Aurizon Network understands that the QCA considers these to be 'NAPE costs' for the purposes of Draft Decision 17.5(a). Aurizon Network disagrees with this Draft Decision, and suggest that these costs remain in the Newlands system.

For pricing purposes, the GAPE DAAU established a separate GAPE 'system' and reference tariff to recover the costs allocated to GAPE Deed customers. It also proposed that reference tariffs for costs allocated to NAPE Deed

¹⁴⁷ Aurizon Network, 2012, Draft Amending Access Undertaking – GAPE Reference Tariff, Section 3, pp. 7-10.

¹⁴⁸ Available at www.qca.org.au.

¹⁴⁹ One customer located in the Newlands system entered into a GAPE Deed.

customers would be finalised as part of the 2014DAU. Aurizon Network's 2014DAU suggested that NAPE costs be socialised with the Newlands system on the basis that a high percentage of contract was expected to be railed. Aurizon Network has addressed the various elements of the QCA's Draft Decision below.

17.7.1 Removing NAPE costs from the Newlands System

Draft Decision 17.5(a) requires Aurizon Network to remove NAPE costs from the Newlands system.

Cost allocation to Existing Newlands customers

Aurizon Network understands that the QCA considers the cost allocation to the 'Existing Newlands customers' (as outlined above) to be 'NAPE costs' for the purposes of Draft Decision 17.5(a). Aurizon Network reiterates that these are not NAPE costs, and disagrees with this Draft Decision. The cost allocation to 'Existing Newlands customers' should remain in the Newlands system.

As outlined in the GAPE DAAU¹⁵⁰, the Newlands system Capital Indicator for the 2010AU regulatory period included an allowance (specifically, \$42.2 million in FY2012) for track renewal works that would have been required in the Newlands system even if the GAPE project did not proceed. This was approved by the QCA as part of its final decision on the 2010AU, and the renewal works were subsequently completed as part of the GAPE scope of works.

In its final decision on Aurizon Network's FY2012 Capital Expenditure Claim¹⁵¹, the QCA approved \$11.9 million of capital expenditure for the Newlands system, and \$1.03 billion for the GAPE system. In its FY2012 RAB Roll-Forward submission, Aurizon Network proposed an allocation of \$30.3 million from the GAPE system, such that the total capital expenditure to be recovered from the Newlands system in FY2012 was \$42.2 million. The cost allocation to Existing Newlands customers reflects the fact that these customers are enjoying benefits from the GAPE project, including:

- Newlands system asset renewals, replacements and upgrades as a result of the GAPE scope of works;
- the ability to operate longer and heavier trains; and
- the realisation of operational efficiencies, which avoided investment in additional infrastructure that would have otherwise been required¹⁵².

The FY2012 RAB Roll-Forward also outlined the relevant capital expenditure allocations to NAPE customers, which were to be deferred for pricing purposes until NAPE customers commenced raiing (as outlined in the GAPE DAAU). The \$30.3 million allocation from GAPE to the Newlands system was separately identifiable in the financial models provided with the FY2012 RAB Roll-Forward submission, as costs which were 'not deferred'.

Furthermore, no amendments were necessary to the Newlands system reference tariffs, because the total quantum of capex recoverable from Newlands system users in FY2012 (i.e. \$11.9m + \$30.3m = \$42.2 million), was the same as the value of the Newlands system Capital Indicator approved by the QCA for that year.

Both the GAPE DAAU and the FY2012 RAB Roll-Forward submission sought to include \$42.2 million for FY2012. The QCA approved Aurizon Network's GAPE DAAU in September 2013¹⁵³, and the FY2012 RAB Roll-Forward in December 2013¹⁵⁴. Accordingly, Aurizon Network disagrees with Draft Decision 17.5(a) as it is appropriate to allocate costs to Existing Newlands customers, consistent with past submissions approved by the QCA.

Cost allocation to NAPE Deed customers

With respect to the cost allocation to NAPE Deed customers (as outlined above), Aurizon Network agrees with the QCA's Draft Decision that these costs should be removed from the Newlands system for the 2014DAU period. Nevertheless, Aurizon Network disagrees that these costs should form part of an independent NAPE System.

¹⁵⁰ Aurizon Network, 2012, Draft Amending Access Undertaking – GAPE Reference Tariff, Section 6.

¹⁵¹ Available at www.qca.org.au.

¹⁵² Aurizon Network, 2012, Draft Amending Access Undertaking – GAPE Reference Tariff, Section 8.

¹⁵³ QCA, 2013, Final Approval: June 2013 GAPE DAAU. File Ref: 631790.

¹⁵⁴ QCA, 2013, Aurizon Network's 2011-12 Regulatory Asset Base (RAB) Roll-Forward. File Ref: 683221 ver 1.

Aurizon Network proposes an alternative treatment for these costs, and has articulated its views in its response to Draft Decision 17.5(b) (the creation of an independent NAPE system) below.

17.7.2 Creation of an independent NAPE System

Draft Decision 17.5(b) requires Aurizon Network to establish an independent NAPE system with a separate reference tariff and the required access undertaking amendments to recover the tariff revenue. Aurizon Network disagrees with the QCA's Draft Decision.

As outlined above, the GAPE DAAU proposed that a proportion of GAPE project capital expenditure costs be recovered from NAPE Deed customers. The portion of costs allocated to NAPE Deed customers (NAPE Share of Capex) were not specifically incremental to NAPE Train Services, i.e. the infrastructure was not constructed solely to provide Access to NAPE Train Services. This infrastructure was required by all GAPE and NAPE Train Services. The NAPE Share of Capex was determined on the basis of the relative volume assumptions outlined in the GAPE and NAPE Deeds. While the deeds outlined the project funding arrangements, they do not grant Access rights to customers, which instead are provided by an Access Agreement.

As it currently stands, the NAPE Share of Capex was included in the RAB upon the QCA's approval of the FY2012 Capital Expenditure claim. the NAPE Share of Capex is excluded for pricing purposes and capitalised at the regulatory WACC. In other words, it is not currently part of an existing reference tariff.

Aurizon Network disagrees with the QCA's Draft Decision to establish an independent NAPE system. Aurizon Network proposes that the 'status quo' with respect to the NAPE share of capex be continued,

To bring this proposal to effect, allowable revenues and volumes associated with the NAPE Share of Capex will be removed from Aurizon Network's 2014DAU submission.

The practical impact of this proposal is that the NAPE Share of Capex will not form part of the MAR for the 2014DAU regulatory period. This results in a reduction to Aurizon Network's MAR as outlined in table 17.3 below.

Table 17.3 MAR reduction associated with cost allocation to NAPE Deed Customers

Impact on MAR	FY2014	FY2015	FY2016	FY2017
\$ million	Nil	Nil	(12.3)	(20.4)

* Source: UT4 Revenue Model – Aurizon Network's response to MAR Draft Decision; actual impact subject to QCA's Final Decision on the 2014DAU.

Furthermore, a separate NAPE system and reference tariff will not be required at this point in time. For clarity the reference tariff for existing customers in the Newlands system will continue to include a charge for capital cost allocations to the 'Existing Newlands customers', as discussed above. These costs are not and never have been a part of the NAPE Share of Capex.

17.7.3 GAPE Reference Tariff Structure

Draft Decision 17.5(c) requires Aurizon Network to revise the GAPE system tariff structure so that the AT3 and AT4 tariff components are calculated in a manner consistent with other CQCR reference tariffs.

Aurizon Network disagrees with the QCA's Draft Decision. The QCA approved the GAPE Reference Tariff structure as part of its Final Decision on the GAPE DAAU¹⁵⁵ and has not provided any reasons as to why this pricing structure is no longer appropriate. Furthermore, the QCA has not identified any specific stakeholder concerns or objections to the GAPE Reference Tariff structure, nor any provisions of the QCA Act that this structure may breach.

The GAPE Reference Tariff structure was established to provide additional transparency to GAPE Train Services paying the GAPE Reference Tariffs. Through this structure, GAPE Access Seekers and Access Holders will be able to independently verify the Access Charges associated with the Goonyella System Enhancements.

The pricing structure is also consistent with the operational characteristics of the haul from the North Goonyella Junction (starting point of the NML). That is, all customers travel the same distance, so the only differences between train services are due to Net Tonnes. Aurizon Network considers that the increased transparency provided via the GAPE Reference Tariff structure is in the interest of GAPE Access Seekers and Access Holders.

Aurizon Network is concerned that the QCA is re-opening and revising past decisions. This is contrary to the promotion of a stable and consistent regulatory framework.

In light of the above, Aurizon Network disagrees with the QCA's Draft Decision, and suggests that the GAPE Reference Tariff structure should remain in the form approved by the QCA as part of its Final Decision on the GAPE DAAU.

17.8 “New” Reference Tariff Arrangements

Draft Decision 17.6 is to refuse to approve Reference Tariffs for individual train services.

Aurizon Network's 2014DAU promotes competition by recognising (via the Distance Discount) the fact that new mines are required to fund and own their Mine Specific Infrastructure (MSI), whereas existing customers received some form of financial support to construct their MSI. The 2014DAU also ensures that, at the very least, new users are held accountable for their incremental costs. This is effected by the MRC concept.

As outlined in section 16.8.8 above, Aurizon Network believes that fairness and competitive neutrality are important considerations when setting Access Charges for all Train Services. Aurizon Network remains concerned that the QCA's Draft Decision is heavily skewed in favour of existing users of the CQCR. Furthermore, in the absence of stakeholder concerns, the QCA has not provided any compelling evidence to justify why they are seeking to unwind past decisions, which will have a material pricing impact on the end customer.

A discussion of each of the matters raised by the QCA is provided below.

17.8.1 Middlemount to DBCT Train Services

Draft Decision 17.6 (a) requires Aurizon Network to derive an alternative reference tariff for the Middlemount to DBCT train service, based on the 2010AU pricing principles. The QCA states that:

“...future application for additional train services from Middlemount to DBCT should be considered based on 2014 DAU pricing principles.”¹⁵⁶

Aurizon Network accepts the QCA's Draft Decision for FY2016 onwards, although it does not consider this to be in the interest of the end customer.

The QCA states that:

¹⁵⁵ QCA, 2013, Final Approval: June 2013 GAPE DAAU. File Ref: 631790.

¹⁵⁶ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 17.5.3, p. 405.

“... a transparent and consistent approach to calculating reference tariffs in the CQCR is in the interests of access seekers and holders (ss. 138(2)(e) and (h) of the QCA Act).”¹⁵⁷

The application of the QCA's redrafted Undertaking pricing principles will have a material impact on the Access Charges payable by the Middlemount to DBCT Train Service.

Aurizon Network notes that the Reference Tariffs approved by the QCA¹⁵⁸ for the Middlemount to DBCT Train Service were applicable to a fixed term transfer of access rights. [REDACTED]

Aurizon Network considers that in making a pricing determination, the QCA must take into consideration the pricing principles in force at the time the decision to invest is made. Nevertheless [REDACTED]

[REDACTED] Aurizon Network accepts the QCA's Draft Decision in this instance.

17.8.2 Caval Ridge to HPSCT Train Services

Draft Decision 17.6 (b) requires Aurizon Network to derive an alternative reference tariff for the Caval Ridge to Hay Point Services Coal Terminal (HPSCT) train service, based on the redrafted pricing principles proposed by the QCA.

Aurizon Network disagrees with the QCA's Draft Decision. In light of the fact that the QCA approved the application of the 2010AU Pricing Principles for this Train Service in October 2014,¹⁵⁹ Aurizon Network has material concerns regarding this decision and considers it to be contrary to the principles of natural justice. As noted above, when making a pricing determination, the QCA must take into consideration information that was known to the relevant parties at the time of making the decision to invest. This would include the applicable pricing principles.

The QCA has not provided an adequate reason as to why the 2010AU pricing principles are no longer appropriate, nor why the 2014DAU pricing principles, which were neither approved nor in affect at the time these Train Services commenced operating, should be retrospectively backdated. This is especially relevant because the Draft Decision materially changes the pricing outcome for the end customer (an access seeker whose interests should be taken into regard under s.138(2)(e)).

The QCA states that its interim position is to:

“...calculate the relevant reference tariff for each of the new train services based on the pricing principles in force at the commencement of operations for each train service.”¹⁶⁰

Aurizon Network confirms that Train Services from Caval Ridge to HPSCT commenced in April 2014. At the time operations commenced, the pricing principles that were approved and in force were those associated with the 2010AU, not any principles subsequently formulated as part of the 2014DAU process.

¹⁵⁷ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 17.5.3, p. 406.

¹⁵⁸ QCA, 2014, Approval of 2014-15 Transitional Reference Tariff for Caval Ridge to HPSCT and Middlemount to DBCT Train Services. File Ref: 779848.

¹⁵⁹ Ibid.

¹⁶⁰ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 17.5.3, pp. 404 – 405.

Furthermore, in its Final Decision with respect to reference tariffs for the Middlemount to DBCT Train Service, the QCA stated that:

“...It is appropriate to apply the UT3 pricing principles to the proposal, which the owners of the Middlemount mine would have relied on in costing rail access requirements, given that changes to the pricing principles proposed in UT4 have not as yet been approved.”¹⁶¹

In its letter confirming approval of Reference Tariffs for Caval Ridge to HPSCT Train Services, the QCA stated that:

“Our approval of the Caval Ridge to HPSCT proposal is based on our assessment that the:

- *proposed discounts to reference tariffs have been accurately calculated*
- *proposal has been determined in accordance with UT3, including the UT3 pricing principles”¹⁶²*

Three months later, the QCA now considers that the 2014DAU pricing principles should apply instead of the UT3 principles [REDACTED]. The practical impact of the QCA’s Draft Decision is that the Access Charges associated with this train service will increase by around 50%. In contrast, the rest of the Goonyella System will see Access Charges reduce by 2% on average. In light of the above and the material impact on Access Charges for the Caval Ridge to HPSCT Train Service, Aurizon Network considers the QCA’s Draft Decision to be inconsistent with Part 5 of the QCA Act and indeed its own views that:

“We consider that a transparent and consistent approach to calculating reference tariffs in the CQCR is in the interests of access seekers and holders (ss. 138(2)(e) and (h) of the QCA Act).”¹⁶³

Accordingly, Aurizon Network disagrees with the QCA’s Draft Decision. Reference Tariffs for this train service should be calculated on the basis of the 2010AU pricing principles for the duration of the contract.

Aurizon Network has discussed the implications of this Draft Decision with BMA, and understands that they will be responding similarly.

17.8.3 Rolleston Electric Assets

Draft Decision 17.6 (c) requires Aurizon Network to apply an incremental cost test to Rolleston electric assets using forecast volumes.

Aurizon Network disagrees with the QCA’s Draft Decision. The pricing principles applied to Rolleston electric assets should reflect the principles in place at the time the investment decision was made. Furthermore, Rolleston electric train services commenced operating while the 2010AU pricing principles were still in effect.

Aurizon Network also seeks to correct the QCA’s assertion that pricing for Rolleston electric assets under the 2014DAU assumed electric volumes at 85 per cent of contract. In conducting the pricing assessment, for electrified coal systems, Aurizon Network needs to determine a forecast of electric utilisation. Aurizon Network prepares an electric Gross Tonne Kilometres (eGTK) forecast for each electrified coal system. For clarity, this forecast was not

¹⁶¹ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 17.5.3, p. 405.

¹⁶² QCA, 2014, Approval of 2014-15 Transitional Reference Tariff for Caval Ridge to HPSCT and Middlemount to DBCT Train Services. File Ref: 779848.

¹⁶³ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 17.5.3, p. 406.

set at 85 per cent of contract. When expressed as a percentage of contracted Gross Tonne Kilometres (GTK), eGTK are equivalent to the following:

Table 17.4 Electric volumes as a proportion of Rolleston traffic

eGTK	FY2014	FY2015	FY2016	FY2017
% of contract GTK	■	■	■	■

* Source: UT4 Pricing Model

With regards to the electric utilisation assumptions, Aurizon Network would appreciate the opportunity to further consult with the QCA, prior to its Final Decision on the 2014DAU.

Revenue Smoothing

Rolleston electric assets were commissioned in December 2015, and the first electric train service from Rolleston to RG Tanna Coal Terminal commenced on 15 December 2014.

The QCA's Draft Decision on Maximum Allowable Revenue (MAR) has proposed changes to the way in which Aurizon Network calculates MAR for the purpose of setting Reference Tariffs. In the case of Rolleston electric assets, these changes effectively mean that Aurizon Network is entitled to recover a full year's return, even though electric railings will only operate for 6 months of the year.

In order to address this, Aurizon Network proposes to apply a revenue smoothing factor to the MAR associated with Rolleston's electric assets. The rate of smoothing will be aligned to the ramp-up profile of Rolleston's electric Train Services. The practical impact of this approach is neutral in NPV terms, and creates a more stable price path as electric utilisation increases.

Aurizon Network considers this approach to be consistent with the objective of Part 5 of the QCA Act, by promoting the efficient operation and use of the network and promoting effective competition.

17.9 Reference Train Service Characteristics

Draft Decision 17.7 rejects some of Aurizon Network's proposed reference train service characteristics.

Aurizon Network proposed amendments to the reference train service characteristics to provide additional clarity and transparency to its customers.

Aurizon Network disagrees with the QCA's Draft Decision 17.7(a), which rejects our proposal to clarify that a Reference Train service should operate using the most direct route between an origin (mine) and destination (port) pairing. A Train Service which travels to multiple 'origins' before travelling to its destination, may consume additional network capacity and/or create additional interface risks¹⁶⁴ relative to a Train Service which operates direct. As a result, this type of 'multi-origin' Train Service should not be considered a Reference Train.

Aurizon Network agrees with the QCA's Draft Decisions 17.7(b) and 17.7(c) on the basis that no material consequences are anticipated by so agreeing. To the extent that these changes become necessary in the future, Aurizon Network will submit a DAAU to the QCA.

¹⁶⁴ Such as when a train enters or exits the mainline corridor from Private Infrastructure.

17.10 Revenue Cap Adjustments

Draft Decision 17.8(a) is to refuse to accept Aurizon Network's proposed revenue cap adjustments in Schedule F. A discussion of each of the matters raised by the QCA is provided below.

17.10.1 Short Run Variable Cost and AT₁

The QCA's Draft Decisions 17.8(a)(i) and (ii) are to reject proposed revenue cap adjustments in relation to the Short Run Variable Maintenance Cost (SRVC) and AT₁ revenue, respectively. Aurizon Network disagrees with the QCA Draft Decisions on both matters.

With respect to the SRVC adjustment, Aurizon Network is willing to discuss with the QCA its approval of the proposed clause 4.1(b)(iii) of Schedule F subject to:

- alignment of the SRVC Rate with the methodology used for the Draft Decision on MAR; and
- Aurizon Network and the QCA working together to confirm the methodology and the details of the calculation of the SRVC Rate for UT4.

In addition and with respect to the AT₁ adjustment, Aurizon Network accepts the Draft Decision subject to a review of this Reference Tariff component prior to the commencement of the UT5 period.

SRVC Adjustment

Aurizon Network's disagrees with the QCA's Draft Decision to disallow an SRVC adjustment to Allowable Revenues as part of the annual Reference Tariff variation.

The main reason for the disagreement is that the QCA's rejection of the SRVC is inconsistent with its position on other adjustments to allowance revenues, associated with changes in forecast volumes, as follows:

- the QCA's Draft Decision on MAR which made an adjustment, equivalent to the SRVC, for the impact on Aurizon Network's maintenance cost allowance for the difference between Aurizon Network's proposed UT4 volumes and the QCA's proposed forecast volumes. These adjustments are set out in the QCA's Draft Decision on MAR¹⁶⁵ and are for 2013/14, 2014/15 and 2015/16.
- QCA decisions on the 2011/12 and 2012/13 Reference Tariffs variations where the QCA reduced System Allowable Revenues for lower revised forecast tonnages, relative to the original UT3 forecast¹⁶⁶.

Aurizon Network acknowledges the QCA's remarks regarding the accuracy of the proposed SRVC Rate for UT4. It is in Aurizon Network's legitimate business interests for short run variable maintenance costs to be adjusted against Allowable Revenues, and that the SRVC Rate is a more accurate indicator of the variation between forecast volumes and forecast maintenance costs than AT₁.

However, Aurizon Network also recognises that the SRVC Rate could be better aligned with the behaviour of maintenance costs in response to volumes, and that further analysis is required. The SRVC Rate also needs to be adjusted for UT4 to reflect the QCA's proposed treatment of re-railing costs (which Aurizon Network accepts for 2015/16 and 2016/17) and potentially for UT5 for ballast undercutting costs (which the QCA proposed to reconsider).

In addition, Aurizon Network confirmed in its response to the Draft Decision on MAR that it would accept the QCA's proposed volume adjustments for 2013/14 to 2015/16 subject to a review of the detailed supporting calculations (only a summary of the methodology was published).

Aurizon Network confirms that it is still yet to receive these detailed calculations¹⁶⁷. Upon receipt of these calculations Aurizon Network is willing to work with the QCA prior to the Final Decision to:

- Verify the calculations as being consistent with short run variable cost concepts as applied to Aurizon Network maintenance costs;

¹⁶⁵ QCA, 2014, Draft Decision: Aurizon Network 2014DAU - MAR, p.110.

¹⁶⁶ This application was inconsistent with the Draft Decision on MAR in that AT₁ was used as a proxy for the SRVC.

¹⁶⁷ Aurizon Network, 2014, Response to QCA's Draft Decision on MAR, p.98.

- Adjust the calculations to reflect the QCA's proposed change in the capitalisation of re-railing costs, which Aurizon Network accepts; and
- Set a revised SRVC Rate for UT4 (to be applied for 2016/17) at the rate confirmed for the adjustments for 2013/14 to 2015/16 maintenance cost allowances, for which Aurizon Network has provided conditional acceptance.

On the basis that the QCA is willing to work with Aurizon Network to confirm these amounts, Aurizon Network proposes that clause 4.1(b)(iii) be reinstated and amended to reflect the revised SRVC Rate. The SRVC Rate would only be applied to the 2016/17 Reference Tariff variation¹⁶⁸.

Aurizon Network notes that the SRVC for UT5 will need to be further reviewed if the capitalisation of ballast undercutting costs, as discussed in the Draft Decision on MAR, is confirmed. Aurizon Network is willing to work with the QCA to review the SRVC as part of the proposed review of the structure of Reference Tariffs.

AT₁ Adjustment

Aurizon Network disagrees with the QCA's Draft Decision to exclude the variation between actual and allowed AT₁ revenues from the revenue cap arrangements, proposed as clauses 4.3(c)(viii) and (ix) of Schedule F.

Aurizon Network is exposed to volume risk to the extent of the difference between short and long run variable maintenance. However, Aurizon Network acknowledges the QCA's comments that confirmation of the extent of this difference requires further analysis.

As indicated in the response to the Draft Decision on MAR, Aurizon Network is undertaking this analysis:

- to confirm the extent to which short run variable costs vary with volumes (the SRVC Rate); and
- to re-confirm the value of AT₁ consistent with the original 1997 methodology.

Aurizon Network is willing to finalise this analysis and provide it to the QCA as part of its proposed review of the structure of Reference Tariffs prior to the commencement of the UT5 period.

While Aurizon Network disagrees with the QCA, it accepts the Draft Decision on the basis that any UT4 variation between actual and forecast maintenance costs due to volume will be confined to 2016/17 (assuming UT5 is approved prior to or around the end of that year) and that AT₁ will be reviewed for the UT5 period.

17.10.2 Audit Costs

The QCA's Draft Decision 17.8(b) is to allow proposed revenue cap adjustments in relation to audit costs, subject to QCA approval.

Aurizon Network accepts the Draft Decision to amend the 2014DAU to require that such costs should be efficiently incurred and not recoverable elsewhere in the Undertaking.

However, from a practical perspective, and particularly where Aurizon Network does not have full control over the audit engagement and conduct of the audit (for example, where the QCA selects the auditor), Aurizon Network will need to ensure that the terms of engagement will transfer the risk associated with the QCA's disallowance of audit costs back to the auditor (unless Aurizon Network is solely responsible for the disallowance).

In this case, Aurizon Network expects that this transfer of risk will be reflected in an increase in the relevant audit fees, and that the QCA will accept these arrangements as efficient.

17.10.3 Rebate Adjustments

The QCA's Draft Decision 17.8(c) is to reject proposed revenue cap adjustments in relation to rebate variations.

Aurizon Network disagrees with Draft Decision 17.8 on the basis that the QCA has misinterpreted the purpose of the proposed clause 4.3(c)(vi) of Schedule F of the 2014 DAU, which excludes from Allowable Revenues both the forecast revenues attributable to rebateable assets and the actual rebates paid.

¹⁶⁸ Assumes the QCA's review of Reference Tariffs and the UT5 MAR is finalised prior to 1 July 2017.

The revenue cap arrangements in Schedule F, with respect to rebates under AFDs, were developed for UT3 to recognise that:

- System Allowable Revenues included allowable revenues attributable to rebateable assets (rebates allowed); and
- Total Actuals Revenues included actual revenues attributable to rebateable assets (rebates paid).

In reaching its Draft Decision the QCA stated:

“We are not convinced that all users should be subject to volume risk with respect to possible under- or over-payment of rebates resulting from an AFD arrangement between Aurizon Network and a particular AFD holder.”

This is not the case. The sole purpose of the rebate adjustment is to ensure that volume risk is isolated to the AFD holder.

Aurizon Network confirms that it cannot agree an arrangement with an AFD Holder for the payment of a ‘net’ access charge (i.e. outside the revenue cap arrangements) as the current definition of Total Actual Revenue includes revenues associated with the payment of a rebate.

In view of the above, in order to reflect the QCA’s intent of the Draft Decision (i.e. to isolate volume risk to the AFD holder), the rebate variation must be retained. This position is also supported by the QRC¹⁶⁹. Aurizon Network therefore disagrees with the QCA’s Draft Decision 17.8 and proposes the reinstatement of the proposed clause 4.3(c)(vi) of Schedule F relating to the rebate variation¹⁷⁰.

Aurizon Network is willing to provide further information to QCA for the proposed drafting on the basis that the need for this clause to be reinstated.

17.10.4 Overload Charges and Ancillary Revenues

The QCA’s Draft Decision 17.8(d) is to include overload charges and ancillary revenues in the calculation of Total Actual Revenue.

Aurizon Network could agree with the Draft Decision subject to amendments to the definitions of Ancillary Revenues and Total Actual Revenues. Aurizon Network agrees with the QCA’s proposed definition of Overload Charges.

Ancillary Revenues

The QCA’s proposed definition for Ancillary Services is as follows:

“Charges for services that are ancillary to others services supplied under an Access Agreement (including, for example, charges for storage, repositioning, and license arrangements) to the extent that [the] QCA determines from time to time should be included in this definition.”

Aurizon Network accepts that revenues received for services covered under the definition of the Declared Service (i.e. Access) should be included in the definition of Total Actual Revenue. “Access” includes:

- use of passing loops and Train queuing and staging;
- loading and unloading of Trains on Rail Infrastructure;
- train marshalling and shunting;
- stowage;
- other Below Rail Services essential for the use of Rail Infrastructure; and

¹⁶⁹ QCA, 2015, Draft Decision: Volume III – Pricing & Tariffs, Section 17.7.2, Table 87, p. 412.

¹⁷⁰ Even if the QCA’s proposes to accept the Reference Tariff discount, the rebate variation should be retained as all AFD holders may not consent to revised AFD arrangements, particularly with respect to multi-user spurs.

- entry onto land (provided that the land is owned, leased or licensed by Aurizon Network).

Aurizon Network agrees with the QCA that whether particular Ancillary Revenues should be included in Total Revenues will need to be applied on a case-by-case basis. However, with respect to the examples proposed by the QCA, Aurizon Network:

- disagrees that storage revenues should be included, as storage does not form part of Access and has been excluded from Access Agreements.
- agrees that repositioning revenues should be included, as repositioning forms part of Access and is therefore included in Access Agreements.
- agrees that licence revenues should be included to the extent that the licence is related to the provision of Access, although in these circumstances licence fees (for example, Transfer Facilities Licences) are for a nominal sum.

There are separate agreements for storage, as this activity does not form part of Access (and as such has been excluded from Access Agreements). The agreements mainly manage interface risks - storage charges do apply however as the activity incurs negligible incremental costs, charges are based on nominal rates (to encourage efficient behaviour by Train Operators) and earn immaterial revenues.

Aurizon Network concedes that it is possible for forecast storage revenues to be deducted from the Maximum Allowable Revenues for the CQCR under a 'single till' approach, as storage is solely on assets included in the RAB. However, any deduction would be immaterial and remove any incentive for Aurizon Network to facilitate storage on the CQCR. Aurizon Network would instead have an incentive to require Train Operators to construct their own facilities, creating an inefficient outcome for the supply chain. Aurizon Network believes that it is more efficient for storage to be provided on the CQCR as:

- Train Operators would then avoid these costs, which in a competitive market would be passed through to end customers; and
- Storage locations are optimised to minimise both disruptions to train operations and Train Operator responses to 'ad hoc' requests from end customers.

Aurizon Network therefore requests that it be free to earn storage revenue (i.e. revenues are excluded from Total Actual Revenues) provided that charges continue to be based on nominal rates, revenues earned continue to be immaterial, and the incremental costs incurred continue to be negligible.

In view of the above, Aurizon Network could agree with the QCA's proposed definition of Ancillary Revenues subject to the removal of "storage" which does not form part of Access; or any other future service which is not part of the declared service and Aurizon Network is not compensated for through its regulatory revenue allowance.

Total Actual Revenues

As indicated above, the QCA's proposed definition for Total Actual Revenue is as follows:

"total revenue from AT₂₋₄, including all revenues from Overload Charges and any Ancillary Revenues relating to maintaining connections to private infrastructure..."

Aurizon Network accepts the QCA's proposed inclusion of Overload Charges on the basis that ballast cutting costs associated with overloaded wagons on Trains are allowed by the QCA as part of the UT4 maintenance allowance.

As indicated above, Aurizon Network accepts the QCA's proposed inclusion of Ancillary Revenues to the extent that the ancillary services are related to provision of Access for coal carrying train services. With respect to connections, there are two types of connections:

- connections which are required to facilitate the movement of coal-carrying Train Services including to and from private infrastructure. These connections are covered by the Standard Rail Connection Agreement which states that costs associated with maintenance of those connections are to be included in Aurizon Network's maintenance cost allowance. In this regard, Aurizon Network confirms that the maintenance allowance submitted for UT4 includes these costs.
- Connections which are required to facilitate the movement of other Train Services. In this regard:

- Costs associated with these connections were excluded from the UT4 allowance; and
- As such, revenues associated with those connections (which are usually equivalent to the incremental maintenance cost under the terms of the relevant non-coal Connection Agreements, or otherwise funded via access charges from non-coal Train Services) are excluded from Total Actual Revenue.

On this basis, the words “relating to maintaining connections to private infrastructure” are unnecessary and should be removed, as in principle all Ancillary Revenues should be included in Total Actual Revenues to the extent that they are related to the provision of Access.

In view of the above, Aurizon Network could agree with the QCA’s proposed definition of Total Actual Revenues subject to:

- the removal of the words “relating to maintaining connections to private infrastructure” from the definition of Total Actual Revenue; and
- the removal of the word “storage” from the definition of Ancillary Services.
-

17.10.5 Increment

The QCA’s Draft Decision 17.8(e) is to remove the Increment calculation and application from Schedule F.

As discussed in the response to Draft Decision 3.6, Aurizon Network accepts the QCA’s proposed drafting with respect to the incentive mechanism including the related amendments in Schedule F relating to the Increment. For clarity, these amendments include:

- Insertion of clause 2.8 of the QCA’s mark-up of the 2014DAU relating to the incentive framework; and
- Deletion of clauses 4.4 and 4.6 of Schedule F relating to the Increment.

17.11 Reference Tariff Variation Events

Draft Decision 17.9 requires Aurizon Network to amend the list of Endorsed Variation and Reference Tariff Review Events outlined in the 2014DAU.

Endorsed Variations

The Endorsed Variation Events outlined in the 2014DAU were carried over from the 2010AU. Aurizon Network agrees with the QCA’s Draft Decision with regards to the list of Endorsed Variation events.

Review Events

The QCA has removed a number of the Review Event provisions proposed in the 2014DAU. Most of these provisions were carried over from the 2010AU.

Aurizon Network is concerned that the QCA’s Draft Decision with respect to the list of Review Events is inconsistent with the Pricing Principles outlined in section 168A of the QCA Act, which states:

“...the price of access to a service...should generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service...”¹⁷¹

Furthermore, the Review Events stated in the 2014DAU helps customers by providing additional flexibility when dealing with changes in circumstances. As a result, Aurizon Network disagrees with the QCA’s Draft Decision, and considers that the following Review Events should be reinstated.

¹⁷¹ QCA Act 1997, Section 168A, p. 139.

1. Aurizon Network's ability to recover maintenance costs that have been prudently and efficiently incurred, but are greater than the maintenance cost allowance (subject to a 2.5% materiality threshold).¹⁷²
2. Provisions relating to the expansion pricing framework (clause 4.3 (e) of the 2014DAU).
3. Provisions relating to a material change in volumes or other circumstances where there are reasonable grounds to amend a Reference Tariff (clause 4.3 (f) and (g)).

Aurizon Network reiterates that all Reference Tariff adjustments as a result of a Review Event are subject to QCA approval.

¹⁷² Aurizon Network, 2014, 2014 Draft Access Undertaking, Schedule F, Clause 4.3 (a).

18 Take-or-Pay Arrangements

18.1 QCA’s Draft Decision

Draft Decision	Reference	Aurizon Network Position
<p>Our Draft Decision is to refuse to approve Aurizon Network’s proposed take-or-pay capping provisions in Schedule F of the 2014 DAU. We would approve these provisions with amendments, to:</p> <ul style="list-style-type: none"> (a) provide greater clarity (without changing the intent) (b) remove Aurizon Network’s proposed operator capping arrangements. 	18.1	<ul style="list-style-type: none"> (a) Agree. (b) Agree.
<p>Our Draft Decision is to refuse to approve Aurizon Network’s proposed take-or-pay arrangements for UT1 access holders in Schedule F of the 2014 DAU. We would approve these provisions with amendments, to:</p> <ul style="list-style-type: none"> (a) remove the exclusion of WICET gtps from the take-or-pay trigger test for UT1 access holders (b) remove Aurizon Network’s provision to shift Aurizon Network Cause paths from a post-UT1 agreement to a UT1 agreement regarding a particular origin–destination pair. 	18.2	<ul style="list-style-type: none"> (a) Agree. (b) Disagree, Aurizon Network has instead provided an alternative proposal.

18.2 Summary of Aurizon Network’s Position

The QCA has proposed to provide a number of amendments intended to provide greater certainty around the determination of Take or Pay liabilities.

Aurizon Network agrees with the intent of the amendments proposed by the QCA, although some points of drafting may require clarification.

The QCA has removed the exclusion of WICET gtps from the Take or Pay trigger test for UT1 Access Holders. Aurizon Network is prepared to agree with the QCA’s Draft Decision on the basis that the QCA approves the December 2014 pricing proposal for WIRP.

In addition the QCA has removed provisions to shift Aurizon Network Cause paths from a post - UT1 agreement to a UT1 agreement regarding a particular origin–destination pair.

The 2014DAU proposals were on the basis that in circumstances where more than one Access Agreement is in place for the same origin-destination pair and Take or Pay is triggered, it is necessary for a ‘hierarchy’ to be applied for allocation the consumption of Train Service Entitlements (TSEs), and the allocation of the Aurizon Network Cause.

Aurizon Network is willing to propose drafting in the Standard Access Agreements to ensure alignment of the consumption of TSEs and the allocation of Aurizon Network Cause for all Access Holders in circumstances where the Access Holder and origin-destination pair are the same.

18.3 Take or Pay Capping

Providing greater certainty

Draft Decision 18.1(a) is to provide a number of amendments intended to provide greater certainty around the determination of Take or Pay liabilities.

Aurizon Network agrees with the intent of the amendments proposed by the QCA, although some points of drafting may require clarification.

The QCA has proposed to remove drafting relating to the adjustment of the calculation of take or pay for the capacity multiplier¹⁷³. Aurizon Network is prepared to accept the drafting subject to the QCA's confirmation that the AT₂ component Take or Pay should include the capacity multiplier where one is to be applied. Otherwise, the provision should be retained.

With the proposed reorganisation of the suite of standard access agreements to remove the access holder access agreement and operator access agreement, the take or pay provisions as they related to an end user access agreement need to be revised¹⁷⁴. Aurizon Network is willing to discuss with the QCA alternative drafting to overcome this.

Aurizon Network is concerned that the use of terminology by the QCA in its drafting of Schedule F may have inadvertently changed the intent. For example, the use of the defined terms "New Access Agreement" and "Old Access Agreement"¹⁷⁵ should be reviewed. Aurizon Network is willing to discuss with the QCA alternative drafting to overcome this concern.

Operator capping

Draft Decision 18.1(b) is to reject Aurizon Network's proposal to provide operator capping for Take or Pay liabilities.

Aurizon Network agrees with the removal of the operator capping arrangements, on the basis that it has subsequently consulted with stakeholders and submitted an alternative proposal to the QCA for a capacity swapping mechanism to allow Access Holders and their end customers to better manage Take or Pay exposures.

18.4 Arrangements for UT1 Access Holders

Exclusion of WICET gtps

Draft Decision 18.2(a) is to remove the exclusion of WICET gtps from the Take or Pay trigger test for UT1 Access Holders.

The 2014DAU proposals were on the basis that the WICET gtps proposed represented 90% of contracted tonnages for Train Services terminating at WICET. Aurizon Network's position was that it was UT1 Access Holders who would bear an unreasonable proportion of volume risk (in effect, cross-subsidising non-UT1 Access Holders) as its Take or Pay liabilities are not subject to mine and system capping.

Aurizon Network notes that its December 2014 submission on pricing for WIRP Train Services proposes a forecast prepared for WICET users which is lower than the 90% proposed in the 2014DAU. While some degree of cross-subsidisation will continue to exist for UT1 Access Holders, it is proportionately less than under the 2014DAU proposal. Aurizon Network is therefore prepared to agree with the QCA's Draft Decision on the basis that the QCA approves the December 2014 pricing proposal.

¹⁷³ QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Schedule F, Clause 3.3(e).

¹⁷⁴ QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Schedule F, Clause 3.3(c) and 3.3(g).

¹⁷⁵ QCA, 2015, Draft Decision: Marked-up Draft Access Undertaking, Schedule F, Clauses 3.2(c) and 3.3(j).

Aurizon Network Cause

Draft Decision 18.2(b) is to remove provisions to shift Aurizon Network Cause paths from a post-UT1 agreement to a UT1 agreement regarding a particular origin–destination pair.

The 2014DAU proposals were on the basis that in circumstances where more than one Access Agreement is in place for the same origin-destination pair and Take or Pay is triggered, it is necessary for a ‘hierarchy’ to be applied for allocation of the following:

- The consumption of Train Service Entitlements (TSEs); and
- The Aurizon Network Cause.

In UT2 and UT3 Access Agreements between Aurizon Network and Aurizon Operations, there is a clause which states that TSEs for the same origin-destination are deemed to be consumed in the following order:

- Firstly, to UT1 Access Agreements;
- Then to UT2 Access Agreements; and
- Then to UT3 Access Agreements (and to UT4 Access Agreements once signed).

Aurizon Network recognises that the effect of this allocation is that Take or Pay under earlier agreements is minimised relative to later agreements. However, this practical approach is not unreasonable on the basis that:

- Access Holders do not currently nominate TSE consumption when placing train orders; and
- The number of Train Services affected is immaterial (therefore require Access Holders to nominate the relevant Access Agreement associated with the affected train).

On the same basis, the 2014DAU proposes that the allocation of Aurizon Network Cause be on an equivalent basis (that is, firstly to UT1 Access Agreements). Aurizon Network confirms that ordering of Aurizon Network Cause is only relevant to incidents which are not force majeure events, as these events are assumed to affect all Access Agreements equally.

Consistent with TSE consumption, the allocation of Aurizon Network Cause firstly to UT1 Access Holders is on the basis that:

- Access Holders do not currently nominate affected Train Services when allocating Aurizon Network Cause (and if they did they would allocate them to the Access Agreement with the greatest commercial advantage); and
- The number of affected Train Services affected is negligible.

While this issue has only arisen with respect to UT1 Access Agreements, it will be relevant to any origin-destination pair with multiple Access Agreements. For example, UT2 and UT3 Access Agreements do differ slightly in respect of Take or Pay calculations, and hence some ordering of both entitlements and Aurizon Network Cause will be required. This issue affects not only Aurizon Operations but also third party operators.

In view of the above, Aurizon Network disagrees with the Draft Decision. However, Aurizon Network acknowledges that the perception of stakeholders is that the 2014DAU proposals are for the sole purpose of protecting UT1 Access Holders. In addition, an allocation hierarchy is required for as long as Take or Pay provisions vary between regulatory periods (i.e. until all UT1 and UT2 Access Agreements expire).

Aurizon Network is therefore willing to propose alternative drafting to the effect of allocating Aurizon Network Cause:

- Firstly, to UT1 Access Agreements;
- Then to UT2 Access Agreements; and
- Then to UT3 Access Agreements (and to UT4 Access Agreements once signed).

Aurizon Network is also willing to propose drafting in the Standard Access Agreements to ensure alignment of the consumption of TSEs and the allocation of Aurizon Network Cause for all Access Holders in circumstances where the Access Holder and origin-destination pair are the same.

Aurizon Network requests that if the QCA is minded to reject Aurizon Network’s alternative proposal then, for the purposes of ensuring compliance with the ‘entitled to earn’ requirements for Take or Pay set out in Schedule F, it sets out:

- How Aurizon Network should allocate TSE consumption between UT1, UT2 and UT3 - and UT4 - Access Agreements for the same Access Holder and origin-destination pair (other than for Access Agreements where Aurizon Operations is the Access Holder); and
- How Aurizon Network Cause should be allocated for the same Access Holder and origin-destination pair.

Appendix 1 Glossary

2010AU	2010 Access Undertaking
2014DAU	2014 Draft Access Undertaking
AA	Access Agreement
ABS	Australian Bureau of Statistics
ACCC	Australian Consumer and Competition Commission
AFDs	Access Facilitation Deeds
AER	Australian Energy Regulator
AMP	Asset Management Plan
AN	Aurizon Network
ARTC	Australian Rail Track Corporation
ASX	Australian Stock Exchange
BCR	Baseline Capacity Review
CA	Construction Agreement
CBAs	Condition Based Assessments
CCC	Contribution to Common Cost
CQCN	Central Queensland Coal Network
CQCR	Central Queensland Coal Region
CQSCM	Central Queensland Supply Chain Model
CTP	Contested Train Path
DAAU	Draft Amending Access Undertaking
DBCT	Dalrymple Bay Coal Terminal
DORC	Depreciated Optimised Replacement Cost
DTP	Daily Train Plan
egtk	Electric Gross Tonne Kilometres
EPA	Expansion Project Agreement
EPM	Engineering and Project Management
EUAA	End User Access Agreement
GAPE	Goonyella to Abbot Point Expansion
gtk	Gross Tonne Kilometres
HPSCT	Hay Point Services Coal Terminal
HVCN	Hunter Valley Coal Network
IAP	Indicative Access Proposal
ILC	Integrated Logistics Centre
ITP	Intermediate Train Plan
IRMP	Interface Risk Management Plan
MAR	Maximum Allowable Revenue
MCI	Maintenance Cost Index
MRC	Minimum Revenue Contribution
MSI	Mine Specific Infrastructure
MTP	Master Train Plan
NAP	Newlands to Abbot Point
NAPE	Newlands to Abbot Point Expansion
NDP	Network Development Plan
NML	Northern Missing Link
NMP	Network Management Principles
NOPP	Network Operations Pathing Planner
NPV	Net Present Value

nt	Net Tonnes
ntk	Net Tonne Kilometres
PIO	Private Infrastructure Owner
QCA	Queensland Competition Authority
QRC	Queensland Resources Council
RAB	Regulatory Asset Base
SCMP	Supply Chain Master Plan
SFA	Study Funding Agreement
SOP	Standard Operating Parameters
SRVC	Short Run Variable Cost
STP	Strategic Train Plan
SUFA	Standard User Funding Agreement
TMDMM	Traffic Management Decision Making Matrix
TOD	Train Operations Deed
TSE	Train Service Entitlement
UHCD	Ultimate Company Holding Deed
WICET	Wiggins Island Coal Export Terminal

Appendix 2 Support for submissions

Aurizon Network has included for the QCA's consideration a summary of points from stakeholder submissions which are supported. For clarity, where Aurizon Network has not commented on (or has indicated that it does not or has not agreed) an amendment from stakeholders, Aurizon Network does not support that amendment or it is still open to consideration.

Item	Issue	Source	Relevant Clause	Comments
Part 4: Negotiation Framework				
1.	Request for additional information to assess an Access Application	QRC mark-up	4.3(d)(i)	Minor drafting changes to clarify requirements for information around Customer Specific Branch Lines
2.	Request for additional information to assess capacity for an Access Application	QRC mark-up	4.3(d)(ii) and new 4.3(d)(iii)	Minor drafting changes to clarify that Aurizon Network may require information to complete a capacity assessment or to determine capacity allocation under Part 7 or Part 8
3.	Cancellation of Access Applications where insufficient information provided	QRC mark-up	4.3(e)	Minor drafting changes to correct error in the process for cancelling an Access Application which is not complete
4.	Cancellation of Access Applications where no Customer agreement	QRC mark-up	New 4.3(f)	Inclusion of an obligation for Aurizon Network not to accept a request from a rail operator to transfer access rights if there is no evidence that both Customer's agree to the transfer. Related amendment is discussed at item 37
5.	Provision of additional information in support of Access Applications	QRC mark-up	4.3(g)	Introduction of a new defined term for Non-Availability Requirements to simplify and clarify drafting. Related drafting changes are discussed at items 14 and 32
6.	Customer support for Access Applications	QRC mark-up	New 4.3(h) and 4.3(i)	Inclusion of provisions requiring confirmation from the customer that it supports the Access Application lodged by a rail operator. Where confirmation is not provided Aurizon Network may cancel the Access Application. Related amendment is discussed at item 37
7.	Rejection of Access Application where no Customer support	QRC mark-up	New 4.3(i)(iii)	Aurizon Network agrees to the inclusion of the word "but"
8.	Applications which require a Customer Specific Branch Lines	QRC mark-up	4.4(c) and 4.4(c)(v)(B)	Deletion of the reference to Customer Specific Branch Line as this is now picked up in clause 4.3(d)(i)

Item	Issue	Source	Relevant Clause	Comments
9.	Applications which may be partially granted without an Expansion	QRC mark-up	4.4(c)(i) and 4.4(c)(ii)	<p>New drafting to provide that where some of an Access Seeker's requested Access Rights can be provided without an Expansion and some can only be provided with an Expansion, the Access Seeker may split the Access Application into two independent Access Applications – one for Access Rights requiring an Expansion and one for Access Rights not requiring an Expansion.</p> <p>While it agrees with the concept proposed, Aurizon Network considers the proposed drafting would benefit from further consideration and fine tuning</p>
10.	Applications which require an Expansion	QRC mark-up	4.4(c)(v)(A) and 4.4(c)(v)(B)	Minor drafting changes for clarification of when a negotiation will resume under Part 4
11.	Non-discrimination based on funding source	QRC mark-up	New 4.4(c)(vi)	Inclusion of an obligation for Aurizon Network not to favour an Access Seeker on the basis of the source of funding for an Expansion. This mirrors clause 8.2.1(q) and clause 7.1(e). See also item 47
12.	Provisional Capacity Allocation	QRC mark-up	4.4(d)	Minor drafting change for clarification of what is considered to be "corresponding Access Rights"
13.	Criteria for acceptance of Access Application up to five years from commencement	QRC mark-up	4.4(e)(ii)(B)	Minor drafting amendment to provide for stages of project development and to clarify the right to submit a new Access Application
14.	Provision of additional information in support of Access Applications	QRC mark-up	New 4.4(h)	Link to the new defined term for Non-Availability Requirements which Aurizon Network will consider when determining if the Access Seeker has complied with the request for evidence on utilisation of Access Rights. Related drafting changes are discussed at items 5 and 32
15.	Request from Access Seeker to vary the Access Application	QRC mark-up	4.5(b)	New drafting which obliges Aurizon Network to notify the Access Seeker within 10 Business Days if a requested variation is a Material Variation
16.	Processing an Access Application where a Material Variation has been requested	QRC mark-up	New 4.5(d)	New process drafting where if an Access Seeker is notified that a requested variation is material and the Access Seeker fails to respond. It will be deemed that the Access Application has been withdrawn and, if applicable, replaced by a new Access Application

Item	Issue	Source	Relevant Clause	Comments
				which varies the previous application to deal with the requested variation
17.	Processing an Access Application where a variation is not material	QRC mark-up	4.5(e)	Minor drafting amendment to clarify timeframes by which Aurizon Network can extend the period for preparation of an Indicative Access Proposal where the Access Seeker has requested a non-material variation
18.	Negotiation Period	QRC mark-up	4.5(f)(iii)	Minor change to update clause referencing
19.	Material Variation where there is a change of Access Seeker	QRC mark-up	New 4.5(g)	New provision to clarify how the Material Variation process applies if an Access Application is taken over in accordance with the new process in clause 4.9.1(b). See item 25 for details
20.	Provision of an Initial Capacity Assessment in an Indicative Access Proposal	QRC mark-up	4.6(b)(iii)	New drafting to clarify that Aurizon Network may not complete a specific capacity assessment where it can rely on a previous assessment which is relevant for the Access Application. The Indicative Access Proposal will contain information from this capacity assessment
21.	Further information required to progress negotiations	QRC mark-up	4.6(b)(vi)	New drafting so that further information required from the Access Seeker must be reasonably required
22.	Notification of intent	QRC mark-up	4.7(b)	Minor drafting changes to link date of withdrawal to that determined in accordance with clause 4.6(e)
23.	Multiple Access Applications for the same Access	QRC mark-up	4.8	<p>New drafting requiring Aurizon Network to negotiate simultaneously with multiple rail operators where the customer is undergoing a tender process for haulage. Where the customer notifies of the chosen rail operator, Aurizon Network will cease negotiation with any other rail operator. Aurizon Network will only execute an access agreement with the rail operator advised by the customer.</p> <p>New drafting to clarify the position where the Customer of an Access Seeker is also an Access Seeker in relation to the same rail haulage task</p>
24.	Customer nomination of rail operator to assist in negotiation process	QRC mark-up	New 4.9.1(a), (b)(i) and (c)(i) and (ii)	New drafting to allow a customer access seeker to nominate its rail operator to act as agent for the purpose of negotiating with Aurizon Network

Item	Issue	Source	Relevant Clause	Comments
25.	Customer nomination of takeover of an Access Application	QRC mark-up	New 4.9.1(b)(ii) and (iii), (c)(iii) and (iv), (d) and (e)	Additional process included to allow a customer to take over an Access Application for which it is the customer, or to have its operator take over an Access Application where the customer was the original Access Seeker. Related drafting change is discussed at item 19
26.	Train Operators bound to the undertaking	QRC mark-up	4.9.2(c)	Minor drafting changes to clarify an objective assessment will be undertaken as to whether the Train Operator is complying with required provisions
27.	Commencement of Negotiation Period	QRC mark-up	4.10.1(b)	Minor drafting changes to clarify this relates to an Access Agreement or Train Operations Agreement
28.	Determination of end of Negotiation Period	QRC mark-up	4.10.1(c)(iv)	New drafting to allow extension of the Negotiation Period in accordance with suspension periods which may apply under new clause 4.10.3(b)(iii) where Aurizon Network is assessing a requested Material Variation. See item 34 for more detail
29.	Offered Access Rights no longer available due to Available Capacity change	QRC mark-up	4.10.1(c)(v)(B)	Minor drafting changes to clarify that it may not be Aurizon Network that commits to Infrastructure Enhancements
30.	Reduction in Available Capacity	QRC mark-up	4.10.1(d)	Minor correction of typographical error
31.	Circumstances for cessation of negotiation	QRC mark-up	4.10.1(e)	Minor correction of typographical error
32.	Confirmation of ability to use access during Negotiation Period	QRC mark-up	New 4.10.2(e)	Link to the new defined term for Non-Availability Requirements which Aurizon Network will consider when determining if the Access Seeker has complied with the request for further information under clause 4.10.2(d). Related drafting changes are discussed at items 5 and 14
33.	Finalising details of Access Agreements post execution	QRC mark-up	New 4.10.2(f)	Replication of previous clause 4.10.3(k)
34.	Processing an Access Application where a Material Variation has been requested within the Negotiation Period	QRC mark-up	4.10.3	New provisions and processes (including timeframes) to allow that if an Access Seeker requests a Material Variation, Aurizon Network will reissue an Indicative Access Proposal and the Access Seeker will determine whether or not to proceed with negotiations on the basis of the reissued Indicative Access Proposal. A related change is discussed at item 28 Aurizon Network notes there is a minor error in clause 4.10.3(h)(iv)(A) in the

Item	Issue	Source	Relevant Clause	Comments
				QRC drafting for an incorrect cross reference
35.	Negotiation of End User Access Agreement and Train Operations Agreement	QRC mark-up	4.11(a)	Minor change to clarify that an End User may participate in negotiations between Aurizon Network and the Train Operator
36.	Circumstances for cessation of negotiations	QRC mark-up	4.12(a)(i)(D)	Minor amendment to include ceasing in respect of a Train Operator where the Train Operator has no genuine intention of obtaining the Access Rights
37.	Circumstances where Aurizon Network must cease negotiations	QRC mark-up	New 4.12(a)(ii)	New drafting to provide that Aurizon Network must cease negotiations with an operator where the customer has advised that the operator is no longer its nominated operator for the Access Rights or does not agree to a transfer. Related amendments are discussed at items 4 and 6
38.	Factors which determine reasonable likelihood of utilisation of Access Rights	QRC mark-up	4.12(c)(ii)(A)	Aurizon Network agrees in principle the intent of the QRC's additional drafting highlighted in its submission
39.	Factors which determine reasonable likelihood of utilisation of Access Rights	QRC mark-up	4.12(c)(ii)(B)	Aurizon Network agrees in principle the intent of the QRC's additional drafting highlighted in its submission
40.	Factors which determine reasonable likelihood of utilisation of Access Rights	QRC mark-up	4.12(c)(ii)(C)	Minor amendment to allow the Access Seeker or the operator to have reasonable likelihood of having sufficient facilities. Aurizon Network does not agree to the deletion of "sufficient" as proposed by the QRC highlighted in its submission
41.	Factors which determine reasonable likelihood of utilisation of Access Rights	QRC mark-up	4.12(c)(ii)(D)	Minor amendment to clarify that when determining whether the output of the mine is sufficient, any existing Access Rights contracted for that mine must be considered
42.	Factors which determine reasonable likelihood of utilisation of Access Rights	QRC mark-up	New 4.12(c)(ii)(E)	New drafting allowing Aurizon Network to consider likelihood of Customer Specific Branch Lines to be developed. Related drafting change is discussed at item 1
43.	Recovery of costs where Access Application is ceased	QRC mark-up	4.12(e)	Minor drafting change to clarify that this occurs where a negotiation has been ceased validly
Part 5 – Access Agreements				
44.	Execution of Access Agreements where there is Available Capacity	QRC mark-up	New 5.2(e) - (g)	New obligation for Aurizon Network not to execute an Access Agreement where there is insufficient available capacity except where that Access Agreement is

Item	Issue	Source	Relevant Clause	Comments
				conditional on the creation of the required Capacity
45.	Access Holder ability to move to the most current generation of standard access agreement	QRC submission	N/A	Aurizon Network supports the principle of giving Access Holders an ability to “uplift” its access agreement into the UT4 form of standard access agreement. Further discussion with stakeholders is required to work through the detail of how this will be achieved
Part 7 – Available Capacity allocation and management				
46.	Application	QRC mark-up	7.1(a)(vi)	Minor change
47.	Non-discrimination based on funding source	QRC mark-up	7.1(e)	Minor drafting changes to mirror new clause 4.4(c)(vi) and 8.2.1(q)
48.	Insufficient Available Capacity	QRC mark-up	7.1(f)	Minor drafting to amend cross references
49.	General requirement for capacity allocation	QRC mark-up	7.2	Clause updated to match criteria with the negotiation cessation criteria under Part 4 (clause 4.12(c)(ii)). Aurizon Network agrees in principle the intent of the QRC’s additional drafting in clause 7.2(a) and 7.2(b) highlighted in its submission. Aurizon Network does not agree to the further change to clause 7.2(c) proposed by the QRC highlighted in its submission
50.	Renewals	QRC mark-up	7.3(a)	Drafting change to clarify that the Access Rights to be renewed are those rights which exist immediately prior to expiry
51.	Renewal from a replacement mine	QRC mark-up	7.3(b)	Deletion of “or destination” as this is not relevant for the replacement mine concept
52.	Renewing less than existing rights	QRC mark-up	New 7.3(c)(i)	New clause to clarify that a Renewing Access Seeker may request less Access Rights than previously contracted
53.	Timeframe for Renewing Access Seeker	QRC mark-up	7.3(d)(iv)	Drafting change to excuse a Renewing Access Seeker from meeting the required negotiation timeframes where the delay is caused by breach by Aurizon Network
54.	Timeframes for Renewal applications	QRC mark-up	7.3(f)	Drafting change to include additional flexibility for the Renewing Access Seeker and Aurizon Network to agree different timeframes
55.	Terms of Access Agreement for a Renewal	QRC mark-up	7.3(f)(i)(A)	Minor drafting change to require Aurizon Network to be reasonable. Aurizon Network does not support the QRC’s comment on clause 7.3(f)(i) to shorten the minimum term of an Access Agreement

Item	Issue	Source	Relevant Clause	Comments
56.	Terms of Access Agreement for a Renewal and negotiation process	QRC mark-up	7.3(g) and 7.3(h)	<p>Additional drafting included to clarify that: Aurizon Network does not have to renew Access Rights on the same terms as the existing Access Rights</p> <p>Negotiations will occur in accordance with Part 4 and Part 5</p> <p>There will be Available Capacity for a Renewal</p> <p>Aurizon Network does not agree to the further change to clause 7.3(g) proposed by the QRC highlighted in its submission</p>
57.	Mutual exclusivity for a Transferee's Access Application	QRC mark-up	7.4.2(a)(iv)(C)	Minor drafting amendment to clarify that in considering if the requested Transfer is mutually exclusive only the Ancillary Access Rights are considered
58.	Transferee to submit an Access Application	QRC mark-up	7.4.2(b)	Inclusion of additional clarification that this process works in conjunction with clauses 4.3(f) and 4.12(a)(ii). Refer to items 4 and 37 for further details. Aurizon Network agrees to the further minor change to clause 7.4.2(b) proposed by the QRC highlighted in its submission
59.	Provisional Capacity Allocation	QRC mark-up	7.5.2(a)(ii)(A)	Minor correction of typographical error
60.	Obligations under any Law for prioritising Access Applications	QRC mark-up	7.5.2(c)(i)	Minor drafting change for clarification
61.	Objectives for determining Capacity allocation	QRC mark-up	7.5.2(d)	Minor drafting change for clarification
62.	New objective to consider for Capacity allocation	QRC mark-up	New 7.5.2(d)(iii)	New factor which provides for consideration as to the extent the Access Application met the criteria in clause 7.5.2(c)(ii)
63.	Promoting efficient investment in Rail Infrastructure	QRC mark-up	7.5.2(d)(viii)(A) and old 7.5.2(d)(viii)(B)	Amend to allow consideration of commercial viability as a factor and remove from the list quality of the product to be transported
64.	Priority for coal services	QRC mark-up	7.5.2(e)	Minor drafting change to ensure that Aurizon Network will prioritise coal services over others subject to clause 7.5.2(c) for obligations under law
65.	No difference between mutually exclusive Access Applications based on objectives	QRC mark-up	7.5.2(g)(i)	Drafting change to ensure Aurizon Network acts reasonably where determining if it is possible to differentiate between Access Applications

Item	Issue	Source	Relevant Clause	Comments
66.	Allocation according to date	QRC mark-up	7.5.2(g)	Strengthening of obligation such that if Aurizon Network cannot differentiate between Access Applications it will prioritise according to date
67.	Determination of relevant date for Capacity allocation	QRC mark-up	7.5.2(g)(iv)	Additional drafting included to determine the relevant date for an Access Application where it has been amended in accordance with the Material Variation process under Clause 4.10.3. Refer to item 34 for more details
68.	Network Management Principles	QRC mark-up	7.6	Aurizon Network has not agreed to the amendments to clause 7.6 proposed by the QRC in its submission
Part 8 - Network development and Expansions				
69.	Review of System Operating Parameters	QRC mark-up	8.11.2(e)	Minor drafting change to clarify that the System Operating Parameters will be reviewed where there is a sustained change, rather than permanent that materially impacts the System Operating Parameters
70.	Availability of review of System Operating Parameters	QRC mark-up	8.11.2(f)	New provision requiring Aurizon Network to provide to Access holders the outcomes of a review of System Operating Parameters subject to confidentiality requirements. Aurizon Network does not agree to the further change to clause 8.11.2(f) proposed by the QRC highlighted in its submission
71.	Capacity Review	QRC mark-up	8.11.3	Replacement of term "Capacity Assessment" with "Capacity Review"
72.	Frequency of Capacity Review	QRC mark-up	8.11.3(a)	Clarification that a Capacity Review will be undertaken where Aurizon Network considers: a change in the System Operating Parameters will result in a change in Existing Capacity a Below Rail change is reasonably expected to result in a material sustained change to Existing Capacity
73.	Factors to be considered in a Capacity Review	QRC mark-up	New 8.11.3(c)(iii)(A)	Addition of Operational Constraints as a factor to be considered in a Capacity Review
74.	Making the Capacity Review available to Access Holders	QRC mark-up	8.11.3(d)	Minor drafting change to introduce new defined term for Capacity Review Outcomes
75.	Expert review of Capacity Review Outcomes	QRC mark-up	8.11.3(e) to (g)	Additional process for completion of an expert review of a Capacity Review, the Capacity Review Outcomes and System

Item	Issue	Source	Relevant Clause	Comments
				<p>Operating Parameters. The expert must consider whether:</p> <p>Aurizon Network has undertaken the Capacity Review and the Capacity Review Outcomes are consistent with Good Engineering Practices</p> <p>If not consistent with Good Engineering Practices, whether the Capacity Review Outcomes should be amended</p> <p>Drafting has been included to:</p> <p>clarify the expert's obligations to Aurizon Network and Access Holders</p> <p>provide for confidentiality of information granted to the expert</p> <p>ability for the expert to review the System Operating Parameters to ensure they are consistent with the relevant operational provisions within the Access Agreements</p> <p>Aurizon Network does not agree to the further change to clause 8.11.3(e) to (g) proposed by the QRC highlighted in its submission</p>
76.	Effect on Capacity Review of expert review	QRC mark-up	New 8.11.3(h)	New provision provides that if an expert determines the Capacity Review Outcome should be amended, Aurizon Network will take the expert's assessment as the new Capacity Review Outcome
77.	Capacity Deficit	QRC mark-up	8.11.3(i)	Amend the provision such that if there is a Deficit, Aurizon Network will also assess the impact of the Deficit on existing Access Rights and identify potential solutions
78.	Relation to Capacity Shortfall	QRC mark-up	New 8.11.3(j)	New provision to clarify that clause 8.11.3(i) does not limit the Capacity Shortfall provisions for an Expansion
79.	Scope of the Network Development Plan	QRC mark-up	New 8.12(c)	New provision which clarifies the intent of the Network Development Plan to consider medium to long term alternatives for increasing Capacity to suit future demand. Aurizon Network has not agreed to the further change to clause 8.12(c) proposed by the QRC highlighted in its submission

Item	Issue	Source	Relevant Clause	Comments
80.	Information to be included in the Network Development Plan	QRC mark-up	8.12(d)	<p>Amended to include additional information to be contained in the Network Development Plan, being:</p> <p>Overview of opportunities to increase capacity including consideration of non-below rail alternatives</p> <p>Indicative timeframes and costs for the options (to the extent that this information is available to Aurizon Network)</p> <p>Aurizon Network has not agreed to the further change to clause 8.12(d) proposed by the QRC highlighted in its submission</p>
81.	Review of the Network Development Plan	QRC mark-up	8.12(e)	Obligation for Aurizon Network to act reasonably in determining if it is required to review the Network Development Plan more frequently if there is a material expected impact which would change the document. Aurizon Network has not agreed to the further change to clause 8.12(e) proposed by the QRC highlighted in its submission
82.	Consultation on the Network Development Plan	QRC mark-up	New 8.12(h)	Additional process where Aurizon Network will provide to Access Holders, Access Seekers and interested parties a copy of the proposed Network Development Plan for review and comment prior to publishing on the Website
83.	Peer review of the Network Development Plan	QRC mark-up	New 8.12(j)	New provision to allow Access Holders to appoint an expert to review the capacity planning inputs and outputs which are used in developing the Network Development Plan. Aurizon Network has not agreed to the further change to clause 8.12(j) proposed by the QRC highlighted in its submission relating to the inclusion of a 60% threshold. Aurizon Network does not agree to the further change to clause 8.12(j) regarding provision of information to the consultant
84.	Excluding Interested Participant's votes	QRC mark-up	Old 8.13.5(f) and (g)	Minor drafting change to ensure that Aurizon Network must seek the QCA's approval to exclude any votes. Aurizon Network does not agree to the deletion of old clauses 8.13.5(f) and (g) proposed by the QRC highlighted in its submission

Item	Issue	Source	Relevant Clause	Comments
85.	Provision of information for a vote	QRC mark-up	8.13.6(a)	Aurizon Network agrees in principle the intent of the QRC's additional drafting in clause 8.13.6(a) highlighted in its submission
86.	Audit of compliance with voting process	QRC mark-up	8.13.7(c)	Minor drafting change to update cross reference. Aurizon Network does not agree to the further change to clause 8.13.7(c) proposed by the QRC highlighted in its submission
87.	Substantial compliance with voting process	QRC mark-up	8.13.7(f)	Minor drafting change to include examples of relevant clauses for substantial compliance. Where substantial compliance has not been achieved, the vote will be invalid and ineffective
88.	Meaning of substantial compliance	QRC mark-up	8.13.7(g)	Minor drafting change to clarify that substantial compliance must be considered objectively
Part 9 – Connecting Private Infrastructure				
89.	Proposal from the Private Infrastructure Owner	QRC mark-up	9.1(b)	Minor drafting change to allow the Private Infrastructure Owner to provide reasonably sufficient details regarding the connection
90.	Reduction in capacity due to connection	QRC mark-up	9.1(c)(iv)	Minor drafting to clarify the assessment of impact on capacity of the connection only considers post construction capacity losses
91.	Satisfaction of conditions for connection	QRC mark-up	9.1(e)	Minor drafting change to allow that the conditions for connection either are satisfied or will be satisfied
92.	Standard or condition of Connecting Infrastructure	QRC mark-up	9.1(e)(i)	Deleted from clause reference to the standard and condition of the connecting infrastructure compared to the rail infrastructure as this has been moved to a new clause 9.1(i). See also item 96
93.	Negotiation of a connection agreement	QRC mark-up	New 9.1(f)	Included new clause requiring Aurizon Network to enter negotiations with the Private Infrastructure Owner for a connection agreement and other relevant agreements. Aurizon Network does not agree to the further change to clause 9.1(f) proposed by the QRC highlighted in its submission
94.	Notification that conditions have not been met	QRC mark-up	9.1(g)	Minor drafting change requiring Aurizon Network to promptly notify the Private Infrastructure Owner where requirements are not satisfied

Item	Issue	Source	Relevant Clause	Comments
95.	Design of connecting infrastructure	QRC mark-up	9.1(h)	Minor correction of typographical error
96.	Standard or condition of Connecting Infrastructure	QRC mark-up	9.1(i)	Relocated provision from clause 9.1(e)(i). See also item 92
Part 10 - Reporting				
97.	Additional measures for Quarterly Network Performance Report	Aurizon Operations submission	10.1.5	Additional reporting to be included: Reinstatement of BRTT performance by system Average train speed for diesel and electric train services by system
Part 12 – Definitions				
98.	Capacity Review	QRC mark-up	12.1	New definition of Capacity Review used in Part 8
99.	Capacity Review Outcomes	QRC mark-up	12.1	New definition of Capacity Review Outcomes used in Part 8. Aurizon Network has not agreed to the further change to this definition proposed by the QRC highlighted in its submission
100.	Customer Access Seeker	QRC mark-up	12.1	New definition of Customer Access Seeker used in Part 4
101.	Existing Capacity	QRC mark-up	12.1	Minor amendment to definition of Existing Capacity to correct a typographical error
102.	Interested Participant	QRC mark-up	12.1	Minor amendment to definition of Existing Capacity to correct a cross reference
103.	Material Variation	QRC mark-up	12.1	Amendment to definition of Material Variation to clarify the materiality of particular changes
104.	Non-Availability Requirements	QRC mark-up	12.1	New definition of Non-Availability Requirements used in Part 4
105.	System Operating Parameters	QRC mark-up	12.1	Amendment to definition of System Operating Parameters to clarify the origin of assumptions included in the System Operating Parameters. For example, information will be taken out of executed Access Agreements or Operating Plans
Schedule A – Preliminary, Additional and Capacity Information				
106.	Telecommunications	QRC mark-up	1(c)	Minor amendment to delete the inclusion of requirements for changes to the communication system
107.	Master Train Plan	QRC mark-up	3(a)	Minor amendment to ensure the Master Train Plan and Daily Train Plan also detail Cross System Train Services
108.	Daily Train Plan	QRC mark-up	3(c)	Minor amendment to correct typographical error
Schedule B – Access Application information requirements				

Item	Issue	Source	Relevant Clause	Comments
109.	Ability to use Access Rights	QRC mark-up	3(a)	Drafting amendment to align this provision with the new requirement in clause 4.3(h)(ii). Related amendment discussed at item 6 and 37
110.	Sufficient Facilities for Railway Operator	QRC mark-up	3(e)	Drafting amendment to align with clause 4.12(c)(ii)(C). Aurizon Network does not agree to the deletion of “sufficient” as proposed by the QRC highlighted in its submission. Related amendment discussed at item 40
111.	Output of a mine	QRC mark-up	3(f)	Drafting amendment to align with clause 4.12(c)(ii)(D). Related amendment discussed at item 41
112.	Customer Specific Branch Line	QRC mark-up	New 3(g)	Drafting amendment to align with clause 4.12(c)(ii)(E). Related amendment discussed at item 42
113.	Customer support for a transfer	QRC mark-up	7(b)	Minor drafting amendment requiring the Access Holder to provide Details for the Transferor. An additional inclusion is required in Part 12 for the definition of Transferor
114.	Evidence to support a transfer	QRC mark-up	7(g)	Minor drafting amendment for clarity
115.	Relevant Access Agreement for a renewal	QRC mark-up	8(f)	Minor typographical correction to footnote 11 and deletion of footnote 12
Schedule F – Reference Tariffs				
116.	Calculation of Total Actual Revenue	Aurizon Operations submission	3.3(c)(ii)	Aurizon Network supports the inclusion of an exception to allow Aurizon Network to exclude from Total Actual Revenue any Relinquishment Fee which would have resulted from a reduction in train paths which had no net change in the total net tonnes to be operated under the relevant Access Agreement. Aurizon Network considers the drafting proposed by Aurizon Operations to achieve this could be clarified

Appendix 3 Key issues in QCA's redrafted Access Agreement and Train Operations Deed

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
Access Agreement (AA)				
1	Definition of Consequential Loss	Clause 1.1 of AA and TOD	The QCA has amended the definition and removed the references to loss of revenue, wasted overheads and demurrage among other things as heads of consequential loss.	<p>We note that the QCA has stated that existing paragraphs of the definition appear to already cover these items but that it would "consider this further if Aurizon Network does not consider these items are adequately addressed and it can explain why it would be reasonable to include these items as consequential loss."¹⁷⁶</p> <p>Please refer to Part 8.4 of this Response for AN's explanation in relation to this matter.</p>
2	Grant of Access Rights	Clause 4.1	The QCA has amended the AA to provide that Access Rights commence on the Commencement Date and not the Commitment Date	The Commencement Date is the date of signing the Agreement. Under the AA there may be a number of Train Service Types with varying Commitment Dates, being the date that access holders require the Access Rights from and the date which the requirement to satisfy any pre conditions of utilising those Access Rights is linked to, therefore it is appropriate that the Access Rights commence on the relevant Commitment Date.

¹⁷⁶ No 40 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015 Response to Policy & Pricing Principles Draft Decision / Aurizon Network

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
3	Access Interface Deed	Clause 4.4	Included a requirement for the Access Holder to enter into an Access Interface Deed (AID) in the AA.	<p>This requirement is equivalent to the requirement under the UT3 SOAA for the operator to procure its customer to provide an AID. It is only where an Access Holder is an operator that it should be required to procure its customer to enter into an AID as AN needs to have a direct contractual relationship with the customer in order to limit its liability to the end customer.</p> <p>An AID is not required where an Access Holder who is an End User enters into the AA as AN's liability to the End User is limited under the AA. In the QCA's response to AN's request for information dated 13 February 2015,¹⁷⁷ it said that clause 4.4(a) is only triggered if the Access Holder wants to exercise its rights under clause 4.3(b). However clause 4.3(b) relates to an Access Holder nominating an operator to utilise all or part of the Access Rights and is not relevant to the AID.</p>
4	Adhoc Train Services	Clause 4.8	<p>Placed a reasonable endeavours obligation on AN to schedule an Adhoc Train Service and removed the exclusion of liability in favour of AN relating to non-provision of an Adhoc Train Service.</p> <p>Removed provisions which made clear that once an Adhoc Train Service is scheduled, the terms of the AA will apply as if it were a Train Service.</p> <p>Removed the ability for an Operator under the TOD to request an Adhoc Train Service. The Access Holder must request all Adhoc Train Services.</p>	<p><i>Reasonable Endeavours Obligation</i></p> <p>AN already has an obligation under the Network Management Principles to use its best endeavours to allocate paths in accordance with the Access Holder's Train Orders, including ad hoc train orders. The inclusion of a contractual obligation in the AA is both unjustified and unnecessary.</p> <p>Previously AN had no obligation to schedule Adhoc Train Services in an AA. The imposition of a reasonable endeavours obligation is contrary to the concept of what an Adhoc Train Service is and conflicts with and creates uncertainty with AN's obligations under the Network Management Principles.</p> <p>Specifically the Network Management Principles provide that the allocation of paths in the ITP will be given firstly to</p>

¹⁷⁷ No 41 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015
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Contracted TSE Orders, Additional Requested Contracted Orders (to assist in mitigation of Take or Pay liability throughout the year) and Adhoc Orders. This ranking is also used in the Contested Train Path principles of the Network Management Principles. The imposition of a reasonable endeavours obligation to schedule ad hoc train services under the AA creates uncertainty as to whether the ranking system in the Network Management Principles satisfies this obligation.

Terms of the Access Agreement will apply

It is important that once an Adhoc Train Service is scheduled, all the provisions of the AA (such as liability and charging provisions) and the TOD (such as operational requirements) apply to the Adhoc Train Service – the QCA has amended the AA so that Access Charges are payable for the Adhoc Train Services but the liability and indemnity provisions do not apply. This approach appears unbalanced given the increased obligation on AN to provide those train services.

Ability for Operator to order Adhoc Train Services

Where the Operator is not the Access Holder, it is impractical and not reflective of current train ordering practices for the Operator not to be able to order Adhoc Train Services under the TOD in its own right.

5	Supply Chain Rights	Clause 4.9	AN can only provide notice to an Access Holder to demonstrate Supply Chain Rights [X] times a year.	If AN has reason to believe that an Access Holder may not hold Supply Chain Rights, it should be able to request that the Access Holder demonstrate that it holds those Supply Chain Rights regardless of whether it has already given a notice in that year.
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Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
6	Invoicing	Clause 5.2	AN is obliged to deduct from the amount of the Access Charges payable under an invoice any amounts which the Access Holder (in the AA) or the Operator (in the TOD) may be able to set off against the amount payable under the invoice.	<p>AN should not be required to deduct set off amounts against charges in an invoice as it may not know what the set off amounts will be, and the set off amount may be in dispute.</p> <p>The requirement to set off amounts against charges in an invoice should only apply in the AA in circumstances where there is a failure by AN to comply with Performance Levels.</p>
7	Resumption	Clause 7.6 - 2015 DAU	<p>Removal of the concept of Underutilisation Event in the Resumption provisions which allowed AN to resume Access Rights where an event or circumstance would likely have a sustained or permanent and material adverse impact on the Access Holder's ability to utilise the Access Rights.</p> <p>Removal of the ability for AN to resume Access Rights where the Access Holder did not operate due to FM of Access Holder</p> <p>Removal of ability to partially resume underutilized Access Rights where AN only has a sustained alternative demand for part of the underutilised Access Rights.</p> <p>The timeframe for an Access Holder to dispute the Resumption Notice has been increased from 10 Business Days to 28 calendar days.</p>	<p><i>Underutilisation Event</i></p> <p>AN believes the scope of circumstances under which it can resume Access Rights is too narrow and does not allow AN to efficiently resume Access Rights where it is clear that an access holder does not have the ability to utilise them into the future. (e.g. mine closures).</p> <p>Please refer to Part 8.4 and Part 11.7.2 of this Response for further discussion in relation to this.</p> <p>AN has always had the right to resume Access Rights where the Access Holder did not operate due to FM of the Access Holder and the QCA has provided no justification for the removal of this right. If the Access Rights are not being utilised and this is not due to Aurizon Network Cause, then AN should have the right to resume those Access Rights in such circumstances.</p> <p><i>Underutilised Access Rights Definition</i></p> <p>It is not clear why the definition of Underutilised Access Rights has been removed. The QCA's drafting introduces uncertainty as to what Access Rights are capable of being resumed.</p> <p><i>Partial Resumption</i></p> <p>It is not clear why the ability for AN to partially resume Access Rights has been removed. To the extent there is only a sustained alternative demand for part of the Access Rights, AN should be able to partially resume. This</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
				<p>supports the efficient utilization of capacity on the CQCR network.</p> <p><i>Dispute Timeframes</i></p> <p>It is not clear why the dispute timeframe has been increased to 28 calendar days. Given the Access Holder has had 15 Business Days to respond to the Information Request Notice prior to the Resumption Notice, a further 28 calendar days to dispute the Resumption Notice appears excessive and does not align with the object set out in s.69E of the QCA Act. Furthermore, the timeframe does not work where the Resumption can occur within 10 Business Days of the Resumption Notice.</p> <p>For consistency, all timeframes should be in Business Days.</p>
8	Capacity Shortfall Provisions	Clause 8 Clause 8.9.3 - 2015 DAU	This section of the Draft Decision has been reviewed in conjunction with the Expansion Process.	Please refer to Part 12.14 of this Response for further discussion in relation to this.
9	AN's ability to reduce Nominated Monthly Train Services if Payload Exceeded	Clause 8 - AN August 2014 submission	Removal of the ability for AN to reduce an Access Holder's Nominated Monthly Train Services if the Maximum Payload is consistently exceeded over a period of 1 year.	<p>Please refer to Part 8.4 of this Response for further discussion in relation to this.</p> <p>This provision should be reinstated as it was broadly agreed with Industry (QRC) and Operators through consultation prior to the submission of the 2014DAU.</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
10	Access Holders ability to reduce Nominated Monthly Train Services due to higher Payloads	Clause 9 – AN August 2014 submission	Removed the ability for an Access Holder to initiate an increased to Maximum Payload and resulting reduction in Nominated Monthly Train Services.	<p>We note and appreciate that the QCA is willing to consider further whether there is merit in retaining this provision to enable an access holder to initiate an increase in Maximum Payload with a corresponding reduction in nominated monthly train services.¹⁷⁸</p> <p>Please refer to Part 8.4 of this Response for further discussion in relation to this.</p>
11	Transfer	Clause 7.4.2 – 2015 DAU	<p>The ability to agree a Transfer Date that is less than 3 months from the date that the Notice of Intention to Transfer is given to Aurizon Network has been removed.</p> <p>The concept of Ancillary Access Rights has been removed</p> <p>The QCA has included a right for the Transferee to renew the Transferred Access Rights.</p> <p>Provision stating that UT3 transfer provisions apply until such time UT4 is approved.</p>	<p><i>Transfer Date</i></p> <p>AN is unclear why, if it can be facilitated, it cannot agree with an Access Holder to have a Transfer Date which is less than 3 months from the date that the Notice of Intention to Transfer. This provides Access Holders considerable flexibility. If the deletion has only been made for the purpose of ensuring that the proposed new Short Term Transfer process be used for transfers within a 3 month timeframe, this needs to be clarified and the drafting amended appropriately.</p> <p><i>Ancillary Access Rights</i></p> <p>AN is not clear why the concept of Ancillary Access Rights has been removed. Confirmation of whether Ancillary Access Rights are required and are capable of being granted provides greater certainty and ability for an Access Holder to transfer and manage their Access Rights. It also allows AN to properly assess a proposed transfer and consider whether there is capacity to provide any additional access rights that may be required by the proposed transferee in order to utilise the access rights which are proposed to be transferred.</p> <p><i>Renewal of Access Rights</i></p>

¹⁷⁸ No 40 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015
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Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
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AN considers there should be an option for the transferor to elect to either permanently transfer its Access Rights to a transferee (giving the Transferee an ability to renew) or transfer Access Rights for a defined period of time. In the absence of this choice, Access Holders will be limited in their ability to manage their Access Rights where they do not wish a permanent transfer to take place but require transfers for periods of time greater than the periods permitted under the short term transfer process.

If the transferee holds access rights until the expiry date of the transferors' original train service entitlement, Part 7 of AN's proposed 2014 DAU gives the transferee the right to renew those access rights. Otherwise there is no right to renew,

AN assesses capacity only for the proposed transfer period – where a transfer requires additional capacity (i.e. is to an origin further than the transferor origin) it may only be accommodated for the proposed transfer period due to a number of factors such as other access agreements not having yet commenced or other transfers that have occurred in that coal system. Allowing transfers to be renewed will require AN to assess the capacity on the basis that it is a new Access Request – i.e. the capacity required will be available on an ongoing basis.

Please refer to Part 11.5 of this Response for further discussion in relation to this.

UT3 Transfer Provisions

It is unclear why this provision is needed given that until such time UT4 is approved, UT3 will continue to apply. Additionally as transfer provisions currently sit in UT1-UT3 access agreements, those existing contractual provisions apply to any transfers under those agreements.

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
12	Relinquishment	Clause 7.4.3 – 2005 DAU	Deleted requirement for an Access Holder to nominate a time period for its relinquishment.	<p><i>Time period for Relinquishment</i></p> <p>It is unclear from the drafting whether the QCA intends that Relinquishment of Access Rights can only be for the full remainder of the term of the relevant access rights instead of a shorter period. Access Holders should have the flexibility to relinquish Access Rights for a shorter period in the instance that they are unable to transfer and wish to mitigate their Take or Pay liability through a relinquishment.</p>
13	AN's ability to reduce Nominated Monthly Train Services if Nominal Payload is increased	Clause 10 – AN August 2014 submission	Removed the ability for AN to reduce the Nominated Monthly Train Services if Nominal Payload is increased	<p>Please refer to commentary in item 10 and also Part 8.4 of this Response for further discussion in relation to this.</p> <p>It should be noted that in AN's proposed drafting for clause 10, it was provided that this notice to increase Nominal Payload would only occur following consultation with Access Holders and relevant Railway Operators. The process in Clause 10 provides a clear mechanism for this to occur to avoid having to negotiate with access holders each time and agree a potentially different mechanism for this to occur.</p>
14	Relinquishment Fee	Clause 7.4.3 – and 7.4.4(c) 2015 DAU	<p>Inclusion of UT1 Relinquishment Fee provision.</p> <p>Removed the ability for AN to make reasonable assumptions about future events to determine the appropriate Reference Tariffs and Access Charges and limited to making an assumption about escalation at 2.5% every 1 July.</p>	<p>The inclusion of the UT1 Relinquishment Fee provision is not necessary as this is provided for in the body of the UT1 Access Agreements already.</p> <p>It is important that AN has the ability to make assumptions in relation to applicable Reference Tariffs and Access Charges in circumstances where there is no approved Reference Tariff or Access Charge (e.g. Middlemount Tariff). Without this ability, it introduces uncertainty as to the basis upon which Relinquishment Fees should be calculated. This is also relevant to the calculation of Transfer Fees and the Reduction Factor.</p> <p>Please refer to Part 8 of this response for further discussion.</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
15	Reversing changes to Train Service Descriptions	Clause 13.2	Access Holder may elect to allocate a varied Train Service Type to another Operator where a Defaulting Operator is unable to satisfy the conditions for the commencement of Train Services.	<p>Where a Defaulting Operator is unable to satisfy the conditions for the commencement of Train Services, the Train Description for the relevant Train Service Type should be taken not to have been varied immediately upon the Operator being given a notice by AN. In such circumstances, the Operator should only be able to continue to operate the Train Service Type in accordance with the existing Train Description.</p> <p>AN's previous drafting in relation to clause 13.2 should be re-instated.</p>
16	Compliance with Aurizon Network's Accreditation	Clause 16.2 – AN August 2014 submission	Deleted the provision whereby AN will not be in breach of the agreement arising from any act or omission that was reasonably required to comply with its accreditation.	<p>AN is required by law to comply with its safety accreditation. Its obligations under its accreditation may change from time to time and during the extended life of an AA. AN cannot accept a position where compliance with its accreditation causes it to be in breach of an AA/TOD.</p> <p>AN proposes that the limitation of liability in clause 16.2(a) of the 2014 DAU EUAA be reinstated.</p>
17	Compliance with IRMP	Clause 16.4 – AN August 2014 submission	Deleted the provision requiring the Access Holder to participate in the IRMP development process and comply with the IRMP.	<p>The Access Holder needs to have an obligation to participate in the IRMP development process and be bound by the IRMP. While Schedule C of the QCA's amended 2014 DAU contemplates that the Access Holder must participate in the IRMP process, as the access holder is not a party to the undertaking it is not required to do so, or be bound by the IRMP.</p> <p>In order to comply with the <i>Transport (Rail Safety) Act 2010</i>, Qld, and AN's Accreditation, it is essential that AN actively manage interface risks arising due to operations on the</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
18	Non-Compliance by Operator with Train Description	Clause 14.3 Clause 16.6 – AN August 2014 submission	Deleted provisions outlining the process for AN to seek remedy of or amendment to the Train Description where the Operator has failed to and cannot demonstrate it can comply with the Train Description for a Train Service Type.	<p>CQCR. It is an essential component of AN's safety management system for which it is legally accountable.</p> <p>It is not only AN and the train operator that will have interface risks that will need to be managed under the IRMP and consequently the Access Holder should be required to participate in the IRMP development process and comply with the IRMP.</p> <p>Reference in clause 14.3 to clause 13.2(a) is incorrect as this provision deals with the conditions required to be complied with for the commencement of the operation of Train Services where an Operator has sought a new Train Service Type or varied the Train Description of an existing Train Service Type.</p> <p>Clause 14.3 deals with an Operator not complying with the Train Description for a Train Service Type after commencement of the operation of Train Services and the process whereby AN must consult with the Operator and Access Holder to seek compliance or agree amendments to the Train Description to reflect the Operator's inability to comply and allow the Access Holder to nominate a different Operator.</p> <p>As these two clauses address two distinct circumstances, the existing Clause 14.3 should be reinstated.</p> <p>It is important that AN has the ability to vary the Train Description where the Operator consistently fails to meet the existing Train Description and cannot demonstrate it will comply, rather than just relying on current suspension provisions. Allowing AN to vary the Train Description allows operations to continue without detriment to the rest of the supply chain. In addition, having the mechanism in the AA to amend the Train Description will facilitate the review and</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
				<p>update of the System Operating Parameters to ensure they reflect actual performance and operating practices.</p> <p>Clause 16.6 of AN's 2014DAU EUAA should be reinstated as it deals with the circumstances where a Train Service Type under the AA which is operated by two different Operators is varied as a result of one Operator's non-compliance with the Train Description.</p>
19	Notification of Obstructions	Clause 17.3 – AN August 2014 submission	<p>Deleted requirements for the Access Holder:</p> <ul style="list-style-type: none"> to notify AN of any damage / disrepair or failure of the Nominated Network; and not cause any Obstruction and notify AN immediately of such Obstruction 	<p>We understand that the QCA removed this to better separate rights and obligations between End Users and Railway Operators. This is a provision that is currently included in UT3 and which industry did not raise significant concerns with. We note and appreciate that the QCA is willing to consider this further if we can explain why there is a need to retain this provision in the AA.¹⁷⁹</p> <p>The provisions recognise that, in practice, End Users and their Operators will be best placed to identify and report issues with the infrastructure, particularly for End Users where it is near their loadout facilities.</p> <p>Additionally, as the End Users' loadout facilities sit over our infrastructure and they conduct activities near or on our corridor, it is important that they have an obligation not to cause Obstructions, and if they do, to notify AN promptly.</p>
20	Investigations	Clause 17.4 – AN August 2014 submission	Deleted Investigation clauses	<p>It is not clear why the QCA has deleted these clauses as it is important to have defined investigation processes agreed between Access Holders and AN. End Users typically operate loading facilities and undertake other activities on or adjacent to AN's corridor. End Users may be aware of information that is relevant to the Investigation of Incidents. The investigation clauses ensure that End Users are obliged to participate in the conduct of Investigations in relation to</p>

¹⁷⁹ No 26 and 27 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015
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Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
				Incidents. The extent of the participation of End Users in Investigations depends upon the extent of the information of which they are aware that is relevant to the Investigation. We note and appreciate that the QCA is willing to consider this further ¹⁸⁰
21	Breach by Infrastructure Lessor	Clause 18.4	Deleted exclusion where the failure to provide access is due to the breach of the Infrastructure Lease by the Infrastructure Lessor or negligent act or omission.	<p>Consistent with the QCA draft decision, AN should not be liable for matters outside of its control. The deletion of this exclusion exposes AN to liability due to the acts of a third party, being the Infrastructure Lessor.</p> <p>The QCA in the response to AN's RFI noted that this matter was covered under force majeure.</p> <p>At present, AN only has two Infrastructure Lessors. With the introduction of SUFA, AN may, in the future, have numerous Infrastructure Lessors. AN's view is that given the introduction of SUFA, the likelihood of a potential breach by an Infrastructure Lessor will increase, and the potential consequence is significant enough to warrant a specific exclusion in the liability provisions.</p> <p>We note the QCA's view is that it considers the matter to be covered under force majeure. If this is the case, we would like to specifically list this as a force majeure event in the definition of Force Majeure Event to avoid any ambiguity, the potential for dispute and AN incurring unintended liabilities.¹⁸¹</p>
22	Allowable Threshold	Clause 18.4	QCA has lowered the Allowable Threshold from 10% to 5% of the total number of Train Services scheduled in the DTP for a month.	The QCA has provided no justification for reducing the Allowable Threshold from 10% to 5% other than to say that it is to appropriately balance the interests of the parties to

¹⁸⁰ No 28 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015

¹⁸¹ No 29 and 31 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
				<p>the contract.¹⁸² AN cannot accept the reduction in the Allowable Threshold as it substantially increases AN's potential liability for non-provision of access without any additional return provided for this risk.</p> <p>AN could accept access holders having a right to negotiate the Allowable Threshold to a lower amount provided that the particular access charge for that access holder were increased to take account of the additional risk imposed on AN as a result of that reduction.</p>
23	Force Majeure	Clause 22 Clause 7.7 2015 DAU	<p>AN is required to provide an FM notice within 48 hours of the event, failing which the suspension will take effect on and from the time the notice is provided.</p> <p>If more than one Access Holder is affected by the FM event, the obligation to provide access is suspended proportionally between each of the affected Access Holders.</p>	<p><i>48 Hour Notice Timeframe</i></p> <p>The requirement to provide a notice within 48 hours may not be possible for some FM events that cannot be determined until completion of an investigation (i.e. derailment). To the extent the FM is valid, AN's suspension of obligations should commence when the FM event occurred, not when the notice is provided.</p> <p>The requirement also places an additional administrative burden on AN given this will require coverage over the weekend.</p> <p>While the requirement to give an FM notice to the Access Holder is an important obligation, a delay in the giving of an FM notice should not result in AN incurring potentially significant liability as a result of a failure to provide Access Rights in the period prior to the FM notice being given, particularly as the Access Holder will invariably be aware of the occurrence of the FM event via other means e.g. incident notices and will not suffer any loss as a result of the delay in the giving of the FM notice.</p> <p><i>Proportional Suspension of Access Rights</i></p>

¹⁸² No 30 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015
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Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
				<p>This is not required as where there is a reduction in capacity due to an FM event the remaining capacity will be allocated between the access holders in accordance with the Network Management Principles which provide for how AN allocates capacity between Access Holders. The inclusion of a proportional suspension clause in the AA is unnecessary and may result in an allocation of the remaining capacity between access holders that is different to that required to be provided by the Network Management Principles.</p> <p>AN made the above points to the QCA in its request for information dated 13 February 2015 and we note that the QCA has stated that it welcomes stakeholders comments on its proposed approach.¹⁸³</p>
24	Termination for Extended Force Majeure	Clause 7.7 2015 DAU	Removed the ability to terminate for extended Force Majeure event.	It is not clear why the QCA has removed the ability to terminate the Access Rights following an extended FM event. This is particularly relevant where AN does not have the ability to resume Access Rights for an Underutilisation Event.
25	Confidential Information	Clause 31 – AN August 2014 submission	<p>Deleted the provision which allowed AN to use the Confidential Information provided to it for the purposes of:</p> <ul style="list-style-type: none"> • capacity assessment; • investigation and planning of Maintenance Work; • planning Infrastructure Enhancements; and • comply with its obligations under the Access Undertaking. 	<p>This provision expressly allowed AN to use Access Holder confidential information for legitimate purposes in connection with its business. Importantly, its use of the confidential information for those purposes remains subject to the confidentiality provisions in the AA.</p> <p>The deletion of this provision limits AN's ability to conduct its business efficiently if we are required to gain consent to use information such as contracted Access Rights prior to being able to conduct capacity assessments and maintenance planning.</p>

¹⁸³ No 44 and 45 of the QCA's responses dated 23 March 2015 to Aurizon Network's request for information dated 13 February 2015
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Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
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The removal from the confidentiality provisions of the access agreement the ability for AN to disclose information as required by obligations in the Access Undertaking is counter-intuitive given the QCA's positions regarding transparency of capacity information. For example, the QCA has required in Part 10 and Part 13 of its Draft Decision that Aurizon Network ensure that any future access agreement provides an ability for disclosure of the System Operating Parameters, the outputs of a capacity review and all train plans produced under Schedule G.

26	Security	Schedule 1	Reduce security amount from 12 months to 6 months.	Please refer to Part 8.4 of this Response for further discussion in relation to this.
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Train Operations Deed (TOD)

27	Interaction of Rights	Clause 6 – AN August 2014 submission	Deleted provision restricting an Operator's right under the TOD to renew, transfer, vary or relinquish Operational Rights granted to under the TOD by an Access Holder.	<p>This clause makes clear that the Operation Rights granted under the TOD are derived from, and subordinate to, the Access Rights granted to the Access Holder under the AA.</p> <p>AN considers this clause necessary to ensure an Operator does not renew, vary or relinquish the Operational Rights granted to it under the TOD as the rights do not "belong" to and are not held by the operator.</p> <p>An Operator should not be able to amend or vary the Access Rights for an Access Holder under a TOD.</p>
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Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
28	Operation of Train Services	Clause 9	<p>Deletion of the entire clause 10.4 of the AN's 2014DAU TOA which:</p> <p>(a) prohibits the Operator from operating Train Services unless it holds or has the benefit of Supply Chain Rights for those Train Services; and</p> <p>(b) requires the Operator to demonstrate that it holds, or has the benefit of, and will continue to hold, or have the benefit of, Supply Chain Rights</p>	<p>The QCA has contemplated that only the Access Holder will hold, or have the benefit of, Supply Chain Rights and the Operator will rely on the Access Holder's Supply Chain Rights for the operation of Train Services.</p> <p>AN considers that the Operator should have an independent obligation to hold, or have the benefit of, Supply Chain Rights, particularly given this includes for example having a rail haulage agreement. It may hold those Supply Chain Rights itself or it may have the benefit of those Supply Chain Rights from the Access Holder or any other third party.</p> <p>Where AN has received relevant information from either the Access Holder or the Train Operator, it would not require the other party to produce the same information again.</p> <p>Clause 10.4 of AN's 2014 TOD should be reinstated.</p>
29	Authorised Parking	Clause 10.5	<p>Removed the release of liability and indemnity in favor of AN where AN has exercised its rights to remove rollingstock which has been parked on the infrastructure beyond the permitted period.</p>	<p>AN does not consider that this ensures a reasonable and commercially balanced allocation of rights, obligations and risks between the parties particularly given that, prior to AN exercising its right to remove the relevant rollingstock, the operator is provided opportunities to do so itself.</p> <p>It does not benefit the supply chain for rollingstock to be stored outside of permitted periods as it reduces operational flexibility for train services and does not promote the efficient use of infrastructure. Without a release and indemnity, AN may be exposed to liability if it removes any rollingstock which is stored on the Network without authorisation and will not incentivised to take any action where the Operator has failed to do so.</p> <p>Consequently, AN's drafting in the 2014 DAU TOA should be reinstated.</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
30	Compliance	Clause 11	Requirement that Aurizon Network comply with the conditions of the Operator's Accreditation.	AN should only be required to observe and comply with the relevant conditions of the Operator's Accreditation, to the extent AN knows or should reasonably have known of those conditions. This is similar to the approach AN took in Clause 16.2 of the 2014DAU EUAA.
31	Plans	Clause 12	<p>AN must notify the Operator whether or not it approves the Operating Plan within 10 Business Days of receipt.</p> <p>The creation and approval of Operating Plans, IRMP and Emergency Response Plan has been consolidated.</p> <p>Included a requirement for AN and the Operator to conduct a further Interface Risk Assessment each time a Compliance Statement is provided for Rollingstock Authorisation.</p> <p>Disputes in relation to an IRMP are to be determined by an Independent Expert.</p>	<p><i>Operating Plan Approval Timeframe</i> AN previously had 20 Business Days to notify the Operator whether or not it approves the Operating Plan – this timeframe is reflective of the number and level of details that are required to be reviewed in an Operating Plan, particularly where it is for new Train Service Types, the Operations of which requires capacity assessment. The reduction in the timeframe is not practicable and cannot be accepted.</p> <p><i>Consolidation of IRMP, Operating Plan and Emergency Response Plan provisions</i> AN considers the separation of the various Operating Plan, IRMP and Emergency Response Plan processes important for clarity as it clearly distinguishes each process from one another. This assists both AN and the Access Holder to understand the particular requirements of each process.</p> <p><i>IRMP requirements</i> Clause 14.4 already provides for a Rollingstock Risk Assessment to be conducted each time AN receives an Authorisation Request (which includes receipt of a Compliance Statement). A full Interface Risk Assessment in most circumstances is not necessary for Rollingstock Authorisations. Hence to require it to be completed would be an inefficient use of resources.</p> <p><i>IRMP Disputes</i> Given the importance of IRMPs in relation to safety and AN's obligations as Rail Infrastructure Manager, AN should</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
				<p>be able to determine the appropriate controls for risks of operating on its infrastructure, provided this determination is reasonable. AN does not accept the ability of an independent expert to determine the outcome of the IRMP.</p>
32	Rollingstock Certification	Clause 14.5	<p>Provides that the independent certification of rollingstock as compliant with the Rollingstock Standards is binding on AN in the absence of fraud or manifest error.</p> <p>Removed the ability for AN to:</p> <ul style="list-style-type: none"> • assess and dispute the independent certification of rollingstock as compliant with the Rollingstock Standards; and • Request information or documentation in relation to the certification of rollingstock. 	<p>As Rail Infrastructure Manager, AN must have input and control into the Rollingstock Certification process and must have the ability to assess and dispute the independent certification given by a Certifier. This is particularly important given the potential safety implications of this and AN's ultimate responsibilities as Rail Infrastructure Manager.</p>
33	Weighbridges	Clause 16.1	<p>AN's drafting of this clause imposed an absolute obligation on the Operator to ensure that the gross mass of any wagon or train operated by it does not exceed the relevant Maximum Allowable Gross Tonnage. The QCA has amended this clause so that it only imposes a reasonable endeavours obligation on the Operator.</p>	<p>The Maximum Allowable Gross Tonnage of a wagon or a train is the maximum allowable weight at which the wagon or train can be safely operated.</p> <p>The Operator must be under an absolute obligation not to operate a wagon or train on the Network if the weight of the wagon or train exceeds the Maximum Allowable Gross Tonnage. Given that this clause imposes a critical safety obligation on operators, the QCA's amendment to it is unacceptable.</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
34	Infrastructure Management	Clause 18.2	Deletion of ability for AN to impose Operational Constraints for the purposes of carrying out Maintenance Work or Infrastructure Enhancements.	<p>This severely limits AN's ability to carry out Maintenance Work or Infrastructure Enhancements in the most efficient way possible. Operational Constraints may be required as part of returning the Infrastructure for the safe operation of trains following Maintenance work.</p> <p>For example, often AN will undertake maintenance or construction work between train services, by implementing single line running or via speed restrictions. The removal of this ability will result in AN requiring system closures instead to carry out the work. This does not promote the efficient management of the Network.</p> <p>In many instances, following maintenance work, AN may be required to apply speed restrictions for safety reasons. For example, following replacement of track and ballast, trains may be required to run at reduced speed to enable the track and ballast to settle fully prior to being capable of having trains run at normal speed over it.</p> <p>AN's previous drafting must be re-instated.</p>
35	Removal of Rollingstock	Clause 19.4	Release and indemnity in favour of AN in relation to loss or damage arising from the removal of rollingstock from AN's network following an incident.	<p>The timely removal of rollingstock from the network is important to ensure the efficient operation of the network.</p> <p>AN needs the ability to remove rollingstock from the network without incurring liability to the Operator or third parties. The release and indemnity only applies if the Operator has not removed the rollingstock and there has been an expert determination that the removal of rollingstock by AN is reasonable.</p> <p>It is important to the supply chain that, following an incident, the network is returned to operation as soon and as safely as possible. Where an Operator does not act efficiently in this regard, AN should have the capability to do so without being exposed to liability.</p>

Item	Issue	Clause	QCA Draft Decision	Aurizon Network Commentary
36	Qualification of Safety Staff	Clause 20.2(c)	Removed the requirement for the Operator to provide AN with any information relating to the Operator's staff engaged in safety related work that AN considers is reasonably required to be known to AN to comply with its Accreditation and Law and replaced it with an obligation to advise AN of position titles of relevant staff.	The Operator must be obliged to provide AN with any information in relation to Operator's staff engaged in safety related work that AN considers it requires to comply with its Accreditation and Law (not just position titles).
37	Removal of Interface Risk Management Plan, Audit and Inspection Right provisions	<p>Clause 24.1 – AN August 2014 Submission</p> <p>Clause 25.4 – AN August 2014 Submission</p>	<p>Removal of the detailed provisions relating to development, implementation and variation to IRMPs, and audit and inspection processes from the AA Inclusion of less detailed provisions relating to development, implementation and variation to IRMPs, and audit and inspection processes into the AU.</p> <p>The AU provisions appear to be principle based guidelines as opposed to the detailed processes set out in the AA.</p>	<p>Given the importance of an IRMP and the audit and inspection rights, AN considers it more appropriate to retain the more detailed provisions that were contained in the AA.</p> <p>IRMPs are more relevantly managed in an access agreement.</p> <p>AN's drafting in its 2014DAU should be re-instated.</p>

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Appendix 5 Asset Stranding Risk

Asset Stranding Risk

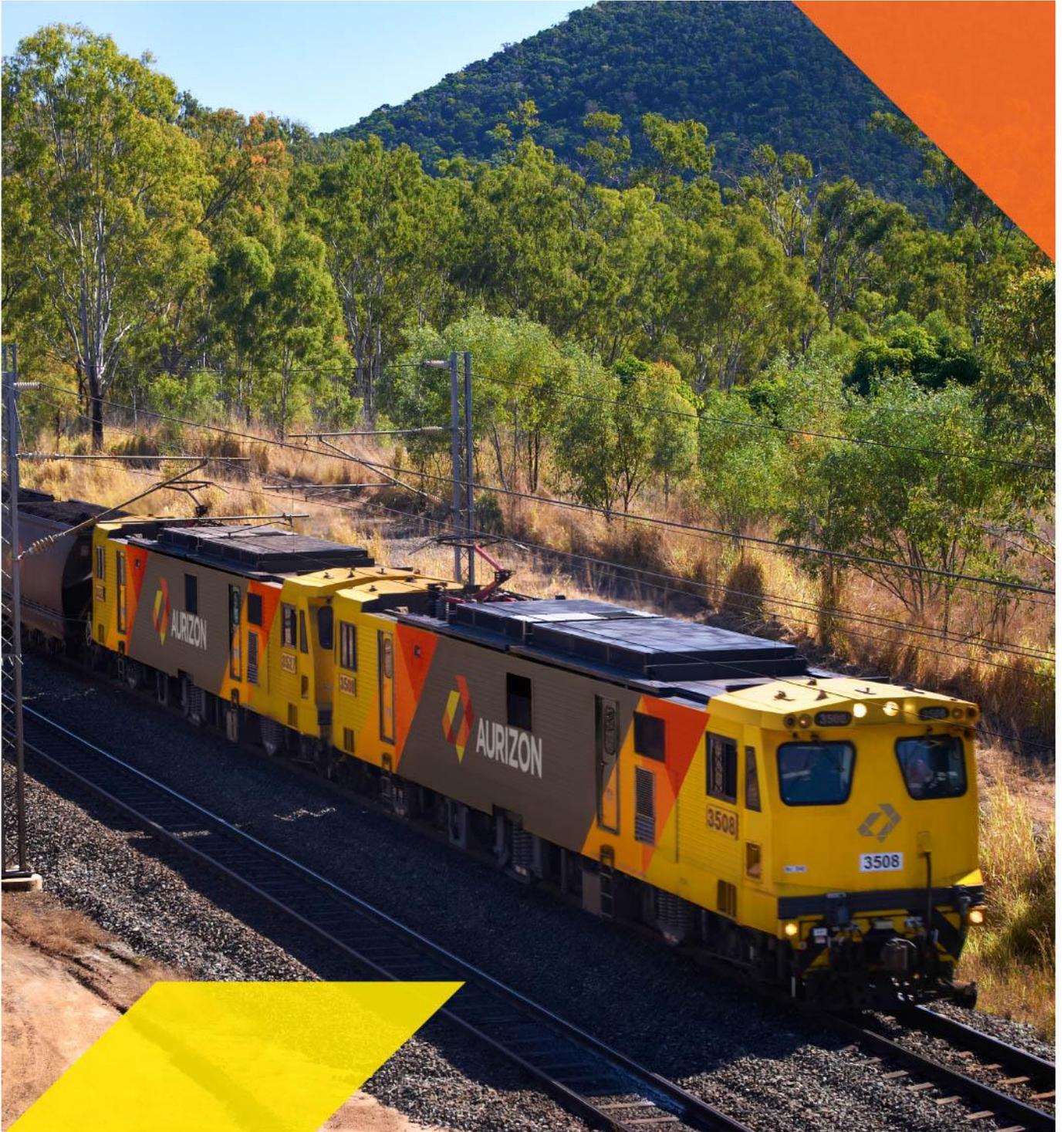


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1. Introduction

Asset stranding risk is the risk that demand for regulated infrastructure reduces before the end of its economic life, and as a result:

- Customers of the infrastructure owner (usually the access provider) are unable to sustain the level of charges at the reduced level of demand; and
- The value of the infrastructure in the Regulatory Asset Base (RAB) is reduced to a more sustainable level, resulting in owner of the regulated asset being unable to recover part or all of the value of its capital invested.

This risk has increasingly become an issue for Aurizon Network, as owner of the Central Queensland Coal Network (CQCN), given the recent fall in coal prices which has resulted in cash operating losses for some miners, together with some mines approaching the end of their recoverable resources. Aurizon Network is at risk to lose the remaining unrecovered investment in the rail infrastructure which serves those mines.

The Policy and Pricing (P&P) Draft Decision recently published by the Queensland Competition Authority (QCA) also significantly increases asset stranding risk for expansion projects. The QCA proposed to create separate systems for expansion projects without any materiality threshold. Expansion projects generally involve less users than the current system, which greatly reduces the system stability. That is, any failure of a particular user may have significant impact on the rest of the system, and render it uneconomical to operate (asset stranded). As a result, the segmentation of the RAB increases the possibility, relative to mainline infrastructure, that Aurizon Network (or any other funders) not able to recover invested capital. Other aspects of the P&P Draft Decision including reinstating demand deterioration as a reason for reducing the RAB value and creating a separate Newlands to Abbot Point (NAP) system also raise Aurizon Network's concern about asset stranding risk.

Although the QCA and other Australian regulators have recognised the existence of asset stranding risk, and employed various means to mitigate such risk, there is not yet a framework developed in place to address asset stranding risk. For example, a mechanism for the ex ante compensation for asset stranding risk, or alternatively, the regulatory treatment of the stranded asset if it does occur.

It is also important to recognise that Aurizon Network is not compensated for asset stranding risk, as suggested by finance theory. The regulated rate of return derived from the Capital Asset Pricing Model (CAPM) only compensates for symmetric systematic risk. The non-systematic and asymmetric nature of asset stranding risk means it is not captured within the framework. Nevertheless, there is still some ongoing confusion and disagreements among stakeholders.

In light of the P&P Draft Decision and an effort to resolve some of the ongoing confusion, this paper discusses whether the current regulatory allowances, in particular the regulated rate of return, has compensated Aurizon Network for the asset stranding risk, and also summarises regulators' positions on this issue. Given the lack of mechanism in place, this paper further investigate various approaches to address the asset stranding risk, and recommends an approach, for the CQCN.

Section 2 of this paper briefly describes the concept of asset stranding risk. Section 3 summarises the current regulatory framework and the associated features. Section 4 discusses whether the regulated

return has compensated for asset stranding risk and also summarises regulators' positions on this issue. Section 5 explores various ways to address asset stranding risk (through compensation or mitigation) and recommends an approach for the CQC.

2. Asset Stranding Risk

Large infrastructure assets such as railways are typically sunk and irreversible investments, in that an asset's economic value cannot be recovered, in whole or in part, via secondary uses. This characteristic is even more acute in railways such as the CQC which are predominantly utilised, and are therefore funded, by bulk traffics serving one or two markets (other regulated railways, such as the Hunter Valley network and the interstate network, both operated by the Australian Rail Track Corporation, serve multiple markets via bulk, general and intermodal freight and passenger traffics).

Under the current revenue cap regulatory regime, capital invested is recovered from the return on and of the RAB, which make up a significant portion of the maximum allowable revenue. However, an asset could become stranded if demand ceases before the end of asset economic life. In such case, the infrastructure provider cannot fully recover the invested capital for providing the infrastructure. This type of risk is defined as asset stranding risk.

Asset stranding risk is not only relevant to Aurizon Network, it also has practical implications for other network service providers. For example, for an investment in building an electricity distribution network to a planned residential area that does not eventuate, the assets will become stranded and the regulated entity will not be able to fully recoup the costs.

The risk of asset stranding is more pronounced under the current regulatory regime, due to the existence of CQC systems for pricing purposes and the phenomenon called 'death spiral'. Access charges are set by allocating the maximum allowable revenue for each CQC system to the total demand for that system. Access holders benefit from the increase in demand, as price will proportionately drop under the revenue cap regime. This is because more users share the same amount of allowable revenue. However, if demand decreases, the remaining access holders will have to pay higher access charge to make up the shortfall in users. Higher access charges, in turn, discourage the remaining users in the system which leads to further decline in the demand. Further decline in demand pushes up prices further. Without intervention, this process will repeat itself until the access charge has spiralled so high that is not commercially viable for the access holders to continue using the infrastructure. In that case, prices become unsustainable for the remaining users within the system, and the assets become stranded.

Future funders of assets in the CQC under the proposed Standard User Funding Agreement (SUFA) framework will also bear asset stranding risk in the event that demand for the assets funded by them also decreases. To the extent that SUFA funders are not compensated for asset stranding risk, they may be required to seek above-regulatory rates of return outside the regulatory pricing framework.

It is also important to recognise that this type of risk is asymmetric in nature for Aurizon Network. Aurizon Network does not benefit from increase in demand due to revenue cap regulation, but bears the risk that assets become stranded.

Asset stranding risk is well recognised by the regulators. As early as in Aurizon Network's first access undertaking submission, the QCA has recognised the existence of asset stranding risk. In rejecting a different reference tariff applying to the Gregory cluster in the Goonyella system, the QCA stated:

The Authority is aware that this approach could create an asset stranding risk for QR. There are several ways in which this risk may be ameliorated that do not distort efficient resource allocation.¹

The Economic Regulation Authority (ERA) also acknowledged the existence of asset stranding risk in The Pilbara Infrastructure (TPI)'s WACC determination:

...the Authority will consider the issue of stranding risk under its future floor and ceiling costs determination for TPI's railway.²

In the discussion of depreciation methodology, the Independent Pricing and Regulatory Tribunal (IPART) also explicitly discussed the asset stranding risk:

While we acknowledge the asset stranding risks that exist under both the LLSM and WAL approach, we consider that LLSM approach provides a better balance of these risks between coal mine and rail infrastructure owners.³

There are various drivers behind the asset stranding risk faced by Aurizon Network (and which will also be faced by SUFA funders). The risk could arise due to the declining coal price which forces miners to close down. The threat has increased dramatically over the recent years as the coal price has fallen. The asset stranding risk could also be triggered by the competition between and within the systems. For example, Aurizon Network submitted a Draft Amending Access Undertaking (DAAU) for Blackwater electric traction tariff, as users may bypass the electrical asset by running diesel consist in the same system, which potentially makes the electric asset stranded. Mine operation could also cause asset stranding for Aurizon Network. For example, a mine closing down due to safety reasons may render a branch or spur line stranded (Access Facilitation Deeds (AFDs) partly address this risk by transferring asset stranding risks on some spur lines to mine owners). Or alternatively, the rail infrastructure could simply become stranded due to the exhaustion of coal reserve prior to the end of economic life of railway. The list is not meant to be exhaustive. The key point is that, asset stranding risk does exist and needs regulatory attention.

3. Regulatory Framework

Australia regulators such as the Australian Energy Regulator (AER), the QCA and the ERA currently apply the "building block" approach to determine the access price charged by network service providers. The building blocks are normally comprised of Return on Capital, Return of Capital, Operating Costs (operations, maintenance and overheads) and Tax. Apart from promoting the efficient usage of the network and operating efficiency improvement, one important objective of the regulatory regime is to promote an efficient level of future investment into the infrastructure.

To achieve this objective, investors must be allowed a return commensurate with the level of risk they have taken on. Specifically, Section 168A(a) of the *Queensland Competition Authority Act* (QCA Act) provides that the access charge should:

generate expected revenue for the relevant service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.

¹ QCA, 2000, Draft Decision: QR's Draft Undertaking Volume 3 – Reference Tariffs, p. 91.

² ERA, 2009, Final Determination on the 2009 WACC for TPI's Railway Network, p. 54.

³ IPART, 2014, NSW Rail Access Undertaking – Review of the Rate of Return and Remaining Mine Life, p. 23.

The National Electricity Law also has a similar provision:

A price or charge for the provision of a direct control network service should allow for a return commensurate with the regulatory and commercial risks involved in providing the direct control network service to which that price or charge relates.⁴

Under the current regulatory framework, the regulatory and commercial risks associated with investments are compensated through the Return on Capital building block, calculated as the product of the regulated rate of return and the beginning RAB for that year. Regulators including the QCA typically use the CAPM as the theoretical foundation to set the regulated return, being the weighted average cost of capital (WACC).

3.1 The Regulatory Assumption

From an investor's perspective, the cash flow received each year comprises of Return on Capital and Return of Capital components. The NPV of the investment for the investor is:

$$NPV = -\text{Capital Invested} + \sum_{t=1}^n \frac{\text{return of capital}_t + \text{return on capital}_t}{(1+r)^t}$$

It can be demonstrated that investors will achieve a zero NPV investment over the life of the project, if the regulated rate of return reflects investors' risk bearing. However, this regulatory process makes the assumption that the regulated entity is always able to recover the Return on Capital and Return of Capital revenue. Nevertheless, this assumption is unrealistic due to the asset stranding risk discussed above.

In the event of asset stranding, regulated entities will not be able to recover the remaining capital invested. As such, the actual return will be less than the regulated rate of return proposed by the regulator. From an ex ante perspective, investor's expected return will be less than the regulated return, and the investment will be negative NPV. Consequently, if the regulated return is not set to be above the cost of capital, investors will be under compensated for the level of risk they have taken on.

By way of an example, consider an asset that requires 10% return under the CAPM framework, and has 10% probability of failure in the coming year (investors lose all the investment in this case). If the regulated return is set at 10% according to the CAPM. Then the expected return will be

$$\text{Expected Return} = 10\% \times (-100\%) + 90\% \times 10\% = -1\%$$

In this extreme case, the expected return is negative and investors will not proceed with the investment. The expected return will only equal the regulated return if there is no asset stranding risk and investors are always able to recover the Return on and of Capital components.

This strong assumption is also recognised by the QCA in a workshop paper on the Blackwater Electric Traction Pricing DAU:

The weighted average cost of capital for Aurizon Network is currently set on the assumption that assets will only be optimised once, at the time the asset enters the asset base. ... If the current approach is changed to allow for subsequent optimisation of the asset base, the WACC may have to be reviewed (upward).⁵

⁴ National Electricity Law, part 1, section 7A(5).

⁵ QCA, 2013, Discussion Paper: Workshop on the Electric Infrastructure Tariff (AT5), p. 3.

That is, the RAB cannot be optimised further. Otherwise, the assumption that investors can always recover the remaining invested capital is violated, and investors need to be compensated for bearing the risk to encourage future investment.

Questions may arise as to why investors should be guaranteed full recovery of an investment. In a competitive unregulated market, investors are never guaranteed to be able to recover all capital invested. In a nutshell, it is due to the return truncation introduced by regulation. Investors sacrifice the investment upside potential (regulatory ceiling), and on the other hand should not be expected to bear the downside risk. A detailed discussion on regulatory return truncation is provided in the following section.

3.2 The Truncation of Return

As a type of asymmetric risks, asset stranding risk is not a problem itself, as long as investors are afforded a return that compensates for the risk. In the current regulatory process, regulators set the regulated return equal the cost of capital. Cost of capital has standard definition in corporate finance theory. It reflects investors' expected return in the prevailing market condition for a similar risk investment. The term 'expected', in a statistical sense, is the probability-weighted average over all possible outcomes.

In an unregulated commercial setting, investors can receive returns to both sides of the return distribution. That is investors receive a return higher than the cost of capital if asset stranding does not happen, while a lower return if it does. The probability-weighted average over all these outcomes will then be the cost of capital, which means the ex ante expected return appropriately compensates for the risk.

However, the current regulatory regime creates return truncation to regulated entities. That is, regulated entities are not allowed to earn a return that is higher than the cost of capital (regulated return), while at the same time exposed to down side risk (e.g. asset stranding risk). Any return that is to the right side of the return distribution is truncated. By definition, investors' expected return will always be less than the cost of capital (regulated return). In this regard, investors are under compensated ex ante. The under-compensation is not unique to asset stranding risk, but also applies to asymmetric risks in general. The under-compensation is best illustrated using a simple example below.

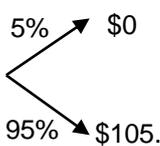
Example 1

Suppose there are two railway projects available to investors. These two projects are identical in every aspect, except for that Project A has a 5% probability of becoming stranded in a particular year. Both Project A and Project B require initial investments of \$1000, and the investment horizon is infinite. With the same level of market risk, well diversified investors require 10% return on both projects. Under the current regulatory regime, investors are permitted to recover \$100 (10% return on \$1000 investment) each year though Return on Capital building block, assuming no depreciation for simplicity. Cash flows and investment returns for both projects are illustrated below.

	Cash Flow Scenario	Expected Cash Flow	Value of Investment	Expected Return
Project A	100% → \$100	$100\% \times \$100 = \100	$\frac{\$100}{10\%} = \1000	$\frac{\$100}{\$1000} = 10\%$
Project B		$5\% \times \$0 + 95\% \times \$100 = \$95$	$\frac{\$95}{10\%} = \950	$\frac{\$95}{\$1000} = 9.5\%$

Clearly, investors are under compensated for Project B. The investors are facing asset stranding risk, while not able to price the risk due to regulatory return truncation. The return ceiling of 10% results in the expected return to be only 9.5%, compared to the regulated return of 10%. The investors will only achieve the regulated return when there is no asset stranding risk, or asymmetric risk in general. If the asymmetric risk is not recognised and compensated, it will certainly deter investors from investing in Project B.

In a competitive unregulated market, investors are compensated through higher return in good states for the additional asset stranding risk in Project B.

	Cash Flow Scenario	Expected Cash Flow	Value of Investment	Expected Return
Project A	100% → \$100	$100\% \times \$100 = \100	$\frac{\$100}{10\%} = \1000	$\frac{\$100}{\$1000} = 10\%$
Project B		$5\% \times \$0 + 95\% \times \$105.3 = \$100$	$\frac{\$100}{10\%} = \1000	$\frac{\$100}{\$1000} = 10\%$

In this case, if asset is not stranded during the year, investors will achieve a return of 10.53%, while 0% return if asset stranding does occur. Nevertheless, investors are fairly compensated for the systematic risk, as the expected return is 10%.

In this simple example, we have assumed the asset stranding risk to be independent each year. However, unlike asymmetric risk such as natural disaster, if an asset becomes stranded in a particular year, it is very likely that asset stranding will continue into future years. Consequently, the expected loss from asset stranding is well under stated in this example. Nevertheless, it does illustrate the importance of asset stranding risk and how regulatory return truncation affects investor's expected return.

A good 'real world' analogy to asset stranding risk is the default risk investors bear in the bond market. The default risk is also asymmetric in nature. That is, investors receive promised payment if the firm does not default while lose the investment in the default event. As a result, investors' expected return is reduced. Nevertheless, bond investors are already compensated through the higher promised return.

For example, given the market risk of a junk bond, investors may require 10% return to compensate for the market risk. Due to the high probability of default, if investors are only offered 10% interest rate, the expected return will be less than 10% as investors are not able to realise the return if the firm defaults. Instead, investors are offered a higher promised payment to compensate for the potential default (default premium), say 20%. Investors will received 20% return if the bond is not in default, while a much lower return (often negative) when the firm fails.

Nevertheless, ex ante, the investor's expected return is 10%, which compensates for the market risk. In this case, the investor's return is not truncated, in the sense that the investor is allowed to earn a higher return (20%) when the firm is not in default. In contrast, the current regulatory framework eliminates the upside potential, and set the regulated return at 10%.

The above examples highlight how investor return is affected by the regulatory return truncation. Investors are not afforded an unbiased opportunity to actually earn the cost of capital on average. If regulators does not compensate investors for bearing the asymmetric risk, the expected return will always be less than the regulated return, which under compensates investors for the regulatory and commercial risks, and is inconsistent with the spirit of the QCA Act.

The importance of recognition and compensation for asymmetric risk (or return truncation) is also well accepted by academia. For example, Kolbe, Tye and Myers (1993) believe asymmetric risk will lead to underinvestment if not taken account by regulators:

Failure [by regulators] to account explicitly for regulatory and other asymmetric risk will usher in a new era of an undercapitalised public utility sector. Regulated firms will have strong incentives to defer investment and utilise small scale technology that is below minimum efficient scale.⁶

Train (1991) provides comments on the regulatory return truncation as well, and believes:

...asymmetric treatment of uncertainty – by which losses by the firm are treated differently by the regularity than extraordinary profits – leads to distortions in the firm's actions that operate against optimality...asymmetry can actually induce the firm to make decisions in a way that ultimately works against the goals of the regulator and the welfare of customers.⁷

Hausman and Myers (2002) also highlight the consequence of not compensating appropriately for asymmetric risk on the US railroads:

We find that failure to take account of uncertainty and asymmetric risk in railroad regulation has quantitatively important effect. We find that the required returns calculated from the STB model that ignores these factors is too low by between 30% and 84.4%. Thus regulation by truncating the return of investment by the railroads will force investment below economically efficient levels...⁸

⁶ Kolbe A., W. Tye and S. Myers (1993), Regulatory Risk: Economic Principles and Applications to Natural Gas Pipelines and Other Industries (Topics in Regulatory Economics and Policy Series), Kluwer, p.60.

⁷ Train K., 1991, Optimal Regulation: The Economic Theory of Natural Monopoly, MIT Press, p. 96-97.

⁸ Hausman J. and S. Myers, 2002, Regulating the United States Railroads: The Effects of Suck Costs and Asymmetric Risk.

In summary, the current regulatory framework creates return truncation for asymmetric risks, by setting the regulated return equal to the cost of capital while not allowing upside potentials. Investors are under-compensated ex ante. Without recognition and appropriate compensation for asymmetric risk, it will not lead to an efficient level of future investment.

4. CAPM and Asset Stranding Risk

The existence of asset stranding risk, or asymmetric risk in general, is well recognised by regulators. The only question is whether investors have been compensated for the risk through the regulated return. Some stakeholders argue that the regulated return is higher than the risk free rate, and should have compensated for asset stranding risk. Regulated returns are calculated with reference to the CAPM, and therefore only compensate for risks accounted for in the specific model. The question is whether the CAPM has taken the asymmetric risk into pricing.

4.1 CAPM Theory

The CAPM builds on the model of portfolio choice developed by Markowitz (1959). In Markowitz's model, investors allocate wealth among assets at $t-1$ that produces stochastic returns at t . The model assumes all investors are risk averse, and more importantly, they only care about the mean and variance of the portfolio return. Consequently, investors prefer portfolios that are of higher expected return given the same variance. Alternatively, they prefer portfolios with lower variance given the same expected return. For this reason, the Markowitz model is often referred to as "mean-variance model". Investors optimise the mean-variance trade-off under the model.

As the CAPM builds on the Markowitz model, it also relies on the same assumption that asset returns are only characterised by mean and variance. Implicitly, the CAPM assumes that returns are multivariate normally distributed. Or alternatively, investors does not require compensation for higher moment risks, which is an unrealistic assumption. Consequently, only symmetric risks are considered under the CAPM. Asymmetric risks such as asset stranding risk is not rewarded under the CAPM.

More importantly, a key insight from the CAPM is that all idiosyncratic risks can be diversified away and does not require compensation. As a result, only systematic risk is rewarded under the CAPM. Systematic risk, or undiversifiable risk, refers to economy wide risks such as interest rate risk, inflation risk and change in economic growth that affect the market as a whole. It measures the extent to which the asset return varies with the market return. Clearly, the CAPM only compensates for symmetric systematic risk, and is thus, an under-specified model.

Apart from the asymmetric nature, asset stranding risk also has the element of an idiosyncratic component. For example, in Aurizon Network's DAAU for electric traction pricing in Blackwater, the potential stranding of the electric asset is mainly driven by the coal-haulage operators bypassing the electric infrastructure by running diesel consists on the Blackwater system, rather than driven by economy wide factors. Asset stranding could also arise if miners decide to close down due to environmental or safety reasons. The non-systematic nature of the asset stranding risk means it is not captured in the beta estimate, and thus, not compensated for under the CAPM and the regulated rate of return. Although demand side factors for asset stranding risk may involve some systematic elements (e.g., declining coal price), it is questionable if the CAPM adequately compensates for the risk given its asymmetric nature.

4.2 QCA Precedent

The QCA also shares the same view that WACC derived from the CAPM does not compensate investors for asymmetric risk such as asset stranding risk, and expressed the position in various regulatory determinations and papers.

As early as in 2004, in assessing the Draft Access Undertaking (DAU) proposed by Dalrymple Bay Coal Terminal (DBCT), the QCA considered that:

...to the extent that these risk factors are systematic, the asset beta for DBCT will reflect these risks. To the extent that elements of these risks are non-systematic (ie company-specific) [including asset stranding risk], the Authority believes that these factors (if proven) should be handled in the cash flows (eg accelerated depreciation).⁹

In assessing Aurizon Network's 2010DAU Tariffs and Schedule F (for UT3), the QCA also explicitly expressed the same view:

The Authority agrees with QR Network and Synergies that the CAPM does not compensate the firm for asymmetric risk.¹⁰

The same position was also adopted by the QCA in its final decision on Aurizon Network's 2010 Access Undertaking, particularly when assessing Aurizon Network's access condition proposal:

In addition to WACC-related matters, the Authority recognises there may be specific, cash flow (i.e. non-covariant) risks for which the infrastructure owner should be compensated. These might include demand risk, asset stranding risk and construction risk.¹¹

The same position is also repeated in the assessment of the new Schedule J for the 2010DAU:

The regulated WACC provides an appropriate return on capital for normal monopoly infrastructure risks that are systematic

...

All investments in Rail Infrastructure (by QR Network or Users) will earn the regulated WACC, unless they incur risks in addition to those that are compensated for in the regulated WACC. Such risks might include demand risk, asset stranding risk and construction risk.¹²

In 2012, the QCA issued a discussion paper on the relation between risk and form of regulation. In discussing the treatment of asymmetric risk under the CAPM, the QCA stated:

The implication of this assumption [normal distribution of return] is that the CAPM does not compensate investors for 'asymmetric' risk. In a regulatory context, asymmetric risks include asset stranding and expose to unlikely (and typically uninsurable) events such as certain natural disasters.¹³

To address the potential stranding of electrical assets in the Blackwater system, Aurizon Network submitted the Blackwater electric traction pricing DAAU. In response, the QCA held a workshop on this

⁹ QCA, 2004, Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking, p. 192.

¹⁰ QCA, 2010, Draft Decision: QR Network's 2010 DAU - Tariffs and Schedule F, p. 48.

¹¹ QCA, 2010, Final Decision: 2010 Access Undertaking Final Decision, p. 108.

¹² QCA, 2004, Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking, pp. 226-227.

¹³ QCA, 2012, Discussion Paper: Risk and the Form of Regulation, p.2.

issue, and expressed the view that Aurizon Network’s regulatory WACC is insufficient to compensate it for asset stranding risk. The QCA said:

The weighted average cost of capital for Aurizon Network is currently set on the assumption that assets will only be optimised once, at the time the asset enters the asset base. ... If the current approach is changed to allow for subsequent optimisation of the asset base, the WACC may have to be reviewed (upward).¹⁴

In the draft decision on the 2013 Blackwater electric traction pricing DAAU, the QCA further acknowledged that WACC does not compensate for asset stranding risk:

The WACC for UT3 was settled in that context – that is, it did not provide for Aurizon Network to bear a more general asset stranding risk that was reflected in its approved WACC or cash flows.¹⁵

The reasons cited were:

The asset/equity betas, in particular, were estimated/benchmarked with reference to the systematic risks of the business. An asset stranding risk is unlikely to be a systematic risk for Aurizon Network as it is unlikely to movements in the Australian share market.¹⁶

That is, the QCA believes asset stranding risk is a type of non-systematic risk, and is not included in the asset/equity beta. As a result, WACC does not provide appropriate compensation for asset stranding risk.

For ease of reference, Table 1 summarises the QCA’s previous positions.

Table 1 QCA Position on Asset Stranding Risk

Year	QCA Decision/Paper	Position
2004	Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking	Asset beta does not reflect asymmetric risk
2010	Draft Decision: QR Network’s 2010DAU - Tariffs and Schedule F	The CAPM does not compensate for asymmetric risk
2010	Final Decision: QR Network 2010 Access Undertaking	Asset stranding risk is an additional risk to those that are compensated through WACC
2012	Discussion Paper: Risk and the Form of Regulation	The CAPM does not compensate investors for asymmetric risks, which include asset stranding risk
2013	Discussion Paper: Workshop on the Electric Infrastructure Tariff (AT5)	WACC needs to be revised upwards if subsequently asset optimisation is allowed
2013	Draft Decision: Aurizon Network 2013 Blackwater Electric Traction Pricing Draft Amending Access Undertaking	Approved WACC or cash flow does not provide Aurizon Network compensation for asset stranding risk

¹⁴ QCA, 2013, Discussion Paper: Workshop on the Electric Infrastructure Tariff (AT5), p. 3.

¹⁵ QCA, 2013, Draft Decision: Aurizon Network 2013 Blackwater Electric Traction Pricing Draft Amending Access Undertaking, p.38.

¹⁶ QCA, 2013, Draft Decision: Aurizon Network 2013 Blackwater Electric Traction Pricing Draft Amending Access Undertaking, p.38.

4.3 Other Australian Regulators

The other Australian regulators have also expressed a similar view, either explicitly or implicitly, that WACC does not compensate investors for asymmetric risks such as asset stranding risk. For example, the Australian Competition and Consumer Commission (ACCC) believed stranding risk should be compensated to the extent they are asymmetric:

... Nevertheless, this is not to say that a regulated entity will not face additional stranding risk so that the firm bears an asymmetric risk justifying a form of compensation.¹⁷

The ACCC also considered asymmetric risk in the GasNet 1998 decision. It was recognised by the ACCC that the CAPM does not compensate investors for asymmetric risk, and an upwards adjustment to beta is appropriate given the difficulty in quantifying the risk.¹⁸

In a later decision, the ACCC again recognised the lack of compensation for asset stranding risk in the current regulatory arrangement. The ACCC considered that:

... if stranding risk is found to be material for the Hunter Valley railway, there should be some accounting for this additional risk.¹⁹

In determining the WACC for The Pilbara Infrastructure (TPI), the ERA rejected TPI's proposal to include an increment to the WACC to compensate for asset stranding risk, as it considered cash flow adjustment is more appropriate. Nevertheless, the ERA confirmed its position that WACC does not compensate TPI for the asset stranding risk. Specifically:

The Authority considered that stranding risk is more appropriately accounted for in cash flows rather than an ad hoc adjustment of the WACC. To be consistent with the Authority's policy of using WACC to only reflect systematic risk, stranding risk (non-systematic risk) will be assessed in the future determination of floor and ceiling costs for TPI's railway.²⁰

Implicitly, the ERA also repeated the same view that WACC does not include compensation for asymmetric risk. Instead, asymmetric risk should be compensated through the cash flow component. The ERA stated:

The Regulator concurs with the approach that asymmetric risk, where it exists, should be addressed through the cash flow as the risk is likely to be specific to a route or part of the network where there is likely to be only one or a small number of users, rather than include the risk in the WACC which would affect all users of the network and involve an element of cross subsidisation.²¹

In the 2009 review of rate of return for NSW railway companies, the IPART also explicitly recognised that WACC does not compensate for asset stranding risk:

IPART has not provided any compensation for asymmetric or stranding risks in this decision [WACC decision]...²²

¹⁷ ACCC, 2002, Final Decision: South Australian Transmission Network Revenue Cap 2003-2007/08, p. 38

¹⁸ ACCC, 1998, Final Decision: GasNet Access Arrangement 1998-2002, p. 60.

¹⁹ ACCC, 2010, Draft Decision: Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking, p. 558.

²⁰ ERA, 2009, Final Determination on the 2009 WACC for TPI's Railway Network, p. 53.

²¹ ERA, 2003, WACC to apply to Westnet Rail and The Western Australian Government Railways Commission, p. 20.

²² IPART, 2009, NSW Rail Access Undertaking – Review of Rate of Return and Remaining Mine Life, p. 42.

4.4 Consultants

Apart from regulators, various consultants involved in the regulatory process also consistently hold the view that regulated entities currently are not compensated for asset stranding risk, or asymmetric risks in general, through the regulated return.

Synergies Economics Consulting (Synergies) was engaged by APA Group to provide advice on the asymmetric risk. Synergies recognised that regulation itself can introduce asymmetric risks where returns for bearing risk are skewed or truncated, and further noted:

The regulatory environment either doesn't allow for the risks to be justifiably compensated (as in the case of non-systematic risks) or inadvertently does not capture the risks (as in the case of systematic asymmetric risks) that would normally be compensated.²³

The Competition Economists Group (CEG) also commented specifically on the asset stranding risk that could be faced by Next Generation Access Network. CEG considered asset stranding risk is not compensated through the CAPM, and therefore:

It is inappropriate to set maximum regulated revenues based on the firm earning a CAPM return if there is material risk that this will not be possible in the long run (i.e., a material risk of asset stranding).²⁴

In a recent report to the Queensland Resources Council (QRC) in relation to Aurizon Network's 2013DAU (for UT4), McKenzie and Partington commented on the list of risks (including asset stranding risk) identified by Aurizon Network, and stated:

The Aurizon report is correct in commenting that the WACC discount rate does not incorporate the non-systematic risks included in the list.²⁵

4.5 Conclusion

Asset stranding risk is a form of asymmetric risk. As the CAPM builds on the assumption that asset returns are multivariate normally distributed, asymmetric risks are not captured in the CAPM framework. Consequently, the regulated return (WACC), derived from the CAPM, does not provide compensation for asymmetric risks in general.

By reviewing prior determinations from various regulators (e.g., the QCA, the ACCC, and the ERA), the fact that investors are not compensated for asset stranding risk is well recognised and not contentious. The same view is also upheld by consultants involved in the regulatory process.

Given the recognition of asset stranding risk and lack of compensation under the current regulatory process, the remaining question is therefore how regulators should treat the asset stranding risk, and in particular how the QCA should address stranding risk in the CQCN.

²³ Synergies, 2009, Asymmetric Risk: The Importance of Recognition and Compensation, p. 14.

²⁴ CEG, 2008, Risks and Returns on Next Generation Access Networks: Comments on the Draft Commission Recommendation on Regulated Access to NGA, p.7.

²⁵ McKenzie and Partington, 2013, Review of Aurizon Network's Draft Access Undertaking, p. 11.

5. Potential Solutions to Asset Stranding Risk

In general, the regulators can adopt various measures to either mitigate or compensate for asset stranding risk. However, mitigating and compensating measures are not perfect substitutes to each other. Asset stranding risk cannot be reduced to zero by any mitigating measure, and Aurizon Network needs to be compensated for the residual risk. In this regard, this section discuss both ex ante and ex post mitigating/compensation mechanisms for asset stranding risk.

Table 2 gives the preview of each approach. Detailed discussions are provided in the following sections.

Table 2 Summary of Potential Solutions

Approach	Advantages	Disadvantages
Ex Ante Approach		
Accelerated Depreciation	<ul style="list-style-type: none"> • Reduce asset stranding risk ex ante • Less contentious than ex ante compensation • Widely used by regulators 	<ul style="list-style-type: none"> • May accelerate 'death spiral' • Does not compensate Aurizon Network for the risk per se
Uplift to WACC / Self-insurance Premium	<ul style="list-style-type: none"> • Consistent with risk return trade-off finance theory • Consistent with self-insurance policy for asymmetric risk 	<ul style="list-style-type: none"> • Extremely difficult to quantify compensation amount • Can be easily rejected given lack of actuarial accuracy • Likely to be contentious among stakeholders
Ex Post Approach		
Write-down of Stranded Asset	None	<ul style="list-style-type: none"> • Violates the regulatory assumption that assets will only be optimised once • May affect investors' confidence and increase WACC which results in price increase
Socialisation of Stranded Asset	<ul style="list-style-type: none"> • Consistent with existing treatment for asymmetric risk • Regulatory precedent • Less contentious than ex ante compensation 	<ul style="list-style-type: none"> • Need to develop an effective and equitable socialisation framework • May not work if serious asset stranding across systems

5.1 Ex Ante Solution

5.1.1 Reducing Asset Stranding Risk Ex Ante

Asset stranding risk is widely recognised by the regulators around Australia. In response, regulators typically adopt various means to mitigate asset stranding risk. Examples include accelerated depreciation, take-or-pay arrangements, investment pre-approval process and long term contracts. Among them, the most widely cited and used approach by regulators is accelerated depreciation.

Typically, network infrastructure is a long-lived asset with a physical asset life spanning over more than 50 years. The economic life of the CQCN, which is closely linked to the lives of the mines it serves, is between 20 and 30 years. Accelerated depreciation assumes an economic life shorter than the physical life, and brings forward the recovery of investment when the demand is high and more certain. As a result, the asset stranding risk is reduced, especially in the later stage of the asset life.

Aurizon Network proposed to reduce the remaining useful lives of certain below-rail assets in Newland and Goonyella systems during the 2005DAU (for UT2) process, in response to asset stranding risk. The QCA rejected the proposal as it did not see there was a material change in the risk. Nevertheless, the QCA did recognise accelerated depreciation could reduce such risk. The QCA stated:

The authority accepted that accelerated depreciation is a legitimate means of mitigating asset stranding risk in certain circumstances.²⁶

Aurizon Network resubmitted the accelerated depreciation proposal to mitigate asset stranding risk in the 2009DAU (for UT3) process. In the draft decision, the QCA finally approved a rolling 20-year accelerated depreciation on new investments, and further noted:

Should there be a material increase in the asset stranding risk, the appropriateness of the 20 year limit could be reviewed.²⁷

The accelerated depreciation as a mean to mitigate asset stranding risk is also well supported by other Australian regulators. In discussing the asset stranding risk for The Pilbara Infrastructure, the ERA stated:

Stranded asset risk can be accounted for by accelerated depreciation (reducing the assumed economic life to reflect a probability weighted asset life).²⁸

The ACCC also shortened the end of the economic life of the Longford pipeline from 2030 to 2023, in light of the possibility that gas production from the Gippsland basin ceases in 2023.²⁹

Similarly, the AER allowed the value of any potential stranded assets to be recovered through accelerated depreciation prior to their removal from the asset base:

To the extent that there are genuine risks of extreme changes in demand for specific service providers which present the potential stranding of an asset, the regulatory regime for gas and electricity can mitigate this risk by providing prudent discount and accelerated depreciation provisions.³⁰

The accelerated depreciation is provided in section 6.5.5(b)(1) and 6A.6.3(b)(1) of the National Electricity Rule (NER), and section r.89(1) of the National Gas Rule (NGR).

Aurizon Network accepts regulators' efforts to mitigate the asset stranding risk through accelerated depreciation, and in this regard has accepted the QCA's Draft Decision on Maximum Allowable Revenue which proposes a capped 20 year life for infrastructure constructed since UT3. However, there

²⁶ QCA, 2005, Final Decision: QR's 2005 Draft Access Undertaking, p. 61.

²⁷ QCA, 2009, Draft Decision: QR Network 2009 Draft Access Undertaking, p. 36.

²⁸ ERA, 2009, Final Determination on the 2009 WACC for TPI's Railway Network, p. 51.

²⁹ ACCC, 2008, Final Decision: Revised Access Arrangement by GasNet Australia for the Principal Transmission System, p. 60.

³⁰ AER, 2013, Explanatory Statement Rate of Return Guideline (Appendices), p. 37.

are problems associated with this approach. As suggested by Davis (2000), it is possible to accelerate the depreciation schedule to provide a full recovery of the invested capital, as the risk of asset stranding could be observable several years before the actual occurrence. However, such approach may not be feasible, especially the ability of disappearing demand to bear higher access charge. That is, accelerated depreciation may worsen asset stranding risk when it is likely to happen, as the consequent increase in prices may accelerate the so called 'death spiral'. As such, regulators may overstate the efficacy of accelerated depreciation in mitigating asset stranding risk.

As mentioned earlier, during Aurizon Network's UT3 process, the QCA approved accelerated depreciation in response to the potential asset stranding risk:

All new investments run some asset stranding risk and the Authority believes that accelerated depreciation is a better approach to compensating QR Network for this risk than alternatives such as a higher WACC.³¹

Aurizon Network does not agree with the QCA that accelerated depreciation 'compensates' for asset stranding risk. From a theoretical perspective, investors are indifferent to alternative depreciation profiles. This is the basis of the 'Invariance Proposition' which states that, if a regulated firm is allowed to earn its cost of capital on the depreciated original cost of its investments, and if actual revenues equal allowed revenues, then the NPV of all investments is zero for any method of calculating depreciation.³²

Put it another way, Aurizon Network does not benefit economically from accelerated depreciation if asset stranding does not occur. This is because Aurizon Network is only permitted to recover up to the RAB value, regardless of the choice of depreciation profiles. At the same time, if an asset stranding event does occur, Aurizon Network still bears the loss – the asymmetry prevails. As a result, accelerated depreciation only mitigates asset stranding risk (by recovering investment costs over a shorter term and more quickly reducing residual value during that term) rather than provides compensation for it. The same logic also applies to other mitigating measures.

5.1.2 Compensating Asset Stranding Risk Ex Ante

Measures such as accelerated depreciation reduce asset stranding risk. However, it is never possible to eliminate the risk entirely. To the extent that asset stranding risk exists, investors require compensation for bearing the risk. In the current regulatory framework, asset stranding risk broadly could be compensated for in two ways:

- an uplift to the regulated return (WACC)
- an increase in the cash flow allowances (self-insurance premium)

5.1.2.1 Uplift to WACC

As discussed in Section 3, regulated return is set to equal the cost of capital derived from the CAPM. At the same time, the regulatory framework in which the regulated return acts as the ceiling rate, truncates the distribution of future returns. As a result, investors' expected return is always lower than the regulated return, and are undercompensated if asset stranding risk exists. One appropriate approach is to lift the regulated return (WACC) in accordance to the probability of asset stranding. In this way, investors are able to achieve a higher return than cost of capital when the risk does not eventuate, which increases investors' expected return to the cost of capital.

³¹ QCA, 2010, Draft Decision: QR Network's 2010 DAU - Tariffs and Schedule F, p. 65.

³² Schmalensee, R., 1989, An Expository Note on Depreciation and Profitability under Rate-of-Return Regulation.

Observed by the ERA, in early determinations, a number of Australian regulators uplifted WACC in recognition of evident asymmetric risk.³³

For example, the ACCC considered asymmetric risk in the GasNet 1998 decision. As opposed to an adjustment in the cash flow, the ACCC dealt with the risk through lifting the rate of return. More specifically, the ACCC increased the equity beta for GasNet towards the top end of the plausible range. The ACCC stated:

*Nevertheless, the Commission does acknowledge that all of these risks are difficult to quantify. Accordingly it has adopted the suggestion of financial experts at the WACC forum, that they are taken account of by choosing beta estimates towards the top end of the plausible range.*³⁴

Essential Services Commission of South Australia (ESCOSA) also gave consideration to setting the ceiling rate of return above the industry-wide WACC to ensure that regulatory truncation did not result. However, as the industry-wide WACC of 7.0% is higher than the maximum expected rate of return on total asset (3.9%), the ESCOSA considered the industry-wide WACC would not truncate the returns and thus did not provide any uplift factor or imputed self-insurance premium when setting the ceiling rate of return.

In the Hunter Valley Coal Network Access Undertaking draft decision, although the ACCC expressed a view that asset stranding risk is better compensated through cash flow allowance, it still gave consideration to it in setting the asset beta. The ACCC noted that:

*an asset beta estimate of 0.5 points is based on the upper bound of most regulatory decisions on commodity networks, and considers this appropriate to account for any residual stranding risk that may exist for the Hunter Valley rail network.*³⁵

5.1.2.2 Self-insurance Premium

Asset stranding risk is a type of asymmetric risk. In this regard, asset stranding risk can also be compensated for through the same approach as other asymmetric risks, by provision of a self-insurance premium. Essentially, the self-insurance premium is set to equal the expected loss from asset stranding, and investors are compensated through retaining the premium when an asset stranding event does not occur.

In more recent regulatory determinations, regulatory practice has evolved in favour of cash flow allowances compared to an uplift to WACC, if any compensation is allowed at all.

The QCA expressed its preference for cash flow adjustment in the final decision on the 2010DAU. The QCA stated:

...But if such arrangements do not sufficiently offset the risks, QR Network can propose changes to the cash flows to which the regulated WACC is applied.

For example, QR Network might consider there was a chance that some of the customers for a section of track would become insolvent during the 20-year term of an agreement, and it would be unable to find replacement customers. The tariffs for users of that track might then be calculated including a forecast cash flow that reflected the risk of not having a customer, which

³³ ERA, 2009, Final Determination on the 2009 WACC for TPI's Railway Network, p. 51.

³⁴ ACCC, 1998, Final Decision: GasNet Access Arrangement 1998-2002, p. 60.

³⁵ ACCC, 2010, Draft Decision: Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking, p. 563.

would be discounted at the regulated WACC when assessing the net present value in order to determine the revenue cap.³⁶

And further:

...To the extent that QR Network seeks additional returns to compensate it for additional risks, the risks should be accounted for in the cash flows to which the regulated WACC rate is applied, with the cash flows being determined considering the possible outcomes and the probabilities of the outcomes as a consequence of the additional risks.³⁷

In response to Aurizon Network's Blackwater DAAU for electric traction pricing, the QCA also repeated the same position:

An asset stranding risk is a cash flow risk that is better reflected in the cash flows rather than in an uplift to the WACC as some have argued (e.g., accelerated depreciation as provided for in UT3). The QCA accepts that its workshop discussion paper suggested that there could be a WACC uplift to reflect an asset stranding risk. However, it did not do this to suggest that this was a reasonable course of action. Rather, it was seeking to illustrate that an asset stranding risk of one part of the network is a risk that may have to be borne by all users of the network - and that a socialisation of that risk is not incongruous in that context.³⁸

The preference for cash flow adjustment is also evident in the 2014DAU draft decision. Aurizon Network submitted a range for WACC in the 2014DAU, and proposed to select the higher end of the range in recognition of regulatory risks which include asset stranding risk. However, the QCA has rejected the proposal in the draft decision:

We do not accept Aurizon Network's view that non-systematic risks should be addressed via specification of a range for WACC and the decision as to where to select WACC from within that range.³⁹

Other regulators also share the view that asymmetric risk is better compensated through cash flow approach. For example, in response to ARTC's concern over asset stranding risk, the ACCC considered:

...stranding risk should generally be accounted for in cash flows. In addition, an adjustment to the beta appears inconsistent with the assumptions of the CAPM.⁴⁰

The ERA stated:

The Regulator concurs with the approach that asymmetric risk, where it exists, should be addressed through the cash flow as the risk is likely to be specific to a route or part of the network where there is likely to be only one or a small number of users, rather than include the risk in the WACC which would affect all users of the network and involve an element of cross subsidisation.⁴¹

³⁶ QCA, 2010, Final Decision: 2010 Access Undertaking Final Decision, p. 108.

³⁷ QCA, 2010, Final Decision: 2010 Access Undertaking Final Decision, p. 227.

³⁸ QCA, 2013, Draft Decision: Aurizon Network 2013 Blackwater Electric Traction Pricing Draft Amending Access Undertaking, p. 39.

³⁹ QCA, 2014, Draft Decision: 2014 DAU Maximum Allowable Revenue, p. 191.

⁴⁰ ACCC, 2010, Draft Decision: Australian Rail Track Corporation Limited – Hunter Valley Coal Network Access Undertaking, p. 558.

⁴¹ ERA, 2003, WACC to apply to Westnet Rail and The Western Australian Government Railways Commission, p. 20.

In discussing the treatment of asymmetric risks for SP AusNet, the AER believed:

For risks associated with the provision of prescribed transmission services that are not compensated for through the WACC or elsewhere in its revenue proposal, a TNSP may propose to “self-insure”, and seek a self-insurance allowance for this purpose.⁴²

The shift towards cash flow compensation is also supported by some scholars and consultants. As pointed out by Davis (2000), compensation for asset stranding risk through rate of return may not be appropriate. Firstly, rate of return is determined by the CAPM which is based on the premise that only systematic risk should be priced. Therefore, an adjustment for idiosyncratic risk would not be consistent. Secondly, an ad hoc adjustment may not be consistent with the evolution of risk through time.

During the DBCT 2004DAU process, the QCA’s consultant, Lally, also supported the cash flow adjustment approach:

Lally further notes that a cash flow adjustment is the natural mechanism to use because asymmetric risks are basically cash flow issues, ie they are compensation for expected losses. Given that the equivalent discount rate adjustment cannot be known until the appropriate cash flow adjustment is first articulated, Lally strongly favours cash flow adjustments over discount rate adjustments.⁴³

More recently, the Queensland Resources Council (QRC) engaged McKenzie and Partington to assess Aurizon Network’s 2010DAU approach in selecting high end of the WACC range in recognition of non-systematic risks. McKenzir and Partington believed:

- *in any event, it is no solution to difficulties of measurement to arbitrarily increase the discount rate. As a general rule it is bad practice to add adjustment factors to discount rates.*
- *adding ‘fudge factors’ to discount rates is bad practice because it drives a wedge between the theoretically correct discount rate and the discount rate actually used.*
- *the advantage of adjusting the cash flow is that it makes the adjustment clearly visible and hence transparent.⁴⁴*

If a self-insurance premium is allowed, Aurizon Network effectively takes on the asset stranding risk. That is, Aurizon Network earns a higher return from the self-insurance premium if no asset stranding event occurs, whereas it bears the loss if it does occur. The approach is similar to the treatment of other asymmetric risks during the UT3 period. For example, costs associated with weather events such as flooding are self-insured by Aurizon Network if the cost is less than \$1m, while a cost pass-through provision is in place for weather events that have more than \$1m costs. If no flooding is experienced during the year, Aurizon Network retains the premium. On the other hand, Aurizon Network bears the cost if flooding event happens and the loss is less than \$1m.

5.1.2.3 Difficulties in Quantifying Compensation

Conceptually, asset stranding risk can be compensated through either the regulated return or cash flow to achieve an expected return that commensurate with the regulatory and commercial risks Aurizon Network is taking on. Regardless of which approach, it is extremely difficult to quantify the amount of compensation required.

⁴² AER, 2008, Final Decision: SP AusNet transmission determination 2008-09 to 2013-14, p. 137.

⁴³ QCA, 2004, Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking, Pp. 252

⁴⁴ McKenzie and Partington, 2013, Review of Aurizon Network’s Draft Access Undertaking, pp. 11-12.

For example, to determine the amount of self-insurance premium required, both the impact and probability of asset stranding need to be quantified. As there are various drivers behind asset stranding risk (sometimes interrelated), it is nearly impossible to precisely identify an unbiased estimate. The calculation is further complicated by the measures often put in place to mitigate asset stranding risk. The lack of actuarial precision means it is very unlikely for Aurizon Network to demonstrate the efficiency of such cost to the QCA's satisfaction. More importantly, it is also naturally difficult for the QCA and relevant stakeholders to assess the reasonableness of the proposed compensation. This explains why there are so few cases where regulators allow explicit compensation for asset stranding risk.

Even though regulators including the QCA have expressed the view that asymmetric risk (including asset stranding risk) is better compensated through cash flow, proposals from network service providers to include a self-insurance premium for asset stranding risk have consistently been rejected by regulators. To Aurizon Network's knowledge, there has not been a successful attempt so far.

For example, the ACCC rejected GasNet's proposal to include a self-insurance premium for asset stranding risk in the cash flow allowances. The ACCC considered prudent discounts and the flexibility of depreciation schedules can mitigate the asset stranding risk.⁴⁵

The same dilemma also applies to compensation attempts through an uplift to WACC.

In its 2006DAU, DBCT proposed a truncation premium (10% uplift to WACC) to compensate potential asset stranding risk. The QCA rejected the ad hoc adjustment to the discount rate, as it considered such adjustments failed to quantify the size of the risk and the likelihood of it occurring.⁴⁶

As outlined above, regulators can easily reject any claims on the basis of lack of actuarial precision. The other frequently cited reason for rejection of claims by regulators is the immateriality of asset stranding risk, given various mitigating measures in place. However, the bottom line is, as long as there is asset stranding risk, investors require compensation in accordance to the materiality of the risk. It is unreasonable for regulators to acknowledge the existence of the risk, but not allow any means of compensating for that risk. Given the inherent difficulties in compensating asset stranding risk ex ante, a potentially more viable solution is to deal with asset stranding ex post, which will be discussed below.

5.2 Ex Post Solution

5.2.1 Write-down of Stranded Asset

If an asset does become stranded, the regulated entity will not be able to collect future revenue from the asset. One seemingly straightforward solution is to write down the stranded asset, as the economic value of the asset is effectively zero if the asset does not have secondary use.

Indeed, under section 1.4(b) and (c) of Schedule A of Aurizon Network's 2010 Undertaking, the QCA can reduce the value of the RAB if:

- b) circumstances arise in the future where demand has deteriorated to such an extent that regulated prices on an unoptimised asset would result in a further decline in demand*
- c) it becomes clear that there is a possibility of actual (not hypothetical) bypass...*

However, this solution will violate the current regulatory principle that the RAB will not be optimised further, and may not achieve the desired outcome of reducing access charges. Consequently, Aurizon Network has submitted to remove these clauses in the 2014DAU.

⁴⁵ ACCC, 2002, Final Decision: GasNet Australia Access Arrangement Revisions for the Principal Transmission System, p. 170.

⁴⁶ QCA, 2004, Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking, pp. 191-192

As pointed out in Section 3, the implicit assumption behind the current regulatory framework is that investment will only be optimised once when it enters the RAB. Otherwise, investors will be under compensated. In terms of the subsequent write-down of a regulated asset, the QCA has observed that:

Australian regulators have generally rejected 're-optimising' existing regulatory asset bases by applying new DORC values at a subsequent date (the exception seems to be for telecommunications).⁴⁷

The QCA further believed that:

...the regulatory asset base can conceptually be thought of as a guarantee that the sunk costs of a specific investment will be paid by the existing and future users of the assets.⁴⁸

Therefore, Aurizon Network believes the write-down of stranded asset is not an option as it violates the basic assumption of the regulatory framework. Nevertheless, the QCA has disregarded the principle and rejected Aurizon Network's UT4 proposal to remove demand deterioration as one of the causes for the RAB reduction in its recent P&P Draft Decision⁴⁹, without any discussion of the need for compensation.

More importantly, the write-down of stranded asset may not achieve the goal of reducing reference tariffs, but may instead work in the opposite direction.

Over the past few years, various parties have called for Australian governments to consider undertaking write-downs of the RAB of electricity network businesses, as a mean of lowering the electricity prices for consumers and constraining future network charges.

The Energy Networks Association (ENA) undertook an analysis on the impacts of potential asset write-down. Contrary to the conventional view that an asset write-down will lower electricity price for consumers, the report suggests that the potential write-down of electricity network asset will increase the price instead. This conclusion holds even extremely large write-down (20% of the current RAB) is undertaken.

As noted in ENA's report:

The mechanism of a predictably updated RAB provides the critical underpinning for low cost financing of new and existing network investments, and acting as an enduring regulatory commitment.⁵⁰

The Australian Energy Market Commission (AEMC) also has concluded in its 2006 review that:

A key mechanism for managing the investment risk for TNSPs was to 'lock-in' and roll forward the RAV from one regulatory period to the next. This aimed to give greater security to investors in the transmission system that their investments would be treated in an appropriate way over time. More specifically, the RAB would not be subject to optimisation at regulatory resets to reflect the economic value of the assets to users, which would otherwise present a significant risk to investors.⁵¹

⁴⁷ QCA, 2012, Discussion Paper: Risk and the Form of Regulation, p. 4.

⁴⁸ QCA, 2012, Discussion Paper: Risk and the Form of Regulation, pp. 4-5.

⁴⁹ QCA, 2015, Draft Decision: 2014DAU Volume II – Capacity & Expansions, pp. 309-311.

⁵⁰ ENA, 2014, Written-down Value? Assessing Proposals for Electricity Network Write-downs, p. 9.

⁵¹ AEMC, 2006, Economic Regulation of Transmission Services Rule Determination, p. 98.

More recently, in its submission to the Senate Standing Committee inquiry into the performance and management of electricity network companies, the AEMC noted:

Any reduction in the Regulated Asset Base (RAB) without compensation is an unforeseen risk for network businesses that would increase the long term required rate of return on capital for future investors. As a result, asset write-downs on the RAB would require the AER to take into account this risk by increasing the network businesses' allowed rates of return. Consequently, short term benefits to current consumers would incur increased costs on future consumers.⁵²

In other words, the low financing costs arise from the avoidance of risk under the regulatory commitment to 'guarantee' the value of the RAB. Investors bear lower risk of windfall losses or systematic under-compensation that would arise in any asset write-down event. If the write-down of asset does occur and the costs are borne by investors, then the foundation underpinning the low financing costs will no longer exist. In response, investors will inevitably demand higher return to compensate for the additional risk that was not taken into account previously. The material increase in the required rate of return will apply to both future and existing investments.

The increase in the electricity prices occurs because reductions in required revenue from the denial of a return on and of capital on the asset written down are more than offset by the higher required rate of return demanded by investors. At the same time, higher electricity charges will lead to further incentives for disconnection from the grid which increase the risk of a utility 'death spiral'.

Apart from the higher return required by investors, any asset write-down proposal would also likely lead to a significant pause in network investment.⁵³ Regulated entities facing the uncertainty of write-down are likely to defer or cancel significant capital investment. The write-down of asset will also affect the nature of the investment. For example, the risk of future asset stranding may induce regulated entities to undertake shorter-lived assets, or assets that require higher level of operating expense rather than capital costs.⁵⁴

In its submission to Senate Standing Committee's inquiry into electricity network companies, the AER also highlighted the impacts on future investment if the exclusion of inefficient investment from the RAB is allowed.

We would caution against an asset write down policy. Electricity network assets have long economic lives, in some cases of 30-40 years. Changing the regulatory treatment of these investments after a few years may create significant sovereign risk issues for network businesses and creates disincentives for future efficient investment.⁵⁵

In conclusion, write-down of regulated assets will overturn the regulatory assumption that assets will only be optimised once when entering the RAB, and affect investors' confidence in recovery of long-lived investments. The increase in required return and investment distortion suggest that asset write-down will not be a viable solution to stranded assets. Consequently, Aurizon Network submits that the QCA should remove demand deterioration as a reason for reducing the RAB value.

⁵² AEMC, 2014, AEMC submission to the Senate inquiry into electricity network companies, p. 6.

⁵³ ENA, 2014, Written-down Value? Assessing Proposals for Electricity Network Write-downs, p. 19.

⁵⁴ Ibid.

⁵⁵ AER, 2014, Submission to Senate Standing Committee Inquiry into Electricity Network Companies, p. 10.

5.2.2 Socialisation of Stranded Asset

As discussed above, write-down of the RAB is not an appropriate response to asset stranding risk as the regulated entity is not compensated for this risk and, even if it were, it may not achieve the desired outcome of reducing access prices.

Asset stranding risk is a type of asymmetric risks. Naturally, we could refer to the current regulatory treatment for asymmetric risks, in the attempt to find an appropriate solution for asset stranding risk.

5.2.2.1 Current Socialisation of Asymmetric Risk

Clause 2.2.1 (b) of Schedule F of the 2010 Access Undertaking allows Aurizon Network to vary the reference tariff to pass through the incremental costs if a review event occurs, subject to the QCA approval:

Review event means:

... c) a Force Majeure Event – of the type set out in either paragraph (v) or (xii) of the definition of that term – affecting Aurizon Network to the extent that Aurizon Network has incurred or will incur additional incremental costs of greater than \$1 million that have not previously resulted in a variation of the relevant Reference Tariff;...

The force majeure event refers to:

- Act of God (v); or
- Fire, flood, earthquake, washaway, landslide, explosion or other catastrophe, epidemic and quarantine restriction (xii).

The force majeure event is a type of asymmetric risk for Aurizon Network, especially for weather related events. As discussed in Section 3, Aurizon Network is not compensated for such risk in advance due to regulatory return truncation. Therefore, a cost pass-through is a reasonable solution if a force majeure event does occur. Notably, Aurizon Network self-insures force majeure event with incremental costs of less than \$1m, and is thus compensated through the self-insurance premium for the small scale force majeure event.

A recent example of the force majeure event Aurizon Network experienced was the 2013 flood event. As a result of heavy rainfall from tropical cyclone Oswald in January 2013, there was extensive damage to the Blackwater and Moura systems, which resulted in temporary closure of the tracks. A substantial amount of repair work was undertaken to restore the systems. In response, Aurizon Network submitted a flood claim in July 2013, and an amount of \$16.1m was approved by the QCA in July 2014. Subject to QCA approval, the amount will be recovered in the remaining six months of 2014-15, which would result in tariffs increasing by around 40% in the Moura system.

Essentially, the review event clause with pass-through is a form of socialisation of costs associated with the occurrence of asymmetric risk events. The current regulatory arrangement is to limit the socialisation within each of the systems. This is reasonable given the usually relatively small magnitude of associated costs, which means the distortion of reference tariff in the respective system is less likely to be material.

However, the QCA also acknowledged the shortcoming of socialising within the system if a large force majeure event is experienced. It may have a significant impact on the pricing, as evident by the dramatic increase in Moura reference tariff resulted from the 2013 flood event. Instead, it may be more appropriate for certain asymmetric risks to be addressed via a network wide socialisation.

The QCA stated:

As was evident following the 2013 flood event, the practical effect of the review event clause is the recovery of costs of force majeure events is not shared equally across the CQCN but is recovered within impacted systems. We are considering, for future events only, whether such an arrangement is consistent with an effective insurance arrangement.⁵⁶

Drawing upon the current regulatory treatment of asymmetric risk, Aurizon Network can either self-insure against the asset stranding risk as discussed in the last section, or alternatively, a cost pass-through arrangement needs to be in place for stranded assets. Asset stranding event typically results in loss that is of much larger magnitude than weather related force majeure events. Consequently, the socialisation of stranded asset costs within the impacted system may not be feasible, especially in light of the 'death spiral'. As indicated by the QCA in the draft decision on the 2014DAU, there could be merits for a network wide socialisation.

There is also regulatory provisions for the socialisation of asset stranding cost on a wider basis under the NER and NGR:

To the extent that there are genuine risks of extreme changes in demand for specific service providers which present the potential stranding of an asset, the regulatory regime for gas and electricity can mitigate this risk by providing prudent discount and accelerated depreciation provisions.⁵⁷

The NER has provisions that allow transmission network service providers to provide prudent discounts to transmission customers, and recover up to 70% of the difference between the allowed revenue and the reduced charge, without the AER approval, from:

- 1) *the other transmission customers for the adjusted non-locational component of prescribed TUOS services; and*
- 2) *for prescribed common transmission services⁵⁸*

The transmission network service provider may recover greater than 70% of the discount amount subject to the AER approval.

Essentially, if assets are observed to approach stranding, the transmission network service providers can provide prudent discount to remaining customers, in an attempt to stop the "death spiral", and recover the discount from the other users. This is a form of ex post socialisation. Similar provision is also included under the NGR.

Overall, a more feasible and consistent approach to deal with asset stranding risk is to establish clear regulatory principles that support full recovery of capital invested. That is, the commitment to not optimise assets out of the RAB if a particular asset becomes stranded. Instead, the regulator should allow the remaining value of the investment to be recovered by some form of socialisation. This approach is supported by the fact that:

- Aurizon Network is currently bearing the asset stranding risk without compensation
- it is virtually impossible to quantify asset stranding risk ex ante, either for a track section or the system as a whole. Consequently, any ex ante adjustment to the rate of return or cash flow may not accurately compensate for asset stranding risk. Access holders will either under or

⁵⁶ QCA, 2014, Draft Decision: 2014 DAU Maximum Allowable Revenue, p. 83.

⁵⁷ AER, 2013, Explanatory Statement Rate of Return Guideline (Appendices), p. 37.

⁵⁸ NER, section 6A.26, p. 855. Similar provision is in NGR, section r.96, p. 68.

over compensate Aurizon Network for asset stranding risk. The ex ante compensation is thus very likely to be contentious among stakeholders

- it is true that socialisation may penalise some Access Holders even if they do not contribute to the failure of the asset. However, all assets bear asset stranding risk, albeit with different magnitude and likelihood of occurrence. The socialisation mechanism provides co-insurance among access holders, which implies an obligation to share the loss if the adverse event does happen. Moreover, in a practical sense, the ex post socialisation is not different from ex ante compensation. If the regulator was to provide self-insurance premium allowance or an uplift to WACC ex ante, the costs essentially float through to the access charge, and is born by all users, which is also a form of socialisation.

5.2.2.2 Stranded Asset Socialisation Example

A recent example of the AER's commitment to the full recovery of the RAB value is the socialisation of stranded metering assets resulting from deregulation.

In October 2013, the Standing Council on Energy and Resources (SCER) submitted to the AEMC rule change proposals to support the increased competition in metering and related services. The rationale behind the proposal was to promote investment in advanced metering technology that can enable more innovative pricing and service offerings for consumers, and create efficiencies for distribution network business and retailers. The AEMC commenced consultation on the proposed amendments in April 2014 and a final decision is expected in April 2015.

Although the rule change proposal has the potential to increase the overall efficiency of the network, there is also downside risk for the distribution network service providers (DNSPs). In particular, if a regulated metering customer opts for new metering services from alternative metering providers, the full cost of those metering installations may not have been recovered. This represents a stranding risk to the DNSPs. Accordingly, DNSPs submitted to the AER that a new metering exit fee may be proposed to recover the residual value of stranded metering asset.⁵⁹

In the draft decision, the AER rejected DNSPs' proposal to levy exit fee when customers exit the regulated metering services, due to the concern that large exit fee may create barrier to entry into the contestable metering market. Nevertheless, the AER is fully supportive of the full recovery of metering capital costs. The AER instead proposed to classify residual capital costs as a standard control service and recover them through network tariffs.

The AER stated:

With the opening of competition in metering services, we have determined that where a customer switches service providers during the 2014-19 period, we will allow the DNSP to continue to recover the return on, and return of, capital on the existing and replacement assets through an annual addition to DUoS charge.⁶⁰

The approach proposed by the AER socialises the stranded metering asset, and recovers the residual value from all network users, which shows its full support to the full recovery of the RAB value.

5.2.2.3 Potential Socialisation Approach for CQCN Stranded Asset

⁵⁹ For example, ActewAGL, 2015-19 Regulatory Proposal, p. 340.

⁶⁰ For example, AER, 2014, ActewAGL Draft Decision, Attachment 16: Alternative control services, p. 34.

In the context of the CQCN, socialisation could occur based on a ‘tiered’ approach to recognise the regional based pricing structures centred around the five systems – Goonyella, Blackwater, Moura, Newlands and GAPE. A tiered approach might include:

- Socialisation within the same system. In effect, this form of socialisation occurs currently as demand increases or decreases from year to year are reflected in the pricing model for each year of the regulatory period.
- Socialisation between systems with the same or similar supply chain characteristics. For example:
 - Between Moura and Blackwater, particularly where port entitlements at Gladstone are re-allocated between systems; and
 - Between Newlands, GAPE and Goonyella, particularly where port entitlements at Abbot Point are re-allocated among systems.
- Socialisation across all systems. This might only occur in the event of a total reduction in demand in one or more systems.

It would be reasonable to expect that socialisation between systems and across all systems might come with safeguards to ensure that system users to whom allowable revenues are transferred are not unduly affected. For example:

- For the former, allowable revenues transferred could be limited to the total revenues from the transferred tonnes at the transferee system’s Reference Tariff (i.e. there would be no net increase in access charges for that system).
- For the latter, it could be demonstrated that a) access charges for the remaining systems would not increase significantly relative to prior years or to the coal spot price and b) it is in the best interests of the supply chain for such socialisation to occur (e.g. the required rate of return would increase in the event that socialisation does not occur).

The socialisation approach above would ensure that asset stranding would only occur in circumstances where there is a systemic and widespread reduction in demand for thermal and metallurgical coal which results in contracted throughput falling below the nameplate capacity of port and rail infrastructure of the entire CQCN, and that residual asset values are sufficiently high to have a material negative impact on access charges for the remaining users.

5.3 Aurizon Network’s Position

It is widely recognised that regulatory risk and return exclude recognition of asset stranding risks. What is not widely agreed however is the degree of compensation or mitigation which should be provided by regulators for funders of network infrastructure in circumstances where the threat of stranding is more than remote.

In the context of the CQCN, asset stranding risks are borne by Aurizon Network, SUFA funders and funders of mine-specific infrastructure. These risks have become more prevalent in recent years due to significant reductions in the spot prices of thermal and metallurgical coal.

Aurizon Network believes that where regulatory risk and return are accepted by Aurizon Network and SUFA funders, asset standing risks should be mitigated (but cannot be eliminated) via ex post socialisation of allowable revenues subject to certain safeguards.

Aurizon Network recognises that whilst ex post socialisation is arguably the best solution to asset stranding risk, there are still various implementation issues, for example the equity issue of socialisation, the extent to which the costs can be socialised across systems and the timing of socialisation.

To comfort some of the concerns, Aurizon Network wishes to clarify that the socialisation of stranded asset should be viewed as the 'last resort' for asset stranding risk. Aurizon Network supports a "pecking order" approach. That is, Aurizon Network supports the QCA's effort to reduce asset stranding risk ex ante, by employing measures such as accelerated depreciation, take-or-pay arrangements and long-term contracts. In the event that an asset is likely to be stranded, Aurizon Network believes changes in common cost allocation or pricing strategy that reasonably defer some of the revenue could also be employed to reduce the asset stranding probability. The socialisation of stranded assets amongst other network users should only be used if all the other measures are not appropriate, and as the last resort.

Aurizon Network therefore recommends that, at least initially, the QCA clarifies its position with respect to mitigation of asset stranding risk through socialisation, to provide regulatory certainty for investors in and customers of Aurizon Network and SUFA funders. Aurizon Network is open to discussion with the QCA, SUFA funders and relevant stakeholders to develop an effective and equitable framework for mitigating asset stranding risk for the UT4 regulatory period, and for compensation or further mitigation via the regulatory framework of any residual stranding risks for subsequent periods.

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