

Queensland Competition Authority

Final decision

Aurizon Network 2014 draft access undertaking Volume I—Governance & access

April 2016

We wish to acknowledge the contribution of the following staff to this report:

The Aurizon team

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PREAMBLE

This final decision completes the QCA's response to Aurizon Network's 2014 draft access undertaking (2014 DAU).

Under section 136 of the *Queensland Competition Authority Act 1997* (QCA Act), we must either approve or reject the 2014 DAU. If we do not approve the 2014 DAU, we must explain how it should be amended to secure approval.

Our final decision is to refuse to approve the 2014 DAU. This decision constitutes a notice for the purposes of section 136(5) of the QCA Act. It sets out the:

- reasons for the QCA refusing to approve Aurizon Network's 2014 DAU; and
- way in which the QCA considers it appropriate to amend it.

The QCA anticipates that Aurizon Network will be resubmitting a revised draft access undertaking shortly after the release of this final decision.

Provided that Aurizon Network's revised draft access undertaking is consistent with this final decision, the QCA will approve the revised draft access undertaking. This could occur quite quickly following a suitable consultation period, noting that stakeholders have already had a significant opportunity to comment on all matters related to the 2014 DAU.

EXECUTIVE SUMMARY

On 11 August 2014, Aurizon Network submitted its 2014 DAU, withdrawing its 2013 DAU. Our final decision is to refuse to approve the 2014 DAU, for the reasons set out in this document.

Considerable time has elapsed since the 2013 DAU was submitted on 30 April 2013. This period of time reflects the sheer scope of changes Aurizon Network proposed (compared to the existing undertaking (2010 AU)), the intense stakeholder interest in the development of the new undertaking and our detailed consideration of all matters raised.

We acknowledge the 2014 DAU itself reflects the results of extensive consultation between Aurizon Network and industry participants. Aurizon Network used the 15-month period after the submission of the 2013 DAU to work cooperatively with its stakeholders and considerable progress was made between the parties. However, a number of difficult issues remained unresolved and were considered, as part of the overall consideration of the 2014 DAU.

We are also very aware that the development of the 2014 DAU is occurring at a challenging time for the coal industry in Queensland. Over the course of this investigation, stakeholders have all emphasised the need to improve the productivity and competitiveness of the coal supply chain, of which Aurizon Network is an integral part.

The view that the CQCN is capacity constrained is a key issue throughout Aurizon Network's 2014 DAU, as is the view that new capacity will only be met by costly new expansions. We note that the CQCN delivered its highest number of tonnes in 2014–15, at 225.0 million net tonnes, but this falls well short of the potential approximate 274 million net tonnes¹ contracted in 2013–2014, and the 310 million net tonnes² forecast by the end of UT4 when the first stage of the Wiggins Island Rail Project (WIRP) is completed.

A key theme of our final decision is the need for the 2014 DAU to support the productive use of the existing CQCN capacity, and give stakeholders the confidence that infrastructure will be expanded in a timely, cost efficient way, where there is a case to do so. We consider this requires careful consideration of many aspects of the 2014 DAU, including reporting, access agreements, capacity management and pricing, so they work together to maximise the most productive use of the CQCN.

We have taken an evidenced based approach to assess the need for change. Aurizon Network proposed extensive revisions in the 2014 DAU that were not supported by stakeholders. As such, where we have proposed amendments to the 2014 DAU, we have used the 2010 AU arrangements as a base and enhanced them—for example, we improved the 2010 AU ring-fencing arrangements to provide a clearer set of safeguards regarding the flow of confidential information and staff movements.

Our final decision on the 2014 DAU continues to feature core elements of an access undertaking built on the 'negotiate–arbitrate' model of the QCA Act. In this respect, we have focused on the need for an effective negotiation framework, coupled with a timely and cost effective dispute process and the opportunities to improve transparency and reporting for all parties. Where possible, we have considered whether Aurizon Network's 2014 DAU was unnecessarily complex and we have considered opportunities to streamline these arrangements.

We have also taken into account, and further developed, new ideas introduced in Aurizon Network's 2014 DAU, including in relation to the:

¹ Aurizon Network, 2013 DAU, sub. 3: 15.

² Aurizon Network, 2013 DAU, sub. 3: 19.

- *expansion process—supporting access seekers initiating the development of new infrastructure in the CQCN and to support user funded expansions*
- *expansion pricing framework—a new and more transparent arrangement for setting prices for new infrastructure has been included.*

The approach we have taken is designed to:

- *increase transparency and the flow of information between Aurizon Network, miners, train operators and other supply chain participants so all parties are better able to plan and manage their access entitlements and reduce the unit costs of below-rail infrastructure*
- *provide greater confidence to access holders that contracted access rights can be provided, which should minimise over-contracting (if it is occurring), support the development of a more flexible access rights trading arrangement, and minimise the need for unwarranted investment in infrastructure*
- *provide improved information and confidence to stakeholders that access is being provided in a manner where unfair differentiation of a material nature between access seekers or users does not occur*
- *enhance the performance reporting arrangements so that access seekers and holders are better informed about CQCN performance, including on major items such as maintenance costs*
- *provide safeguards to balance Aurizon Network's position as a monopoly provider of infrastructure in the expansion of the network so it cannot unreasonably extend the time or request returns for infrastructure provision to gain commercial advantage*
- *make the undertaking simpler where possible.*

The 2014 DAU provides an opportunity to put these arrangements into place and provide a solid basis to support the provision of access in the CQCN.

Final decision

Our final decision is to refuse to approve the 2014 DAU. In our final decision, we have indicated the reasons we consider Aurizon Network's 2014 DAU was not appropriate having regard to section 138(2) of the QCA Act and the ways in which the 2014 DAU should be amended in order for us to approve it.

Our final decision is presented in the following volumes:

- Volume I—Governance and access
- Volume II—Capacity and expansions
- Volume III—Pricing and tariffs
- Volume IV—Maximum allowable revenue (MAR)
- Volume V—Definitions, interpretations, acronym list and reference list

We understand Aurizon Network intends for the 2014 DAU to take effect from the date of expiry of the 2010 AU, and to be known as 'UT4'. References to UT4 in this decision are references to the 2014 DAU, pending our approval of a replacement undertaking.

Background to this final decision

In April 2013, Aurizon Network submitted a draft access undertaking (the 2013 DAU). Aurizon Network subsequently withdrew the 2013 DAU in August 2014, replacing it with another draft access undertaking (the 2014 DAU).

Aurizon Network presented the 2014 DAU as its response to issues raised by stakeholders in its 2013 DAU:

The 2014 DAU is the result of extensive consultation and negotiations with industry participants over a 15-month period in relation to positions reflected in the 2013 DAU. ... [It] reflects Aurizon Network's position on the outcome of the negotiated changes to the 2013 DAU. In large parts, the 2014 DAU adopts the positions argued for by industry participants, whilst in other parts it reflects Aurizon Network's preferred position after consideration of the position proposed by industry.

As the 2013 DAU and 2014 DAU have proposed fundamental changes to the regulation of the CQCN, we have encouraged regular discussions between Aurizon Network and its stakeholders to identify potential problematic issues and, wherever possible, to reach consensus.

We acknowledge the constructive approach of all parties to this process as well as the assistance Aurizon Network staff and other stakeholders have provided to us through the investigation.

Previous decisions on the 2014 DAU

Aurizon Network provided a submission and explanatory materials to support its 2014 DAU. Aurizon Network said any explanatory documents provided in support of its 2013 DAU were still relevant, but the 2014 DAU prevails to the extent of any inconsistency.³

Given the complex issues involved, and the demands being placed on all parties participating in the process, we released our initial draft decision on the 2014 DAU in two separate parts:

- the cost and revenue aspects (i.e. maximum allowable revenue (MAR)) (30 September 2014)
- the policy and pricing aspects (30 January 2015).

We then published supplementary draft decisions on particular aspects of the 2014 DAU:

- the capacity transfer mechanism (30 April 2015)
- the revenue and pricing treatment of the Wiggins Island Rail Project (31 July 2015).

Our initial draft decisions⁴ refused to approve the 2014 DAU. We did not consider it appropriate, as an overall package, having regard to the relevant sections of the QCA Act. Our initial draft decisions provided reasons for this, along with the amendments we considered were required in order for it to be approved.

On 16 December 2015, we released a consolidated draft decision (CDD) that encompassed all aspects of the 2014 DAU allowing for Aurizon Network and stakeholders to consider our draft decision overall, and having regard to stakeholder submissions.

The final decision relative to our consolidated draft decision

We have had regard to all submissions provided in response to our CDD, resulting in the following key changes:

- (a) Ring fencing - we have made a number of drafting amendments to improve workability of ring fencing arrangements. We have made amendments to clarify the Ultimate Holding Company Support Deed (UHCSA) (Schedule D). While we had a requirement in the CDD that if a UHCSA is not executed or maintained, confidential information could not be disclosed to another Aurizon Group

³ Aurizon Network, 2014 DAU, sub. 1: 4.

⁴ A reference to initial draft decision is a reference to one or more of the four draft decisions we have published previously on 30 September 2014, 30 January 2015, 30 April 2015 and/or 31 July 2015.

entity, we have changed this to a requirement that the confidential information register be audited every three months until rectified (clause 2.5(c)).

- (b) Access agreements - we have made a number of amendments to the terms and conditions of the standard access agreements (SAAs) to improve their operation. Access charge and force majeure provisions are now included in the SAAs, rather than using 'incorporation clauses'.
- (c) Short-term transfers - we have decided that short-term transfers should be more clearly defined in the drafting, and that transfer fees should not apply for transfers of up to 12 months. However, fees would apply where the same transfer occurs for more than two years in three. We also allow more time for Aurizon Network to approve a short-term transfer.
- (d) Baseline capacity - we have redefined the various capacity measures to make them clearer and have determined that a dynamic capacity analysis would not be appropriate for the broader capacity measures.
- (e) Pricing principles - we have acknowledged concerns from some stakeholders for the need for some case-by-case assessment of the pricing arrangements for an expansion to account for particular circumstances of individual projects. We have refined drafting so that in limited situations, we may agree to divergences from the endorsed pricing approach, where appropriate.
- (f) RAB - our final decision recognises that it is reasonable for Aurizon Network to have the opportunity to propose market-based solutions to address demand deterioration before we seek to optimise (i.e. reduce) Aurizon Network's RAB. Accordingly, our final decision provides we consider alternative proposals from Aurizon Network before we trigger the RAB-reduction provisions.

WIRP pricing arrangements

Generally, our final decision retains our position on WIRP pricing arrangements from our CDD. However, we propose deferring WIRP Moura revenues for the remainder of the UT4 period in the absence of Aurizon Network providing a comprehensive proposal that fulsomely addresses the implications of the only Moura system WIRP user ceasing railings.⁵ Aurizon Network's proposal was not supported with sufficient information for us to understand the implications of these recent developments.

The other main issue raised by stakeholders relates to our proposed allocation of WIRP costs. We have maintained our view from the CDD that the WIRP user group analysis does not provide conclusive evidence that the costs of two Blackwater duplications should be allocated to non-WIRP users.

Maximum allowable revenue

We have made adjustments to the maximum allowable revenue (MAR). Aurizon Network sought a \$62 million (1.6%) increase from our CDD. After assessing Aurizon Network's proposal and other MAR matters, the net impact of our final decision is a \$2 million decrease in the MAR. The reasons for this include:

- (a) Asset lives - we noted that asset lives were incorrect in the model. Aurizon Network submitted that this would increase the MAR by approximately \$32 million and we accepted this.
- (b) Capex items - two large projects are not included in Aurizon Network's submitted capital claim, but were included in our MAR calculations based on earlier advice from Aurizon Network. To better align with the capital claim we have deferred these two large projects for pricing purposes. This decreases the MAR by approximately \$21 million.

⁵ The Baralaba mine was placed into 'care and maintenance' in February 2016, following its owner Cockatoo Coal moving into administration in November 2015.

- (c) Return on inventory - we have now included a return on inventory allowance of \$5 million as we consider that it is prudent and efficient to maintain a certain level of critical spares and other inventory items, and the holding cost is a legitimate business cost.
- (d) Ballast costs - Aurizon Network submitted extensively on ballast costs and sought an additional \$20 million. We examined these claims in detail but remain of the view that our CDD costs remain appropriate, except for a minor update to the maintenance cost index.
- (e) Business management costs - we allowed an additional \$1 million for business management costs. We did not include an additional \$8 million sought by Aurizon Network as we had previously rejected Aurizon Network's method for allocating coal and non-coal costs.

For clarity, we have identified the various drafts of the undertaking as:

- the 2014 DAU—Aurizon Network's submitted draft access undertaking
- the initial draft decision amended DAU—referred to as the 'IDD amended DAU'
- the consolidated draft decision amended DAU—referred to as the 'CDD amended DAU'
- the final decision amended DAU—referred to in this final decision as the 'final amended DAU'.

We have also provided marked-up versions of our final amended DAU:

- against the 2014 DAU
- against the CDD amended DAU.

For convenience, we have used our CDD amended DAU as the baseline for this final decision.

A summary of our final decision is provided below.

Volume 1: Governance and access

Intent and scope of the 2014 DAU

The 'Intent and Scope' section of the 2014 DAU establishes the duration, intent and scope of the undertaking, including the extent to which it covers access and related services. It is an important part of the 2014 DAU, as it clarifies what the undertaking is trying to achieve, describes its overarching objectives and scope, and provides guidance as to the interpretation of the remainder of the undertaking.

Our final decision is to not approve Part 2 of the 2014 DAU. The main aspects of our decision include:

- locating the provisions related to Aurizon Network's treatment of access seekers, users and related parties in Part 2, to make it unambiguous that these are to be applied to all parts of the 2014 DAU, not just in relation to ring-fencing provisions; and also proposing additional provisions to provide more detailed statements on Aurizon Network's ability to differentiate between these parties
- providing for the scope of the undertaking to apply to all aspects of the declared service
- accepting the provisions relating to supply and sale of electricity, while adding drafting to provide that the 2014 DAU dispute resolution mechanism applies to matters relating to the sale of electricity
- proposing amendments to clarify the operation of the provisions relating to duration and application of reference tariffs, which establish the 2014 DAU pricing and tariff arrangements for the period 1 July 2013 to 30 June 2017.

Ring-fencing

Aurizon Network is part of a vertically integrated group of companies, including the dominant supplier of above-rail services in the CQCN. In this context, we consider Aurizon Network's ring-fencing regime must be sufficiently robust to ensure that it cannot use its privileged position or confidential information, knowingly or unknowingly, in a manner that favours its or the Aurizon Group's strategic intent, to the detriment of competition in upstream and downstream markets.

Aurizon Network significantly rewrote the 2010 AU ring-fencing arrangements for the 2014 DAU. Aurizon Network said these changes were necessary to reflect the now-privatised nature of its business. However, stakeholders considered the proposed arrangements to be inappropriate.

We consider that, overall, the 2014 DAU ring-fencing arrangements do not appropriately take account of the interests of access seekers and access holders as they potentially enable Aurizon Network to unfairly differentiate in favour of related entities. We therefore do not accept Aurizon Network's 2014 DAU ring-fencing arrangements.

We propose using the 2010 AU ring-fencing principles as a base, and to build on them to provide a clearer set of safeguards regarding confidential information flow and Aurizon Network staff movements. For example, we propose maintaining registers of both parties who have been provided information and the process for making any decisions using such information, and having this information available for audit.

Our final decision is to not approve Part 3 of the 2014 DAU. The main aspects of our decision include:

- clarifying that the ring-fencing regime applies to declared services of the CQCN only
- allowing staff transfers to working groups across the Aurizon Group with movements recorded in the Confidential Information Register—which, as Aurizon Network suggested, would provide potential efficiency benefits to access seekers and users
- widening the definition of high-risk personnel, at Aurizon Network's suggestion, to include staff who negotiate access agreements and manage capacity
- clarifying that security measures would apply only to premises that are used to store confidential information
- requiring Aurizon Network to request, rather than procure, its holding company to execute an Ultimate Holding Company Support Deed (UHCSA).

Our final decision takes the approach that the 2014 DAU should allow for Aurizon Network to structure itself in a manner which supports its legitimate business interests in the provision of the declared service, while demonstrating that effective ring-fencing obligations protects access seekers and access holders from the risk of unfair differentiation of a material nature.

Reporting, compliance and audits

An effective reporting, compliance and audit regime underpins the integrity of the access regime and is an essential element to provide transparency and accountability of Aurizon Network's operations.

Our final decision is to refuse to approve Aurizon Network's proposed reporting, compliance and audit regime in Part 10 of the 2014 DAU. The main aspects of our decision include:

- a briefing on the planned scope of maintenance before the start of each year and for a consolidated annual maintenance report to be made available to all stakeholders
- a provision for Aurizon Network to develop a template for a quarterly maintenance report, following consultation with stakeholders

- Aurizon Network to maintain an issues register of breaches and written complaints
- expansion of the scope and frequency of audits based on the requirements in the 2010 AU
- Aurizon Network to provide a plan for the implementation of audit recommendations and seek to implement the auditor's recommendations.

Dispute resolution

A robust, cost-effective and binding dispute resolution mechanism is an important part of the undertaking. When disputes are resolved in a fair and timely way, parties can be confident that negotiations will proceed in a meaningful manner in accordance with the intent, obligations and processes of the undertaking. An effective dispute resolution mechanism also makes parties accountable for their conduct.

Our final decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism in Part 11 of the 2014 DAU. The main aspects of our decision are:

- broadening the scope of the dispute resolution mechanism so that it can be accessed for a broader range of disputes by a broader range of parties
- refining the processes, procedures and obligations on parties to resolve disputes, including providing for disputes to be referred to the QCA when the parties cannot agree how to progress the dispute.

Negotiation framework

Part 4 of the 2014 DAU provides a framework for the negotiation of access rights. It also establishes the key steps in the negotiation process and the information access seekers and Aurizon Network may be required to provide as part of these negotiations.

Our final decision is to refuse to approve Aurizon Network's proposed negotiation framework. The main aspects of our decision include:

- providing greater clarity and certainty about the obligations and processes for applying for access and negotiating agreements
- better balancing the rights and interests of Aurizon Network and other parties, by addressing Aurizon Network's ability to use its unique position and increasing the transparency and accountability of its decision making
- improving information flows so parties have sufficient information to make informed and timely decisions
- improving competition between above-rail operators (e.g. when tendering for rail haulage contracts).

Access agreements

Access agreements are essential for the provision of access to the CQCN. It is therefore important to have effective arrangements in place for the development and execution of these agreements.

Aurizon Network's 2014 DAU included four SAAs that cater to various contracting scenarios. We considered the arrangements had become overly complex and could result in potential ambiguity and inconsistencies with how particular matters are dealt with in the various agreements.

Our final decision proposes to move to a simpler approach involving a:

- standard access agreement (SAA)—dealing with access rights
- standard train operations deed (TOD)—dealing with train operations matters associated with the use of access rights.

This approach removes two of the four standard agreements from the 2014 DAU, but with our proposed amendments, will cover all contracting scenarios available under the existing access agreements. For example, it will allow mining companies and train operators to hold access rights and/or undertake train operations. In addition, clearly separating the responsibility for holding access rights from train operations may lead to more efficient use of the network, assisting the development of a capacity transfer market and promoting further above-rail competition.

We have also proposed a number of amendments to the detailed terms and conditions of the 2014 DAU SAAs where we consider they are not appropriate, including with respect to:

- certainty and security over access arrangements—to provide parties with adequate specification over factors affecting the holding or use of access rights. This includes transparent and clearly defined processes around how access rights can vary over the life of the contract (e.g. resumptions, relinquishments and transfers) and alternating between train operators
- appropriate terms and conditions—to provide arrangements that represent a reasonable and commercially balanced allocation of rights, obligations and risks between parties and ensures risks are allocated to those best able to manage them

Private connecting infrastructure

Part 9 of the 2014 DAU identifies the circumstances where Aurizon Network will consent to a connection of private infrastructure to the rail network. The 2014 DAU also includes a Standard Rail Connection Agreement (SRCA) with standard terms and conditions for connection.

These provisions are an important component of the regulatory framework as third parties are increasingly being required to develop and own private infrastructure to connect to the network. We focused on how the arrangements will allow connections to the network to be designed and developed more quickly and with greater certainty for all parties.

We have not accepted Aurizon Network's arrangements for connecting private infrastructure as we considered the process outlined by Aurizon Network was insufficiently clear and certain regarding the rights and obligations of the relevant parties. We have proposed amendments to Part 9 and the SRCA to address this, while taking proper account of Aurizon Network's, Private Infrastructure Owners' (PIOs') and users' rights and interests. This includes further developing the terms and conditions of the SRCA, including by clarifying the treatment of coal loss mitigation.

Volume II: Capacity and expansions

Baseline capacity

Our final decision is to refuse to approve Aurizon Network's 2014 DAU approach to baseline assessment. We consider it is appropriate for us to require Aurizon Network to participate in supply chain groups and network development plan (NDP) processes to promote the efficiency objectives of Part 5 of the QCA Act.

Our final decision includes a new section in the 2014 DAU (i.e. Part 7A) which will require Aurizon Network to undertake a baseline capacity assessment for each coal system. We have proposed Aurizon Network:

- seek to establish a common understanding of baseline capacity with access holders, access seekers and customers. Our final decision provides that we can prepare an alternative baseline capacity assessment where Aurizon Network disagrees with our proposed changes to its baseline capacity assessment, and that Aurizon Network must publish both capacity assessments' reports on its website for stakeholders' consideration

- seek to promptly resolve any capacity deficits revealed by the capacity assessments, and to consult with affected stakeholders in doing so
- prepare a comprehensive NDP, based on a mix of dynamic capacity modelling (where appropriate) and static capacity modelling, to provide stakeholders with confidence that Aurizon Network is planning expansions efficiently.

Available capacity allocation and management

One of the major concerns of stakeholders about the 2014 DAU was the ability of Aurizon Network to allocate limited access rights based on a set of broad criteria. These criteria replaced the previous queuing mechanism and were perceived to give Aurizon Network the ability to negotiate and 'pick winners'. We consider this to be inappropriate.

Our final decision proposes retaining the queuing mechanism to increase transparency of the capacity allocation process and ensure access seekers are treated in a non-discriminatory manner. This decision also proposes access seekers, once they become access holders, be provided with certainty over use of contracted access rights by retaining relinquishment and resumption provisions.

Aurizon Network proposed to include a framework for short-term capacity trading in the 2014 DAU. In our consultation process, access seekers were generally supportive of Aurizon Network's proposal.

In our initial draft decision, a key issue was the socialisation of the difference in access costs in a long-haul to short-haul capacity transfer, which we considered to be inappropriate. We proposed amendments that introduced a transfer fee instead. We also considered it appropriate to amend the criteria for assessing short-term capacity transfers proposed by Aurizon Network as we considered they were overly restrictive.

In this final decision, we have defined a short term transfer as a transfer of access rights for up to 12 months (as opposed to three months). No transfer fees would apply for such transfers, but to manage gaming, a fee would apply for transfers of access rights that apply for more than two years in three. We also consider that we need more information on the nature of short-term transfers. Accordingly, we have included a reporting requirement in Part 10 of our final amended DAU.

Network development and expansion process

Aurizon Network's 2014 DAU proposed a new expansion process, which would fundamentally change the dynamics of expanding the CQCN.

The 2014 DAU would transfer more responsibility and risk for funding CQCN expansions to access seekers and third-party funders, reflecting Aurizon Network's changing approach to financing expansions. We consider the 2014 DAU would allow Aurizon Network to dictate study scope, report deliverables and capacity allocation among coal customers and would not incorporate ongoing developments of the SUFA. It also would not provide dynamic capacity assessments of existing access rights and new access requests over the medium term.

We propose a range of amendments to:

- provide reliable, transparent outputs with respect to standard, scope, cost and capacity for all expansion projects that go through the study stage gate process
- support flexible user funding arrangements to create competitive tension for financing projects of all scales
- prevent Aurizon Network from unreasonably or unnecessarily delaying the delivery of expansions.

We agree with Aurizon Network that its obligation to fund a shortfall should be subject to certain conditions related to the cause of the shortfall.

Network management principles

The network management principles (NMP) are a set of train-planning and train-control rules which impact on Train Service Entitlements (TSEs) and therefore access rights. A clear and transparent set of NMP can assist in optimising the use of available capacity and improving productivity. It can also improve information symmetry among access holders, promote effective supply chain coordination and increase Aurizon Network's accountability for providing TSEs to access holders.

We consider it appropriate to require amendments to the 2014 DAU to:

- increase transparency and availability of train plans and TSE-reconciliation reports, including requiring additional detail in the content of those documents
- establish timelines for Aurizon Network to submit train plans, TSE-reconciliation reports and initial system rules.

Regulated asset base and customer voting

The return on, and return of, capital relating to Aurizon Network's regulated asset base (RAB) is a significant component of the reference tariffs of the CQCN's systems. We have responded in our final decision to concerns expressed by Aurizon Network about asset stranding and optimisation risk, particularly in regard to long-term and sustained demand deterioration. In recognising that demand deterioration is a market-driven occurrence, our final decision provides that Aurizon Network can submit a demand-deterioration solution to us before we activate the RAB-optimisation process.

We have accepted Aurizon Network's proposal that equity raising costs should be recognised and included in the RAB, but require Aurizon Network to show that its equity raising costs are efficient and necessary to support CQCN investment.

For customer voting, we are proposing customers should vote on a package of measures (i.e. scope, standard and cost), not simply scope (as has been the case previously). This would enable the voters to make a more informed assessment of the project.

Volume III: Pricing and tariffs

Pricing principles

Part 6 of the 2014 DAU sets out the processes to identify or develop reference tariffs for new train services, including those involving expansions and/or new spur lines connected to the CQCN.

Our views on the broader approach to pricing principles, as set out in our final decision, are:

- The proposed high-level pricing principles may result in a less credible and effective pricing regime. We have proposed to clarify and strengthen the boundaries for, and the conditions of, how access charges are negotiated, and to set out effective mechanisms to comply with the obligations under the QCA Act.
- The application of Aurizon Network's proposed expansion pricing framework requires clarification and may cause existing users to bear an inappropriately high level of expansion financial risks. We have proposed amendments to make the expansion pricing framework sufficiently flexible to be able to account for expansion specific characteristics and better allocate risk.
- The revised approach to pricing train services that use new spur lines inappropriately increases the complexity of the pricing regime for limited benefits. We have largely retained the 2010 AU approach for pricing train services that use new spur lines but have proposed a few amendments to address stakeholder concerns and to make this approach consistent with the expansion pricing framework.

- The revised provisions significantly reduce regulatory oversight of the negotiation of commercial terms. We have proposed to reinstate and refine the 2010 AU access conditions provisions to strengthen regulatory oversight.

Reference tariffs and take-or-pay

Reference tariffs and related provisions in Schedule F provide the basis for which access charges are determined and recovered. Aurizon Network proposed key changes to reference tariff arrangements in the 2014 DAU, with matters affected including characteristics of reference train services, rebalancing of the tariff structure, changes to take-or-pay arrangements and revenue cap adjustments.

The majority of reference train service characteristics proposed in the 2014 DAU are similar to the 2010 AU, other than some refinements to the general characteristics. We consider most characteristics appropriate for application, although we have some concerns, including those relating to Aurizon Network's coal loss mitigation standard and the proposal for using the most direct route.

Many of the proposed changes would make the pricing arrangements even more complex, resulting in 'winners and losers'. We consider a more strategic approach, supported by customer consultation, should be pursued for UT5. In this final decision, we rejected changes which we are not convinced align with the ongoing development of the CQCN including Aurizon Network's proposals for:

- major rebalancing of its tariff structure, with significant increases in the AT2 reference tariff in various systems. Aurizon Network has also proposed a number of measures to address the potential adverse implications of the significant increases in the AT2 tariff
- changes to the arrangements for the incremental maintenance charge (AT1 tariff) to minimise its variability and incorporate this tariff component in the revenue cap
- changes to take-or-pay arrangements, including the adoption of operator capping and special arrangements for UT1 access holders to address perceived greater take-or-pay costs and risks for UT1 as compared with post-UT1 access holders.

We have also reassessed a number of new reference tariff arrangements approved during the 2010 AU period, including some GAPE pricing issues which were deferred until 2014 DAU consideration.

This final decision also includes our assessment of Wiggins Island Rail Project (WIRP) pricing. We have maintained our CDD position with respect to WIRP pricing.

Volume IV: Maximum allowable revenue (MAR)

Our final decision is to refuse to approve Aurizon Network's submitted maximum allowable revenue (MAR) of \$4.67 billion. We consider that a MAR of \$3.93 billion is appropriate based on our assessment of efficient costs (see Table 1). We have established efficient costs by considering submissions, consulting with stakeholders, engaging technical experts and conducting our own investigations and analysis. This process led us to conclude that the efficient level of Aurizon Network's costs is 16 per cent lower than submitted.

Table 1 Total MAR (\$ million)

<i>Cost</i>	<i>Aurizon Network submission</i>	<i>QCA final decision</i>	<i>Difference</i>	<i>Reason for change</i>
Operating	900	806	(94)	\$57 m reduction in corporate overheads based on our assessment of efficient corporate overheads for the stand-alone business. \$23 m reduction in environmental charges as these costs should not be borne by non-electric users. \$14 m for various other reductions.
Maintenance	1,066	805	(261)	\$185 m reduction due to a reduction in re-railing costs, allocation to non-coal traffic and updated volumes. \$76 m reduction in ballast costs due to Aurizon Network's lower estimate and our identification of efficiencies.
Depreciation	1,224	1,288	63	We brought forward the commencement of depreciation from the year after commissioning to the year of commissioning.
Inflation	(576)	(515)	61	We used actual inflation of 1.3% for 2014–15 rather than a 2.5% forecast.
Return on Investment	1,884	1,515	(369)	We used a return on investment of 7.17% rather than 8.18%.
Tax and imputation credits	251	144	(107)	A lower return on capital decreases profits, tax and imputation credits.
Working capital allowance	0	12	12	We included a working capital allowance.
Capital carryover	(135)	(129)	6	We included a smaller capital carryover from UT3.
Total MAR ¹	4,670	3,925	(745)	

Note (1) Does not sum as Aurizon Network proposed to smooth the recovery of its revenue to avoid price shocks. This smoothed total is \$4.67 billion. This is \$56 million more than the sum of the unsmoothed amounts - however, is equivalent in present value terms.

1 INTRODUCTION

1.1 The market context

Aurizon Network is part of the broader coal supply chain in central Queensland. The CQCN is the largest coal rail network in Australia, carrying coal from mines either for export or for domestic use including in power stations and industrial plants (Box 1). In 2013, coal exports accounted for 55 per cent of the total value of Queensland's overseas merchandise exports.⁶

Box 1: Central Queensland Coal Network

The CQCN is made up of around 2670 km of track servicing around 49 mines, three power stations and five port terminals. There are four major coal systems:

- Moura—primarily services coal mines in the Moura region, together with the Callide Basin, with all coal being hauled to Gladstone, either for use at domestic industrial plants, Gladstone Power Station or for export via the Port of Gladstone.
- Blackwater—primarily services coal mines in the central and southern Bowen Basin and carries the product through to Stanwell Power Station, Gladstone Power Station and the Port of Gladstone.
- Goonyella—services coal mines in the central and northern Bowen Basin and carries product to the ports at Hay Point. The Goonyella System connects to the Blackwater System in the south and the Newlands system in the north.
- Newlands—is located at the northern end of the Bowen Basin connecting to the port at Abbot Point. The system services mines located in the Newlands System, as well as an increasing number of mines located in the Goonyella System via the Goonyella to Abbot Point Expansion (GAPE) project.



Source: Aurizon Network, 2013 DAU, sub. 2: 22; Aurizon Network, 2013 DAU, sub. 4: 15.

⁶ Queensland Treasury and Trade, 2014(a): 1.

The Queensland coal industry is competing in increasingly competitive global markets. Declining coal prices have outpaced cost-cutting, thereby reducing margins and putting further pressure on the profitability and competitiveness of some CQCN mines.

These challenging conditions are continuing, with international markets remaining in oversupply and prices remaining subdued. The QRC said the challenges confronting the resources sector in Queensland have intensified:

... the current coal industry downturn is as severe as any in the country's history and its recovery is likely to be a three to five year process ... mines have been forced to close and coal jobs have been lost ... based on current prices, it would be hard to find a thermal coal mine in Queensland operating at a profit ... For metallurgical coal miners, the situation is hardly better, noting that according to McCloskey's metallurgical coal on the spot market fell below 115 dollars a tonne last week – and that's for the highest quality coal.⁷

While accepting the challenging conditions for many of its customers in the short term, Aurizon Network has indicated in its submission that it is cautiously confident about the outlook for the export coal industry in the medium to long term.⁸

1.2 Productivity, efficient costs and flexibility

The competitiveness of Queensland's mining sector is critical to Queensland's economy. The performance of the CQCN is a key factor to achieving this. UT4 has an important role in ensuring that the CQCN is used efficiently. Section 69E of the QCA Act states that the objective of the third party access regime that the CQCN and Aurizon Network are subject to is:

...to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

In this context, access holders (and seekers) operating in the CQCN need to be confident that they are paying an efficient cost for the services provided. Therefore, in addition to addressing the pricing principles contained in section 168A of the QCA Act Aurizon Network's undertaking should endeavour to increase productivity, system flexibility and innovation within the CQCN, as well as encourage proactive coordination throughout the supply chain.

1.3 Towards a more effective and simplified access regulation regime

We note concerns have been expressed by stakeholders regarding the excessive complexity of the 2014 DAU and the resulting costs and risks for all stakeholders, including Aurizon Network.

We therefore consider that the 2014 DAU will better meet the objectives of Part 5 of the QCA Act through a degree of simplification, including in concepts, processes and drafting style. However, in doing so, we are mindful of the need to retain those concepts, processes and drafting with which all stakeholders are broadly familiar. Our approach to the review of the 2014 DAU has therefore sought to achieve simplification, yet to maintain familiarity.

Governance framework

The governance framework surrounding Aurizon Network must be sufficiently robust to prevent Aurizon Network from using its vertical integration or confidential information, knowingly or

⁷ Roche, 2014: 1, 6.

⁸ Aurizon Network, 2013 DAU, sub. 2: 30; Aurizon Network, 2014(f): 2.

unknowingly, in a manner that unfairly differentiates in favour of the Aurizon Group, to the detriment of competition in upstream and downstream markets.

To ensure there is a governance framework that encourages trust and confidence, the core areas to consider include:

- effective obligations to ensure no unfair differentiation between the Aurizon Group and other users of the CQCN
- ring-fencing of the confidential information of other users of the CQCN
- reporting and accountability for performance and compliance
- dispute resolution
- the role of standard access agreements to promote the provision of the declared service by Aurizon Network on reasonable and non-discriminatory terms.

Each of these elements have to work effectively to ensure Aurizon Network's actions are transparent, Aurizon Network is accountable for its actions and the Aurizon Group cannot discriminate in favour of its own operations to the detriment of other users of the CQCN.

Management of capacity

The declared service provided by Aurizon Network is defined in section 250 of the QCA Act as the use of the CQCN infrastructure. Central to the provision of this service is the provision of train paths in a manner that efficiently uses the capacity of the CQCN.

This requires:

- transparency in infrastructure planning over the long, medium and short term
- transparency in the measurement and modelling of capacity
- articulation of effective capacity provided by existing infrastructure, based on existing operational and contractual parameters
- articulation of baseline capacity provided by existing infrastructure, based on optimal operational and contractual parameters
- placing the above in the context of mine–rail–port supply chain efficiency.

Maximising the productivity of the existing CQCN infrastructure is important in ensuring Queensland's coal industry can continue to compete effectively in the global market.

Network expansion and funding

Efficient expansion of the CQCN is a key element underpinning the objective of Part 5 of the QCA Act.

The Standard User Funding Agreement (SUFA) has been developed to provide an alternative to Aurizon Network's terms of financing for a particular expansion, where Aurizon Network is unwilling to fund the expansion at the regulated rate of return, and instead proposes 'commercial terms'.⁹

⁹ The funding of expansions of the CQCN is subject to Aurizon Network being obliged under the QCA Act to expand the CQCN, but it only has to bear the costs of the expansion if it volunteers to do so (see s. 119 of the QCA Act).

Trading and pricing

Greater understanding of capacity requirements and availability across stakeholders can increase the accuracy and timeliness of capacity allocation while permitting greater flexibility, which in turn can enhance efficiency in the use of the CQCN.

In this context, access seekers may wish to temporarily trade/transfer their access rights and the holding cost associated with those rights to other users if they do not need them (i.e., reallocation of spare capacity). Section 106 of the QCA Act enables users to transfer their rights under an access agreement, subject to any relevant provisions or limitations on transfers set out in an approved access undertaking. Short-term transfers are therefore a key part of encouraging operational flexibility within the CQCN to improve productivity and efficiency.

We consider the existing pricing structure is overdue for simplification. This is also the case for the take-or-pay arrangements that provide a proxy for the holding cost of capacity. Simplification would complement the implementation of any trading mechanism. An appropriate holding cost for capacity is also needed to encourage efficient expansion of the CQCN.

2 LEGISLATIVE FRAMEWORK

This chapter sets out how we have applied our legislated obligations in making our final decision. For more specific analysis, please refer to the preceding chapters and our final amended DAU.

2.1 Part 5 of the QCA Act

Part 5 of the QCA Act establishes a third party access regime to provide a legislated right for third parties to acquire services provided using significant infrastructure that is owned by a monopoly service provider. When the Bill to establish the QCA Act was introduced, the accompanying Explanatory Notes said:

The underlying rationale of creating third party access rights to significant infrastructure is to ensure that competitive forces are not unduly stifled in industries which rely upon a natural monopoly at some stage in the production process, especially where ownership or control of significant infrastructure is vertically integrated with upstream or downstream operations.

A key aspect of the market system is that an infrastructure owner is entitled to choose with whom it will deal. The threat of competitors providing substitutes constrains a seller's ability to charge excessive prices or otherwise restrict supply. However, in cases where these substitutes do not exist, a seller possesses significant market power. A seller may exercise its market power to increase its profit by restricting output because doing so enables the seller to increase its price.

In cases of natural monopoly, one facility meets all of a market's demand more efficiently than a number of smaller and more specialised facilities. Accordingly, it is not socially desirable that the infrastructure comprising a natural monopoly be duplicated. At the same time, the absence of competition enables a natural monopoly infrastructure owner to extract excessive profits through exercising market power.

This is especially the case where the business which operates the natural monopoly also has a commercial interest in upstream or downstream markets (for example a rail operator who also owns the track). Such a business may discriminate against its upstream or downstream competitors by offering access on more favourable terms and conditions than is offered to competitors. In this way, an owner of a natural monopoly is able to stifle competition in upstream or downstream markets.

The purpose of third party access is therefore to provide a legislated right to use another person's infrastructure. This should prevent owners of natural monopolies charging excessive prices. It should also encourage the entry of new firms into the potentially competitive upstream and downstream markets which rely on a natural monopoly infrastructure in the production process, and thereby enable greater competition in those markets. This in turn would promote more efficient production and lower prices to consumers.¹⁰

Declared service

Aurizon Network is the access provider of a declared service for the purposes of Part 5 of the QCA Act.

The relevant service is 'the use of a coal system for providing transportation by rail' (as defined under section 250 of the QCA Act) and is referred to in this decision as the 'declared service'. The relevant infrastructure to which the declared service relates is collectively referred to in this decision as the 'central Queensland coal network' (CQCN).

¹⁰ Explanatory notes for the *Queensland Competition Authority Bill 1997*: 3-4.

As a result of this declaration, Aurizon Network (as the access provider for the service) and access seekers are subject to various rights and obligations under the QCA Act, including an obligation to negotiate access to the service in good faith.¹¹

2.2 Assessment approach

The 2014 DAU was lodged by Aurizon Network under section 136 of the QCA Act.

Under section 136(4) of the QCA Act, we are required to either approve, or refuse to approve, the 2014 DAU and, in doing so, we are required to have regard to the factors set out in section 138(2) of the Act.¹²

We acknowledge that we are not permitted to refuse to approve the 2014 DAU simply because we consider a minor and inconsequential amendment should be made to the 2014 DAU.¹³

If we refuse to approve a draft access undertaking (by reference to section 138(2)), we must give notice stating the reasons for refusal, and the way in which we consider it is appropriate to amend the draft access undertaking.¹⁴ This final decision constitutes a notice for the purposes of section 136(5) of the QCA Act.

This final decision on the 2014 DAU is the culmination of an extensive regulatory process that has involved Aurizon Network withdrawing its proposed 2013 DAU and then submitting the 2014 DAU. We note that, in considering this final decision, we have reviewed the 2014 DAU applying the legislative criteria and relevant statutory processes taking into account:

- each part of the 2014 DAU submitted by Aurizon Network
- submissions provided by Aurizon Network¹⁵ and stakeholders,¹⁶ including:
 - submissions in response to our draft decisions¹⁷ on the 2014 DAU, namely:
 - on the MAR aspects of the 2014 DAU (September 2014)
 - on the remainder of the 2014 DAU (January 2015)
 - on our supplementary draft decision on the capacity transfer mechanism (April 2015)
 - on our supplementary draft decision on the revenue and pricing treatment of the Wiggins Island Rail Project (July 2015).
 - in response to our consolidated draft decision on the 2014 DAU (December 2015).
- all information provided by Aurizon Network

¹¹ Section 100 of the QCA Act.

¹² Refer to section 2.3 of this chapter for details.

¹³ Section 138(5) and (6) of the QCA Act.

¹⁴ Section 136(5) of the QCA Act.

¹⁵ Aurizon Network said any explanatory documents provided in support of its 2013 DAU were still relevant, but the 2014 DAU prevails to the extent of any inconsistency (2014 DAU, sub. 1: 4).

¹⁶ We also published on our website extensive comments on Aurizon Network's 2013 DAU proposal; our cost of capital forum; and consultants' reports on maintenance and operating costs, volume forecasts and ballast cleaning costs.

¹⁷ A reference to an 'initial draft decision' references to one or more of the five draft decisions we have published previously on 30 September 2014, 30 January 2015, 30 April 2015 and/or 31 July 2015.

The remainder of this chapter sets out our approach to the criteria listed in section 138(2) of the QCA Act in relation to Aurizon Network's 2014 DAU when coming to our final decision outlined in the preceding chapters.

2.3 Section 138(2) of the QCA Act

Section 138(2) of the QCA Act states that we may approve the 2014 DAU only if we consider it appropriate to do so having regard to each of the matters set out in s. 138(2) of the QCA Act. The statutory factors guiding our decision-making process are set out in Box 2.

Box 2: Section 138(2) of the QCA Act

The authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following —

- (a) *the object of this part;*
- (b) *the legitimate business interests of the owner or operator of the service;*
- (c) *if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;*
- (d) *the public interest, including the public interest in having competition in markets (whether or not in Australia);*
- (e) *the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;*
- (f) *the effect of excluding existing assets for pricing purposes;*
- (g) *the pricing principles mentioned in section 168A;*
- (h) *any other issues the authority considers relevant.*

The 'object of this part' as referred to in section 138(2)(a) is set out in section 69E:

The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

The pricing principles set out under section 168A are:

The pricing principles in relation to the price of access to a service are that the price should —

- (a) *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; and*
- (b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (d) *provide incentives to reduce costs or otherwise improve productivity.*

As section 138(2) is drafted as a simple list, with the language of the section imposing no requirement that any particular item is necessarily more significant than the others, no one factor is given primacy over another.

'Appropriate'

The QCA Act requires us to determine whether it is appropriate to approve a draft access undertaking having regard to the relevant matters listed in section 138(2). The use of the term 'appropriate' in the QCA Act is one of wide import.

Our task is to consider whether the undertaking is 'appropriate' by reference to all the statutory factors, including their application and relative weighting.

In considering whether the 2014 DAU is appropriate, we are not compelled to make a decision that is the least onerous and restrictive, from the perspective solely of the regulated business. We are required to determine whether the 2014 DAU is 'appropriate' by reference to the factors in section 138(2), factors that have a focus which is wider than the perspective of the regulated business.

The QCA has adopted this approach in this final decision.

'Have regard to'

In making our decision as to whether the 2014 DAU is appropriate to approve, we must have regard to the factors in section 138(2) of the QCA Act.

The phrase 'have regard to' has been interpreted by Australian courts as requiring the decision-maker to take into account the matters to which regard is to be had as an element in making the decision.

As discussed further below, the QCA regards each factor as a fundamental consideration (in the sense of being a central element in the deliberative process) but other relevant considerations may warrant a particular decision being made (see section 138(2)(h)).

Weight

The factors listed in section 138(2), considered in light of the provisions of the draft access undertaking, may, and indeed often will, give rise to competing considerations which need to be weighed in deciding whether it is appropriate to approve the undertaking. Some of the factors to which the QCA must have regard favour different conclusions.

Some examples of possible tensions are:

- between the legitimate business interests of the owner or operator of the service (s. 138(2)(b)) on the one hand and the interests of persons who may seek access to the service (s. 138(2)(e))
- between the effects of excluding existing assets for pricing purposes (s. 138(f)) and include a return on investment commensurate with the regulatory and commercial risks involved (s.168A(a)).

In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard (as is the case in the QCA Act), it is generally for the decision-maker to determine the appropriate weight to be given to them.¹⁸ We consider that this approach applies here.

2.3.1 The object of Part 5

Section 138(2)(a) requires us to have regard to the object of Part 5 of the QCA Act when deciding whether it is appropriate to approve a draft access undertaking.

¹⁸ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (per Mason J).

Promoting economically efficient outcomes

The object of Part 5 of the QCA Act¹⁹ is to promote the economically efficient operation of, use of and investment in significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

We consider these efficient outcomes include:

- efficient operation and use of the existing network—to promote economically efficient operation and use of existing infrastructure, we consider the 2014 DAU should, among other things, encourage and not discourage utilisation of the infrastructure
- efficient investment in the network—the 2014 DAU should enhance the transparency and processes associated with identifying efficient investments, including identifying the need for network extension and processes to action those extensions. It should also provide controls and incentives to provide for future capital expenditure that is prudent, including in terms of scope, standard and costs

2.3.2 The legitimate business interests of Aurizon Network

Section 138(2)(b) requires us to have regard to the 'legitimate business interests' of the owner or operator of the service, in this case Aurizon Network. As the owner and operator are the same entity the QCA's consideration of section 138(2)(b) also covers section 138(2)(c).

'Legitimate business interests' is not a defined term under the QCA Act.

Aurizon Network has legitimate business interests across a range of areas, including:

- the commercial interest in recovering revenue for the service that is at least enough to meet the efficient costs in providing the relevant service and in earning a return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service
- a balanced risk position in the allocation of contractual risks and liabilities as between Aurizon Network and access holders
- appropriate incentives to maintain, improve and invest in the efficient provision of the facility to provide the declared service
- incentives to improve commercial returns, where these returns are generated from, for example, innovative investments or cost-efficiency measures.

The legitimate business interests of Aurizon Network is one of the factors to be weighed up by the QCA pursuant to section 138(2).

2.3.3 The public interest

Section 138(2)(d) requires the QCA to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia).

The term 'public interest' is not defined in the QCA Act.

We also note that any assessment of the public interest will be shaped by its context.

¹⁹ Section 69E of the QCA Act.

We consider it to be in the public interest for there to be an access undertaking that establishes a stable, certain regulatory framework that facilitates the delivery of below-rail services at prices that reflect the requirements found in the QCA Act.

In this way, rail operators and end users are able to have confidence that access charges promote an efficient allocation of resources, consistent with the public interest in having competition in the above-rail market.

Where consumers of rail services sell their products in international markets or face intense competition in their domestic markets, the ability of such consumers to pass on rail transport costs is likely to be constrained. If the costs of providing the service are not efficient, this could undermine the competitiveness for rail operators accessing Aurizon Network's declared service and consumers of above-rail services provided by those rail operators (particularly coal producers in global coal markets).

In addition, we consider that an undertaking that delivers regulatory certainty provides a major stimulus to the Queensland economy and local employment which is an important public interest consideration.²⁰ The development of new, or replacement, upstream producers may be at risk if there is material pricing uncertainty for rail access. This can have flow-on impacts on Queensland's regional economic development.

Having effective competition in upstream and downstream markets

Efficient access to the CQCN is of significance for competition in the market for coal freight services, including through contracting and operating requirements embodied in Aurizon Network's proposal. We consider that Aurizon Network continues to have the ability and incentive to use its market power to adversely affect competition in a number of dependent markets including:

- the market for above-rail services
- the market for coal products that are transported on CQCN
- the market for resource tenements from which those products are produced.

Competition in the above mentioned markets can be affected by the operation of the contracting and operating requirements embodied in the 2014 DAU.

We therefore consider that an access undertaking should seek to:

- minimise any barriers for access to the declared service
- improve the conditions for competition in upstream and downstream markets by promoting regulatory certainty to enable confidence in decision-making.

Supply chain co-ordination

We consider there to be a strong alignment between effective supply chain coordination and the public interest. There is a clear link between allowing for the coal supply chain to operate in the most effective and efficient way possible and the public interest in maintaining an internationally competitive Queensland coal sector.

²⁰ QCA, July 2001: 45.

2.3.4 The interests of persons who may seek access

Section 138(2)(e) requires the QCA to have regard to the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the services are adversely affected. We consider that the rights of existing access holders are relevant under section 138(2)(h), to the extent they are not also access seekers under section 138(2)(e).

We consider that section 138(2)(e) encompasses the interests of train operators as access seekers or potential access seekers. Indeed, we have received submissions from BMA, Aurizon Operations and Asciano (each train operators in the CQCN), and their views are considered throughout this decision.

We consider the interests of access seekers include: an effective negotiation framework; transparent and public information about access to and use of the CQCN; adequate reporting; certain and effective transitional arrangements as one undertaking replaces another; access principles that are effective for a balanced negotiation or renewal of an access agreement; standard access agreements that represent a fair risk allocation; effective obligations to maintain the network; and a workable and effective network extension framework.

Finally, in having regard to the interests of persons who may seek access, our final decision on the 2014 DAU is primarily drafted in the context of use of the CQCN for the transportation of coal carrying-train services. The 2014 DAU is also applicable to non-coal access seekers, as the CQCN also accommodates non-coal traffics. While the predominant use of the CQCN is access for haulage of coal, and the undertaking is predominantly focused on the provision of access for coal related activities, we have had regard to interests of non-coal access seekers.

2.3.5 The effect of excluding existing assets for pricing purposes

Section 138(2)(f) requires the QCA to have regard to the effect of excluding existing assets for pricing purposes.

We have had regard to this criterion as part of our assessment of the 2014 DAU for the declared service, including the development of revenues and tariffs.

2.3.6 The pricing principles in section 168A

Section 138(2)(g) requires the QCA to have regard to the pricing principles in section 168A.

The pricing principles in relation to the price of access to a service are that the price should:

- (a) *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; and*
- (b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (d) *provide incentives to reduce costs or otherwise improve productivity.*

The QCA considers the pricing principles, including section 168A(a), to be fundamental considerations (in the sense of being a central element in the deliberative process), but that does not mean they have primacy over other considerations or that it is necessary for them to be "complied with" in some absolute way. It is open to the QCA to consider that a draft access undertaking which provides for a price that allows a service provider to recover at least the

efficient costs of providing access to the service and a relevant return on investment, is, including by reference to other factors such as the object of Part 5 of the QCA Act (section 138(2)(a)), the interests of access seekers and holders (sections 138(2)(e) and (h)) and the public interest (section 138(2)(d)), not one which it is appropriate to approve.

Section 168A(a) is also not intended to be applied in isolation to the rest of the section and we assess this principle in light of the remaining pricing principles, which neither modifies nor constrains the operation of section 168A(a).

The pricing principles are only one of a number of factors to which we must have regard pursuant to section 138(2). Whether a draft access undertaking allows recovery of at least enough to meet efficient costs and a relevant return is of course relevant and fundamental to our assessment of the 2014 DAU. But we are not required to consider it appropriate to approve a draft access undertaking merely because the price contained in it will generate revenue that is at least enough to meet the efficient costs of the service and a relevant return.

2.3.7 Any other issues the QCA thinks are relevant

Section 138(2)(h) allows the QCA to have regard to any other issues it considers relevant.

This paragraph is expressed in broad terms. We consider the interests of access holders and end users are relevant under this paragraph. The interests of these stakeholders broadly coincide with the interests of access seekers, as all access seekers who sign contracts will become access holders. However, as discussed in various parts of this chapter, there are some issues of particular relevance to access holders and end users.

In addition to the above, we consider the following matters to be relevant:

- the terms of the 2010 AU and the reasons for proposed changes to it
- certainty through maintenance and operational integrity
- the extent to which commercially negotiated outcomes should be recognised under the negotiate-arbitrate principle
- the need for clarity and certainty
- the extent to which a regulated entity earns windfall gains and monopoly profits.

Role of the 2010 AU

The 2010 AU comprises a set of legally binding terms and conditions that is in use, and with which stakeholders are familiar. Many submissions we have received have compared the 2014 DAU to the 2010 AU.

A previously approved undertaking is relevant, as is the nature and extent of change being proposed by Aurizon Network and the reasons for that change. Accordingly, we consider the 2010 AU provides a useful point from which to assess the proposals contained in the 2014 DAU and associated standard agreements.

While we acknowledge the utility of having regard to the 2010 AU (and have ourselves taken it into account in considering some aspects of the 2014 DAU), it provides no more than a useful starting point for a contextual assessment of the proposed undertaking. Where relevant, it is a factor to which we have had regard.

Certainty through maintenance and operational integrity

Within section 138(2)(h) we have also considered the role of certainty from regulatory arrangements. That is, the extent to which stability and certainty promote confidence in the

regulatory arrangements and therefore economic efficiency by reducing uncertainty associated with long term investment decisions.

This may be considered in the context of operational integrity of the network with regard to maintenance, as well as the performance of the network over the longer term.

Negotiate–arbitrate model and commercial negotiations

The third party access regime in the QCA Act is underpinned by the 'negotiate–arbitrate' approach to regulation.

We consider that parties should endeavour to negotiate a mutually beneficial outcome before they resort to arbitration. When parties are unable to agree, arbitration is an appropriate means to resolving disputes. Indeed, if the dispute resolution process is not credible, the negotiation process can be unduly biased in favour of Aurizon Network by not sufficiently addressing the asymmetry in bargaining power.

An access undertaking is a means to achieve *ex ante* certainty by providing the terms and conditions on which Aurizon Network will provide access, to avoid developing these arrangements separately with each access seeker.

We have therefore considered how the 2014 DAU affects the role of customer engagement, the balance of negotiation strength, barriers to participation, the flow of relevant and timely information and whether it provides for effective dispute mechanisms, accountability and transparency.

The need for clarity and certainty

We consider an access undertaking should be clear and certain.

Distinct from minor and inconsequential changes, unclear and uncertain provisions create scope for unnecessary disputes over interpretation issues, additional transaction costs between parties and avoidable regulatory uncertainty.

In the absence of clarity and certainty, this could create barriers to efficient access to, or the efficient use of, the service, with consequential negative effects on competition in upstream and downstream markets.

Windfall gains and monopoly profits

A return that generates windfall gains or monopoly profits would be inconsistent with economically efficient investment, operation and use of a regulated network and has the potential to have both upstream and downstream investment impacts.

3 INTENT AND SCOPE

Part 2 of the 2014 DAU outlines the intent and scope of Aurizon Network's undertaking. It establishes the aims and objectives of the undertaking and provides guidance as to the interpretation of the remainder of the 2014 DAU.

The key elements of our decision are to:

- provide that the provisions of the undertaking be applied consistently, except where the undertaking 'expressly' provides otherwise*
- propose that the general principles of non-discrimination and independence be moved from Part 3 of the 2014 DAU (Ring-fencing) to Part 2 (Intent and Scope), in order to make clear that they underpin the operations of the entire undertaking. We have also proposed inclusion of more detailed statements outlining Aurizon Network's obligations with respect to differentiation between access seekers and holders, consistent with the unfair differentiation concept used in the QCA Act*
- clarify that the operation of the reference tariffs and adjustment charges do not involve the retrospective application of the undertaking*
- amend the 'scope' clause to clarify that 'access' in that clause includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act*
- approve the clauses relating to the supply and sale of electricity, inclusive of a dispute resolution provision to make clear that the dispute resolution provisions set out in the undertaking apply to this service*
- accept that a definition of 'associated services' does not need to be included in the undertaking, as it is not clear that these services are covered by the declaration.*

3.1 Introduction

Part 2 of the 2014 DAU establishes the duration, as well as the intent and scope of the undertaking.

The 'Intent and Scope' part of the 2014 DAU is important as it should provide:

- clarity over what the undertaking is designed to achieve
- a description of the overarching objectives of the undertaking
- clear statements regarding Aurizon Network's treatment of access seekers, access holders and related parties
- an appropriate description of the scope of the undertaking
- guidance as to the interpretation of the remainder of the undertaking.

3.2 Overview

3.2.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU proposed that:

- the intent of the undertaking is, among other things, to facilitate negotiation of access agreements by Aurizon Network and access seekers
- the scope of the undertaking indicates that it provides only for the negotiation and provision of access and is not applicable to the negotiation or provision of services other than access
- to the extent Aurizon Network sells or supplies electricity to a related operator, it cannot refuse to sell or supply electricity to another access seeker or access holder
- the undertaking be effective from the approval date to the terminating date (the earlier of 30 June 2017 and the date on which the undertaking is withdrawn in accordance with the QCA Act)
- reference tariffs are stated to apply retrospectively and are effective from the commencing date (1 July 2013).

The 2014 DAU also includes provisions requiring Aurizon Network to act in a manner consistent with the unfair differentiation obligations in the QCA Act; and apply the provisions of the undertaking consistently to all access seekers, access holders, train operators, access applications and negotiations for access, except where the undertaking provides otherwise.

3.2.2 Stakeholders' initial position

In initial submissions, stakeholders raised several concerns with Aurizon Network's 2014 DAU proposals, including:

- lack of a clear and unambiguous statement supporting non-discriminatory treatment of all access seekers and access holders²¹
- inappropriate limitation of the scope of the undertaking²²
- lack of an absolute obligation on Aurizon Network to supply electricity to access seekers and access holders²³ or to do so in a non-discriminatory manner²⁴
- lack of a dispute resolution mechanism for disputes arising in respect of electricity supply²⁵
- lack of a definition of, and obligations related to, 'associated services'²⁶
- lack of requirements regarding an incentive mechanism²⁷
- specific elements of the drafting, where stakeholders proposed changes to improve clarity, certainty and/or transparency.²⁸

²¹ Asciano, 2014 DAU, sub. 22: 28–29.

²² QRC, 2014 DAU, sub. 42: 10.

²³ Anglo American, 2014 DAU, sub. 7: 17-19; QRC, 2014 DAU, sub. 42: 11.

²⁴ Asciano, 2014 DAU, sub. 22: 29.

²⁵ Anglo American, 2014 DAU, sub. 7: 20; Asciano, 2014 DAU, sub. 22: 65; QRC, 2014 DAU, sub. 42: 11

²⁶ QRC, 2014 DAU, sub. 42: 11–12.

²⁷ Asciano, 2014 DAU, sub. 22: 66.

²⁸ QRC, 2014 DAU, sub. 31.

3.2.3 Legislative framework and QCA assessment approach

Legislative framework

In assessing Part 2 of Aurizon Network's 2014 DAU, we have had regard to all the factors in section 138(2) of the QCA Act and given them an appropriate level of weighting, as per the approach described in Chapter 2.

Against this background, we consider that, in our assessment of Part 2 of the 2014 DAU:

- section 138(2)(a), (b), (d), (e) (g) and (h) should be given more weight, as identified below
- section 138(2)(c), relating to the legitimate business interests of the operator where the owner and operator are different entities, and section 138(2)(f), the effect of excluding existing assets for pricing purposes, should be given less weight as these are less practically relevant to our assessment of the Intent and Scope part of the undertaking.

In certain circumstances there may be some tension between the factors to which we have assigned weight. As noted in our analysis of the legislative framework (Chapter 2), when these circumstances arise, the QCA, as decision-maker, is required to exercise judgement, having regard to the factors relevant in the circumstances.

QCA assessment approach

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act, as set out in section 69E, namely to promote the economically efficient operation, use of and investment in the CQCN, as the significant infrastructure by which the declared service is provided, with the effect of promoting effective competition in upstream and downstream markets. Given this, when coming to our consolidated draft decision on Part 2 of Aurizon Network's 2014 DAU, we consider we should have regard to the extent to which it:

- promotes economically efficient use of, and investment in, the CQCN, including by encouraging supply chain coordination initiatives and giving appropriate incentives for Aurizon Network to provide an efficient service
- enhances effective competition in upstream and downstream markets.

We consider the behavioural conduct requirements within Part 2 of the 2014 DAU and definition of the scope of the undertaking to be of relevance in this regard.

Section 138(2)(b) of the QCA Act requires that we have regard to the legitimate business interests of Aurizon Network, while sections 138(2)(d) and 138(2)(e) require us to have regard to the public interest and the interests of access seekers. Section 138(2)(h) allows for any other issues we consider relevant to be considered. In this context, we consider the interests of existing access holders relevant, to the extent they are not already 'access seekers' under section 138(2)(e). Against this background, when coming to our consolidated draft decision on Part 2 of the 2014 DAU we consider we should have regard to the extent which it:

- provides accountability and transparency, including by appropriately defining the scope of the declared service
- provides for the ability to cover other services, where this has been proposed by Aurizon Network
- ensures effective dispute resolution mechanisms
- enhances effective negotiation and customer engagement, including by providing a clear statement of the intent or objective of the undertaking.

Section 138(2)(g) requires us to have regard to the pricing principles mentioned in section 168A of the QCA Act. When coming to our decision on Part 2 of the 2014 DAU we have also had regard to these pricing principles.

The remainder of this chapter sets out how we have reached our decision with respect to the following areas of Part 2 of the undertaking:

- duration of the undertaking
- the objective of the DAU and behavioural conduct
- scope of the undertaking
- supply and sale of electricity
- electricity dispute resolution
- associated services
- incentive mechanism
- other specific drafting.

3.3 Duration

3.3.1 Aurizon Network's proposal

Clause 2.1 of the 2014 DAU contemplated the retrospective application of the 2014 DAU to a date prior to its commencement.

3.3.2 Initial draft decision

This clause was not discussed in our initial draft decision.

3.3.3 Consolidated draft decision

While we understood the aim of Aurizon Network's proposal in the 2014 DAU was to provide certainty and clarity regarding the retrospective application of reference tariffs, we considered that the retrospective application of an undertaking in the manner proposed by Aurizon Network was not consistent with the QCA Act and gave rise to potential invalidity. Section 149 of the QCA Act, in particular, provides that an approved access undertaking comes into operation at the time of approval and continues in operation until it expires or is withdrawn. Accordingly, it would not be appropriate for us to approve the proposed retrospective application of the undertaking.

Case law on this issue draws an important distinction between the time at which an undertaking comes into legal effect (i.e. the approval date), and the operation of provisions in the undertaking that apply after the approval date but that may be influenced in their operation by events that occurred before the approval date. The latter are permissible under the QCA Act but retrospective application is not.

Specifically, in a 2007 decision, the Australian Competition Tribunal considered arguments by Telstra that an access undertaking submitted by Optus was invalid by reason of retrospectivity. The Tribunal considered a provision in the then *Trade Practices Act 1974* (Cth) that is very similar to section 149 of the QCA Act. The Tribunal commented that:

A distinction is to be drawn between the point of time at which an undertaking comes into effect, that is to say the point of time at which it becomes operative and legally binding, and the operation of particular terms and conditions after that point of time is reached. The fact that a

term or condition may operate in respect of a period of time prior to the undertaking becoming operative does not mean that the term or condition has been expressed to come into effect prior to the undertaking being accepted by the Commission. Put shortly, once an undertaking has been given legal effect and has become operative, it can contain provisions which apply to a point of time earlier than the point of time at which it comes into effect without offending s 152BS(10). Of course, the Commission (and on review the Tribunal) still has to be satisfied that such terms and conditions are reasonable for the purposes of s 152BV(2)(d).²⁹

We note that historic undertakings have contained an adjustment charge mechanism that is consistent with the reasoning of the Tribunal in the Optus Mobile decision. Conceptually, for example, the ‘adjustment charge’ has been a charge payable during the term of the 2010 AU that has been calculated by reference to historical charges. The charge is intended to place the rail user in the same financial position as if backdating of the charges had occurred (and interest on the amount had been accrued and capitalised). The adjustment charge does not actually backdate charges and give the 2010 AU retrospective application.

Given this, we considered it appropriate, having regard to the legitimate business interests of Aurizon Network (section 138(2)(b)) as well as the interests of access holders and access seekers (section 138(2)(e) and (h)) and the need for clarity and certainty (section 138(2)(h)) that the wording of the 2014 DAU is amended so that the element of retrospectivity is removed and a formulation consistent with that endorsed by the Australian Competition Tribunal is adopted.

Accordingly, we considered it appropriate to amend the wording of clause 2.1 of the 2014 DAU in the manner we have proposed in the CDD amended DAU. Our suggested amendments removed the element of purported retrospectivity from clause 2.1, but did not change its commercial impact or intent. In particular, we considered there was merit in making the adjustment proposed in the adjustment charges with reference back to the adjustment date, consistent with various statements and expectations of various stakeholders to this effect.

3.3.4 Stakeholders' comments on the consolidated draft decision

The QRC did not support adjustment charges being applied in respect of differences between approved allowable revenues and transitional revenues for FY2015. It considered this adjustment should be smoothed and reflected in reference tariffs within the final two years of the undertaking period.³⁰

3.3.5 QCA analysis and final decision

Our final decision is to refuse to Aurizon Network's proposal regarding the duration of the 2014 DAU.

We note stakeholders have raised concerns with this clause in the context of its effect on the calculation of adjustment charges. Our decision in respect of the calculation of adjustment charges is set out in Chapter 20.

We remain of the view that our analysis, reasoning and decision on clause 2.1 of the 2014 DAU remains appropriate and the additional issues raised do not require further amendment to the clause contained in our CDD amended DAU. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

²⁹ *Application by Optus Mobile Pty Limited & Optus Networks Pty Limited (2007) ATPR 42–137.*

³⁰ QRC, 2014 DAU, sub. 124: 2, 8.

The amendments we consider are appropriate to be made to Part 2 of the 2014 DAU in order for it to be approved are set out in our final amended DAU.

Final decision 3.1

- (1) **After considering Aurizon Network's proposed duration of the 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amends the 2014 DAU is to amend clause 2.1 in the manner we have proposed in clause 2.1 of our final amended DAU.**
We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.4 The objective of the DAU and behavioural conduct

3.4.1 Aurizon Network's proposal

Clause 2.2 of Part 2 of Aurizon Network's 2014 DAU covers the intent of the undertaking. With regard to behavioural conduct, the intent of the 2014 DAU is stated to be to:

- 'ensure Aurizon Network acts in a manner that is consistent with the unfair differentiation obligations under sections 100(2) to (4) and section 168C of the Act' (cl. 2.2(e))
- 'ensure Aurizon Network applies the provisions of this Undertaking consistently to all Access Seekers, Access Holders, Train Operators, Access Applications and negotiations for Access, except where this Undertaking provides otherwise' (cl. 2.2(f)).

By contrast, Part 2 of the 2010 AU included a more detailed statement of obligations regarding behavioural conduct that related to non-discriminatory treatment (see clause 2.2 of that undertaking). The intent of the 2010 AU was outlined separately in clause 2.3 of the 2010 AU.

Essentially, Part 2 of the 2010 AU addresses intent and behavioural conduct in separate clauses and relates behavioural conduct to the principle of non-discrimination. In contrast, Aurizon Network's 2014 DAU included behavioural conduct as part of the intent of the undertaking and related this to the concept of unfair differentiation. Further, the concept of non-discrimination is introduced in clause 3.2 within Part 3 (Ring-fencing) of the 2014 DAU.

3.4.2 Summary of the initial draft decision

We considered all stakeholder submissions in reaching our initial draft decision.³¹ Our initial draft decision was to not approve the relevant clauses of the 2014 DAU. We proposed the following amendments:

- clause 2.2—refer to the 'objective' rather than 'intent' of the undertaking
- clause 2.2(a)—facilitate the 'non-discriminatory' negotiation of access agreements, rather than just the negotiation of access agreements
- clause 2.2(f)—include the word 'expressly' to emphasise the need for the undertaking to expressly state when consistency in Aurizon Network's application of the provisions of the undertaking is not needed

³¹ QCA, 2015(a): 26–27.

- clause 2.2—to include the general principles of non-discrimination and independence (moved from clause 3.2 of the 2014 DAU) and additional matters
- the introduction of a new clause (cl. 2.3) to provide an interpretations clause for identifying how the undertaking should be interpreted
- the introduction of a new clause (cl. 2.4) to effectively re-instate the 2010 AU non-discriminatory treatment clause.

Prior to setting out our decision, we first briefly consider the provisions included in the QCA Act with respect to the behaviour expected of access providers in respect of their treatment of access seekers and access holders. It is useful to do so, because the 2010 AU, the 2014 DAU, our initial draft decision and stakeholder submissions use differing language and concepts when describing what constitutes appropriate and inappropriate conduct—which creates complexity. The following discussion of the provisions of the Act provides the underlying context for our consolidated draft decision with respect to a number of the issues raised by Aurizon Network and stakeholders.

3.4.3 The QCA Act, behavioural conduct and unfair differentiation

The QCA Act sets out a regime governing non-discrimination by Aurizon Network, which is characterised by the concept of 'unfair differentiation'. That concept is unique to the QCA Act and is not defined, so is a matter of statutory interpretation. The legislative scheme relating to the application of the concept of 'unfair differentiation' in the context of a draft access undertaking can be broadly summarised as follows:

- Aurizon Network is subject to an unfair differentiation obligation which has a materiality threshold.
- The QCA may authorise differential treatment under an approved access undertaking, provided such treatment is consistent with pricing principles and appropriate having regard to the factors set out in section 138(2) of the QCA Act.
- Where differential treatment occurs in an access agreement or access determination, the differential treatment must not have the purpose of preventing or hindering access.
- The concept of preventing or hindering access is assessed holistically across all terms of an arrangement with a focus on particular features, but has a strict application without a materiality threshold.
- In relation to preventing or hindering access, while the concept of purpose is subjective, it can be inferred objectively from Aurizon Network's conduct.

Section 168C(1) of the QCA Act requires that in providing access, an access provider must not unfairly differentiate between users of the service in a way that has a material adverse effect on the ability of one or more of the users to compete with other users.

Section 168C(2) of the Act limits this prohibition, as it provides that an access provider may in fact engage in the conduct described above, where that conduct is expressly permitted by an undertaking, access code, access agreement or access determination. In practice, to be expressly permitted by an undertaking, the 'unfair differentiation' would need to have been expressly approved by us through our decision to approve the undertaking. Given this, we would have reached a view as to whether such differentiation was appropriate in light of the statutory factors set out in section 138(2) of the Act. In any event, any such conduct may not be inconsistent with the pricing principles.

In relation to access agreements and access determinations, a further qualification applies—section 168C(3) provides that subsection 168C(2) does not authorise an access provider to do anything that would prevent or hinder a user's access to the declared service (in contravention of ss. 104 or 125 of the QCA Act).

Against this background, section 137(1A) of the QCA Act requires that, where the owner or operator is a related access provider, an access undertaking must contain provisions for identifying, preventing and remedying conduct of the access provider that unfairly differentiates 'in a material way' between access seekers or users, or results in the access provider recovering through the price of access costs that are not reasonably attributable to the provision of the service. The QCA Act, however, does not prescribe what types of provisions are necessary and appropriate in order to achieve these outcomes.

'Material way' is defined in subsection 137(3) as "a way that has a 'material adverse effect' on the ability of one or more access seekers or users to compete with other access seekers or users." While the QCA Act does not prescribe a materiality threshold that has to be exceeded, or how a 'material adverse effect' should be assessed, some assistance is provided by section 14A of the *Acts Interpretation Act 1954* (Qld), which provides that 'in the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.' Schedule 1 of the *Acts Interpretation Act* provides that 'purpose' includes 'policy objective'. The purpose and policy objective of the QCA Act, in particular for Part 5 of the QCA Act is set out under section 69E (this is analysed above in Section 2.5 of this decision).

Sections 104 and 125 of the QCA Act, which prohibit conduct with the purpose of preventing and hindering a user's access rights under access agreements and access determinations, are broad provisions. Such conduct is engaged in where the terms, taken as a whole, on which an access provider provides or proposes to provide access to the declared service, are less favourable than the terms on which the access provider provides itself or a related body corporate with access. The QCA Act does not prescribe precisely what would constitute more favourable terms.

However, subsection (3) of each of sections 104 and 125 provides that in making this assessment, particular regard should be had to the fees, tariffs and other payments to be made for access, as well as the nature and quality of the declared service provided or proposed to be provided. There is no materiality threshold that has to be exceeded prior to different terms being considered 'more favourable'. Accordingly, even if terms or proposed terms of access are only marginally 'more favourable' (taken as a whole) to the access provider or related body corporate than to another user, this will be sufficient to constitute a breach of section 104 or 125. Sections 105 and 126 of the Act give us the power to compel the production of information about arrangements under which access is provided, in order to find out whether an access provider is complying with section 104 and 125.

When undertaking such an assessment, subsection (4) of each of sections 104 and 125 provides that a relevant party may be taken to have engaged in conduct for the purpose of preventing or hindering a user's access to the declared service even if, after all the evidence has been considered, the existence of the purpose is ascertainable only by inference from the conduct of the relevant party. In other words, while Aurizon Network's purpose in engaging in particular conduct is subjective, the prohibited purpose can be inferred objectively from Aurizon Network's conduct.

Finally, section 153 of the QCA Act grants the court powers to make orders in relation to a person who has engaged or is proposing to engage in conduct contravening sections 100(2),

104, 125 and 168C of the QCA Act. The court can impose its own remedies, including injunctions and compensation orders, if the court is satisfied that the conduct contravenes the QCA Act.

Overall, the QCA Act seeks to provide a framework that does not preclude an access provider differentiating between different access seekers and users but seeks to ensure that any differentiation that is 'unfair' does not have detrimental consequences for competition. The QCA Act is not prescriptive in terms of providing strict definitions, tests or materiality thresholds to be applied. As such, the QCA Act allows a flexible, broad approach to assessing the compliance of an access provider with the sections of the QCA Act identified above.

Further, whilst section 137(1A) of the QCA Act requires an access undertaking to include provisions to identify, prevent and remedy certain behavioural conduct, it does not prescribe what these provisions should be. It is for us to ensure that this requirement is satisfied as part of our assessment of a DAU. The interpretation that must be given to each of these sections is the one that best achieves the purpose, including the policy objective of the QCA Act.

The subsequent sections of this chapter describe how we have had regard to both the framework and language of the QCA Act in coming to decision regarding the objective of the 2014 DAU and behavioural conduct. These sections deal with:

- location of the general principles of non-discrimination and independence
- non-discriminatory treatment and unfair differentiation
- related parties of Aurizon Network
- intent versus objective
- interpretation.

In a number of instances, the amended clauses we have proposed in our CDD amended DAU span a number of these issues and are discussed in each section.

3.4.4 Location of the general principles of non-discrimination and independence

The 2014 DAU includes a clause setting out general principles of non-discrimination and independence in Part 3 (Ring-fencing) of the 2014 DAU (cl. 3.2). In our initial draft decision, we considered that these general principles should be moved into Part 2 (Intent and Scope) of the 2014 DAU and modified. We considered this indicated to stakeholders the importance of the non-discrimination principles and that these principles act to underpin the operations of the entire undertaking, not just the ring-fencing provisions. We proposed incorporating the modified principles across the intent clause and the new non-discrimination clause we proposed (cls. 2.2 and 2.4 of the IDD amended DAU, respectively).

The table below summarises how the general principles of non-discrimination and independence included in Aurizon Network's 2014 DAU at clause 3.2 were both modified and incorporated within clauses 2.2 and 2.4 of the IDD amended DAU.

Table 2 Approach to clause 3.2 of Aurizon Network's 2014 DAU

<i>Clause 3.2 of Aurizon Network's 2014 DAU</i>	<i>Clause proposed in the initial draft decision</i>
<p>Clause 3.2(a):</p> <p>Aurizon Network will not:</p> <p>(i) engage in conduct for the purpose of preventing or hindering an Access Seeker's or Access Holder's Access;</p> <p>(ii) unfairly differentiate between Access Seekers in a way that has a material adverse effect on the ability of one or more of the Access Seekers to compete with other Access Seekers; or</p> <p>(iii) provide access to:</p> <p>(A) a Related Operator; or</p> <p>(B) a Related Party in respect of a port owned or operated by the Related Party where the port is connected to the Rail Infrastructure,</p> <p>on more favourable terms than the terms on which Aurizon Network provides Access to competitors of the Related Operator or Related Party, as applicable (having regard to all terms on, and circumstances in which, Access is provided including the Access Charges and differences in the Access Rights provided).</p>	<p>Clause 2.2(g):</p> <p>Ensure Aurizon Network does not, and procures that its Related Parties do not:</p> <p>(i) engage in conduct for the purposes of preventing or hindering an Access Seeker's or Access Holder's Access (without derogating in any way Aurizon Network's obligations under sections 104 and 125 of the Act); or</p> <p>(ii) provide Access to:</p> <p>(A) a Related Operator; or</p> <p>(B) a Related competitor; or</p> <p>(C) a Third Party that has commercial arrangements with a Related competitor,</p> <p>on terms more favourable to the Related Operator, Related Competitor or Third Party than the terms on which Aurizon Network provides Access to competitors of Related Operators or Related Competitors, as applicable (having regard to all of the terms on, and circumstances in which, Access is provided including the Access Charges and differences in the Access Rights provided or utilised).</p>
<p>Clause 3.2(b):</p> <p>Aurizon Network will not discriminate in the granting of Access Rights to an Expansion based on the source of funding for the expansion.</p>	<p>Clause 2.4(b):</p> <p>Aurizon Network must not unfairly differentiate between Access Seekers in negotiations for the provision of Access or between Access Holders in providing Access, including in relation to:</p> <p>(iv) any decision relating to the source of funding for an Expansion</p>
<p>Clause 3.2(c):</p> <p>Aurizon Network will ensure that:</p> <p>(i) all transactions between Aurizon Network and Related Operators in relation to Access are conducted on an arm's-length basis; and</p> <p>(ii) all Access Seekers and Train Operators, irrespective of whether they are a Related</p>	<p>Clause 2.2(h):</p> <p>Ensure that:</p> <p>(i) all transactions between Aurizon Network and Related Operators in relation to Access are conducted on an arms-length basis;</p> <p>(ii) all Access Seekers, irrespective of whether they are an Aurizon Party or a Third</p>

<i>Clause 3.2 of Aurizon Network's 2014 DAU</i>	<i>Clause proposed in the initial draft decision</i>
<p>Operator or a Third Party are provided with a consistent level of service with respect to Access and:</p> <p>(A) in respect of Train Operators, are given an equal opportunity to operate Train Services in accordance with corresponding Access Rights; and</p> <p>(B) in respect of Access Seekers, are given as equal opportunity to obtain Access Rights.</p>	<p>Party:</p> <p>(A) are provided with a consistent level of service; and</p> <p>(B) given an equal opportunity to obtain Access Rights,</p> <p>(C) subject to the express provisions of the Act and this Undertaking</p>
<p>Clause 3.2(d):</p> <p>Aurizon Network will ensure that, subject to the express provisions of the Act and the Undertaking, all decisions made under this Undertaking are consistent between all Access Seekers, Access Holders and/or Train Operators in the same circumstances.</p>	<p>Clause 2.2(h):</p> <p>Ensure that:</p> <p>(iii) all decisions made under this Undertaking are made in a manner that is consistent between all Access Seekers and/or Access Holders in the same circumstances.</p>
<p>Clause 3.2(e):</p> <p>Aurizon Network will not engage in:</p> <p>(i) anti-competitive cost shifting;</p> <p>(ii) anti-competitive cross-subsidies; or</p> <p>(iii) anti-competitive price or margin squeezing.</p>	<p>Clause 2.2(i):</p> <p>Ensure that Aurizon Network does not engage in any activity or conduct (or agree to engage in such activity or conduct), either independently or with Related Operators, which has the purpose of, results in or creates, or is likely to result in or create:</p> <p>(i) cost shifting;</p> <p>(ii) cross-subsidies;</p> <p>(iii) price or margin squeezing; or</p> <p>(iv) a substantial lessening of competition or a situation that is otherwise anti-competitive.</p>

Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network had no concerns with moving its proposed general principles of non-discrimination and independence from Part 3 of the 2014 DAU to Part 2.³² Aurizon Network, however, did object to a number of the proposed amendments made. These are considered in more detail in Section 3.4.5 below.

Other stakeholders

Stakeholders expressed support for moving these principles into Part 2 of the 2014 DAU, although there were comments about the appropriateness of including these principles within clause 2.2.³³

The QRC expressed concern that including these principles in clause 2.2 would not achieve the intent of the drafting as they would be presented as 'objectives' rather than obligations on Aurizon Network. It proposed simplifying clause 2.2(g) of our IDD amended DAU by removing the more detailed principles and including these as obligations under clause 2.4 relating to non-discriminatory treatment.³⁴ Similarly, Anglo American considered that clause 2.2 (g),(h) and (i) should all be replicated in the substantive obligations in UT4, as it considered an objects clause can only be used to assist in interpretation of substantial clauses and these are important provisions which require enforceability.³⁵

Consolidated draft decision

Having regard to section 138(2) and stakeholder submissions, we did not consider it appropriate to approve that the content of clause 3.2 of the 2014 DAU be included in Part 3 of the 2014 DAU.

In coming to our consolidated draft decision we focused on the content of clause 3.2, rather than the clause's title. The title of clause 3.2 of Aurizon Network's 2014 DAU refers to the general principles of non-discrimination, while the content and language adopted within the clause does not, in the majority of cases, refer to discrimination or non-discrimination. Rather, it seeks to adopt, where practicable, the relevant principles contained in the QCA Act. For instance, it places emphasis on the concepts of unfair differentiation, the prevention of the hindering of access and the notion of more favourable terms.

We considered that the content of this clause should not be contained in Part 3 (Ring-fencing) of the 2014 DAU. We were of the view that it should apply to the entire scope of the undertaking.

These are important principles, which define the behaviour required of Aurizon Network in its treatment of access seekers, users and related parties, and which we considered should underpin all actions and decisions of Aurizon Network made in accordance with the undertaking. Keeping the clause in Part 3 implies that its application is limited to that part, instead of extending to the entire undertaking.

We were of the view that access holders, access seekers and train operators should be able to expect the underlying intent is that these principles are applied in a comprehensive manner

³² Aurizon Network, 2014 DAU, sub. 83: 47–48.

³³ QRC, 2014 DAU, sub. 84: 8–9; Vale, 2014 DAU, sub. 79: 2.

³⁴ QRC, 2014 DAU, sub. 84: 9.

³⁵ Anglo American, 2014 DAU, sub. 95: 8.

across the scope of the 2014 DAU and not just as a ring-fencing measure. In our view this approach took into account the section 138(2) factors overall. In particular, it provides access holders, access seekers and train operators with clarity and assurance of the behavioural conduct required in all dealings relating to the 2014 DAU, which is in their interests (s. 138(2)(e) and (h)), without inappropriately detracting from Aurizon Network's legitimate business interests (s. 138(2)(b)).

Indeed, in our view, a lack of clarity and assurance about the application of the principles contained in clause 3.2 of the 2014 DAU does not align with either the object of the access regime or the public interest (s. 138(2)(a) and (d)). For example, a lack of such clarity and assurance may be detrimental to promoting the efficient operation and investment in the CQCN if it encourages users to hold additional access rights simply to mitigate possible behavioural conduct that they perceive to be unfavourable, but for which there is no clear process to challenge. Entry into upstream and downstream markets may also be discouraged if potential entrants are not given clear expectations regarding what is considered appropriate behavioural conduct on Aurizon Network's behalf.

Given this, we maintained our view that moving the clause 3.2 to Part 2 of the 2014 DAU would indicate to all stakeholders that the provisions within that clause act to underpin the operations of the entire undertaking, not just the ring-fencing provisions. We did, however, agree with stakeholder comments that it is more appropriate for parts of the content of clause 3.2 of the 2014 DAU to be included in clause 2.4 (a substantive clause of the DAU), rather than the objective clause (clause 2.2) as proposed in our initial draft decision. We discuss this issue further in Section 3.4.5 below, as part of our discussion of Aurizon Network's obligations regarding the treatment of access seekers, access holders and related parties.

Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed with relocating the general principles of non-discrimination and independence (cl. 3.2 of the 2014 DAU) into Part 2 of the DAU, although it did propose amendments to the content of these principles (these are discussed below).³⁶ Anglo American also supported relocation of these principles into Part 2 of the undertaking.³⁷

QCA analysis and final decision

Our final decision is to refuse to approve the location of the general principles of non-discrimination and independence proposed by Aurizon Network in its 2014 DAU.

Stakeholders did not provide any new information or arguments on this issue in response to our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

³⁶ Aurizon Network, 2014 DAU, sub. 125: 31.

³⁷ Anglo American, 2014 DAU, sub. 127: 8.

Final decision 3.2

- (1) After considering Aurizon Network's proposed location of the general principles of non-discrimination and independence in Part 3 of the 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to move clause 3.2 to become clause 2.3 of the undertaking, and amend clause 2.3 in the manner set out in our final amended DAU.**
We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.4.5 Non-discriminatory treatment and unfair differentiation

In our initial draft decision, we proposed a number of amendments to the Intent and Scope part of the undertaking that would act to underpin the fair negotiation and provision of access via the 2014 DAU in a non-discriminatory manner. These comprised proposals for:

- clause 2.2(a) of the 2014 DAU to be amended to refer to 'non-discriminatory' negotiation of access agreements as follows:

<i>2014 DAU clause</i>	<i>Initial draft decision proposal</i>
Clause 2.2: The intent of this Undertaking is to: (a) facilitate the negotiation of access agreements by Aurizon Network and Access Seekers.	Clause 2.2: The objective of this Undertaking is, without limitation, to: (a) facilitate the non-discriminatory negotiation of access agreements by Aurizon Network and Access Seekers

- clause 2.2(f) of the 2014 DAU to be amended as follows to provide that the provisions of the undertaking be applied consistently, except where the undertaking 'expressly' provides otherwise:

<i>2014 DAU clause</i>	<i>Initial draft decision proposal</i>
Clause 2.2: The intent of this Undertaking is to: (f) ensure Aurizon Network applies the provisions of this Undertaking to all Access Seekers, Access Holders, Train Operators, Access Applications and negotiations for Access, except where this Undertaking provides otherwise.	Clause 2.2: The objective of this Undertaking is, without limitation, to: (f) ensure Aurizon Network applies the provisions of this Undertaking consistently to all Access Seekers, Access Holders, Train Operators, Access Applications and negotiations for Access, except where this Undertaking expressly provides otherwise.

- the inclusion, as follows, of clause 2.4 into the 2014 DAU which is similar to the statement of obligations relating to non-discriminatory treatment included in the 2010 AU:

<i>2010 Access Undertaking</i>	<i>Initial draft decision proposal</i>
<p>Clause 2.2: Non-discriminatory treatment</p>	<p>Clause 2.4: Non-discriminatory treatment</p>
<p>(a) This Undertaking will be consistently applied to all Access Seekers, Access Applications and negotiations for Access. QR Network will not unfairly differentiate between Access Seekers in negotiating with Access Seekers for the provision of Access or between Access Holders in providing Access, including in relation to:</p> <p>(i) any decision relating to whether QR Network will undertake an Expansion;</p> <p>(ii) assessing, allocating and managing Capacity; and</p> <p>(iii) providing scheduling and Train Control Services in accordance with the Network Management Principles,</p> <p>except where there is an express provision to the contrary in:</p> <p>(iv) the Undertaking or the Act; or</p> <p>(v) an Access Agreement and the relevant conduct would not contravene Clause 3.2(a).</p>	<p>(a) This Undertaking must be consistently applied to all Access Seekers, Access Applications and negotiations for Access.</p> <p>(b) Aurizon Network must not unfairly differentiate between Access Seekers in negotiations for the provision of Access or between Access Holders in providing Access, including in relation to:</p> <p>(i) any decision relating to whether Aurizon Network will undertake an Expansion;</p> <p>(ii) assessing, allocating and managing Capacity;</p> <p>(iii) providing scheduling and Train Control Services in accordance with the Network Management Principles;</p> <p>(iv) any decision relating to the source of funding for an Expansion; and</p> <p>(v) assessing and selecting Access Seekers,</p> <p>except where there is an express provision to the contrary in:</p> <p>(iv) the Undertaking or the Act; or</p> <p>(v) an Access Agreement and the relevant conduct would not contravene clause 3.1(g).</p>
	<p>(c) Aurizon Network must:</p> <p>(i) not engage in conduct for the purpose of preventing or hindering an Access Seeker's access to the declared service within the meaning of sections 125(2) to (7) of the Act; and</p> <p>(ii) take all reasonable steps to ensure that the technical and operational quality of the services that Aurizon Network supplies to the Access Seekers and Access Holders, whether under an Access Agreement or otherwise, is no less favourable than the quality of equivalent services that Aurizon Network supplies to Related Operators.</p>
<p>(b) If an Access Seeker or Access Holder considers QR Network has failed to comply with Clause 2.2(a) they may lodge a written complaint with QR Network.</p>	<p>(d) If an Access Seeker or Access Holder considers that Aurizon Network has failed to comply with clause 2.4(a) or clause 2.4(b), it may lodge a written complaint with Aurizon Network and must provide a copy of that complaint to the QCA.</p>
<p>(c) QR Network will:</p> <p>(i) advise the QCA, as soon as practicable, of any complaints it receives pursuant to Clause 2.2(b);</p>	<p>(e) Aurizon Network must:</p> <p>(i) advise the QCA, as soon as practicable, of any complaints it receives under clause 2.4(d);</p>

<i>2010 Access Undertaking</i>	<i>Initial draft decision proposal</i>
<p>(ii) investigate complaints received pursuant to clause 2.2(b); and</p> <p>(iii) advise the complainant and the QCA in writing of the outcome of that investigation and QR Network's proposed response, if any, and use reasonable endeavours to do so within twenty-eight (28) days after receiving such complaint.</p>	<p>(ii) investigate complaints received under clause 2.4(d); and</p> <p>(iii) within twenty-eight (28) days after receiving such a complaint, advise the complainant and the QCA in writing of the outcome of that investigation and Aurizon Network's proposed response, if any.</p>
<p>(d) If the complainant is not satisfied with the outcome of QR Network's investigation, the complainant can apply to the QCA seeking an audit of the conduct that is the subject of the complaint in relation to QR Network's compliance with Clause 2.2(a).</p>	<p>(f) If the complainant is not satisfied with the outcome of Aurizon Network's investigation, the complainant may apply to the QCA requesting an audit of the conduct that is the subject of the complaint under clause 2.4(d).</p>
<p>(e) If a complainant applies to the QCA in accordance with Clause 2.2(d):</p> <p>(i) the QCA may request QR Network to have an audit conducted in accordance with Clause 10.3 in respect of QR Network's compliance with Clause 2.2(a) as it relates to the relevant complaint, if the QCA reasonably believes that such an audit is necessary; and</p> <p>(ii) if the QCA makes such a request, the audit will be conducted in accordance with Clause 10.3.</p>	<p>(g) If a complainant applies to the QCA in accordance with clause 2.4(f):</p> <p>(i) the QCA may request Aurizon Network to conduct an audit in accordance with clause 10.3 in respect of Aurizon Network's compliance with clause 2.4(a) and 2.4(b) as it relates to the relevant complaint; and</p> <p>(ii) if the QCA makes such a request, clause 10.8 applies.</p>

Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network submitted that we had introduced objects that are not consistent with the QCA Act, and that we were therefore acting beyond power.³⁸

Aurizon Network said that:

*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.*³⁹

Aurizon Network considered usage of the term 'non-discriminatory' unacceptable, as it is too broad and could capture differences in treatment of two access seekers which are not unfair, are objectively justified (as a result of different circumstances), or are insufficiently material to have an impact on competition between access seekers or users.

It considered any statement regarding non-discriminatory treatment should be consistent with the language used in sections 100 and 137(1A) of the QCA Act and focus on preventing unfair differentiation that has a material impact on competition and is not reasonably justified due to the different circumstances applicable to the relevant access seeker.⁴⁰ To do otherwise would mean that Aurizon Network would be exposed to a standard and liability that is not required by the Act.⁴¹ In a similar vein, it also opposed the inclusion of an objective for Aurizon Network not to engage in conduct which could result in a substantial lessening of competition or a situation that is otherwise anti-competitive (cl. 2.2(i)(iv) of our IDD amended DAU), as it considered the regulation of general anti-competitive conduct is dealt with under the *Competition and Consumer Act 2010* (Cth).⁴²

To this effect, Aurizon Network considered clauses 2.2(e) and (f) of the 2014 DAU already deal adequately with the issue of unfair differentiation by providing objectives of the undertaking for ensuring that Aurizon Network complies with its obligations under sections 100(2)–(4) and 168C of the QCA Act and that Aurizon Network applies the provisions of the undertaking consistently.⁴³ More generally, Aurizon Network considered that, rather than setting out each way that Aurizon Network could discriminate, it would be more efficient and appropriate to include a single formulation to capture the essence of section 137(1A) of the QCA Act.⁴⁴

Similarly, Aurizon Network also opposed the non-discriminatory treatment clause included as part of our initial draft decision (cl. 2.4 of the IDD amended DAU). It considered the restriction on unfair differentiation in this clause should be limited to unfair differentiation that has a material impact on competition between users or access seekers, and should 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 also queried whether it was necessary to include particular sub-clauses under clause 2.4 as it considered these were already addressed elsewhere in the clause.⁴⁵

³⁸ Aurizon Network, 2014 DAU, sub. 83: 37.

³⁹ Aurizon Network, 2014 DAU, sub. 83: 44.

⁴⁰ Aurizon Network, 2014 DAU, sub. 83: 44–46.

⁴¹ Aurizon Network, 2014 DAU, sub. 83: 27.

⁴² Aurizon Network, 2014 DAU, sub. 83: 48.

⁴³ Aurizon Network, 2014 DAU, sub. 83: 45–46.

⁴⁴ Aurizon Network, 2014 DAU, sub. 83: 48.

⁴⁵ Aurizon Network, 2014 DAU, sub. 83: 46–47.

Aurizon Network had no objection to inclusion of the word 'expressly' in clause 2.2(f).⁴⁶

Other stakeholders

The QRC, Asciano, Vale and Anglo American expressed support for the initial draft decision in respect of the proposed changes to provisions related to non-discrimination.⁴⁷ Asciano considered the initial draft decision will limit the potential of Aurizon Network to engage in discriminatory behaviour and inappropriate use of market power.⁴⁸

The QRC also said that clause 2.4(a) of our IDD amended DAU, which provides that the undertaking must be consistently applied to all access seekers, access applications and negotiations for access, should also extend to access holders,⁴⁹ while Anglo American said it should be extended to all access holders and train operators.⁵⁰ It considered it would be appropriate to make this obligation subject to either the QCA Act, the remainder of the undertaking or the relevant access agreement expressly providing for inconsistent treatment.⁵¹

Aurizon Operations considered that breach reporting and non-compliance for differentiation between access seekers should be limited to decisions or conduct which is contrary to the requirements of the QCA Act. It noted the difference in requirements between clause 2.4(b) of the IDD amended DAU and section 100(2) of the QCA Act and said that, in a similar context in the telecommunications access regime where there is an obligation of non-discrimination, the ACCC concluded that it should only concern itself with conduct which is inconsistent with the objects of the legislation. Aurizon Operations considered the problem with expanding the statutory obligation to include any differentiation is that decisions in favour of a third party operator are unreported. It said a practical consequence is that there will be an increased level of risk aversion in dealings with a related operator that is greater than dealings with third party operators.⁵²

Consolidated draft decision

Overall, we did not consider it appropriate to approve the non-discriminatory treatment provisions in the 2014 DAU, having regard to section 138(2) and stakeholder submissions.

We considered it was important the 2014 DAU set out clear statements of Aurizon Network's obligations regarding non-discriminatory treatment. While we noted the 2014 DAU includes references to Aurizon Network's statutory obligations regarding 'unfair differentiation' (cl. 2.2(g) of the 2014 DAU), we did not alter our view that the 2014 DAU does not provide detailed enough statements on Aurizon Network's obligations with respect to its treatment of access seekers, users and related parties.

We were of the view that particular forms of behaviour, regardless of intent, could have consequences, whether desirable or undesirable, for promoting the efficient operation of, use of and investment in the CQCN and the effect this has on promoting competition in upstream and downstream markets.

⁴⁶ Aurizon Network, 2014 DAU, sub. 83: 46.

⁴⁷ QRC, 2014 DAU, sub. 84: 8; Asciano, 2014 DAU, sub. 76: 10–11; Vale, 2014 DAU, sub. 79: 2; Anglo American, 2014 DAU, sub. 95: 3.

⁴⁸ Asciano, 2014 DAU, sub. 76: 10.

⁴⁹ QRC, 2014 DAU, sub. 84: 9.

⁵⁰ Anglo American, 2014 DAU, sub. 95: 8.

⁵¹ Anglo American, 2014 DAU, sub. 95: 8.

⁵² Aurizon Operations, 2014 DAU, sub. 93: 26–27.

For instance, if Aurizon Network were to favour consistently, without a justifiable reason, related operator train services relative to third party train services, this may lead to train paths being allocated inefficiently and result in the inefficient operation of and investment in the CQCN. Further, such activity could deter train operators from entering the market if there was a perception of bias in the provision of train paths. This would not be consistent with the object of the regime (s. 138(2)(a) of the QCA Act), nor would the potential effect on competition be consistent with the public interest in having competition in markets (s. 138(2)(d)). Indeed any bias (perceived or otherwise) would not be in the interests of access seekers or access holders (s. 138(2)(e) and (h) of the QCA Act) and could affect competition within related markets.

In certain circumstances, Aurizon Network may favour a particular train operator, whether this is a related or third party, for legitimate objective reasons, such as to ensure that train paths are fully used while aligning with contractual entitlements. Such a scenario can promote the efficient operation of, use of and investment in the CQCN through the allocation of train paths in an efficient manner, and enhance the competitiveness of Queensland's coal sector. This aligns with the object of the access regime, the public interest and the interests of access seekers and access holders. It is also aligned with Aurizon Network's legitimate business interests (section 138(2)(b) of the QCA Act).

In these scenarios, Aurizon Network differentiates between its customer base but with markedly different outcomes with respect to the appropriateness of such differentiation, having regard to the factors listed under section 138(2) of the QCA Act. In our view, it is because of this potential for these divergent outcomes that there needs to be more detailed statements in the 2014 DAU regarding Aurizon Network's obligations with respect to its ability to differentiate between its customers.

In light of this view, we proposed in our initial draft decision a number of amendments to clause 2.2 of the 2014 DAU, as well as the insertion of a new clause (cl. 2.4), to provide a more detailed set of arrangements regarding Aurizon Network's obligations with respect to its treatment of access seekers, users and related parties.

We noted Aurizon Network and other stakeholders highlighted several issues with these amendments, including the creation of potential uncertainty about, and inconsistencies with, the coverage and scope of Aurizon Network's obligations regarding differential treatment. Having regard to stakeholder submissions, we recognised that the proposed amendments set out in our IDD amended DAU would introduce a level of complexity to these arrangements that may be counterproductive. For these arrangements to be more effective, we considered they should clearly define Aurizon Network's obligations with respect to its treatment of access seekers, users and related parties, so that all parties have a clear expectation and understanding, including for the benefit of Aurizon Network, of the circumstances in which Aurizon Network may or may not differentiate between its customers.

With this in mind, we revised our proposed amendments, to establish a clearer and simpler set of arrangements in the undertaking for governing Aurizon Network's obligations with respect to its treatment of access seekers, users and related parties. Specifically, we revised these amendments to:

- provide a clearer separation between objectives of the undertaking and Aurizon Network's behavioural obligations
- provide greater consistency with the unfair differentiation concept used in the QCA Act
- clarify the processes related to the handling and auditing of complaints about Aurizon Network's compliance with its obligations regarding differentiation between its customers.

In many instances, we revised particular provisions in our proposed amendments for more than one of these reasons. However, we considered it appropriate to discuss these changes separately to better explain our rationale for revising our IDD proposed amendments. For the avoidance of doubt, stakeholders should refer to the drafting in our CDD amended DAU to see the way in which we considered it appropriate for the 2014 DAU to be amended in respect of these clauses.

Clear separation between objectives and behavioural obligations

As discussed above, we did not consider it appropriate for the general principles of non-discrimination and independence to be located in Part 3 of the 2014 DAU, and instead proposed they be located in the Intent and Scope part of the undertaking so that they underpin the operations of the entire undertaking, not just the ring-fencing provisions. We incorporated these principles in both clause 2.2 (the objectives of the undertaking) and clause 2.4 (non-discriminatory treatment) of our IDD amended DAU.

We noted stakeholders' comments querying whether particular principles we included in clause 2.2 should be inserted into a substantive clause of the undertaking, so that these may be enforced as an obligation of Aurizon Network, rather than being applied as objectives of the undertaking.

We considered Aurizon Network's ability to differentiate between access seekers, users and related parties is an important matter that should be reflected in both the overarching objectives of the undertaking, to guide the interpretation of the undertaking, and clause 2.4, to establish detailed obligations that Aurizon Network must comply with.

However, we acknowledged that clauses 2.2 and 2.4 of our IDD amended DAU would introduce a degree of complexity and duplication across these clauses which would not be beneficial. In particular, we recognised that we proposed inserting detailed provisions within the objectives clause which could be better characterised as behavioural obligations on Aurizon Network, rather than as objectives guiding the interpretation of the undertaking. We were of the view that it is in the interests of all stakeholders to remove this duplication by providing a clearer separation between the objectives of the undertaking and Aurizon Network's behavioural obligations.

Accordingly, we revised our amendments to clauses 2.2 and 2.4 with the intent to provide a clearer separation between the objectives of the undertaking and the behavioural obligations of Aurizon Network. We considered refocusing clause 2.2 in this way would provide a more effective objectives clause, as there would be a simpler and clearer set of objectives to guide the interpretation of the undertaking. It would also reduce duplication and complexity by locating Aurizon Network's behavioural obligations in a single clause. This would aid clarity and enable parties to have a clear understanding of Aurizon Network's obligations when implementing the provisions of the 2014 DAU. The table below summarises how clauses 2.2 and 2.4 have been revised in our CDD amended DAU to more clearly separate between objectives and behavioural obligations.

Table 3 Summary of revisions to clauses 2.2 and 2.4 in the IDD amended DAU to clearly separate objectives and behavioural obligations

<i>Clause</i>	<i>Rationale</i>
<p>Insertion of the following new objectives:</p> <ul style="list-style-type: none"> • Clause 2.2(a) of our CDD amended DAU—to ensure the service taken to be declared under section 250(1)(a) of the Act is provided in a manner that does not unfairly differentiate in a material way (as that term is defined in section 137(3) of the Act) • Clause 2.2(b) of our CDD amended DAU—to prevent Aurizon Network recovering, through the price of access to the service taken to be declared under section 250(1)(a) of the Act, any costs that are not reasonably attributable to the provision of that service. 	<p>These are broad, overarching statements that we considered will appropriately set out the essence of the unfair differentiation concept established in the QCA Act. These statements reflect the requirements of access undertakings for a service owned or operated by a related access provider, such as Aurizon Network (as set out under section 137(1A) of the QCA Act). As such, we considered it appropriate for these principles to be used as an objective to aid interpretation of the undertaking.</p>
<p>Removal of the objectives listed as clauses 2.2(e), (f), (g), (h) and (i) of our IDD amended DAU.</p>	<p>We considered that each of these objectives are better characterised as a behavioural obligation of Aurizon Network and have incorporated these in clause 2.4 of our CDD amended DAU.</p> <p>These clauses were also amended to provide greater consistency with the unfair differentiation concept established in the QCA Act, as discussed below.</p>
<p>Removal of cl. 2.2(j) of our IDD amended DAU</p>	<p>This objective is to achieve an appropriate balance between particular interests, which are broadly representative of several of the factors to which we must have regard when deciding whether it is appropriate to approve a DAU.</p> <p>We understood the intent for the inclusion of this objective. However, in the interests of promoting a clearer and simpler objectives clause, we considered this objective should not be included. We considered the terms of an approved undertaking, as a whole, will represent an appropriate balance between these interests and a further statement of this as an objective of the undertaking is unnecessary.</p>

Consistency with the 'unfair differentiation' concept in the QCA Act

We noted Aurizon Network's comments that provisions related to 'non-discriminatory treatment', as proposed in our initial draft decision, should reflect the concept of 'unfair differentiation' that is expressed in the QCA Act. Specifically, Aurizon Network has objected to:

- the term 'non-discriminatory' being included as part of one of the objectives of the undertaking (i.e. facilitate the non-discriminatory negotiation of access agreements by Aurizon Network and access seekers) (cl. 2.2(a) of the IDD amended DAU)
- the differences in how 'unfair differentiation' is expressed in clauses 2.2 and 2.4 of the IDD amended DAU compared to how it is expressed in the QCA Act.

In using the term 'non-discriminatory' in our initial draft decision, our intent was not to prevent all forms of discrimination from occurring. The QCA Act does not require an access provider to provide access on the same terms for each access agreement (s. 102 of the QCA Act) and, as noted by Aurizon Network, the concept of unfair differentiation established in the QCA Act

expressly permits differentiation between access seekers (and users) in certain circumstances. We also noted that price discrimination (when it aids efficiency) is also reflected in the pricing principles set out under section 168A of the QCA Act.⁵³ 'Discrimination' is an economic term which is well-established and which we considered appropriate to use in the context of a broad objective of the undertaking, such as clause 2.2(a).

However, we acknowledged the view expressed by Aurizon Network about the perceived effect the use of this term could have on its ability to differentiate between access seekers (or users) for legitimate reasons, as permitted under the QCA Act (embodied within the 'unfair differentiation' concept used in the Act).

We recognised there should be greater consistency between the 'unfair differentiation' concept used in the QCA Act and the provisions in the undertaking concerning the behaviour of Aurizon Network with respect to the treatment of parties. Differences in language between the QCA Act and the undertaking on what is essentially the same subject matter can, in specific cases, create uncertainty and ambiguity, particularly in relation to Aurizon Network's ability to differentiate in the circumstances permitted in the QCA Act.

Importantly, we wished to make clear that it is not necessary, or indeed appropriate, for all provisions related to Aurizon Network's treatment of access seekers and users to simply mirror the language of unfair differentiation, as used in the QCA Act.

As discussed above, we considered the 2014 DAU needs to contain detailed provisions regarding how Aurizon Network will treat access seekers and holders in order to appropriately account for their interests, the public interest and the object of Part 5 of the Act, given the effect actual or perceived biased behaviour by Aurizon Network could have on the efficient provision of the service and competition in related markets. Indeed, section 137(1A) of the QCA Act requires the 2014 DAU to include, among other things, provisions for identifying, preventing and remedying conduct that unfairly differentiates in a material way between access seekers and users.⁵⁴ This would not be achieved by simply replicating in the undertaking the unfair differentiation provisions expressed in the QCA Act. Instead, we considered it requires the inclusion of additional provisions to govern the behaviour of Aurizon Network in its treatment of access seekers, users and related parties, which complement, rather than reiterate or displace, the unfair differentiation concept established in the QCA Act. For example, clause 2.4(d) of our CDD amended DAU included a requirement for Aurizon Network to ensure that all of its transactions with other parties in relation to access are conducted on an arms-length basis. This was intended to complement and enhance the effectiveness of the unfair differentiation provisions in the QCA Act.

As such, we did not consider that a term such as 'non-discriminatory' (or other descriptor) can never be used in an undertaking. However, the appropriateness of using such a term depends on the context and whether it creates potential conflict with what is provided for under the QCA Act.

Accordingly, we revised clauses 2.2 and 2.4 of our IDD amended DAU to minimise potential inconsistencies with the unfair differentiation concept used in the QCA Act. The table below

⁵³ Section 168A(a) of the QCA Act.

⁵⁴ Section 137(1A) sets out additional requirements for access undertakings for a service owned or operated by a 'related access provider' (i.e. an access provider that owns or operates the services and provides, or proposes to provide, access to the service to itself or a related body corporate). Aurizon Network is a related access provider for the purposes of this section.

provides a summary of the changes we made to the amendments proposed in the IDD amended DAU to provide greater consistency with the unfair differentiation concept used in the QCA Act.

Table 4 Summary of changes made to clauses 2.2 and 2.4 of the IDD amended DAU to provide greater consistency with the unfair differentiation concept used in the QCA Act

<i>Clause</i>	<i>Rationale</i>
<p>Clause 2.2(a) of the IDD amended DAU—facilitate the non-discriminatory negotiation of access agreements by Aurizon Network and Access Seekers</p>	<p>We removed reference to 'non-discriminatory' in this clause (this clause is now clause 2.2(c) of our CDD amended DAU). We acknowledged use of non-discriminatory in this context could create uncertainty with respect to Aurizon Network's ability to differentiate between access seekers in the circumstances set out under section 100 of the QCA Act.</p> <p>We considered the inclusion of another descriptor in this objective, such as unfair differentiation, is not needed and would only add complexity given the new objectives we have proposed in clause 2.2(a) and (b) of our CDD amended DAU already reflect the unfair differentiation concept.</p>
<p>Clause 2.2(b) of the IDD amended DAU – apply the provisions of the Act through:</p> <p>(i) the establishment of processes for Access negotiations and the utilisation of Capacity that are expeditious, efficient, timely, flexible, commercial and non-discriminatory;</p> <p>...</p>	<p>We retained the use of 'non-discriminatory' in this clause (this clause is now clause 2.2(d) of our CDD amended DAU), noting this was originally included in the 2014 DAU.</p> <p>We considered this usage is appropriate as its context is about the establishment of processes, rather than the actual treatment of access seekers or access holders. We considered processes should be established so that they are not, in themselves, discriminatory. It is in the decisions and conduct of Aurizon Network where differentiation may occur. As such, we did not consider there is any inconsistency with the unfair differentiation concept in this instance.</p>
<p>Clause 2.2(i) of the IDD amended DAU – ensure that Aurizon Network does not engage in any activity or conduct (or agree to engage in such activity or conduct), either independently or with Related Operators, which has the purpose of, results in or creates, or is likely to result in or create:</p> <p>...</p> <p>(iv) a substantial lessening of competition or a situation that is otherwise anti-competitive</p>	<p>We removed clause 2.2(i)(iv) of the IDD amended DAU, as we acknowledged the use of this terminology could be considered to overlap with the jurisdiction of the Australian and Competition and Consumer Commission (ACCC) which is not intended.</p>
<p>Clause 2.4 of our IDD amended DAU</p>	<p>We made a number of amendments to this clause (including those aspects of clause 2.2 of our IDD amended DAU moved into this clause, as discussed above) to ensure obligations regarding Aurizon Network's treatment of access seekers, users and related parties are not inconsistent with the unfair differentiation concept used in the QCA Act. These include:</p> <ul style="list-style-type: none"> changing the title of this clause from 'Non-discriminatory treatment' to 'Behavioural obligations', which we consider better encapsulates the substance of this clause.

<i>Clause</i>	<i>Rationale</i>
	<ul style="list-style-type: none"> ensuring these obligations reflect the circumstances in which the QCA Act permits Aurizon Network to differentiate between access seekers and users. <p>We also revised this clause for the purposes of simplification by removing duplication between Aurizon Network's obligations, where appropriate.</p>

Aurizon Network's compliance with its obligations on differentiation between its customers

Our IDD amended DAU included a process for an access seeker or access holder to lodge a complaint with Aurizon Network if it considers that Aurizon Network has failed to comply with its obligations under clause 2.4, with the handling of such complaints subject to audit (cl. 2.4(d)–(g) of our IDD amended DAU). This reflects a similar process included in the corresponding clause in the 2010 AU (cl. 2.2(b)–(e)).

As discussed above, Aurizon Network's obligations regarding its ability to differentiate between access seekers and access holders are essential to provide confidence to parties that it will not be biased in its treatment of its customers. However, for these obligations to be effective, clear and credible mechanisms are necessary for enforcing compliance with these obligations. We considered a complaint handling process is necessary in this regard, as it provides access seekers and holders with a clear and relatively simple avenue for raising issues about how they have been treated and having the matter resolved in a timely manner.

However, to rule out doubt, this complaints handling process was not intended to replace our role in monitoring Aurizon Network's compliance with its obligation to comply with an access undertaking (s. 150A of the Act), or other obligations such as with respect to the hindering of access (ss. 104 and 125 of the Act) or unfair differentiation.

We noted the behavioural obligations under clause 2.4 contained particular elements which involved questions of judgement and degree that cannot reasonably be determined by Aurizon Network. For example, Aurizon Network is not well placed to determine whether its treatment of a particular access seeker has had a material adverse impact on that access seeker's ability to compete with other access seekers. Accordingly, we included additional drafting (cl. 2.4(k) of our CDD amended DAU) to clarify that the complaints mechanism does not preclude an access holder or seeker from making a complaint direct to us, nor does it displace our powers under the QCA Act to investigate Aurizon Network's compliance with its obligations under the QCA Act.

Stakeholders' comments on the consolidated draft decision

Aurizon Network expressed some agreement with our revised amendments to clauses 2.2 and 2.4 of the CDD amended DAU to clearly separate objectives of the undertaking from behavioural obligations and to provide greater consistency with the unfair differentiation obligations in the QCA Act. However, it proposed further amendments to clause 2.4, including that:

- clause 2.4(b)(ii) of the CDD amended DAU be deleted, as its subject matter is already addressed by clause 2.4(b)(i) and that there are several aspects of the drafting that change the prohibition on unfair differentiation contained in sections 100 and 168C of the QCA Act
- clause 2.4(c) of the CDD amended DAU be deleted, as it contains provisions which are unnecessary or change the unfair differentiation obligations under the QCA Act

- clause 2.4(d)(iii) of the CDD amended DAU be deleted, as it is inconsistent with the prohibition on unfair differentiation in the QCA Act.⁵⁵

QRC and Anglo American expressed support for the amendments to clearly separate objectives of the undertaking from unfair differentiation obligations.⁵⁶

With respect to the complaint and audit process set out under clause 2.4 of the CDD amended DAU, Aurizon Network did not support the ability for the QCA to require an audit, as it considered that, in conjunction with the audit provisions, this will vest the QCA with a power it does not have under the QCA Act, including a power to potentially re-write the undertaking and to make a decision where it has no jurisdiction.⁵⁷

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed intent and scope provisions in the 2014 DAU relating to the objectives of the undertaking and Aurizon Network's obligations regarding its treatment of access seekers and holders.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD is appropriate and as a result, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

However, we agree with stakeholders that some refinements are appropriate. For this reason, our final decision includes:

- removing clause 2.4(c)(ii) of the CDD amended DAU. We consider this obligation is not necessary to include as the unfair differentiation this clause is seeking to protect against is already adequately addressed by the unfair differentiation obligations contained elsewhere in clause 2.3 (previously cl. 2.4 of the CDD amended DAU).
- amending clause 2.3(d)(iii) to make it clear this obligation is intended to be consistent with section 137(1A) and (3) of the QCA Act
- amending clause 2.3(f) so that it includes references to section 168C of the QCA Act.
- minor amendments to the complaint handling and audit process. We have made amendments to the types of recommendations that an auditor may make (discussed in Chapter 5) and made some minor drafting amendments, including correcting a cross-reference to the relevant audit arrangements. We otherwise remain of the view it is appropriate for the QCA to have the ability to require an audit in the circumstances set out in these provisions.

We have also removed the exceptions at the end of clause 2.4(b) of the CDD amended DAU because they are adequately covered by clause 2.3(f).

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU. This includes the further refinements as set out above.

⁵⁵ Aurizon Network, 2014 DAU, sub. 125: 31-32, 36-37.

⁵⁶ QRC, 2014 DAU, sub. 124: 8; Anglo American, 2014 DAU, sub. 127: 8.

⁵⁷ Aurizon Network, 2014 DAU, sub. 125: 38

Final decision 3.3

- (1) **After considering Aurizon Network's proposed intent and scope provisions relating to the objectives of the undertaking and Aurizon Network's obligations regarding its treatment of access seekers and holders, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amends the 2014 DAU is to amend the relevant clauses in the manner set out in clauses 2.2 and 2.3 of our final amended DAU, including to:**
 - (a) **provide a list of objectives of the undertaking as set out in clause 2.2 of our final amended DAU**
 - (b) **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 consistent with the QCA Act, as set out in clause 2.3 of our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.4.6 Unfair discrimination and related parties

Our initial draft decision also considered the 2014 DAU did not include sufficient provisions for identifying circumstances where Aurizon Network may unfairly advantage a related party.

While we noted the 2014 DAU included provisions not to provide favourable treatment to a related operator or a port owned or operated by a related party, our initial draft decision was to include additional provisions for Aurizon Network not to unfairly discriminate in favour of:

- ports in Queensland in which the Aurizon Group holds an interest (rather than only those owned or operated by the Aurizon Group)
- coal mines in Queensland in which the Aurizon Group holds an interest
- a third party which has a commercial agreement with a related party.⁵⁸

We considered these additions to the general principles of non-discrimination and independence would provide greater accountability and transparency to the negotiation and provision of access in the CQCN, and would also act to protect and enhance competition in upstream and downstream markets, noting the potential for the Aurizon Group to acquire ownership interests (minority or otherwise) in coal mines and ports.

In addition, we proposed that the drafting in the non-discrimination and independence provisions of the 2014 DAU makes it clear that the existence of these provisions does not derogate in any way from Aurizon Network's obligations under the QCA Act (i.e. section 104 or 125 of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network said that it is prepared to volunteer a commitment that it would 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, it considered that the drafting in clause 2.2(g)(ii) of our IDD amended DAU is too broad, as the definition of a

⁵⁸ See clause 2.2(g)(ii) of the IDD amended DAU and the definition of a 'related competitor'.

'related competitor' could extend to any port or coal mine in Queensland. Aurizon Network considered this is beyond the legitimate scope of the undertaking as it could capture a port or mine which is not connected, or not proposed to be connected, to the declared service. Aurizon Network proposed amending the definition of a 'related competitor' so that it applies in respect of any port or coal mine connected, or proposed to be connected, to the CQCR.⁵⁹

Aurizon Network also did not consider it appropriate that it be required to procure that its related parties do not engage in conduct which prevents or hinders an access seeker's or access holder's access (as per cl. 2.2(g)(i) of our IDD amended DAU). It considered it has no power to procure that its parent or related companies behave in a particular way, and considered that its related parties could be held liable themselves for a contravention of section 104 or 125 of the QCA Act.⁶⁰

Other stakeholders

Anglo American said clause 2.2(h)(i) of our IDD amended DAU should refer to 'related operators, related competitors and third parties.'⁶¹ Anglo American added that, in the light of the Aurizon Group's diversification of its interests, protections against the abuse of Aurizon Network's natural monopoly position in favour of related entities in upstream and downstream markets are essential to promote the public interest, including the public interest in having competition in markets, whether or not in Australia, as required by section 138(2)(d) of the QCA Act.⁶²

Consolidated draft decision

We did not consider it appropriate to approve the 2014 DAU in respect of the provisions regarding Aurizon Network's treatment of related parties.

We considered it essential the 2014 DAU contains adequate protections against Aurizon Network unfairly advantaging related parties in the provision of access to the service that account for all potential circumstances in which the Aurizon Group may acquire an interest in upstream or downstream markets. We considered this is essential to be consistent with the object of the regime and the public interest (s. 138(2)(a) and (d)), as an access provider which is able to unfairly advantage related parties with interests in upstream or downstream markets may have a negative impact on competition in those markets.

As proposed in Aurizon Network's 2014 DAU, this clause would only apply to a related operator or a related party in respect of a port owned or operated by that party. We maintained our view from the initial draft decision that this did not adequately address the circumstances in which there is potential for Aurizon Network to unfairly advantage a related party. In particular, we were concerned it would not apply to:

- ports in which the Aurizon Group holds an interest, but does not necessarily operate or hold a majority ownership
- coal mines in which the Aurizon Group holds an interest

⁵⁹ Aurizon Network, 2014 DAU, sub. 83: 47.

⁶⁰ Aurizon Network, 2014 DAU, sub. 83: 46

⁶¹ Anglo American, 2014 DAU, sub. 95: 8.

⁶² Anglo American, 2014 DAU, sub. 95: 3.

- a third party which has a commercial agreement with a related party, particularly noting the growing trend for end users to hold their own access rights and separately contract with an above-rail operator for haulage services.

In these circumstances a related party to Aurizon Network may acquire an interest in an upstream or downstream market, which would not be captured by Aurizon Network's obligation not to unfairly advantage a related party under the 2014 DAU. We did not consider this appropriate given how critical the CQCN is to the central Queensland coal supply chain and the negative effect unfair differentiation could have on competition in dependent markets.

Whether or not Aurizon Network unfairly advantages a related party, we considered there is sufficient potential for this to occur and, in the absence of any protections in this regard, this could affect public confidence in the regime and the operation of the undertaking. We did not consider this would be consistent with the interests of access seekers and holders, the object of Part 5 of the QCA Act or the public interest (s. 138(2)(e), (h), (a) and (d) respectively). We also considered this is consistent with Aurizon Network's legitimate business interests, given it would not unreasonably restrict dealings with related parties, only ensure they are not unfairly advantaged relative to other access seekers or access holders.

We agreed with Aurizon Network's comments that this obligation should only apply to ports or mines to the extent they connect to, or are proposed to be connected to, the declared service. Our concern was the potential for Aurizon Network to unfairly advantage a related party in the provision of the declared service, and the effect this could have in markets upstream or downstream to that service. Accordingly, we did not intend to capture Aurizon Network's dealings with ports or mines which are not connected, or are not proposed to be connected, to the CQCN. As such, we amended the definition of 'related competitor' in our CDD amended DAU so that this obligation only applies to ports or mines that are an origin or destination for any good conveyed over the relevant rail infrastructure for the declared service.

As discussed in section 3.4.5 of this decision, we revised clauses 2.2 and 2.4 of our IDD amended DAU to provide a clearer separation between the objectives of the undertaking and Aurizon Network's behavioural obligations, and to provide greater consistency with the concept of unfair differentiation used in the QCA Act. This obligation is now reflected in clause 2.4(b) of our CDD amended DAU, which includes, among other things, an obligation for Aurizon Network not to unfairly differentiate in a material way in relation to any decision relating to the provision of access to:

- a related operator
- a related competitor
- a third party that has commercial arrangements with a related competitor or related operator.⁶³

We also revised other aspects of our IDD amended DAU related to Aurizon Network and its related parties, including:

- removing provision for Aurizon Network to procure that its related parties do not prevent or hinder an access seeker's or access holder's access (cl. 2.2(g)(i) of our IDD amended DAU)—we acknowledged Aurizon Network's comments about the appropriateness of requiring it to control the actions of a related party in this regard, and acknowledged a related party itself may be held liable under section 104 and 125 for preventing or hindering a user's access.

⁶³ Clause 2.4(b)(ii)(F) of our CDD amended DAU

Accordingly, we did not consider it necessary to include the reference to Aurizon Network procuring the conduct of its related parties.

- providing that all transactions between Aurizon Network and any other party in relation to access are conducted on an arms-length basis—we acknowledged Anglo American's comment that this obligation should not be limited to only related operators (as per clause 2.2(h)(i) of our IDD amended DAU). We considered it appropriate to expand this obligation to apply to all parties, so that access seekers have confidence that all transactions in relation to access are conducted on an arms-length basis. This clause is clause 2.4(d)(i) of our CDD amended DAU.

Stakeholders' comments on the consolidated draft decision

Aurizon Network did not support the inclusion of clause 2.4(b)(ii) of our CDD amended DAU (as discussed above), which included, among other things, the unfair differentiation obligation on Aurizon Network in respect of a related operator, related competitor and a third party that has commercial arrangements with a related competitor or related operator. Anglo American supported this obligation, although said a reference to the provision of 'Below Rail Services' should be included as well.⁶⁴

Aurizon Network and the QRC supported providing that all transactions between Aurizon Network and any other party in relation to access are conducted on an arms-length basis.⁶⁵

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed intent and scope provisions regarding Aurizon Network's treatment of related parties.

We have considered the concerns raised by stakeholders in response to our CDD. However, we remain of the view that our analysis, reasoning and decision in our CDD remains appropriate and the additional issues raised do not require further amendment to the proposed undertaking contained in our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

⁶⁴ Anglo American, 2014 DAU, sub. 127: 8-9.

⁶⁵ Aurizon Network, 2014 DAU, sub 125: 32; QRC, 2014 DAU, sub 124: 8.

Final decision 3.4

- (1) **After considering Aurizon Network's proposed intent and scope provisions regarding Aurizon Network's treatment of related parties, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amends the 2014 DAU is to amend the relevant clauses in the manner set out in clause 2.3 of our final amended DAU, including to:**
 - (a) **provide that Aurizon Network must not unfairly differentiate in favour of a related competitor, related operator or third parties which have commercial arrangements with a related competitor or a related operator**
 - (b) **provide that Aurizon Network must ensure that all transactions between Aurizon Network and any other party in relation to access are conducted on an arms-length basis.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.4.7 Intent vs objective

Our initial draft decision was to refuse to approve the heading of clause 2.2 of the 2014 DAU and propose it be amended to 'Objective' and the first line to be amended to begin:

The objective of this Undertaking is, without limitation, to

In addition, our IDD amended DAU also proposed drafting making clear that the undertaking must be interpreted in a manner that best achieves its objectives, subject to the object of Part 5 of the QCA Act (section 69E).

Stakeholders' comments on the initial draft decision

Aurizon Network supported replacement of the term 'intent' with 'objective'.⁶⁶

Consolidated draft decision

We maintained our view that it is appropriate, in light of the importance of this clause in influencing interpretation of the rest of the 2014 DAU, to propose the replacement of references to 'intent' with 'objective'.

Stakeholders' comments on the consolidated draft decision

Stakeholders did not make any additional comments regarding this issue.

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed intent and scope provisions on the interpretation of the 2014 DAU. Stakeholders did not provide any new information or arguments on this issue in response to our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

3.4.8 Interpretation

Our initial draft decision was to refuse to approve the 2014 DAU without the inclusion of an interpretation clause. We proposed a new clause 2.3 be included in the 2014 DAU, which provided that the undertaking must be interpreted in a manner that best:

⁶⁶ Aurizon Network, 2014 DAU, sub. 83: 43.

- achieves the objectives set out in the 'Objectives' clause, subject to section 69E of the QCA Act
- gives effect to the objective of Part 5 of the QCA Act, as specified in section 69E.

Stakeholders' comments on the initial draft decision

Aurizon Network agreed with our initial draft decision regarding the insertion of an interpretation clause, subject to redrafting to ensure it is clear and does not add uncertainty to the application or operation of the undertaking. Aurizon Network considered it should be made clear that this clause is not intended to displace the plain meaning of the undertaking, and will only apply where there is ambiguity or uncertainty about its meaning.⁶⁷

Consolidated draft decision

We considered it important for there to be an interpretation clause to provide appropriate guidance on how the objectives established in this part of the 2014 DAU are to be applied in the access undertaking.

We noted Aurizon Network's concerns about the interpretation clause we proposed as part of our initial draft decision. We recognised that an interpretation clause should be clear in its intended operation and should not create uncertainty in how the undertaking is to be applied. As such, we have removed reference to the object of Part 5 of the QCA Act in our proposed interpretation clause. We considered having a simpler interpretation clause, based solely on interpreting the undertaking by reference to the objectives of the undertaking, rather than balancing these with the object of Part 5 of the QCA Act, would improve clarity and minimise potential uncertainty in how the undertaking is to be interpreted.

We considered this clause is now sufficiently clear to serve its purpose and did not consider it appropriate to amend this clause by further prescribing its intended operation and use.

Stakeholders' comments on the consolidated draft decision

Aurizon Network considered clause 2.3 of the CDD amended DAU should be amended to include the words 'In the event of any ambiguity,' at the beginning of the clause, as the clause may affect the interpretation of clauses that are otherwise already clear in their meaning.⁶⁸

QCA analysis and final decision

Our final decision is to refuse to approve the intent and scope provisions on the interpretation of the 2014 DAU proposed by Aurizon Network.

We have considered the concerns raised by stakeholders in response to our CDD and consider our analysis, reasoning and decision in our CDD requires further refinement to address those concerns.

In particular, our analysis, reasoning and decision has changed from that set out in our CDD analysis above with regard to the inclusion of an interpretation clause. As discussed in our CDD, an interpretation clause should be clear in its intended meaning and should not create uncertainty in how the undertaking is applied. While we sought to remove ambiguity with this clause in our CDD, we note Aurizon Network remains concerned about how this clause is intended to be applied. In light of these continuing concerns, we no longer require inclusion of an interpretation clause. We consider this is a better option than further prescribing the

⁶⁷ Aurizon Network, 2014 DAU, sub. 83: 49.

⁶⁸ Aurizon Network, 2014 DAU, sub. 125: 36.

application of the interpretation clause which may continue to create ambiguity about how the objectives of the undertaking are to be applied.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 3.5

- (1) After considering Aurizon Network's proposed intent and scope provisions on the interpretation of the 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposal.**
 - (2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.2 to 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, as in clause 2.2 of our final amended DAU.**
- We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

3.5 Scope of the undertaking

3.5.1 Aurizon Network's proposal

Clause 2.3(a) of Part 2 of Aurizon Network's 2014 DAU states that:

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.

The 2010 AU included the following provision (see clause 2.4(a) of that undertaking):

Subject to Clauses 2.4(b) to (f), this Undertaking provides only for the negotiation and provision of access.

Clauses 2.4(b) to 2.4(f) of the 2010 AU were largely replicated (with minor drafting changes) in the 2014 DAU, as follows (clause references refer to the 2014 DAU):

- Access holders are responsible for the provision of services (other than access) required for the operation of train services (clause 2.3(b)(i)).
- Access holders are also responsible for the necessary approvals from the owners of land on which rail infrastructure is situated, if it is not owned by Aurizon Network or Aurizon Network does not have legal right to authorise access to the land (clause 2.3(b)(ii)).
- Nothing in the undertaking can require Aurizon Network to act in a way that is inconsistent with its passenger priority or preserved train path obligations (clause 2.3(c)).
- Nothing in the undertaking can require Aurizon Network or another party to vary, or act inconsistently, with an existing access agreement or train operations agreement (clause 2.3(d)).
- Nothing in the undertaking affects the rights of Aurizon Network under the QCA Act (clause 2.3(e)).
- The undertaking will not apply to the extent it is inconsistent with an access agreement or train operations agreement (clause 2.3(f)).

- Provisions related to the supply and sale of electricity are included (clauses 2.4(a) and 2.4(b)).⁶⁹

3.5.2 Summary of the initial draft decision

We considered that the scope of the undertaking should include any matter that is addressed in the 2014 DAU. We refused to approve Aurizon Network's proposed clause 2.3(a) of the 2014 DAU and instead proposed additional drafting to clarify that all matters addressed in the undertaking are considered to be within the scope of the undertaking.

Our initial draft decision was to propose the words 'Except where expressly stated to the contrary' also be included at the beginning of clause 2.3(a) and (f) of the 2014 DAU (clause 2.5(a) and (f) in the IDD amended DAU) to provide greater transparency for stakeholders regarding the scope, coverage and operations of the 2014 DAU.

Our initial draft decision approved the main elements of clause 2.3(e) of the 2014 DAU as proposed by Aurizon Network, but we considered it was appropriate that the clause should also refer to the rights under the QCA Act of parties other than Aurizon Network. In our initial draft decision, we proposed clause 2.3(e) of the 2014 DAU (cl. 2.5(g) of the IDD amended DAU) to read: 'Nothing in this Undertaking affects the rights of Aurizon Network or other parties under the Act'.

3.5.3 Stakeholders' comments on the initial draft decision

Aurizon Network disagreed with including the words 'Except where expressly stated to the contrary' in clause 2.5(a) of the IDD amended DAU, as it considered the access undertaking relates to the provision of access to the declared service and, if it volunteers to accept provisions unrelated to the provision of the declared service, these should be specifically identified rather than relying on a catchall statement.⁷⁰

Aurizon Network noted a possible issue with respect to our drafting changes in clause 2.5(e) of our IDD amended DAU, where the clause refers to a standard access agreement instead of the Access Agreement and Trains Operations Agreement. Aurizon Network considered this would mean the access agreements between Aurizon Network and access holders that are negotiated will not be caught by this clause and therefore the undertaking would require Aurizon Network to vary the relevant access agreement or act in a way inconsistent with the access agreement.⁷¹ Aurizon Network supported our amendment to clause 2.5(g) of our IDD amended DAU.

The QRC supported our drafting change to clause 2.5(a).⁷² However, the QRC did not support clause 2.5(g) of the IDD amended DAU as it considered that, as the 2014 DAU is a voluntary undertaking, the undertaking should be able to modify the rights of Aurizon Network that are set out under the QCA Act.⁷³

3.5.4 Consolidated draft decision

Having regard to section 138(2) of the Act and stakeholder submissions, we refused to approve Aurizon Network's proposed arrangements for the scope of the undertaking, as set out in clause 2.3 of the 2014 DAU.

⁶⁹ Provisions related to the supply and sale of electricity are discussed in Section 3.6.

⁷⁰ Aurizon Network, 2014 DAU, sub. 83: 49.

⁷¹ Aurizon Network, 2014 DAU, sub. 83: 49

⁷² QRC, 2014 DAU, sub. 84: 9.

⁷³ QRC, 2014 DAU, sub. 84: 10.

In our view, it was important for the scope of the undertaking to reflect all matters addressed within the undertaking. This allowed parties to have greater clarity about and understanding of the scope, coverage and operations of the 2014 DAU. We considered this is important to the interests of access seekers and holders (s. 138(2)(e) and (h)), as well as in the interests of clarity and certainty (s. 138(2)(h)), as an unreasonably restrictive scope of the undertaking could limit the ability of access seekers and access holders to effectively use the undertaking's dispute resolution mechanisms or for the undertaking to be otherwise enforced. Given this, in our initial draft decision we proposed including drafting in clause 2.3(a) of the IDD amended DAU to ensure all matters covered under the access undertaking are reflected in this clause.

We noted Aurizon Network's comments that its access undertaking relates to the provision of access to the declared service (unless it chooses to volunteer to accept provisions unrelated to the declared service). We understood Aurizon Network's position but we did not consider it appropriate for the scope of the undertaking to be limited to the term 'access', as defined under the 2014 DAU.

We considered all services provided by Aurizon Network that are part of the declared service should be subject to the scope of the undertaking. However, the term 'access' (as defined for the purposes of the 2014 DAU) cannot be a substitute for what is the declared service, which is defined under section 250(1)(a) of the QCA Act, and has a potentially broader scope than the activities listed within the definition of the term 'access'.

Accordingly, we considered the scope of the undertaking, as set by the defined term 'access' in clause 2.3 of the 2014 DAU, is too narrowly defined in the context of this clause, as it may exclude from the scope of the undertaking services provided by Aurizon Network that are part of the declared service. We therefore refused to approve clause 2.3 of the 2014 DAU.

In our initial draft decision, we proposed including drafting in the scope clause (cl. 2.5(a) of the IDD amended DAU) so that all matters covered under the access undertaking are reflected in this clause. However, on reflection, we thought our concerns were better addressed by clarifying that "Access" may have a wider meaning than the one proposed by Aurizon Network, so that clause 2.5(a) does not try to limit the scope of the DAU to "Access" as defined but permits the DAU to properly deal with the declared service. We considered our previous amendment may have introduced uncertainty as to the extent of the DAU, which appropriately deals with access to the declared service. We considered it appropriate to make this change, having regard to the factors set out in section 138(2), in particular the interests of clarity and certainty (s. 138(2)(h)) in that it avoids any doubt about whether services provided by Aurizon Network that are part of the declared service are within the scope of the undertaking.

We further maintained our view to approve the inclusion of clause 2.3(e) of the 2014 DAU, subject to amendments so that it also applies to access seekers and holders to recognise that their rights under the QCA Act should not similarly be affected by the undertaking (clause 2.5(g) of the CDD amended DAU). We considered this clause to be a statement of fact regarding rights under the QCA Act, which does not negatively impact on the scope of the undertaking. However, unless this clause is made reciprocal, we considered this could create uncertainty about whether the rights of access seekers and holders under the QCA Act are affected by the undertaking, which we did not consider appropriate from a clarity and certainty perspective (section 138(2)(h)).

We recognised the consequences noted by Aurizon Network of our proposed drafting changes, namely inserting 'standard access agreement' in clause 2.5(e) of the IDD amended DAU, and we have revised the drafting accordingly (cl. 2.5(e) in the CDD amended DAU).

3.5.5 Stakeholders' comments on the consolidated draft decision

Several stakeholders commented on our amendments to provide that 'access', for the purposes of clause 2.5, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act:

- Aurizon Network did not agree with this amendment, as it considered this broadens the definition of 'access' to include matters that are not defined but are nevertheless part of the declared service. It said this would create uncertainty about the scope of the undertaking and may give rise to disputes. It also said it is not possible to define with any certainty Aurizon Network's obligations from start to finish and that this amendment would create difficulties in confirming the responsibilities of each party.⁷⁴
- The QRC supported this amendment, as it considered it avoids any potential lack of alignment between the scope of the undertaking and the declared service.⁷⁵
- Anglo American considered section 250(1)(b) of the QCA Act was also a relevant declared service that should be referred to in this provision. It also considered there should be a clear obligation on Aurizon Network to supply 'Below Rail Services', which was removed from the CDD amended DAU (cl. 3.4(c) of the IDD amended DAU).⁷⁶

Other comments made by stakeholders were:

- Aurizon Network considered that clause 2.5(e) should be amended to also apply to train operations deeds, rather than only access agreements.⁷⁷
- Aurizon Network considered that clause 2.5(f) should be amended to remove the words 'except where expressly stated in the Undertaking', as it considered this is unnecessary and beyond power given section 168 permits parties to agree an access agreement that is inconsistent with an undertaking.⁷⁸
- The QRC reiterated its comments that clause 2.5(g) should be deleted as a voluntary undertaking should be able to modify the rights of Aurizon Network under the Act.⁷⁹

3.5.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed 'Scope' clause of the 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD is appropriate and as a result, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We note Aurizon Network's comments about the potential uncertainty caused by our amendments to clause 2.4(a) (previously cl. 2.5(a) of the CDD amended DAU), particularly the potential implications for determining responsibilities between Aurizon Network and access holders. For the reasons expressed above, we maintain our view that the scope of the

⁷⁴ Aurizon Network, 2014 DAU, sub. 125: 38.

⁷⁵ QRC, 2014 DAU, sub. 124: 8.

⁷⁶ Anglo American, 2014 DAU, sub. 127: 9.

⁷⁷ Aurizon Network, 2014 DAU, sub. 125: 38.

⁷⁸ Aurizon Network, 2014 DAU, sub no 125: 39.

⁷⁹ QRC, 2014 DAU, sub no 124: 8.

undertaking should not exclude services provided by Aurizon Network that are part of the declared service.

We also do not consider that clause 2.4(f) is beyond power and have maintained our CDD in respect of this clause. The words "except where expressly stated in this Undertaking" mean the undertaking may specify when it is to apply despite an inconsistency with an Access Agreement or a Train Operations Deed. We consider this clause to be consistent with section 168 of the Act, which states that a term of an access agreement is not invalid merely because it is inconsistent with the undertaking.

We disagree with Aurizon Network's submission regarding clause 2.4(e), and consider that there should not be a reference to train operations deed because this defined term will only come into existence after the Approval Date. We agree with the principle submitted by Aurizon Network, that is, the undertaking should not amend any agreement that governs train operations executed prior to the Approval Date. However, we consider that the defined term 'Access Agreement' captures all existing access agreements, which govern train operations prior to UT4. Accordingly, no further amendment to this clause was considered necessary.

In response to Anglo American, we do not consider the proposed changes to the 'scope' clause are necessary, including given the obligations on Aurizon Network elsewhere in the undertaking to supply below rail services (e.g. cl. 3.5). We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU. This includes the further refinements as set out above.

Final decision 3.6

- (1) **After considering Aurizon Network's proposed 'Scope' clause of the 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) **The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.3 of the 2014 DAU in the manner set out in clause 2.4 of our final amended DAU, including to:**
 - (a) **provide that 'access', for the purposes of this clause, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act (cl. 2.4(a) of the final amended DAU).**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.6 Supply and sale of electricity

3.6.1 Aurizon Network's proposal

Part 2 of Aurizon Network's 2014 DAU provided that:

- to the extent Aurizon Network sells or supplies a related operator with electricity, it cannot refuse to sell or supply electricity to another access seeker or access holder. However, the sale or supply of electricity is not part of access and, except as expressly referred to in the undertaking, is not subject to the provisions of the undertaking (cl. 2.4(a) of the 2014 DAU)

- Aurizon Network will not be obliged to sell or supply electricity to an access seeker or access holder or to agree to do so if it is not lawfully entitled to; or on terms that would be unreasonable or uncommercial (cl. 2.4(b) of the 2014 DAU).

These clauses largely mirror clauses in the 2010 AU.

3.6.2 Summary of the initial draft decision

Our initial draft decision was to approve Aurizon Network's 2014 DAU proposal, as it relates to the supply and sale of electricity. We noted that Aurizon Network's 2014 DAU, in large part, replicates the provisions relating to the supply and sale of electricity that were contained in the 2010 AU. Our reasoning is outlined below.

Terms and conditions for supply and sale of electricity

The 2014 DAU provides that, if Aurizon Network supplies or sells electricity to its related operator, it must agree to also supply or sell electricity to other access seekers or access holders (or a nominated railway operator). We considered the obligation to supply or sell electricity to third parties if it is supplied or sold to the related operator of Aurizon Network, combined with the unfair discrimination provisions in the 2014 DAU and the QCA Act, were sufficient to ensure discrimination in the supplying and selling of electricity cannot occur. We did not consider it appropriate for the undertaking to include lengthy notice periods relating to any decision by Aurizon Network to cease supplying electricity to train operators (for example, if it considers the terms of supply have become unreasonable or uncommercial), noting that Aurizon Network must agree to supply electricity to other access seekers or holders if it supplies it to its related operator.

In our initial draft decision, we also considered it is not clear that the supply and sale of electricity falls within the declaration under the QCA Act, although we noted this does not preclude Aurizon Network from nominating to include provisions relating to the supply and sale of electricity in the 2014 DAU, as it has done.

3.6.3 Stakeholders' comments on the initial draft decision

Aurizon Network agreed with the initial draft decision in respect of the supply and sale of electricity.⁸⁰

The QRC reiterated its comments from its submission on the 2014 DAU that Aurizon Network should commit to supply electricity as an absolute obligation. The QRC noted that Aurizon Network has an incentive to provide electricity and that there is some protection provided under the initial draft decision, with provisions regarding unfair discrimination and the proposal to provide a dispute resolution procedure for electricity disputes (cl. 2.7(c) of the IDD amended DAU). The QRC suggested the issue be revisited in future undertakings.⁸¹

Anglo American said the supply of electricity should be covered by UT4, as there is no other way for users of the CQCN to procure electricity. It added that the declaration in section 250 of the QCA Act clearly includes electricity assets and Aurizon Network is entitled to recover the costs of those assets. Anglo American submitted that it is inconsistent with the declaration of the CQCN to require regulation of all aspects of the natural monopoly facility, and yet to permit Aurizon Network to charge monopoly prices for a service which is an essential component of that natural monopoly. It considered that, as a natural monopolist, Aurizon Network can control

⁸⁰ Aurizon Network, 2014 DAU, sub. 83: 43.

⁸¹ QRC, 2014 DAU, sub. 84: 10–11.

services associated to the provision of below rail access that are not contestable, or are weakly contestable, and it is important for the access undertaking to regulate those services. It considered Aurizon Network's legitimate business interests would not suffer if electricity services are provided on a cost pass-through basis.⁸²

Vale supported the initial draft decision to include a dispute resolution mechanism for disputes arising in respect of electricity supply and stated that the lack of an absolute obligation for Aurizon Network to supply electricity presents a risk to train operators, customers and the coal system generally.⁸³

3.6.4 Consolidated draft decision

We noted the views expressed by stakeholders about whether or not the supply of electricity is part of the declared service.

The 2014 DAU was submitted to us under section 136 of the QCA Act, which allows the inclusion of matters within the undertaking, regardless of whether or not those form part of the declared service. As such, we therefore are still required to approve or refuse to approve the terms included in the 2014 DAU by Aurizon Network for the supply of electricity, having regard to section 138(2), irrespective of whether or not that supply is part of the declared service.

Taking into account section 138(2) and stakeholder submissions, we approved Aurizon Network's 2014 DAU, as it relates to the supply and sale of electricity, subject to our comments in Section 3.7 of this decision on dispute resolution.

We maintained our view from the initial draft decision that the 2014 DAU contains adequate protections for third party operators in respect of the supply and sale of electricity. We considered that Aurizon Network has sufficient incentive to supply electricity to enable the use of the QCN. We also considered the provisions we proposed in our CDD amended DAU, as well as those in the QCA Act, regarding Aurizon Network's treatment of access holders, access seekers and related parties, should protect against any unfair differentiation by Aurizon Network with respect to the terms of the supply and sale of electricity between parties. However, we maintained our view that there should be dispute resolution available to parties in respect of the supply and sale of electricity (discussed in Section 3.7 of this decision).

Coverage of supply of electricity in the declaration

Contrary views were raised by Aurizon Network, the QRC and Anglo American on whether electricity supply falls within the scope of the service declaration under section 250(1)(a) of the QCA Act.

Our analysis of this issue addressed whether each of the following falls within the declaration:

- the supply of electricity network services; and
- the supply of electrical energy.

Electricity network services

The term 'rail transport infrastructure' used in section 250(3) of the QCA Act is expressly defined among the list of defined terms set out in Schedule 2 to the QCA Act. Schedule 2 of the QCA Act defines that term by reference to the same definition used in the *Transport Infrastructure Act 1994* (Qld) (TIA). The TIA definition includes overhead electrical power supply

⁸² Anglo American, 2014 DAU, sub. 95: 3–5.

⁸³ Vale, 2014 DAU, sub. 79: 2.

systems associated with the railway's operation, as well as other facilities necessary for operating a railway.

It is clear that overhead electrical power cables and associated power supply infrastructure (such as substations) that support the conveyance of electricity that are associated with the railway's operation and owned and operated by Aurizon Network would fall within the definition of the rail transport infrastructure of the CQCN.⁸⁴ Therefore the use of that electricity network infrastructure is necessarily a use of the rail transport infrastructure. Accordingly, the supply of the use of electricity network services is part of the declared service under the QCA Act (namely the supply of the use of Aurizon Network's electricity network infrastructure to convey electrical energy through the relevant parts of the CQCN).

Supply of electrical energy

The supply of electrical energy is also sensibly included as part of the declared service where that electricity supply is made to train operators for the purpose of operating electric traction train services in the Blackwater and Goonyella coal systems.

Section 72 of the QCA Act states that service includes the use of a facility. The exclusion of the supply of goods from the meaning of 'service' in section 72(2)(a) (with 'goods' being defined to include electricity) does not apply to the extent that the supply is an 'integral, but subsidiary, part of the service'.

Electricity comprises a critical aspect of access for operators of electric trains. Otherwise they cannot make "use of" the electricity network and overall rail transport infrastructure.

Thus, the supply of electricity can be seen to fall within the declared service that is the subject of the 2014 DAU. Moreover, this is how such electrical energy has been supplied by Aurizon Network to date, namely as an integral, but subsidiary, part of the rail access service.

As noted by Anglo American, there is a lack of contestability for the supply of electrical energy to access seekers in relation to the CQCN. This is because Aurizon Network is the only practical and plausible supplier of electricity within its electricity network. A lack of alternative suppliers also supports the characterisation of the supply as part of the declared service.

3.6.5 Stakeholders' comments on the consolidated draft decision

Stakeholders largely did not raise any additional issues with our CDD in respect of the arrangements for the supply and sale of electricity by Aurizon Network.

Anglo American reiterated its views that there should be specific regulation for the supply and sale of electricity and that Aurizon Network should provide the supply and sale of electricity on a cost pass-through basis.⁸⁵

Aurizon Network also reiterated its view that the supply and sale of electricity is not part of the declared service, although proposed alternative drafting to provide for disputes in relation to the supply and sale of electricity by Aurizon Network (discussed below).⁸⁶ It also said the provision in the definition of 'Access', which stated that access does not include the sale or supply of electric energy, should be reinstated and that the reference to 'electric transmission

⁸⁴ A substation or other electricity infrastructure that is built/owned/operated by a user for their own activities would not, however, form part of the rail transport infrastructure.

⁸⁵ Anglo American, 2014 DAU, sub. 127: 10-11.

⁸⁶ Aurizon Network, 2014 DAU, sub. 125: 39-40.

infrastructure' should be amended to 'overhead electrical power supply systems' for consistency with the relevant definition under the *Transport Infrastructure Act 1994*.⁸⁷

The QRC supported deletion of the statement that supply of electricity is not part of 'Access' as defined under the undertaking.⁸⁸

3.6.6 QCA analysis and final decision

Our final decision is to approve Aurizon Network's 2014 DAU, as it relates to the supply and sale of electricity, subject to our comments on dispute resolution in Section 3.7 of this decision.

We have considered the concerns raised by stakeholders in response to our CDD. However, we remain of the view that our analysis, reasoning and decision in our CDD is appropriate and the additional issues raised do not require further amendment to the proposed undertaking contained in our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We note that Aurizon Network's proposed amendments with regard to dispute resolution (discussed below) has provided a way forward on this matter regardless of whether or not it is part of the declared service.

We also note the issue raised by Aurizon Network with regard to the use of the term 'electric transmission infrastructure' in the definition of 'Access'. Nonetheless, we have maintained our acceptance of this terminology from our IDD and CDD, noting it is clearer given the QCA's position on the treatment of the supply and sale of electricity and is consistent with previous arrangements proposed by Aurizon Network.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider it appropriate for Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

3.7 Electricity dispute resolution

3.7.1 Aurizon Network's proposal

Part 2 of the 2014 DAU does not include a specific clause providing a dispute resolution mechanism for disputes relating to the supply and sale of electricity.

The 2010 AU does include such a clause. Clause 2.4(e) of this undertaking states that:

If a Dispute arises between an Access Holder, a Nominated Railway Operator or an Access Seeker and QR Network regarding a refusal by QR Network to sell or supply electric energy (or procure such a sale or supply from a QR Party) or the proposed terms and conditions on which QR Network (or a QR Party) offers to sell or supply electric energy to the Access Holder, Nominated Railway Operator or Access Seeker, the Dispute may be referred to Dispute resolution in accordance with Clause 10.1.

3.7.2 Summary of the initial draft decision

Anglo American,⁸⁹ Asciano⁹⁰ and the QRC⁹¹ submitted that a dispute resolution mechanism relating to the supply and sale of electricity should be included in the 2014 DAU. We agreed

⁸⁷ Aurizon Network, 2014 DAU, sub. 125: 40.

⁸⁸ QRC, 2014 DAU, sub. 124: 8.

⁸⁹ Anglo American, 2014 DAU, sub. 7: 20.

because we considered it important that any matter addressed in the undertaking should be subject to dispute resolution, and that the ability for supply and sale of electricity to be disputed be made clear. In particular, our view was that it is important that matters included in the undertaking, which are subject to Aurizon Network's discretion and negotiation with access seekers and/or access holders, should be subject to effective dispute resolution mechanisms.

Given this, our initial draft decision was to refuse to approve the 2014 DAU regime for electricity supply and sale, in light of the lack of a clause providing for a dispute resolution mechanism for disputes relating to the supply and sale of electricity. We considered it was appropriate for Aurizon Network to amend the 2014 DAU to include a clause similar to the dispute resolution clause relating to supply and sale of electricity included in the 2010 AU (cl. 2.4(e) of the 2010 AU).

3.7.3 Stakeholders' comments on the initial draft decision

Aurizon Network disagreed with our initial draft decision to provide for dispute resolution in respect of the supply and sale of electricity. It said this provision has the effect of investing the QCA with an arbitration power in respect of the supply of electricity, which it considered is beyond the scope of the QCA's powers under the QCA Act as it considered the supply of electricity is not part of the declared service.⁹² Aurizon Network said that, while it made a voluntary commitment to supply electricity, it need not make any commitment for dispute resolution on electricity matters and proposed deleting this provision.⁹³

Anglo American, Vale and QRC supported the initial draft decision,⁹⁴ with Vale noting that significant investments had been made by stakeholders within the electrified systems to enter long-term take-or-pay contracts for the operation of a specific train configuration (i.e. electric traction trains).

3.7.4 Consolidated draft decision

After having regard to section 138(2) of the QCA Act and stakeholder submissions, we maintained our decision to refuse to approve Aurizon Network's proposals relating to the regime for electricity supply and sale in the 2014 DAU.

As discussed above, we believe that electricity supply and sale is part of the declared service and, in any event, we are required by the QCA Act to assess the entirety of the 2014 DAU presented to us and only approve a draft access undertaking if we considered it appropriate to do so having regard to the factors listed in section 138(2) of the Act. Even if the terms had been volunteered, it does not mean that those terms fall outside our purview and the scope of section 138(2).

Moreover, if we refuse to approve a DAU, or an aspect thereof, whether it is voluntarily submitted or otherwise, we are required by section 136(5) of the QCA Act to state the way in which we consider it appropriate to amend the DAU.

This means that it is within our power to propose the inclusion of a dispute resolution mechanism for the supply and sale of electricity. Indeed, we are obliged to do so if it is one of

⁹⁰ Asciano, 2014 DAU, sub. 22: 65.

⁹¹ QRC, 2014 DAU, sub. 42: 11.

⁹² Aurizon Network, 2014 DAU, sub. 83: 37

⁹³ Aurizon Network, 2014 DAU, sub. 83: 50.

⁹⁴ Anglo American, 2014 DAU, sub. 95: 5; Vale, 2014 DAU, sub. 79: 2; QRC, 2014 DAU, sub. 84: 10.

the ways that we consider it appropriate to amend the 2014 DAU, having regard for the factors set out in section 138(2) of the QCA Act.

As discussed in our initial draft decision, we were of the view that matters included in an undertaking, which are subject to Aurizon Network's discretion and negotiation with access seekers or access holders, must be subject to an effective dispute resolution mechanism, especially because the electricity network and supply of electricity are not contestable. We considered there should be no exception for the supply and sale of electricity.

We considered the terms and conditions of the supply and sale of electricity to be an integral part of an access seeker's/holder's use of the electrified sections of the CQCN. Given this importance, we did not consider it appropriate for access seekers and holders to be unable to have access to a dispute resolution mechanism in relation to the supply and sale of electricity.

An effective dispute resolution mechanism is an important means to address imbalances in negotiating power between Aurizon Network and access seekers/holders. In the absence of such a mechanism, we were concerned about the effect this could have on an access seeker's/holder's ability to negotiate with Aurizon Network on electricity supply, and the terms and conditions that may result. We considered this could lead to outcomes that are not consistent with the object of the regime (s. 138(2)(a)). We also considered the lack of a dispute resolution mechanism in this regard does not provide an appropriate balance between the interests of access seekers and access holders (s. 138(2)(e) and (h)) and the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Accordingly, we considered it appropriate to amend the 2014 DAU to include a dispute resolution mechanism in respect of the supply and sale of electricity.

3.7.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed to the inclusion of a dispute resolution mechanism under the undertaking for the supply and sale of electricity, subject to amendments it proposed to expressly recognise the jurisdiction of electricity regulators to resolve disputes.⁹⁵

Anglo American also supported inclusion of dispute resolution for the supply and sale of electricity.⁹⁶

3.7.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's 2014 DAU proposal for the supply and sale of electricity in the absence of a robust and certain dispute resolution mechanism.

We welcome Aurizon Network's pragmatic approach on the inclusion of dispute resolution for the supply and sale of electricity. Provided there is a clear and effective dispute resolution mechanism available to parties, we have no preference for these disputes to be dealt with in accordance with the undertaking or by a regulator in another jurisdiction.

However, the drafting proposed by Aurizon Network creates uncertainty about the circumstances in which another regulator has jurisdiction to decide the dispute and how that would be determined by the parties. We consider this impacts on the effectiveness of the dispute resolution mechanism. In the absence of any detailed arrangements from Aurizon Network providing certainty in this regard, we do not consider the dispute resolution mechanism proposed by Aurizon Network is robust or certain.

⁹⁵ Aurizon Network, 2014 DAU, sub. 125: 39-40.

⁹⁶ Anglo American, 2014 DAU, sub. 127: 10.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

Final decision 3.7

- (1) **After considering Aurizon Network's proposal for the supply and sale of electricity, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) **The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.4 of the 2014 DAU to include specific provision for dispute resolution in respect of the supply and sale of electricity, as set out in clause 2.6 of the final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.8 Associated services

3.8.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU did not include a definition of 'associated services', nor any obligations relating to such services. In UT3, Aurizon Network said these services were unregulated, and it has been charging customers for them outside of the regulatory framework.

In its response to submissions on its 2013 DAU, Aurizon Network said it considers the undertaking only applies to negotiation and provision of access to the declared service, and is not applicable to negotiation or provision of services other than access (except for supply and sale of electricity, which it has elected to include). Aurizon Network said associated services were outside the scope of the regulatory regime.⁹⁷

3.8.2 Summary of the initial draft decision

Our initial draft decision was to approve Aurizon Network's proposal to not include a definition of, or obligations related to, associated services in the 2014 DAU.

The QRC and Anglo American identified a list of associated services, comprising:⁹⁸

- rail infrastructure management and train control services for rail spurs
- level and other crossings including maintenance and upgrades
- land leases to customers of corridor land and land owned by Aurizon Network
- design, scope and standard reviews of connecting infrastructure
- electricity supply and sale
- rail relocation and related construction and maintenance services (for private spurs and loops)

⁹⁷ Aurizon Network, 2013 DAU, sub. 77: 44.

⁹⁸ QRC, 2014 DAU, sub. 42: 12; Anglo American, 2014 DAU, sub. 7: 15.

- transfer facilities licences regarding load-out interface requirements, load profiling, dust veneering and other matters Aurizon Network has sole authority over
- capacity modelling—specifically dynamic modelling services such as system capacity and private infrastructure interface.

We accepted that some of the examples of services identified may have limited contestability or be services where Aurizon Network's economies of scale and scope may mean they are the lowest cost practical supplier. However, the services listed appeared to relate to services provided on private infrastructure are therefore may not be covered by the declaration in the QCA Act.

Given this, our initial draft decision was to approve the absence of a definition for, and obligations related to, associated services in the 2014 DAU.

3.8.3 Stakeholders' comments on the initial draft decision

Aurizon Network agreed with our initial draft decision.⁹⁹

The QRC noted we had not accepted its original proposal that Aurizon Network should provide associated services on reasonable terms (i.e. ancillary services for which it is only practicable for access holders to engage Aurizon Network to perform). The QRC accepted our initial draft decision but submitted that, where another railway is connected to the regulated network, Aurizon Network should be under an obligation to agree an arrangement which provides for coordinated train control across the two networks (without obliging Aurizon Network to provide train control on the other railway).¹⁰⁰ Glencore supported the QRC's proposal, and added that if negotiations in such matters are unresolved, it should be referred to the QCA.¹⁰¹

Anglo American said that UT4 should include a definition or list of associated services and re-submitted its list of such services. Anglo American reiterated that the majority of its list were services that were not contestable, or at least weakly contestable.¹⁰²

Anglo American cited the example of Aurizon Network's Projects team, where payment at set rates for their time and project management services is an Aurizon Network requirement. Anglo American considered these services to be non-contestable and should be regulated to ensure that Aurizon Network is not double-recovering 'Project' team fees that are billed for access-related services—for example, where team members are employees of Aurizon Network.¹⁰³

Anglo American also:

- did not agree that rail relocation services could be subject to competition as no other party could remove or relocate mainline track without Aurizon Network's consent
- did not agree that private infrastructure falls outside of section 250 of the QCA Act. Anglo American stated that balloon loops and spur lines have always fallen within the scope of access undertakings and been subject to regulation

⁹⁹ Aurizon Network, 2014 DAU, sub. 83: 43.

¹⁰⁰ QRC, 2014 DAU, sub. 84: 11–12.

¹⁰¹ Glencore, 2014 DAU, sub. 96: 3.

¹⁰² Anglo American, 2014 DAU, sub. 95: 5.

¹⁰³ Anglo American, 2014 DAU, sub. 95: 5–6.

- had concerns around the cost and provision of rail grinding and track laying services. It considered there should be full transparency around how these services are contracted and conducted.¹⁰⁴

3.8.4 Consolidated draft decision

Taking into account section 138(2) and stakeholder submissions, we approved Aurizon Network's proposal to not include a definition of, or obligations related to, associated services in the 2014 DAU. However, we refused to approve Aurizon Network's overall proposal in relation to associated services and proposed an amendment in clause 2.5 of our CDD amended DAU to clarify that 'access', for the purposes of the scope of the undertaking, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act.

We noted and appreciated stakeholders were concerned about whether or not particular services should be subject to the undertaking. However, we remained of the view that it was not appropriate for us to develop and implement, as part of the undertaking, a clear and otherwise satisfactory definition of 'associated services' that should be made subject to regulatory obligations.

In our view, the fundamental question in considering each service to be an 'associated service' is whether or not the service is actually part of the relevant declared service under the QCA Act, which in the case of Aurizon Network, is listed under section 250(1)(a) of the QCA Act. This defines whether or not a particular service provided by Aurizon Network is subject to access regulation under Part 5 of the QCA Act. Accordingly, if a particular service provided by Aurizon Network is taken to be part of the declared service, we considered it should be subject to the undertaking.

Our proposed amendment in clause 2.5 of our CDD amended DAU clarified that 'access', for the purposes of the scope of the undertaking, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the Act.

We considered this proposal would address stakeholder concerns about whether particular services provided by Aurizon Network should be subject to the undertaking, while avoiding extending the scope of the undertaking into services that are not part of the declared service. To the extent parties are concerned about whether a particular 'associated service' provided by Aurizon Network is subject to regulatory obligations, parties should seek to use the dispute resolution processes available to them under the QCA Act or the access undertaking.

3.8.5 Stakeholders' comments on the consolidated draft decision

As discussed in Section 3.5, Aurizon Network did not support our amendment in clause 2.5(a) to clarify that 'access', for the purposes of the scope of the undertaking, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the Act.¹⁰⁵

Anglo American supported our view that services provided by Aurizon Network that are taken to be part of the declared service should be subject to the access undertaking. However, it considered that the undertaking should seek to minimise uncertainty about whether an 'associated service' is part of the declared service, rather than resolve these matters through

¹⁰⁴ Anglo American, 2014 DAU, sub. 95: 6–7.

¹⁰⁵ Aurizon Network, 2014 DAU, sub. 125: 33, 38.

dispute resolution. It reiterated its views about the specific associated services it considered should be regulated.¹⁰⁶

3.8.6 QCA analysis and final decision

Our final decision is to refuse to approve the arrangements for 'associated services' proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. However, we remain of the view that our analysis, reasoning and decision in our CDD remains appropriate and the additional issues raised do not require further amendment to the proposed undertaking contained in our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

Final decision 3.8

- (1) After considering Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's overall proposal for 'associated services'.**
- (2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.3 of the 2014 DAU to:**
 - (a) provide that 'access', for the purposes of the scope of the undertaking, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act (as set out in clause 2.4(a) of the final amended DAU).**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.9 Incentive mechanism

3.9.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU did not include, or provide for development of, formal incentive mechanisms.

We noted the 2010 AU included provisions relating to the potential development and approval of a draft incentive mechanism. This mechanism sought to provide Aurizon Network and the industry with the opportunity to develop a framework that provided Aurizon Network with an incentive to operate, and invest in, the rail infrastructure efficiently and to do so in a way that promotes efficiency of a coal supply chain.

3.9.2 Summary of the initial draft decision

Our initial draft decision was to refuse to approve the 2014 DAU without the inclusion of a process for development and approval of an incentive mechanism in the undertaking (cl. 2.8 of the IDD amended DAU).

¹⁰⁶ Anglo American, 2014 DAU, sub. 127: 11-13.

We agreed with stakeholders' views that a well-developed incentive mechanism would be beneficial for the 2014 DAU and, if one is to be developed, should include:

- performance metrics and KPIs that are linked to performance and contracted entitlements
- linkages to individual operators
- symmetry between incentives linked to over-performance and under-performance.

We also included criteria for what we considered an incentive mechanism needs to achieve (cl. 2.8 of our IDD amended DAU).

An incentive mechanism that meets these criteria will act to:

- encourage efficient use of, and investment in, the rail infrastructure
- promote competition in upstream and downstream markets
- enhance customer engagement
- improve transparency and accountability in provision of the declared service.

We did not prescribe how the incentive mechanism should be developed. We considered this can best be achieved by Aurizon Network working in collaboration with its stakeholders.

3.9.3 Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network accepted our initial draft decision to include a process providing for the development of a draft incentive mechanism. Aurizon Network said it was willing to re-engage with coal industry stakeholders to explore options for an alternative mechanism but said it would be difficult to reach agreement with stakeholders on an incentive mechanism. Aurizon Network said that the key hurdles in reaching agreement relate to:

- the need to align metrics with TSEs—Aurizon Network noted that TSE delivery is influenced by parties other than Aurizon Network (ports, mines, and above rail operations), and that TSE delivery is asymmetric in distribution (actual delivery is skewed to less than 100%). Aurizon Network provided some suggestions to address these issues and indicated a willingness to discuss with stakeholders
- addressing the imbalance caused by Aurizon Network's membership of the Aurizon Group—Aurizon Network said that if the broad mix of contracts narrows so that a third party operator becomes the dominant operator, there may be incentives for Aurizon Network to favour one train operator over another. Aurizon Network was willing to recommence discussions with third party operators on how this concern could be addressed in the incentive mechanism.¹⁰⁷

Other stakeholders

The QRC and Vale considered that clause 2.8 of the IDD amended DAU does not add anything to the undertaking as it only offers Aurizon Network a discretion to develop an incentive mechanism.¹⁰⁸ The QRC suggested abandoning clause 2.8 in favour of us providing guidance on the substance of a mechanism in our consolidated draft decision, noting that there is

¹⁰⁷ Aurizon Network, 2014 DAU, sub. 83: 50–52.

¹⁰⁸ QRC, 2014 DAU, sub. 84: 11; Vale, 2014 DAU, sub. 79: 3.

insufficient time to develop a mechanism as part of UT4. It suggested that Aurizon Network present a proposal supported by stakeholders as part of the UT5 submission.

Anglo American submitted that an incentive mechanism is not appropriate for the current form of regulation. It considered that price cap regulation is a truer and more appropriate form of incentive regulation, rather than an artificially created incentive mechanism, and should be considered for UT5.¹⁰⁹

Asciano and BMA considered the development of an incentive mechanism should be mandatory. Asciano said it would broadly support an incentive mechanism that genuinely met the criteria set out in clause 2.8(b) of the IDD amended DAU. BMA had concerns about an incentive mechanism being based on metrics that are high-level and immeasurable. It also considered that a more targeted requirement for the development of an incentive mechanism be included, which is more likely to be achievable before the end of UT4 and could be revised at a later date.¹¹⁰

3.9.4 Consolidated draft decision

Taking into account section 138(2) and stakeholders' submissions, we revised our position and decided we would no longer require the inclusion of a process for the development of a draft incentive mechanism.

In our view, a well-developed incentive mechanism, developed by Aurizon Network in consultation with stakeholders, would be beneficial for promoting the efficient use of, and investment in, the CQCN, as well as providing greater transparency and accountability in the provision of the declared service. We noted stakeholders generally support an incentive mechanism.

However, as noted above, Aurizon Network provided details of issues that would need to be taken into account in an incentive mechanism. We noted, in particular, the need for metrics to be relevant, balanced and measurable. Given this, we acknowledged it is likely there will not be sufficient time to develop an incentive mechanism during the term of UT4. We were particularly mindful that Aurizon Network (and stakeholders) would likely be engaging on a number of other regulatory matters under UT4.

While we considered that an incentive mechanism should be developed by Aurizon Network in consultation with industry, we did not consider it appropriate for us to provide a prescriptive process for the development of a mechanism, nor did we consider it practicable for us to provide detailed guidance on the substance of the mechanism as part of this decision.

Our initial draft decision proposed the development of a draft incentive mechanism (cl. 2.8 in our IDD amended DAU), which enabled Aurizon Network to submit a draft mechanism for our approval but did not require a mechanism to be developed.

On balance, we no longer considered the inclusion of this process in the undertaking is necessary. The draft amending access undertaking (DAAU) process under the QCA Act (ss. 142–143 of the Act) could already be used by Aurizon Network to submit a draft incentive mechanism for our approval. We also considered the minimum requirements for what the mechanism must contain (listed in clause 2.8) did not need to be specified in the undertaking, as this was a matter we would already consider as part of our assessment of a DAAU under section 143 of the QCA Act.

¹⁰⁹ Anglo American, 2014 DAU, sub. 95: 7.

¹¹⁰ Asciano, 2014 DAU, sub. 76: 12; BMA, 2014 DAU, sub. 78: 8–9.

Accordingly, for our consolidated draft decision on the 2014 DAU, we did not consider it necessary for a specific process to be included in the undertaking. That does not, however, prevent Aurizon Network from submitting to us a draft incentive mechanism for our approval during UT4 or as part of the development of the next access undertaking (UT5).

3.9.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed with the removal of the process for the development of a draft incentive mechanism.¹¹¹

However, Asciano did not support the removal of this process. It considered a mandated incentive mechanism should be introduced in the final decision or, if not, a discretionary incentive mechanism.¹¹²

Anglo American reiterated its objections to the concept of an incentive mechanism while Aurizon Network operates under a revenue cap model.¹¹³

3.9.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's 2014 DAU proposal, but we do not consider an amendment to the 2014 DAU to provide for an incentive mechanism is required.

We have considered the concerns raised by stakeholders in response to our CDD. However, we remain of the view that our analysis, reasoning and decision in our CDD remains appropriate and the additional issues raised do not require further amendment to the proposed undertaking contained in our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

Final decision 3.9

(1) Our final decision is to refuse to approve Aurizon Network's 2014 DAU proposal, but we do not consider an amendment to the 2014 DAU to provide for an incentive mechanism is required.

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

3.10 Other specific drafting

3.10.1 Summary of the initial draft decision

In addition to the issues discussed above, stakeholders also proposed a number of additional specific amendments to the drafting contained in Part 2 of the 2014 DAU. Our initial draft decision was to refuse to approve Part 2 of the 2014 DAU in the form submitted by Aurizon Network, and propose the following amendments to the 2014 DAU:

¹¹¹ Aurizon Network, 2014 DAU, sub. 125: 34.

¹¹² Asciano, 2014 DAU, sub. 126: 6.

¹¹³ Anglo American, 2014 DAU, sub. 127: 9.

- addition of the word 'flexible' to the list of descriptors of the processes for access negotiations and utilisation of capacity contained in clause 2.2(b)(i) of the IDD amended DAU
- inclusion of a requirement related to clause 2.5(b)(ii) of the IDD amended DAU for Aurizon Network to notify access holders in writing if it is not the owner of, or does not have a legal right to authorise access to, land to which the access holder is seeking access (cl. 2.5(c) of our IDD amended DAU).

We also proposed that the requirements relating to the Ultimate Holding Company Support Deed be moved from Part 3 (Ring-fencing) to Part 2 of the 2014 DAU. This reflected our view that this commitment is more than just a ring-fencing matter, and should encompass the entire undertaking.

3.10.2 Stakeholders' comments on the initial draft decision

Aurizon Network agreed with our initial draft decision on the above matters.¹¹⁴ Aurizon Network noted that it had no objection to moving requirements relating to the Ultimate Holding Company Support Deed from Part 3 to Part 2, although it had objections to the content of the Deed itself (these views are discussed in Chapter 4 (Ring-fencing)).¹¹⁵

The QRC supported the inclusion of clause 2.5(c) in our IDD amended DAU, requiring Aurizon Network to notify an access holder if it does not own land on which rail assets are located. However, the QRC proposed a drafting change to improve clarity by specifically linking the obligation to the land on which rail infrastructure is situated referred to in clause 2.5(b)(ii) of IDD amended DAU.¹¹⁶

3.10.3 Consolidated draft decision

We did not consider it appropriate to approve the following elements of the 2014 DAU:

- clause 2.2(b)(i), as it did not include a reference to flexibility in respect of the establishment of processes for access negotiations and use of capacity. The inclusion of flexibility would emphasise the importance of this attribute and enhance the potential for this clause to support effective negotiation and stakeholder engagement, which we considered to be an important consideration in the interests of access seekers and access holders (section 138(2)(e) and (h)).
- clause 2.3(b)(ii), as it did not require Aurizon Network to notify access holders if it is not the owner of or have a legal right of access to, land to which the access holder is seeking access. We proposed that Aurizon Network be required to do so, as we considered it is in the interests of access holders and Aurizon Network for access holders to be provided with this assistance so they may be able to use the service (section 138(2)(b) and (h)). In response to the QRC's submission, we clarified this requirement by specifying that it applied to the land upon which the rail infrastructure was situated (cl. 2.5(c) of our CDD amended DAU).
- the requirements related to the Ultimate Holding Company Support Deed being located in Part 3 of 2014 DAU (Ring-fencing) (we considered the substance of these requirements in Section 4.4.2 of this decision). We did not consider it appropriate for these requirements to be included in Part 3 of the 2014 DAU from a clarity and certainty

¹¹⁴ Aurizon Network, 2014 DAU, sub. 83: 44.

¹¹⁵ Aurizon Network, 2014 DAU, sub. 83: 52.

¹¹⁶ QRC, 2014 DAU, sub. 84: 9.

perspective (section 138(2)(h)). The Ultimate Holding Company Support Deed is an important measure that underpins the Aurizon Group's commitment toward Aurizon Network's compliance with its obligations under the access undertaking, of which ring-fencing is one aspect (albeit a significant aspect in the context of Aurizon Network's position within a consolidated business structure). We considered its inclusion within Part 2 of the 2014 DAU reflects this commitment is more than just a ring-fencing matter, and should encompass the entire undertaking.

We considered it appropriate for the 2014 DAU to be amended as set out in the CDD amended DAU (as described in our consolidated draft decision 3.10 below).

3.10.4 Stakeholders' comments on the consolidated draft decision

Aurizon Network expressed agreement with the CDD in relation to these matters, although it made comments with respect to the content of the provisions for the Ultimate Holding Company Support Deed (stakeholder comments on the Ultimate Holding Company Support Deed are discussed in Chapter 4 – Ring-fencing).¹¹⁷

3.10.5 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed clauses 2.2(b)(i), 2.3(b)(ii) and 3.3 of the 2014 DAU.

Stakeholders did not provide any new information or arguments on this issue in response to our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 2 of the 2014 DAU for it to be approved are set out in the final amended DAU.

¹¹⁷ Aurizon Network, 2014 DAU, sub. 125: 34.

Final decision 3.10

- (1) After considering Aurizon Network's proposed clauses 2.2(b)(i), 2.3(b)(ii), 3.3 of the 2014 DAU, our final decision is to refuse to approve these clauses of the 2014 DAU.**
- (2) The way in which we consider it is appropriate that these clauses are amended is set out in clauses 2.2, 2.4 and 2.5 of the final amended DAU, as follows:**
 - (a) the word 'flexible' in the list of descriptors of the processes for access negotiations and utilisation of capacity (clause 2.2(d)(i) of the final amended DAU)**
 - (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 upon which the rail infrastructure is situated to which the access holder is seeking access (clause 2.4(c) of the final amended DAU)**
 - (c) movement of the requirements relating to the Ultimate Holding Company Support Deed from Part 3 to Part 2 (clause 2.5 of the final amended DAU).**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4 RING-FENCING

Aurizon Network proposed new ring-fencing arrangements for the 2014 DAU to reflect the now privatised nature of its business. Significant restructuring has occurred within the Aurizon Group since the 2010 AU commenced, that has resulted in Aurizon Network subcontracting more services from the Aurizon Group.

Stakeholders consider Aurizon Network's new ring-fencing arrangements to be inadequate.

For the purposes of this consolidated draft decision, we considered the appropriateness of the 2014 DAU as originally proposed by Aurizon Network.

Our final decision is to refuse to approve Aurizon Network's 2014 DAU ring-fencing arrangements. We accept that the 2014 DAU should allow for Aurizon Network to structure itself in a manner which supports its legitimate business interests in the provision of the declared service. However, in taking into account the factors in section 138(2)(a) to (h) of the QCA Act, we consider the 2014 DAU does not appropriately balance the competing interests we are required to have regard to.

The way in which we consider it appropriate for Aurizon Network to amend its draft access undertaking so that it can be approved is to:

- *strengthen the role of the ultimate holding company support deed and confidentiality agreement provisions*
- *maintain registers of parties that have been provided information and the process for making any decisions using such information; and having this information available for audit*
- *include tiered employee training measures regarding the treatment of confidential information*
- *require secondments/transfers of employees between Aurizon Network and another Aurizon party to be notified to the QCA prior to the secondment/transfer being made*
- *require Aurizon Network to identify Aurizon Network employees separately from the remainder of the Aurizon Group employees, providing clearer separation when employees do transfer.*

Further, we consider it is appropriate the 2014 DAU should be amended to include the 2010 AU financial separation/accounting principles and Aurizon Network's ring-fencing obligations in respect of rail infrastructure.

In setting out how it is appropriate to amend the 2014 DAU, we have had regard to the 2010 AU ring-fencing arrangements, as an example of an effective ring-fencing regime. We consider it appropriate to enhance certain provisions in the 2014 DAU to provide a clearer set of safeguards regarding confidential information flow and Aurizon Network staff movements, and strengthen the provisions around the management and release of confidential information.

The detailed drafting of Parts 2, 3, 10 and Schedules D and I attached to this final decision sets out the way in which we consider it is appropriate to amend the 2014 DAU.

4.1 Introduction

Aurizon Network is part of a vertically integrated group of companies. This group also includes the dominant supplier of above-rail services in the CQCN. In this context, Aurizon Network's

ring-fencing regime has to be sufficiently robust so that Aurizon Network cannot use its monopoly power or receive confidential information, knowingly or unknowingly, and use it in a manner that favours the Aurizon Group's strategic intent, to the detriment of competition in upstream and downstream markets.¹¹⁸

The existing ring-fencing arrangements that apply to Aurizon Network (in the 2010 AU) are outlined in the table below.

Table 5 Measures covered in the 2010 AU ring-fencing regime

<i>Measure</i>	<i>Purpose</i>
Information separation	Processes for handling of confidential information
Operational separation	Measures to separate Aurizon Network's operations from the Aurizon Group
Functional separation	Measures to separate Aurizon Network functions into access and non-access functions
Management separation	Measures to separate management of Aurizon Network from the Aurizon Group
Employee separation	Measures to separate Aurizon Network's employees from the Aurizon Group
Accounting separation	Measures to separate Aurizon Network's accounts from the Aurizon Group
Compliance measures	Mechanisms for dealing with compliance and complaint handling
Decision-making	Principles for making and recording how decisions are made

Aurizon Network's proposed ring-fencing arrangements for the 2014 DAU are set out in Part 3 of the DAU and Schedules D and I.

Aurizon Network's 2013 DAU and subsequent 2014 DAU broadly rewrote the ring-fencing regime contained in the 2010 AU. Aurizon Network considered its proposals met its core ring-fencing obligations, but in a more streamlined and cost effective manner.

Stakeholders did not agree with Aurizon Network's submission on this point. The proposals in both the 2013 DAU and 2014 DAU were perceived by stakeholders to weaken the existing ring-fencing provisions at a time when Aurizon Network has communicated its strategic intent to leverage the benefits it obtains from vertical integration. Stakeholders also suggested that the existing 2010 AU ring-fencing provisions are not sufficiently robust, in any case.

This chapter outlines how we have reached our final decision and the way in which we consider it appropriate for Aurizon Network to amend the ring-fencing provisions in the 2014 DAU. In our view, an effective ring-fencing regime promotes effective competition in upstream and downstream markets, and strengthens customer confidence and trust in Aurizon Network's actions.

Our proposed amendments address those aspects of the proposed 2014 DAU ring-fencing arrangements that we consider do not achieve these objectives. We acknowledge our amendments will strengthen existing ring-fencing requirements but consider this is appropriate given the importance of ring-fencing arrangements.

¹¹⁸ Examples of such behaviour include providing preferential treatment to upstream or downstream operations of the Aurizon Group and related entities, the sharing of confidential information and personnel with access to, or knowledge of, this information between related entities; as well as cost shifting, cross-subsidisation and price/margin squeezing.

4.2 Overview

Aurizon Network's proposal

Aurizon Network said its intent in the 2014 DAU was to streamline the ring-fencing regime so it is effective and widely understood, and contributes to a low-cost compliance culture.¹¹⁹ Aurizon Network said the 2014 DAU contains, in substance, the same principal controls as existed in prior undertakings, with obligations clarified or strengthened.¹²⁰ In its view, the 2014 DAU creates a workable and balanced framework that addresses key competition risks and ensures a level playing field.¹²¹

Aurizon Network recognised ring-fencing is important to the way the Aurizon Group is structured, how it operates, and how it creates value for its shareholders and customers. Aurizon Network viewed its proposals as seeking to achieve a ring-fencing regime that is clear, readily understandable and workable for its large number of employees, contractors and other Aurizon parties.¹²²

Aurizon Network said its core ring-fencing obligations had remained largely unchanged since UT1. Aurizon Network also noted that, at each regulatory review, new provisions have been added in response to concerns of a hypothetical nature, resulting in an unnecessarily complex and unwieldy regime.¹²³

4.2.1 Legislative framework and QCA assessment approach

Factors affecting approval of an access undertaking

We are required to assess Aurizon Network's ring-fencing proposals having regard to the factors in section 138(2) of the QCA Act, as set out in Chapter 2 of this final decision.

As identified above, our consideration of the factors in section 138(2) of the QCA Act and our final decision is in relation to the 2014 DAU as originally proposed by Aurizon Network. Aurizon Network's revised proposal is only relevant to the way in which we consider the 2014 DAU should be amended, should we refuse to approve relevant aspects of the 2014 DAU.

In the context of assessing Aurizon Network's proposed ring-fencing regime, we must have regard to the factors listed in section 138(2). Accordingly, we have allocated those factors a weighting, as follows:

- section 138(2)(a), (b), (d), (e), (g) and (h) should be given more weight, as they raise important considerations from a ring-fencing perspective
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, of which we consider section 168A(a), (c) and (d) should be given more weight
- sections 138(2)(f) and 168A(b) should be given less weight, as they are not as practically relevant to our assessment of Aurizon Network's proposed ring-fencing regime and protections against anti-competitive behaviour or unfair differentiation of a material nature.

¹¹⁹ Aurizon Network, 2013 DAU, sub. 2:55.

¹²⁰ Aurizon Network, 2013 DAU, sub. 2:54.

¹²¹ Aurizon Network, 2013 DAU, sub. 2:55.

¹²² Aurizon Network, 2013 DAU, sub. 2:55.

¹²³ Aurizon Network, 2013 DAU, sub. 2:55.

Section 138(2)(a) of the QCA Act requires us to have regard to the object of Part 5 of the QCA Act. We consider this means that the ring-fencing regime needs to be effective enough to provide confidence and credibility to promote efficient investment. For example, if ring-fencing is not effective and credible, there could be excessive transaction costs, a lack of confidence among investors, or constraints on competitive outcomes in upstream and downstream markets. The object of Part 5 of the QCA Act is not met if Aurizon Network is able to engage in preferential treatment of a related above-rail operator and discriminating against others by being able to use confidential information in a way that it unfairly differentiates between access seekers.

Section 138(2)(b) of the QCA Act directs us to have regard to the legitimate business interests of Aurizon Network. Ring-fencing arrangements should not unnecessarily impinge on Aurizon Network's ability to operate as if it were operating in a competitive environment. We consider that Aurizon Network's interests also include being able to recover the reasonable costs it incurs in managing the ring-fencing regime. To this end, the costs of compliance may need to be weighed against the objectives. However, Aurizon Network's interests are balanced by other factors, including industry participants having confidence that no materially unfair differentiation occurs (see below).

Section 138(2)(c) of the QCA Act requires us to have regard to the protection of the legitimate business interests of the operator of the service, where the owner and operator of the service are different entities. This factor is given a low weighting as Aurizon Network is both the owner and operator of the declared service.

Section 138(2)(d) of the QCA Act requires us to have regard to the public interest. We consider it in the public interest that ring-fencing is effective and transparent. Without effective ring-fencing, investors may be unwilling to invest in growing the coal mining sector as they may be concerned that Aurizon Network could exercise its market power to use certain information to unfairly differentiate materially between third party access seekers and its related entities. Ring-fencing is therefore required to safeguard the public interest.

Section 138(2)(e) of the QCA Act requires us to have regard to the interests of access seekers. Access seekers need to be confident that they can compete on equal terms with entities that are related to Aurizon Network, and that any confidential information is managed appropriately.

Section 138(2)(f) of the QCA Act requires us to have regard to the effect of excluding existing assets for pricing purposes. This factor is given a low weighting.

Section 138(2)(g) of the QCA Act requires us to have regard to the pricing principles in section 168A of the Act. Of these pricing principles:

- section 168A(a) requires that expected revenue is sufficient to meet the efficient costs of providing access. This is relevant to ensure that efficient costs of ring-fencing measures are recovered through expected revenues—for example, costs associated with maintaining a register or implementing security measures
- section 168A(b) relates to multi-part pricing and is not directly relevant to ring-fencing
- section 168A(c) requires that prices should not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related entity. This is relevant to the extent that ring-fencing arrangements should ensure that such discrimination does not occur where Aurizon Network deals with related entities.

- section 168A(d) requires that prices should provide incentives to reduce costs or improve productivity. We consider that effective ring-fencing will promote competitive market outcomes, thereby providing incentives for cost efficiencies to be achieved.

Section 138(2)(h) of the QCA Act requires us to have regard to any other issues that we consider relevant. We consider that:

- The ring-fencing arrangements should be understandable and predictable thereby promoting confidence in the regulatory regime overall and reducing transaction costs.
- A ring-fencing regime must be effective. That is, the regime must be operationally effective satisfying the requirements of Part 5 of the Act, and perceived by access seekers and access holders to be effective.
- The interests of access holders are relevant, given that they are affected by ring-fencing arrangements and are not specifically identified under section 138(2).

Contents of access undertakings

Section 137 of the QCA Act sets out what a draft access undertaking must, and can, include. Section 137(1A) of the QCA Act provides that an access undertaking for a service operated by an access provider, which provides itself or a related body corporate with access to that service, must include provisions for preventing and remedying conduct which unfairly differentiates in a material way between access seekers and users. The definition of 'material way' in the same section clarifies that this concept is directed at differentiation that may materially adversely affect competition.

Further, section 137(2)(ea) of the QCA Act specifically provides that a draft access undertaking may include more general ring-fencing provisions, as it provides for:

arrangements to be made by the owner or operator to separate the owner's, or operator's, operations concerning the service from other operations of the owner or operator concerning another commercial activity.

Whether the 2014 DAU contains provisions that satisfy these requirements is a relevant issue (s. 138(2)(h) of the QCA Act), and one we had regard to in deciding whether to approve the 2014 DAU and what amendments would be appropriate to enable the 2014 DAU to be approved.

QCA assessment approach

In our view, Part 5 of the QCA Act and sections 137 and 138 require that an appropriate ring-fencing regime:

- avoids unfair differentiation of a material nature in favour of related entities that could affect competition in upstream and downstream markets
- manages confidential information
- manages separation of operational, functional, management, employment and accounting activities, where there are linkages with related parties
- ensures that reporting, compliance and auditing provisions are credible and effective
- is perceived by access seekers and access holders to be credible and effective.

Our application of these practical considerations to Aurizon Network's 2014 DAU are shown in the table below.

Table 6 QCA approach to assessing effectiveness of the 2014 DAU ring-fencing regime

<i>Assessment criterion</i>	<i>Rationale</i>
Does the regime support the objective of promoting effective competition in upstream and downstream markets?	This involves assessing whether the: <ul style="list-style-type: none"> • commitments to avoid anti-competitive behaviour and unfair differentiation of a material nature • ultimate holding company support deed (UHCSA) have sufficiently strong provisions within them to be fit for purpose.
Are the management of confidential information and decision making principles credible and effective?	This involves assessing whether the ring-fencing regime: <ul style="list-style-type: none"> • protects confidential information from inappropriately flowing between the owner/operator of the declared service and upstream or downstream activities or related parties • provide suitable decision making principles.
Are the operational and functional separation provisions credible and effective?	This involves assessing whether the ring-fencing regime effectively separate: <ul style="list-style-type: none"> • Aurizon Network's operations from the remainder of the Aurizon Group • operations regarding the declared service from other operations.
Are the employee separation provisions credible and effective?	This involves assessing whether the ring-fencing regime place effective controls on staff movements between Aurizon Network and related parties.
Are the management separation provisions credible and effective?	This involves assessing whether the ring-fencing regime ensure the independence of management and Aurizon Network corporate decision making regarding the declared service, from other commercial activities.
Are the accounting separation provisions credible and effective?	This involves assessing whether the ring-fencing regime effectively separate: <ul style="list-style-type: none"> • Aurizon Network's accounts from the remainder of the Aurizon Group • the accounts, relating to operations associated with the declared service, from other operations.
Are the reporting, compliance and auditing provisions credible and effective?	This involves assessing whether the ring-fencing regime: <ul style="list-style-type: none"> • provides transparent, timely and meaningful information reporting • provides an effective compliance regime • includes a robust and transparent audit process.

In assessing the details of the ring-fencing proposals in the 2014 DAU, we also considered which is the most effective baseline to work from—either Aurizon Network's revised drafting of Part 3 in the 2014 DAU, or arrangements in the 2010 AU. This is discussed below.

4.3 The 2014 DAU ring-fencing regime

4.3.1 Aurizon Network's proposal

Aurizon Network provided various reasons to substantiate its overarching approach to ring-fencing in the 2014 DAU. These are outlined in the table below.

Table 7 Aurizon Network's approach to ring-fencing in the 2014 DAU

<i>Issue</i>	<i>Aurizon Network's rationale</i>
Legislative environment	<ul style="list-style-type: none"> • Prior to privatisation, the Queensland Government strengthened ring-fencing obligations through legislation in the <i>Transport Infrastructure Act 1994</i> (TIA). This required an independent board and arms-length dealings between Aurizon Network and its related operator. Aurizon Network said the ring-fencing obligations in the access undertaking should supplement enforcement of statute, not supplant it, and said the QCA should not, and cannot, require a regime stricter than the legislature intended through imposing additional requirements in the access undertaking.¹²⁴ • Aurizon Network said the relevance of section 137(2)(ea)¹²⁵ of the QCA Act has lessened due to legal separation of Aurizon Network from its parent company. It said the QCA's focus, when considering ring-fencing, resides in section 138(2) regarding the legitimate business interests of access providers, seekers, holders and users.¹²⁶ • Aurizon Network also said it is the service that is regulated, not all activities of the legal entity (Aurizon Network Pty Ltd). Aurizon Network challenged the legal basis for ring-fencing beyond declared services, and suggested limits on imposing obligations.¹²⁷
Aurizon Network's legitimate business interests	<ul style="list-style-type: none"> • Aurizon Network said privatisation meant the Aurizon Group and Aurizon Network were no longer subject to mixed mandates of public ownership, having instead a predominant objective of advancing shareholders' interests. Aurizon Network said this had implications for a regulatory framework that had previously too readily assumed Aurizon Network's commercial interest could be subordinated to the larger purpose of promoting development of Queensland coal mines. It said the 2014 DAU was an opportunity to develop a regulatory framework that balanced Aurizon Network's commercial interests with the interests of access seekers, holders and the public.¹²⁸
Vertical integration	<ul style="list-style-type: none"> • Aurizon Network said vertical integration produces tangible efficiency benefits that flow to and promote the interests of access providers, access seekers and users, as well as the public interest.¹²⁹ It said this creates powerful incentives for it to contribute to supply chain performance, compared with weak financial incentives for standalone network businesses.¹³⁰ Aurizon Network said efficiency benefits should be preserved by ring-fencing, with the focus instead on guarding against cross-subsidy and confidential information misuse undermining competition.¹³¹
Behavioural constraints	<ul style="list-style-type: none"> • Aurizon Network said access negotiations increasingly centre on producers rather than operators, and the ring-fencing regime should also change to reflect this. Aurizon Network said it does not compete in the same market as producer access seekers, so anti-competitive concerns are not prominent.¹³² • Aurizon Network also said it is 'policed' by 20 of the largest Australian companies and users who are 'alive' to risks of Aurizon Network discriminating against third party operators. As a result, the level of regulatory ring-fencing intervention, to protect informed consumer interests, can be substantially less than in a retail context.¹³³

¹²⁴ Aurizon Network, 2013 DAU, sub. 2: 60.

¹²⁵ Section 137(2)(ea) requires separating operations concerning a regulated service from another commercial activity.

¹²⁶ Aurizon Network, 2013 DAU, sub. 2: 59.

¹²⁷ Aurizon Network, 2013 DAU, sub. 77: 19–20.

¹²⁸ Aurizon Network, 2013 DAU, sub. 2: 25.

¹²⁹ Aurizon Network, 2013 DAU, sub. 2: 57.

¹³⁰ Aurizon Network, 2013 DAU, sub. 2: 57.

¹³¹ Aurizon Network, 2013 DAU, sub. 2: 57.

¹³² Aurizon Network, 2013 DAU, sub. 2: 57.

¹³³ Aurizon Network, 2013 DAU, sub. 2: 58.

4.3.2 Summary of the initial draft decision

In our initial draft decision, we considered Aurizon Network's proposed ring-fencing provisions diluted the requirements of the QCA Act; accordingly, its proposed regime was not sufficiently effective in that it did not adequately balance the competing interests referred to in section 138(2) of the QCA Act.

Our initial draft decision had regard to Aurizon Network's reasons for its new ring-fencing provisions (as set out in the above), namely:

- the legislative environment
- Aurizon Network's legitimate business interests
- the benefits of vertical integration
- credible behavioural constraints.

We have also had regard to the evidence and practice of the 2010 AU ring-fencing arrangements.

Legislative environment

We agreed with the QRC's view,¹³⁴ that Aurizon Network adopted an overly narrow interpretation of the QCA Act and the ring-fencing requirements (see Part 5, s. 137(1A) and (2)(ea) and s. 138(2) of the QCA Act).

We considered the relevant statutory requirements, as set out above, are relevant considerations when deciding whether or not to approve the 2014 DAU (see ss. 137(1A) and (2)(ea) and 138(2) of the QCA Act).

Aurizon Network's legitimate business interests

We considered the 'legitimate business interests' of an owner or operator of a facility are those commercial interests of the owner or operator that, if catered for, would allow the owner or operator to recover its costs in providing the relevant service and to earn a regulated return on its invested capital. Compliance costs can be incorporated into the maximum allowable revenue (MAR) used for determining access charges. We recognised that operating a ring-fencing regime is a cost-benefit exercise.

Vertical integration

Aurizon Network addressed the interaction of vertical integration issues and ring-fencing to support its 2014 DAU ring-fencing proposals. We considered that:

- Aurizon Network provided no compelling evidence to demonstrate that vertical integration provides it with efficiency gains in comparison to the costs it would face if it were a stand-alone entity, or that any cost efficiencies realised are material and flow through to Aurizon Network's customers
- a vertically integrated Aurizon Network would face materially differing financial incentives to contribute to supply chain efficiency than a stand-alone Aurizon Network. It is also not clear why an effective ring-fencing regime would erode any efficiencies Aurizon Network gains from vertical integration, given it is in Aurizon Network's legitimate business interests that

¹³⁴ QRC, 2013 DAU, sub. 84: 23; QRC, 2014 DAU, sub. 42: 14.

the efficient costs of compliance with the ring-fencing framework in place should be included in its MAR.

In submissions, the QRC also said the ring-fencing regime in the 2014 DAU was inadequate to regulate the activities of a privatised, integrated business whose stated goals are to leverage its integrated model.¹³⁵

Behavioural constraints

We did not consider Aurizon Network's argument that it is 'policed' by access seekers, access holders and train operators who are 'alive' to the risks of anti-competitive behaviour to justify a 'light-handed' approach to ring-fencing arrangements. Aurizon Network had provided no practical evidence that a small customer base, comprising large mining and transport companies is capable of such a function. Further, in submissions, stakeholders did not consider themselves capable of performing this function, or that the regulatory arrangements provide sufficient information for customers to do so.

We were of the view that Aurizon Network retains significant bargaining power as a monopoly access provider of CQCN below-rail services, and therefore we could not rely on it being 'policed' by customers.

We also did not agree with Aurizon Network's view that, because it does not compete in the same market as producer access seekers, anti-competitive concerns are not prominent. We noted that Aurizon Network's related body corporate had acquired an interest in a coal mine and the Aurizon Group was pursuing interests in other infrastructure in the coal supply chain, such as ports.

Evidence and practice in the 2010 AU

Overall, stakeholders said they lacked confidence in the current ring-fencing regime (the 2010 AU regime) and even more so in Aurizon Network's proposed 2014 DAU ring-fencing regime.¹³⁶

We noted that despite an apparent lack of confidence, very few complaints and audit issues had been raised with respect to the existing ring-fencing provisions. This could indicate that the ring-fencing regime is effective, or it could indicate, for example, that stakeholders are unwilling to lodge complaints or regard the complaint process as ineffective.

Stakeholders were also concerned that Aurizon Network proposed significant changes to the ring-fencing regime, rather than learning from other regimes and building on the 2010 AU.

Initial draft decision conclusion and approach

We concluded Aurizon Network's 2014 DAU ring-fencing provisions were not appropriate as those provisions failed to balance the legitimate business interests of Aurizon Network with the interests of access seekers and access holders (ss. 138(2)(b) and (e) of the QCA Act).

In deciding how best to indicate the way in which it would be appropriate to amend Aurizon Network's 2014 DAU ring-fencing provisions, and noting these provisions were effectively 'new' to the QCA and stakeholders, we considered it was within our discretion to adopt a pragmatic solution and use the 2010 AU as the baseline position with appropriate changes (as opposed to accepting Aurizon Network's 2014 DAU ring-fencing provisions as the baseline position).

¹³⁵ QRC, 2013 DAU, sub. 84: 20–21; QRC, 2014 DAU, sub. 42: 14.

¹³⁶ QRC, 2013 DAU, sub. 84: 5, 7; QRC, 2014 DAU, sub. 42: 13.

We believed that taking an incremental approach and proposing amendments to the existing 2010 AU ring-fencing provisions would result in a ring-fencing regime we could approve having regard to sections 137 and the factors listed in 138(2) of the QCA Act. We considered that building on the 2010 AU provisions would facilitate the proposed ring-fencing regime achieving the practical considerations referred to above.

4.3.3 Stakeholders' comments on the initial draft decision

Baseline comparison

Aurizon Network disagreed with our use of the 2010 AU as the baseline, arguing that each undertaking is specific to the requirements at the time and should not be a build upon a previous version.¹³⁷ Asciano agreed with using the 2010 AU as a base.¹³⁸

QCA power to propose ring-fencing drafting

Aurizon Network said that:

- (a) it disagreed with most of our amendments, saying we had gone beyond our statutory powers by substantially rewriting the ring-fencing provisions
- (b) we had introduced greater complexity and inflexibility
- (c) our approach should be to consider whether the undertaking is appropriate, not to substitute our own version merely because we prefer an alternative set of words
- (d) our approach was inconsistent with the QCA Act.¹³⁹

The QRC supported what it considers to be significant improvements proposed for the ring-fencing regime, noting it considers the 2014 DAU proposed by Aurizon Network to be defective in a large number of respects. It said the ring-fencing regime we proposed 'represents a step toward a meaningful and effective ring-fencing regime.'¹⁴⁰

Anglo American and Vale supported our ring-fencing changes.¹⁴¹

Chapter 2 addresses Aurizon Network's view with respect to our statutory powers.

Effectiveness of ring-fencing

Aurizon Network submitted that we have not demonstrated that its proposed ring-fencing provisions are inadequate and have no facts before us to justify our proposed amendments—that is, there is no evidence of failure and no complaints. Aurizon Network said this was an unusual approach to regulation.¹⁴²

Vale submitted that it is difficult to assess the effectiveness of the ring-fencing regime on the basis of claims for breach.¹⁴³

QCoal supported our initial draft decision, but said the benefits should outweigh the costs of the ring-fencing regime. QCoal said the lack of complaints is not surprising and it does not mean

¹³⁷ Aurizon Network, 2014 DAU, sub. 83: 57.

¹³⁸ Asciano, 2014 DAU, sub. 76: 12.

¹³⁹ Aurizon Network, 2014 DAU, sub. 83: 57.

¹⁴⁰ QRC, 2014 DAU, sub. 84: 13.

¹⁴¹ Anglo American, 2014 DAU, sub. 95: 8; Vale, 2014 DAU, sub.79: 3.

¹⁴² Aurizon Network, 2014 DAU, sub. 83: 57.

¹⁴³ Vale, 2014 DAU, sub 79: 3.

there have been no breaches. Unless the breach is blatant, it is very difficult for the access holder to detect it or to obtain evidence.¹⁴⁴

Aurizon Operations said that when considered in isolation, the ring-fencing measures do not appear unreasonable. However, in aggregate, there is a potential for an increased level of compliance risk in how Aurizon Network interfaces with its related operator.¹⁴⁵

4.3.4 Consolidated draft decision

In our view, evidence (or a lack thereof) of complaints of non-compliance is not determinative. Without sufficient information, it is difficult to gather enough evidence to support a claim for a breach of the ring-fencing provisions and therefore evidence of a lack of complaints does not necessarily support Aurizon Network's position.

Additionally, a practical consideration that arises under the QCA Act is the degree to which a proposed regime is deemed by stakeholders to be credible and effective. We took into account stakeholder's views in this regard.

Overview

Having regard to the criteria listed in section 138(2) of the QCA Act, and the submissions we received on the initial draft decision, we did not consider it is appropriate to approve Aurizon Network's 2014 DAU ring-fencing regime.

In our view, Aurizon Network's proposed 2014 DAU ring-fencing regime:

- did not provide an appropriate balance between the legitimate business interests of Aurizon Network and the interests of access seekers and access holders (s. 138(2)(b), (e) and (h) respectively) and was not in the public interest in having competition in markets (s. 138(2)(d))
- did not promote stable and predictable regulatory arrangements (identified above under section 138(2)(h))
- allowed scope for the access provider to set terms and conditions that discriminate in favour of downstream operations of the access provider or related entity (s. 168A(c))
- risked conduct which could unfairly differentiate between access seekers and users (s. 137(1A))
- was neither credible for stakeholders nor practically effective.

The proposed 2014 DAU ring-fencing arrangements were, in our view, broadly inadequate to regulate the activities of a privatised integrated business whose stated goals are to leverage its integrated model. Given Aurizon Network's changed business structure and its intention to leverage the benefits of vertical integration, we considered that the 2014 DAU ring-fencing regime could allow Aurizon Network to exercise anti-competitive behaviours, restrict transparency, and manage information flows to its advantage (or the advantage of related parties).

In reaching this view, the practical effectiveness of the proposed ring-fencing regime was given particular weight. In our view this consideration arose under sections 137 and 138(2)(a), (d), (e) and (h) (as discussed above). Assessing effectiveness included assessing whether:

¹⁴⁴ QCoal, 2014 DAU, sub. 80: 2.

¹⁴⁵ Aurizon Operations, 2014 DAU, sub. 93: 27.

- Aurizon Network's 2014 DAU ring-fencing regime effectively satisfies the requirements of Part 5 of the QCA Act
- industry participants consider the ring-fencing regime credible and effective
- the ring-fencing regime effectively balances competing interests
- when considered in light of the existing 2010 AU ring-fencing regime, Aurizon Network's 2014 DAU is effective.

Each is addressed below.

The object of Part 5 of the QCA Act

Ring-fencing arrangements for a vertically integrated business need to satisfy the objectives of section 69E of Part 5 of the QCA Act; that is, the economically efficient operation of, use of and investment in, significant infrastructure. If a proposed ring-fencing regime has the potential to result in outcomes that increase costs, decrease the confidence of potential investors, and lower productivity in the coal sector, the regime is likely not effective.

It is in the public interest to maintain competition in markets (s. 138(2)(d) of the QCA Act). An effective ring-fencing regime will contribute to ensuring markets are competitive and therefore satisfy this factor.

In our view, Aurizon Network's proposed 2014 DAU ring-fencing regime did not appropriately satisfy the requirements of Part 5 of the QCA Act and did not sufficiently promote the public interest in maintaining competition in this industry.

Whether industry participants consider the ring-fencing regime effective

An absence of complaints under a ring-fencing regime could imply that the ring-fencing regime is effective. It could also mean that access seekers and holders do not have awareness that there has been a breach, or lack sufficient evidence to substantiate a complaint. Therefore, the level of complaints or otherwise is not determinative. We considered that stakeholders' confidence in the proposed provisions is of greater relevance. For example, any loss of confidence in ring-fencing could affect Aurizon Network's credibility, lose trust among its customer base and affect future investment decisions.

Further, the proposed 2014 DAU ring-fencing arrangements lack credibility among access seekers and access holders, as under those arrangements there would not be sufficient information to determine whether or not the regime is effective.

Whether the ring-fencing regime effectively balances competing interests

We are required to assess whether Aurizon Network's proposed 2014 DAU ring-fencing regime appropriately balances competing interests under section 138(2) of the Act (i.e. Aurizon Network's legitimate business interests and the public interest in competition in markets).

The benefits of ring-fencing relate to avoided costs of anti-competitive practices and are not readily quantifiable. We acknowledged that there are potentially additional costs of administration and compliance associated with the ring-fencing regime, and these would be passed through to customers. However, we considered that the wider economic benefits of competition in markets justify these additional costs. Overall, we did not consider Aurizon Network's 2014 DAU ring-fencing arrangements represent an appropriate balance between these interests.

Baseline comparison

Our view was that under section 138(2)(h) we can consider the effectiveness of Aurizon Network's new ring-fencing regime by comparing that regime with the 2010 AU ring-fencing regime.

This approach was in our view more transparent, and more easily evaluated in terms of cost-effectiveness, which we considered to provide an appropriate balance between the interests of access seekers, access holders, and Aurizon Network's legitimate business interests, in accordance with section 138(2) of the QCA Act.

The 2010 AU regime therefore provided a baseline for assessing the proposed regime's effectiveness and supported our assessment that Aurizon Network's proposed 2014 DAU ring-fencing regime is not appropriate.

4.3.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed with the consolidated draft decision, subject to amendments. In its submission, Aurizon Network proposed comprehensive redrafting of Part 3. Aurizon Network reiterated the views that the QCA has not demonstrated that there is a lack of confidence in the industry with ring-fencing arrangements and that our consolidated draft decision—amended DAU was heavy-handed.¹⁴⁶

Asciano reiterated that the absence of complaints under a ring fencing regime does not necessarily imply the regime is effective.¹⁴⁷

The QRC said the ring-fencing arrangements were complex and unclear. The QRC said that further amendments are required to provide a strong ring-fencing regime and to ensure that Part 3 is effective and meaningful.¹⁴⁸

4.3.6 QCA analysis and final decision

Our final decision is to refuse to approve the ring-fencing arrangements proposed by Aurizon Network in its 2014 DAU.

While Aurizon Network has proposed a redraft of Part 3, our preference is to address the specific issues raised (as in the following sections), as this allows stakeholders to understand the changes made since the consolidated draft decision to our proposed amended DAU.

Aurizon Network's concerns that we have not sufficiently demonstrated the industry's lack of confidence in ring-fencing are in contrast to the views expressed in QRC's submission. We maintain the view that a detailed and effective ring-fencing regime is required.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

¹⁴⁶ Aurizon Network, sub. 125: 41, 50–52.

¹⁴⁷ Asciano, sub. 126: 11.

¹⁴⁸ QRC, sub. 124: 9.

Final decision 4.1

- (1) After considering Aurizon Network's proposed 2014 DAU ring-fencing arrangements, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to adopt the ring-fencing provisions in the 2010 AU as the baseline for our proposed amendments.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.4 Overarching provisions

We assessed Aurizon Network's 2014 DAU in the context of two overarching provisions:

- commitments to avoid anti-competitive and discriminatory behaviour (see Section 4.4.1 below)
- the ultimate holding company support deed (see Section 4.4.2 below).

These principles encompass the entire undertaking.

4.4.1 Aurizon Network's proposal

Aurizon Network's approach to the principle of avoiding anti-competitive and discriminatory behaviour in the 2010 AU, compared with its approach in the 2014 DAU, is shown in the table below. The table also shows a similar comparison in terms of the role of the ultimate holding company support deed (UHCSA).

In considering Aurizon Network's 2014 DAU, as indicated above, we consider the 2010 AU can assist us to determine whether the proposed provisions deliver an effective ring-fencing regime.

Table 8 Aurizon Network's approach to ring-fencing—in the 2010 AU and 2014 DAU

<i>Ring-fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Commitments to avoid anti-competitive and discriminatory behaviour	<p>Contained in Part 2 of the undertaking regarding the intent and scope of the entire undertaking.</p> <p>This can be applied to the Aurizon Group by virtue of the UHCS D provisions.</p>	<p>Includes a statement of general principles of non-discrimination in Part 3 of the 2014 DAU. The commitments are similar to the 2010 AU but are now no longer included in the 'Intent and Scope' part of the undertaking.</p> <p>These commitments can be applied to the Aurizon Group by virtue of the UHCS D provisions.¹⁴⁹</p>
UHCS D	<p>The 2010 AU contains a commitment that Aurizon Network will procure Aurizon Holdings to enter into a deed which obliges the Aurizon Group to, among other things, take steps to ensure Aurizon Network can comply with its obligations in the undertaking (cl. 2.5.1 of the 2010 AU).</p>	<p>The 2014 DAU contains a commitment that Aurizon Network will request Aurizon Holdings to enter into a deed, which, among other things, obliges the Aurizon Group to not instruct Aurizon Network to contravene its obligations under Part 3 of the 2014 DAU. Aurizon Network considered that focusing on its obligations under Part 3 of the 2014 DAU is more appropriate, as it targets where competition risks are highest, namely in the handling of confidential information, separation of functions, potential conflicts of interest and the risk of discriminatory behaviour.¹⁵⁰</p>

4.4.2 Commitment to avoid anti-competitive and discriminatory behaviour

Summary of the initial draft decision

Aurizon Network moved the statement of commitment to general principles of non-discrimination from the Intent and Scope section of the 2010 AU to Part 3 of the 2014 DAU (Ring-fencing).¹⁵¹ In our initial draft decision, we considered a commitment to avoid anti-competitive and discriminatory behaviour should be overarching and is not only a ring-fencing issue. We considered the ring-fencing provisions are intended to give effect to the underlying principle that Aurizon Network should not partake in anti-competitive and discriminatory behaviour in any of its actions. This principle encompasses the entire undertaking, consistent with the object of Part 5 of the QCA Act.

We also said that the commitments must be fit-for-purpose, given the evolution of Aurizon Network, the Aurizon Group and its strategic intent to leverage the benefits it obtains from vertical integration. Accordingly, we considered it is necessary to extend ring-fencing provisions to account for port and mine interests.

We also accepted that a potential impact of moving network functions, such as engineering, project delivery and specialised track services, out of Aurizon Network to a related party, is a potential increase in the risk of conflicts of interest.

As a result, in our initial draft decision we considered the following changes were appropriate:

¹⁴⁹ Aurizon Network, 2013 DAU, sub. 2: 64–65.

¹⁵⁰ Aurizon Network, 2013 DAU, sub. 2: 65.

¹⁵¹ Aurizon Network, 2013 DAU, sub. 2: 63.

- Reinstated in Part 2 of the 2014 DAU an overarching principle-based set of statements similar to those in clause 2.2(a) of the 2010 AU, but updated to reflect the evolution of Aurizon Network (cl. 2.2 of the initial draft decision-amended DAU).
- Include a strengthened clause 3.2 from the 2010 AU in Part 2 of the DAU that covered issues surrounding port and mine ownership and clarified the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing (cl. 2.2(i) of the initial draft decision-amended DAU).

Stakeholders' comments on the initial draft decision

Non-discriminatory treatment and overarching principles

Aurizon Network said the ring-fencing regime proposed by the QCA is beyond power and unjustified. Aurizon Network considered the ring-fencing provisions proposed in the initial draft decision to be a more extreme version of those in the 2010 AU.¹⁵²

Aurizon Network disagreed with the reference to discriminatory behaviour as not being consistent with the object of Part 5 of the QCA Act. Aurizon Network said we should focus on unfair differentiation—it said seeking to avoid discriminatory behaviour is too broad as it could capture differences in treatment of two access seekers which is not unfair or is objectively justified (as a result of different circumstances) or is not sufficiently material to have an impact on competition.¹⁵³

Aurizon Operations submitted that, in aggregate, our proposed ring-fencing measures increase the compliance risk of how Aurizon Network interfaces with its related operator. Aurizon Operations said the problem with expanding the statutory obligation to include any differentiation is that there will be an increased level of risk aversion in dealings with a related operator, which will be greater than in dealings with third party operators.¹⁵⁴

Ownership arrangements

Aurizon Network said we had assumed that Aurizon Network's stated intent to leverage the benefits of vertical integration is indicative of anti-competitive intent. Aurizon Network said this is illogical given there are many ways for leveraging benefits from vertical integration, such as provision of shared services. Aurizon Network indicated that, given the scope of an access undertaking as described in the QCA Act, there is nothing to prohibit it from owning a port or mine or undertaking above-rail services outside the CQCR. Aurizon Network said that industry did not express any objection to ownership or interest in a port by Aurizon Network or a related party.¹⁵⁵

Aurizon Network did not accept that we could propose rigid constraints in the absence of any explanation or evidence that these provisions are necessary to facilitate the access of third parties. It said the access undertaking should not be a barrier for Aurizon Network to progress its legitimate business interests outside of the CQCR.¹⁵⁶

Asciano, Vale and Anglo American agreed with our position in the initial draft decision.¹⁵⁷

¹⁵² Aurizon Network, 2014 DAU, sub. 83: 37.

¹⁵³ Aurizon Network, 2014 DAU, sub. 83: 8, 44, 46.

¹⁵⁴ Aurizon Operations, 2014 DAU, sub. 93: 27.

¹⁵⁵ Aurizon Network, 2014 DAU, sub. 83: 59.

¹⁵⁶ Aurizon Network, 2014 DAU, sub. 83: 59.

¹⁵⁷ Asciano, 2014 DAU, sub. 76:12; Vale, 2014 DAU, sub. 79: 3; Anglo American, 2014 DAU, sub. 95: 8.

The QRC supported ownership restrictions and said clause 3.5(e) of the initial draft decision amended DAU should be expanded to restrict Aurizon Network from above- or below-rail activities in another railway, as it would be difficult to separate out costs.

The QRC also said that clause 3.5 should be expanded to include the development of an access undertaking, all standard documents and any future undertaking—this would restrict Aurizon Network from delegating that function to another Aurizon entity, and act to protect confidential information.¹⁵⁸ The QRC considered these activities to be essential roles in Aurizon Network's provision of below-rail services.

Consolidated draft decision

Having regard to the criteria listed in section 138(2) of the QCA Act, and the submissions received on the initial draft decision, we did not consider it was appropriate to approve Aurizon Network's 2014 DAU ring-fencing regime.

Non-discriminatory treatment and overarching principles/clause 3.5 of the 2014 DAU

We noted Aurizon Network's comments that provisions related to 'non-discriminatory treatment', as proposed in our initial draft decision, should reflect the concept of 'unfair differentiation' that was expressed in the QCA Act.

In response to Aurizon Operations, we accepted that ring-fencing requirements result in compliance risk for Aurizon Network which could affect the costs associated with providing services to related parties as compared to other competitors. However, this is a consequence of establishing provisions to meet the section 168A(c) principle that the access provider is not to set terms and conditions that discriminate in favour of downstream operations of a related party.

For the consolidated draft decision, we had regard to the criteria in section 138(2) including paragraph (g), and to the effectiveness of the 2014 DAU (which includes the extent to which the proposed provisions remedy or prevent conduct that unfairly differentiates in favour of related parties in a material way).

Ownership arrangements

We acknowledged that shared services can result in lower costs and more efficient service delivery for the benefit of all customers, and could therefore be in the interests of access seekers and access holders. At the same time, vertical integration necessitates an effective ring-fencing regime to allow these benefits to be realised, but without negatively impacting competition in upstream and downstream markets, as per the object of Part 5 of the QCA Act and the public interest (ss. 138(2)(a) and (d)).

The intent is not to prohibit Aurizon Network from owning a port or mine, or undertaking above-rail services, outside the CQCN. Rather, we considered that an effective ring-fencing regime required that Aurizon Network should not undertake activities that would be in competition with other operators in the CQCN.

In response to the QRC, we considered:

- The ability to separate out costs is not sufficient reason to prohibit Aurizon Network from owning another railway, provided it is completely separate from the CQCN. We noted that the cost allocation manual provides for a method for allocating Aurizon Holdings' overhead costs to Aurizon Network.

¹⁵⁸ QRC, 2014 DAU, sub. 84: 14.

- The proposed inclusion (in cl. 3.5 of the initial draft decision-amended DAU) of the role of development of an undertaking and all standard documents is in our view not necessary and would effectively be regulatory over-reach. Development of an undertaking is not part of providing the declared service and to include it as such would be inconsistent with the statutory scheme of the QCA Act. However, the management of confidential information is relevant.

Conclusion

We considered Aurizon Network's approach to the principle of avoiding anti-competitive and discriminatory behaviour overly favours the business interests of Aurizon Network and its related entities. We did not consider the 2014 DAU provisions were strong enough given the changes in Aurizon Group's structure which, in our view, could facilitate, or be perceived to facilitate, anti-competitive and discriminatory behaviour. Further, the moving of network functions out of Aurizon Network to a related party could give rise to increased risk of conflicts of interest.

In our view, Aurizon Network's 2014 DAU ring-fencing regime was not consistent with the interests of access seekers and access holders (s. 138(2)(e) and (h)), or the public interest in having competition in markets (138(2)(d)). In reaching this view we had regard to Aurizon Network's legitimate business interests but considered this should be balanced against the other interests (s. 138(2) of the QCA Act).

Amending the 2014 DAU

The way we considered it appropriate to amend Aurizon Network 2014 DAU was set out in our consolidated draft decision-amended DAU.

We considered it was appropriate to include a clear and unambiguous overarching statement of principles for avoiding unfair differentiation with specific statements for Aurizon Network not to engage in anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing (cl. 2.4 of the consolidated draft decision-amended DAU). We made drafting changes since our initial draft decision to ensure consistency with the wording of the QCA Act, while maintaining our decision to include an overarching statement of principles regarding Aurizon Network's treatment of access seekers, access holders and related parties.

Our amendments also provided an appropriate balance in provisions regarding its commitment to avoid anti-competitive and discriminatory behaviour. We noted that, since the initial draft decision, we had clarified the scope of activities that Aurizon Network may engage in, as being those related to rail infrastructure as declared under section 250 of the QCA Act.

Our intention was that clause 3.5(e) of the initial draft decision amended DAU (cl. 3.4 of the consolidated draft decision-amended DAU) related to the declared service—that is, the access undertaking relates to the CQCN (and potential connections to or expansions of the CQCN) and cannot apply to external services. We amended the drafting to apply only to rail infrastructure related to declared services. We noted that clause 3.13(f) (consolidated draft decision-amended DAU) restricts Aurizon Network from providing confidential information to another Aurizon entity for the purpose of obtaining advice regarding this undertaking and standard documents.

Our changes did not deleteriously affect the legitimate business interests of Aurizon Network (s. 138(2)(b)) and in our view provided an appropriate balance between Aurizon Network's interests and those of access seekers and access holders.

Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed with our decision, subject to drafting amendments to our proposed amended DAU (see Part 2 of our amended DAU).¹⁵⁹

QCA analysis and final decision

Our final decision is to refuse to approve the provisions regarding Aurizon Network's commitment to avoid anti-competitive and discriminatory behaviour proposed by Aurizon Network in its 2014 DAU.

We have made drafting amendments in Part 2 of our final amended DAU.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 4.2

- (1) **After considering Aurizon Network's 2014 DAU provisions regarding its commitment to avoid anti-competitive and discriminatory behaviour, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to:**
 - (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 (cl.2.3)**
 - (b) **replace clause 3.2 of the 2014 DAU with a strengthened version of clause 3.2 from the 2010 AU, clarifying the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing**
 - (c) **move clause 3.2 of the 2014 DAU, dealing with principles of non-discrimination, to Part 2.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.4.3 Ultimate holding company support deed

Summary of initial draft decision

In our initial draft decision, we agreed with stakeholders about the need to strengthen Aurizon Network's obligations to obtain compliance of each member of the Aurizon Group with respect to Aurizon Network's ring-fencing obligations.

Given the significance of the UHCSO, we were of the view that Aurizon Network should procure, rather than request, its holding company to execute and maintain the UHCSO in full force at all times. We also provided for Aurizon Network to be held liable for any contraventions of the UHCSO by its holding company.

Our view reflected the increased potential for conflicts of interest and incentives for anti-competitive and discriminatory behaviour arising from the changes that have occurred to the

¹⁵⁹ Aurizon Network, sub. 125: 42.

Aurizon Group corporate structure and the Group's stated intent to leverage the benefits obtained from vertical integration.

We also proposed a stronger link between the contents of the UHCSD and the undertaking than in the 2014 DAU. Effectively, the undertaking (i.e. the initial draft decision—amended DAU) sets out the detailed obligations, requirements and implications that need to be included in the UHCSD. Thereafter, these requirements will be included within the UHCSD itself.

Although as a vertically integrated entity, it may be in Aurizon Network's interests to lessen its obligations associated with the UHCSD, we did not accept that this appropriately balances Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act) with other relevant considerations. We considered our initial draft decision appropriately balanced the interests of access seekers, access holders and train operators, with Aurizon Network's legitimate business interests (s. 138(2)(b), (d) and (e) of the QCA Act). We also considered it to be compatible with encouraging competition in upstream and downstream markets and the public interest (s. 138(2)(a) and (e) of the QCA Act). It also adopts an incremental, predictable approach to change with respect to the ring-fencing provisions (s. 138(2)(h) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network said the UHCSD was a voluntary commitment from Aurizon Network and not a legislative requirement.

Aurizon Network disagreed with our initial draft decision, and said the requirement for the UHCSD is punitive and seeks to bind the holding company, which is not the operator of the declared service. Aurizon Network said the QCA's decision substantially expands upon Aurizon Network's voluntary offer by imposing an obligation on Aurizon Network to procure that its parent company execute the UHCSD and significantly expands the scope, terms and effect of the UHCSD.

Aurizon Network submitted that it would be obliged to 'procure' the execution of a deed by a company over which it has no control. Aurizon Network is also obliged to ensure that Aurizon Holdings at all times complies with the requirements of the deed—under Australian law, Aurizon Network as a subsidiary company has no right to control its holding company. Aurizon Network also did not consider it reasonable for it to be held liable for contraventions of the UHCSD by its holding company.¹⁶⁰

Aurizon Network said the QCA has no powers under the QCA Act to compel conduct of a third party, even if that party is a related operator. Aurizon Network was not willing to volunteer to establish the UHCSD, as redrafted by the QCA, and said we should accept Aurizon Network's volunteered draft.¹⁶¹

The QRC, Anglo American, Vale, and Asciano agreed with our initial draft decision in respect of the obligations surrounding the UHCSD.¹⁶²

The QRC supported the proposal to include a positive obligation in the UHCSD to ensure rail infrastructure within the scope of the declared service is only ever owned by Aurizon Network.¹⁶³

¹⁶⁰ Aurizon Network, 2014 DAU, sub. 83: 59-60.

¹⁶¹ Aurizon Network, 2014 DAU, sub. 83: 61.

¹⁶² QRC, 2014 DAU, sub. 84: 18; Vale, 2014 DAU, sub. 79: 3; Asciano, 2014 DAU, sub. 76: 11.

¹⁶³ QRC, 2014 DAU, sub. 84: 18.

Asciano suggested the obligations on Aurizon Holdings under the UHCSD should apply to all previous undertakings to ensure all access seekers and holders are protected.¹⁶⁴

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refused to approve Aurizon Network's 2014 DAU provisions regarding the UHCSD.

We noted other stakeholders' broad support for the initial draft decision and Asciano's comments regarding application to previous undertakings. We did not believe it is appropriate to apply the changes to previous undertakings.

We considered it important there is an effective ring-fencing regime in place for Aurizon Network, given there is potential for conflicts of interest and incentives for anti-competitive and discriminatory behaviour, particularly in light of Aurizon Network's stated intent to leverage benefits from its corporate structure.

We considered that an important component of an effective ring-fencing regime is that there was an UHCSD in place. This was necessary to support the effectiveness of the regime by ensuring that Aurizon Network's holding company (and other related parties within the Aurizon Group) did not prevent or hinder Aurizon Network from complying with its ring-fencing obligations. We considered this is consistent with the application of sections 137 and 138 of the QCA Act.

We acknowledged Aurizon Network's comments in relation to the requirements related to the UHCSD that we proposed in our initial draft decision. In particular, we acknowledged that it would not be reasonable to require Aurizon Network to 'procure' its holding company to execute and maintain the UHCSD or to hold Aurizon Network responsible for a contravention of the deed by its holding company, given Aurizon Network does not have the power to compel its parent company to act in a particular way. Accordingly, we revised our drafting so that Aurizon Network is only required to 'request' its holding company to execute the UHCSD.

We noted Aurizon Network's holding company and other entities within the Aurizon Group would be well aware that Aurizon Network is a regulated company earning a regulated return, and that, as a consequence, it has particular obligations that may require the cooperation of related entities. We considered this is particularly relevant in respect of the confidential information of access seekers and holders that Aurizon Network possesses, particularly given the undertaking will permit Aurizon Network to disclose this information outside of Aurizon Network in particular circumstances. As such, access seekers and holders should have confidence that their confidential information will be handled strictly in accordance with the requirements set out in the undertaking. Without a UHCSD in place, we did not consider access seekers and holders could have this confidence, as there was no assurance that Aurizon Network's holding company will observe Aurizon Network's ring-fencing obligations and not prevent or hinder Aurizon Network's compliance with these.

Accordingly, while we accepted Aurizon Network should only be required to 'request', rather than 'procure', its holding company to execute a UHCSD, we considered that the undertaking should cease to permit the use and disclosure of confidential information within the Aurizon Group (outside of Aurizon Network) in the event a UHCSD is not executed or not maintained in

¹⁶⁴ Asciano, 2014 DAU, sub. 76: 11.

full force. Likewise, the use and disclosure of confidential information outside of Aurizon Network should be similarly restricted if a procured UHCSO is not complied with.

Our approach was necessitated by Aurizon Network's position as part of a consolidated business structure and the need for it to comply with its obligations under the undertaking, particularly with respect to its obligations relating to confidential information. We considered this is necessary to appropriately account for the interests of access seekers and holders with respect to the handling of their confidential information.

Amending the 2014 DAU

The way we considered it appropriate to amend the undertaking is set out in our consolidated draft decision—amended DAU and Schedule D. We made drafting changes to the initial draft decision—amended DAU in response to Aurizon Network's and other stakeholders' submissions.

In terms of our amendments Aurizon Network is required to 'request' that its holding company execute a UHCSO and include provisions setting out the intention of the UHCSO, including that Aurizon Network's holding company (and each Aurizon Party) does not engage in any conduct which may prevent or hinder Aurizon Network from complying with its ring-fencing obligations. However, the undertaking will cease to permit use or disclosure of confidential information within the Aurizon Group (outside of Aurizon Network) if a UHCSO is not procured, maintained in full force or complied with.

We considered these amendments provide an appropriate balance of the interests of access seekers, access holders and train operators, with Aurizon Network's legitimate business interests (s. 138(2)(b), (d) and (e) of the QCA Act).

Stakeholders' comments on the consolidated draft decision

Aurizon Network restated its view that the UHCSO is a voluntary commitment and that it was not prepared to make any of the changes to the Deed suggested by the QCA in the consolidated draft decision. It said the QCA is beyond power to request such changes.¹⁶⁵

Aurizon Network submitted that clause 2.6(b) of the consolidated draft decision-amended DAU should be deleted, as the form of the UHCSO is set out in Schedule D and clause 2.6(b) cannot change the form of the UHCSO.¹⁶⁶

Aurizon Network also commented on the drafting of the UHCSO (Schedule D).¹⁶⁷ The comments and our responses are summarised in the table below.

Table 9 Aurizon Network's comments on the UHCSO

<i>Clause (consolidated draft decision- amended DAU)</i>	<i>Comment</i>	<i>QCA response</i>
3.1(a)	Some of the suite of obligations that are set out in this clause are drafted in a manner that they would apply to Aurizon Network. Where this occurs, Aurizon Holdings is effectively acting as a guarantor for Aurizon Network's compliance - this is not contemplated by the QCA Act and has not	We note the consolidated draft decision required that Aurizon Holdings take steps to assist rather than guarantee that each other member of the Aurizon Corporate Group complies. We consider that Aurizon Network is over-stating the extent to which a guarantee is required.

¹⁶⁵ Aurizon Network, sub. 125: 76.

¹⁶⁶ Aurizon Network, sub no 125: 39

¹⁶⁷ Aurizon Network, sub.. 125: 77–78

Clause (consolidated draft decision- amended DAU)	Comment	QCA response
	been offered voluntarily by Aurizon Network. The QCA has no power to require a guarantor for an access provider's compliance.	However, we have made a number of amendments to the UHCSA in response to specific matters raised below.
3.1(a)(i)	This clause requires Aurizon Holdings to comply with the arrangement in Part 3. This is not within QCA's power. Any arrangements under Part 3 can only apply to Aurizon Network.	We note that the clause only required that Aurizon Holdings to use 'reasonable endeavours' to comply. However, we removed the clause in the final amended DAU to address Aurizon Network's concerns.
3.1(a)(ii)	The obligation requiring Aurizon Holdings 'to take all necessary steps' to enable Aurizon Network to comply with Part 3 is unbounded, uncertain and unnecessary.	We are of the view that the ultimate parent company should provide that a subsidiary such as Aurizon Network has the resources to comply with regulatory obligations. We do not consider that it would be appropriate to set boundaries on the steps required for Aurizon Network to comply. However, we have amended the clause in the final amended DAU to ensure the obligations are proportionate and reasonable. (Clause 3.1(a)(i) of the final amended DAU).
3.1(a)(iv)	This clause requiring Aurizon Holdings to ensure their conduct cannot hinder Aurizon Network's compliance is unclear. It should be deleted.	We consider that it is reasonable that holding company should not engage in conduct that would prevent or hinder Aurizon Network's compliance with its regulatory obligations under the QCA Act or the undertaking. We have therefore retained this clause (now 3.1(a)(iii)) in the final amended DAU.
3.1(a)(v)(A)	This requires Aurizon Holdings to comply with provisions of the undertaking relating to confidential information as if bound by the same obligations as Aurizon Network. This is outside QCA's powers, and is unworkable. For example, it would require Aurizon Holdings and each Group member to maintain a separate confidential information register.	We consider that the drafting provided in clause 3.1(a)(ii) essentially overlaps with this provision. Accordingly, for the final amended DAU, we have deleted this clause.
3.1(a)(v)(C)	This purports to require Aurizon Holdings to 'secure, protect and take all steps' to prevent any use or disclosure of confidential information other than as permitted under the undertaking. No additional contractual obligations are needed given the QCA's heavy-handed obligations on Aurizon Network before Aurizon Network can disclose confidential information to an Aurizon party.	We consider that the drafting provided in clause 3.1(a)(ii) essentially overlaps with this provision. Accordingly, for the final amended DAU, we have deleted this clause.
3.1(a)(vi)	This clause requiring Aurizon Holdings to have the authority to provide or authorise access to land that an access seeker or	We note that a similar obligation was included in UT3 (2.5.1(a)). By including an obligation on Aurizon Holdings to ensure

Clause (consolidated draft decision- amended DAU)	Comment	QCA response
	<p>access holder requires access to, is inappropriate, outside power and unworkable. The reasons were that:</p> <p>(a) Section 250(3)(b) of the QCA Act deals conclusively with this issue—it makes such assets the subject of the declared service, and the QCA Act and the undertaking regulate the provision of access accordingly</p> <p>(b) The QCA cannot require Aurizon Holdings, for example, to provide or authorise access to land owned or controlled by a different party.</p> <p>(c) The QCA’s drafting requires Aurizon Holdings and each member of the Group to renegotiate existing leases and other arrangements in order for Aurizon Holdings and each member to have the power provide or authorise access to that land. This obligation extends to leases and other arrangement to which Aurizon Holdings and the other members are not necessarily a party.</p>	<p>Aurizon entities provide access to access seekers or holders is reasonable and proportionate as it does no more than restate the obligations that exist under the QCA Act. We further consider such an obligation assists to ensure the undertaking is workable (by removing any ambiguity over access).</p> <p>In response to issues raised:</p> <p>(a) Notwithstanding s. 250, there is no reason why the undertaking cannot clarify that to provide access to a declared service includes access to property, if required.</p> <p>(b) The deed requires Aurizon Holdings 'use reasonable endeavours' to ensure members of the Aurizon Holdings corporate group authorise access to land. The deed does not compel Aurizon Holdings. If access is needed for the declared service but the property is owned by a different Aurizon Holdings entity (other than Aurizon Network), access would be required under the QCA Act to deliver the declared service. The clause is reasonable and proportionate as it requires Aurizon Holdings use reasonable endeavours and assists to ensure the undertaking is workable.</p> <p>However, we have included an additional provision to allow an Aurizon Group member to write to the QCA to seek a waiver of this requirement. (Clause 3.1(a)(v) of the final amended DAU).</p>
3.1(a)(vii)	<p>This requires Aurizon Holdings to take steps required to allow Aurizon Network to procure a sale or supply of electric energy. Aurizon Network's obligation is to sell or supply, not procure.</p>	<p>We agree and have amended the drafting in the final amended DAU accordingly. (Clause 3.1(a) (vi) of the final amended DAU)</p>
3.1(a)(viii)	<p>The QCA cannot impose generic obligations to enable or assist Aurizon Network to comply with the undertaking. In respect of the second part, to the extent that Aurizon Network is required to comply, that is a matter to Aurizon Network and the obligation is not necessary in that regard. The QCA cannot impose generic obligations to enable or assist Aurizon Network to comply with the undertaking</p>	<p>We have amended this clause so that it reads: 'to enable or assist Aurizon Network to comply with its obligations in respect of the undertaking'. (Clause 3.1(a)(vii) of the final amended DAU)</p>
3.1(b)	<p>This clause makes no sense because it purports to bind parties who are not parties to the deed, namely Group members other</p>	<p>It would frustrate the QCA Act and undertaking if Aurizon Holdings could structure its operations or act in a way that frustrated Aurizon Network’s</p>

Clause (consolidated draft decision- amended DAU)	Comment	QCA response
	than Aurizon Holdings.	compliance with regulatory obligations, and Aurizon Network was unable to otherwise remedy this. The obligation is appropriate, and in our view assists to ensure the undertaking is workable (by removing any ambiguity over access). A similar provision was included in UT3. We have made no change.
3.1.2	Clause 3.1.2 is incorrect and outside power as the QCA has no power to control the ownership or leasing of infrastructure. The bulk of rail infrastructure is owned by Queensland Treasury Holdings. The QCA's requirements are not even remotely required for the undertaking or for the QCA Act.	We consider that, although this clause was in UT3, it is no longer relevant in the current context of the ownership of rail infrastructure. We have therefore, for the final amended DAU, deleted the clause.
3.2	This clause purports to impose a condition precedent on any sale or transfer of Aurizon Network. This is an extraordinary requirement particularly in relation to a publically listed entity. Aurizon Holdings was willing to voluntarily accept a reasonable endeavours obligation, but this requirement by the QCA purports to actually impose (presumably require the imposition of) a condition precedent. The QCA is well outside its powers under the QCA Act.	We propose to revert to the drafting of clause 3.2 provided in the 2014 DAU. (Clause 3.4 in the final amended DAU).

The QRC did not support that Aurizon Network's obligation to procure that its ultimate holding company enter into the UHCSO, be softened —and that Aurizon Network is only required to 'request' that the holding company do so. The QRC considered that a failure to obtain the Deed jeopardises the entire ring-fencing regime and that Aurizon Network should use reasonable endeavours to procure that its ultimate holding company enter into the Deed.¹⁶⁸

Asciano also did not support the changes made to the UHCSO and related provisions in the consolidated draft decision. It considered these changes undermine the effectiveness of the UHCSO in a number of ways, including reduced consequences for breaches. Aurizon Holdings now has to enable Aurizon Network to comply with the undertaking rather than ensure it complies.¹⁶⁹

QCA analysis and final decision

Our final decision is to refuse to approve the provisions regarding the UHCSO proposed by Aurizon Network in its 2014 DAU.

While we acknowledge that the UHCSO is a voluntary commitment by Aurizon Network, we maintain our view that under section 136(5)(b) of the QCA Act, the QCA has the power to amend the DAU if it considers it is appropriate to do so. In proposing changes to Aurizon

¹⁶⁸ QRC, sub. 124: 14.

¹⁶⁹ Asciano, sub. 126: 9–10.

Network's UHCSD that we consider are appropriate, we have however, sought to address Aurizon Network's concerns by making a number of refinements to the UHCSD as noted above.

In regard to QRC's comment, we reiterate that Aurizon Network does not have the power to compel its parent company to act in a particular way. We do not consider that the QRC has substantiated its reasons for rejecting the amendments.

In response to Asciano, we disagree that the effectiveness of the Deed is weakened, as we consider that clause 2.5(b) of the final amended DAU sets out an appropriate remedy for a breach of the Deed. We have further amended the clause 2.5(b) of the final amended DAU to require that in the event that a UHCSD is not procured, an audit of the confidential information register is required every three months and training of high-risk personnel is required every 6 months until rectified. This imposes a level of responsibility on Aurizon Network while not hindering information flows.

Taking into account the submissions from Aurizon Network, QRC and Asciano on this issue, the QCA is concerned to ensure the UHCSD is implemented, as it is central to an effective ring-fencing regime (in particular where the regulated entity is vertically integrated). For this reason, the QCA has proposed a further refinement to its amended DAU. Namely, that in the event the ultimate holding company does not execute the UHCSD, or the UHCSD is not maintained in full force or complied with, an audit of the confidential information register every three months as well as training for high-risk personnel every six months will be required until this situation is rectified. This refinement meets the concerns voiced by QRC and Asciano and balances other interests, as it will only come into effect on the occurrence of the events specified.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 4.3

- (1) After considering Aurizon Network's 2014 DAU provisions regarding the UHCSA, our final decision is to refuse to approve Aurizon Network's proposal.
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:
 - (a) provide that Aurizon Network request that its ultimate holding company provides the ultimate holding company support deed (UHCSA) in the form set out in schedule D of our final amended DAU
 - (b) provide that, in the event the ultimate holding company does not execute the UHCSA, or the UHCSA is not maintained in full force or complied with, the undertaking will require an audit of the confidential information register every three months, as well as training of high-risk personnel every six months, until rectified (cl.2.5(c) of final amended DAU).
 - (c) move clause 3.2 to Part 2 of the undertaking, and amend it to mirror the requirements of the UHCSA.

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.5 Information management and decision-making principles

Aurizon Network's proposal

Aurizon Network said the information access control measures in the 2010 AU permitted full disclosure of access seeker confidential and protected information within Aurizon Network, but tightly restricted access beyond Aurizon Network.

Aurizon Network considered this unduly constrained its legitimate use of shared corporate services, even where no competition concerns would be raised by disclosure.¹⁷⁰ It said the redrafted Part 3 (in the 2014 DAU) contains the same principal controls as existed in the 2010 AU, but adopted a more targeted approach. The control applied only to disclosures by third-party access seekers that, if made available to a related operator, would provide a competitive advantage that it would not otherwise have.¹⁷¹

Aurizon Network's proposed approach to information management and decision-making records in the 2014 DAU, and how this compares with the 2010 AU, is summarised in the table below.

In considering Aurizon Network's 2014 DAU, as indicated above, we consider the 2010 AU is relevant, including in relation to whether the proposals deliver an effective ring-fencing regime.

¹⁷⁰ Aurizon Network, 2013 DAU, sub. 2: 72.

¹⁷¹ Aurizon Network, 2013 DAU, sub. 2: 71.

Table 10 Aurizon Network's approach to information management and decision-making records in the 2010 AU and 2014 DAU

<i>Ring-fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Management of confidential information	<p>The regime is set up very broadly, to be a framework for all confidential information, rather than limiting coverage to information that could be used anti-competitively by an above-rail business group.</p> <p>The framework allows full disclosure of confidential information within Aurizon Network, and limited disclosure elsewhere in the Aurizon Group businesses. This approach was workable for the 'Network Access Unit', but is not consistent with a large stand-alone network business.¹⁷²</p>	<p>The 2014 DAU introduces a concept of 'protected information', to distinguish regulated restrictions on information flow from those entered into voluntarily by Aurizon Network.</p> <p>The disclosure framework is based on 'need to know', with a cascading system of disclosures across various categories of recipients (both in and outside Aurizon Network) that require access to the information. Appropriate controls are retained.¹⁷³</p>
Decision-making principles	<p>The 2010 AU contained a set of decision-making principles that required:</p> <ul style="list-style-type: none"> • the decision-maker to be identified • decisions to be consistent between access seekers/holders • decision to be in compliance with the undertaking, laws, lawful direction, access agreements, access code, Aurizon Network policies and procedures • decisions to be documented. 	<p>The 2014 DAU removes specific decision making principles on the basis they captured too many decisions and had no means of being audited if all decisions were made consistent with the principles.</p> <p>Aurizon Network questioned whether strict compliance with the provisions was proportional to the competition risks of many decisions captured.</p> <p>In accordance with the TIA, access agreements with related operators require board processes to document arm's length arrangements, and are capable of being audited.¹⁷⁴</p>

In initial submissions, stakeholders said that due to the increasing conflicts of interest, such as potential interests in ports, the definition of confidential information should be expanded. The QRC said the definition of protected information is too narrow and unless rectified may lead to non-disclosure of information or claiming all information as confidential.¹⁷⁵ Stakeholders supported the recording of all access to confidential information within a register. Full details of stakeholder views are provided in our initial draft decision.¹⁷⁶

Characteristics of an effective information management system

In the context of ring-fencing, an effective information management system must produce meaningful, comprehensive information that can be used to assess any material concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to confidential/protected information.

We considered an effective information management system also requires a robust and complete record keeping system, which records:

¹⁷² Aurizon Network, 2013 DAU, sub. 2: 61–62.

¹⁷³ Aurizon Network, 2013 DAU, sub. 2: 61–62.

¹⁷⁴ Aurizon Network, 2013 DAU, sub. 2: 63.

¹⁷⁵ QRC, 2014 DAU, sub. 42: 17.

¹⁷⁶ QCA, 2015(a), Volume I: 55.

- to whom, when and for what reason confidential/protected information is being disclosed/accessed
- what decisions are being made with that information and how these are being made.

Overall, we were of the view that an information management system is needed that will produce robust and complete records, identify decisions that were made using certain information, as well as have regard to proportionality and the operational needs within Aurizon Network. Such a system would appropriately balance the interests of access seekers, access holders and train operators with Aurizon Network's legitimate business interests.

We also considered competition in upstream and downstream markets may be encouraged if there is confidence that the ring-fencing regime has adequate controls and produces appropriate records that can be accessed by the relevant parties.

4.5.1 Definition of confidential/protected information

Aurizon Network's 2014 DAU introduces the concept of protected information (cl. 3.11 of the 2014 DAU) which distinguishes regulated restrictions on information flow from those entered into voluntarily by Aurizon Network.

Summary of the initial draft decision

We considered that, compared to the 2010 AU, the approach adopted by Aurizon Network in the 2014 DAU:

- narrows the range of information to which the ring-fencing provisions apply
- increases the scope of information disclosure and the level of subjectivity associated with that disclosure
- widens the spectrum of exemptions/carve-outs.

Overall, we considered Aurizon Network's concept of protected information increases the potential for disputes about whether specific information should be categorised as protected. We did not consider such an outcome leads to the efficient operation of the CQCN or the supply chain. Nor does it encourage trust or collaborative engagement between Aurizon Network and its customer base.¹⁷⁷

We noted the QRC's view¹⁷⁸ that the approach in the 2014 DAU may encourage access seekers, access holders and train operators to ensure excessive levels of information remain confidential.

As such, we considered Aurizon Network's proposal does not align sufficiently with the object of Part 5 of the QCA Act or the public interest (s. 138(2)(a) and (d)). While it may be in Aurizon Network's interest to broaden the opportunity for information disclosure across the vertically integrated corporate group, we did not consider this represents a legitimate business interest of Aurizon Network in the context of the object of Part 5 of the QCA Act (s. 138(2)(b) of the QCA Act).

In reaching this view, we considered it appropriate to adopt the definition of confidential information used in the 2010 AU, and with minor modifications propose this as the appropriate

¹⁷⁷ We were also of the view that the QRC's proposal to adopt a tighter definition of protected information and subsume it into a broader definition of confidential information suffers from similar concerns: it has the potential to constrain Aurizon Network's ability to use information for operating the CQCN.

¹⁷⁸ QRC, 2014 DAU, sub. 42: 17.

way to amend the 2014 DAU. We considered this approach appropriately balances the interests of access seekers, access holders and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network disagreed with our initial draft decision on the definition of confidential information. While Aurizon Network agreed that a clear definition is important, it raised the following issues with the initial draft decision:

- Our redrafted definition will add confusion and inadvertently regulate the treatment of all confidential information held by Aurizon Network, rather than just that related to the declared service. Aurizon Network said this is contrary to the 2010 AU, which stated that the confidential information only related to that disclosed or obtained in the course of the negotiation or provision of access.
- The QCA is acting beyond the scope of the QCA Act by using a very broad definition of confidential information, not specific to access in the CQCN. Aurizon Network said our definition could apply irrespective of whether disclosure could lead to conduct in contravention of statutory prohibitions on unfair differentiation.
- The term 'confidential information' is possibly confusing, and could encompass various forms of confidential information that are not related to access seekers and access holders. Aurizon Network preferred the term 'protected information' to distinguish this information from the broader forms of confidential information held by Aurizon Network.¹⁷⁹

Anglo American agreed with the QCA's proposed definition, but said there is an element of subjectivity to the definition of confidential information (in sub-paragraph (g) of the definition in Part 12 of the initial draft decision-amended DAU), which allows the holder of confidential information to make a judgement call as to when the disclosure of the information by the recipient would no longer be expected to affect the affairs of the owner of the information.

Anglo American was concerned about the use by Aurizon Network of disclaimer or confidentiality clauses on a broad range of documents, for example presentations, and said this information should be provided to the QCA to assist in its statutory obligations. Anglo American preferred that a clause be incorporated in the 2014 DAU allowing parties to provide information to the QCA, even where the information is subject to a confidentiality obligation.¹⁸⁰

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refused to approve Aurizon Network's 2014 DAU provisions regarding the definition of confidential information.

Overall, we considered Aurizon Network's definition of protected information was not appropriate because it narrowed the range of information that could be classified as confidential and increases the potential for disputes about whether specific information should be categorised as protected. This could affect cooperative engagement between Aurizon Network and its customer base.

Aurizon Network's definition of 'protected information' potentially reduces the types of information that would be subject to ring-fencing and increases the risk of unfair differentiation

¹⁷⁹ Aurizon Network, 2014 DAU, sub. 83: 61.

¹⁸⁰ Anglo American, 2014 DAU, sub. 95: 9.

in the treatment of access seekers or users. For example, to define protected information to not include information that is independently developed by Aurizon Network or is aggregated with other information in a way that de-identifies the information, could be subject to interpretation and therefore dispute. We considered there was some risk that information that was regarded by an access seeker as commercial in nature could be assessed by Aurizon Network as being not confidential. We preferred for the definition to have a wider scope, to provide confidence to negotiating parties.

Aurizon Network's approach to this issue in the 2014 DAU could create a complex information management system and a blurring of when unrecorded disclosure of/access to confidential/protected information is acceptable. We considered the probable impact of this was to reduce the level of record taking to the extent that it rendered the ring-fencing regime less than effective.

Amending the 2014 DAU

The ways to amend the 2014 DAU were set out in our final amended DAU.

We proposed to replace the definition of protected information with an amended version of the definition of confidential information used in the 2010 AU. For the reasons outlined in the analysis above, we considered our approach appropriately aligns with the object of Part 5 of the QCA Act and balances the interests of relevant parties under section 138(2) of the QCA Act.

In proposing the drafting, we acknowledged the unintentional exclusion of information from disclosure may hamper effective negotiation outcomes and could be not in the legitimate business interests of Aurizon Network. We had adjusted the definition of confidential information used in the initial draft decision, and we considered the definition in this consolidated draft decision provides an appropriate balance between the legitimate business interests of Aurizon Network, the interests of access seekers, access holders and the public interest (s. 138(2)(b), (d), (e) and (h) of the QCA Act).

In particular, we clarified that the confidential information recorded in the register would only relate to that information relevant to Aurizon Network's role in supplying the declared service associated with the CQCN, that is, the register is effectively self-selecting. Information not related to the declared service would therefore not be listed in the register. For the sake of clarity, we made drafting changes to prevent the confidential information register from inadvertently capturing information that is not relevant to the declared service.

In response to other stakeholders:

- subjectivity of paragraph (g) of the definition of confidential information—we acknowledged this introduces an element of subjectivity on the part of a recipient as to whether confidential information remains confidential and should be treated as such, which could be subject to interpretation and dispute. We therefore removed this from the definition.
- provision to the QCA of information that is subject to a confidentiality obligation—the QCA already has powers under the QCA Act to request confidential information in certain circumstances (e.g. as part of an investigation or arbitration under the Act). However, in accordance with sections 187, 207 and 239 of the QCA Act, the QCA can only disclose confidential information to a limited range of persons if disclosure would be likely to damage a person's commercial activities and would not be in the public interest.

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that the consolidated draft decision definition of confidential information, with reference to 'commercial affairs' is too broad and vague, and therefore

exposes Aurizon Network to compliance risk. Aurizon Network noted circularity in the definition.¹⁸¹

Aurizon Network also proposed including examples of confidential information as in its proposed 2014 DAU.

Anglo American submitted that it would be appropriate for any documents provided to the QCA (when the QCA is making a decision on any matter subject to regulation under the undertaking) to remain confidential to the QCA.¹⁸²

QCA analysis and final decision

Our final decision is to refuse to approve the definition of confidential information proposed by Aurizon Network in its 2014 DAU.

In response to Aurizon Network, we note that it is common to see similar terms such as 'business or financial affairs' in definitions of 'confidential information'. Furthermore, we also note that the term 'commercial affairs' was used in the same context of the definition of 'confidential information' in UT3.

We have amended the drafting to correct the circularity in the definition.

We retain our view that including examples of confidential information is limiting and is not necessary.

In response to Anglo American, we note that if it does not want information disclosed publicly, it may state to the QCA that the disclosure would damage Anglo American's commercial activities. If the QCA considers that disclosure would likely damage Anglo American's commercial activities and would not be in the public interest, then the QCA is obliged to take all reasonable steps to ensure the information is not disclosed without consent (see ss. 239 and 163(4) of the QCA Act). There is no need to provide a further regime in the undertaking, when this is adequately covered in the QCA Act.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

¹⁸¹ Aurizon Network, sub. 125: 43.

¹⁸² Anglo American sub. 127: 41.

Final decision 4.4

- (1) **After considering clause 3.11 of the Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's definition of protected information.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to:**
 - (a) **replace the definition of protected information with an amended version of the definition of confidential information used in the 2010 AU**
 - (b) **replace in all instances 'protected information' with 'confidential information'.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.5.2 Disclosure process and information registers

Aurizon Network's 2014 DAU included a standard procedure for the disclosure of protected information (cl. 3.18 of the 2014 DAU). Aurizon Network also set out a series of steps in the disclosure process in the 2014 DAU.¹⁸³

Summary of the initial draft decision

Our view was that the inclusion of an explicit disclosure process within the ring-fencing provisions is beneficial, provided that the information recorded on the register is meaningful and sufficient, has a broad, clear and transparent list of exemptions and accurately reflects the incidence of disclosure.

We consider the production and availability of robust records to be the fundamental purpose of the information management system. This is particularly important given changes to the Aurizon Group's corporate structure and its stated intent to leverage the benefits obtained from vertical integration. We considered these factors strengthen the need to provide access seekers, access holders and train operators with confidence that robust and comprehensive records exist and that these can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to ring-fenced information, if that becomes necessary.

Against this background, we considered Aurizon Network's proposal—to include in the information register the name of the recipient and the defined category of information to which access is authorised (cl. 3.20 of the 2014 DAU)—was not appropriate in light of the statutory factors. We noted the view of stakeholders that information register entries should be more comprehensive, and considered the information register should capture:

- who required and/or gained access to the confidential information
- who approved access to the confidential information
- for which period access to the confidential information is granted
- what confidential information training the recipient has received, and when
- what the confidential information is to be used for
- what decisions were made using the confidential information

¹⁸³ See QCA, 2015(a), Volume 1: 59.

- how those decisions were made.

We also considered a record of all confidentiality agreements should be maintained as part of the information register. Our initial draft decision was to refuse to approve clauses 3.18 and 3.20 of the 2014 DAU.

Stakeholders' comments on the initial draft decision

In response to our initial draft decision, Aurizon Network said it agreed to the inclusion of a confidential information register but considered only information related to provision or negotiation of access to the declared service should be subject to register requirements. Aurizon Network said that to apply it to a broader class of confidential information is beyond the scope of the undertaking and would have a cost impact requiring an operating cost adjustment to the MAR.¹⁸⁴

Aurizon Network did not agree with much of the list of contents, arguing that the list was overly prescriptive and beyond good regulatory practice. Inclusions that Aurizon Network was concerned about were in clause 3.13(c) of the initial draft decision-amended DAU:

- the period during which the relevant person has access to confidential information (cl. 3.13(c)(ii)B)—this would involve more time and cost, disproportionate to the risk involved
- details of decisions made (cl. 3.13(c)(ii)D)—Aurizon Network agreed that it is appropriate to detail what the information is used for, but said it may not be possible in every instance to determine what decisions are made using the information. It said the information could be combined with other information in such decisions, and also noted there will be a cost involved. It stressed that the register should be limited to purpose
- the inclusion of any confidentiality agreement (cl. 3.13(c)(iii))—Aurizon Network considered that, coupled with the broad definition of confidential information, any confidentiality agreement to which Aurizon Network is a party to would be listed on the register. Aurizon Network considered this to be beyond the powers of the QCA
- the range of people required to complete exit certificates (cl. 3.13(c)(v))—Aurizon Network disagreed with this list (see response to initial draft decision 4.9).¹⁸⁵

Aurizon Network agreed with clause 3.13(c)(ii)E being included, but considered that it is duplicated with clause 3.13(c)(iv), as both appear to ensure that an employee or an external contractor are aware of their obligations.

Aurizon Network disagreed with all confidentiality agreements being maintained as part of the confidential information register.

The QRC supported the confidential information register and the proposed contents. It said the register would promote improved compliance and transparency.¹⁸⁶

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refused to approve Aurizon Network's 2014 DAU provisions for the disclosure process and provisions regarding the protected information register.

¹⁸⁴ Aurizon Network, 2014 DAU, sub. 83: 62.

¹⁸⁵ Aurizon Network, 2014 DAU, sub. 83: 63–64.

¹⁸⁶ QRC, 2014 DAU, sub. 84: 17.

Overall, we considered access seekers, access holders and train operators need to be confident that robust and comprehensive records exist, given Aurizon Network's changed corporate structure. We considered that Aurizon Network's 2014 DAU was not appropriate because its protected information register content was not sufficiently comprehensive to ensure that concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to ring-fenced information are addressed. Aurizon Network's 2014 DAU appeared to favour its own business interests and potentially those of its related entities.

Amending the 2014 DAU

The way to amend the 2014 DAU was set out in our consolidated draft decision-amended DAU.

Our amendments included a more comprehensive confidential information register, which records (amongst other things) the identity of those who request access to confidential information and the purpose for which the confidential information will be used. The register was in our view not onerous to maintain and update. We also included an amended process for permitted disclosure of confidential information, described in more detail in the following sections. We considered the amendments were appropriate because the disclosure process and provisions regarding the protected information register provide a balance between the interests of access holders, access seekers and train operators, and the legitimate business interests of Aurizon Network (s. 138(2)(b) (e) and (h) of the QCA Act).

We noted that our initial draft decision proposals for the content of the confidential information register were not substantially more detailed than was the case in the 2010 AU. We considered that the undertaking and its intent, and therefore any provisions regarding the confidential information register, would relate only to the declared service in the CQCN.

In response to Aurizon Network's comments on our proposed amendments, we considered the following:

- The recording of the period for which a recipient has access to confidential information should not involve a substantial cost or time. It is appropriate from a risk perspective that the period of time is recorded in the register.
- The requirement to record the purpose of, and decisions made by, using the confidential information was already provided for in the 2010 AU. Any decisions made may well not be entirely in consequence of the confidential information, and, in fact, the decisions may not be influenced by the confidential information at all. Nevertheless, we did not consider that recording such decisions would be an onerous requirement, as a particular decision would be a consequence of the purpose of the information in that case; also, there should be no change in costs as the requirement existed in the 2010 AU. Aurizon Network had not quantified the additional costs that it claimed would be incurred.
- The inclusion of confidentiality agreements in the confidential information register is not an onerous requirement and would only relate to information relevant to the negotiating parties.

We also noted the difference in emphasis between clauses 3.13(c)(ii)(E) and 3.13(c)(iv) of the initial draft decision—amended DAU—the first of the two clauses refers to confirmation that the recipient has signed a declaration, whereas the latter provides for a record of persons and entities that have signed a declaration.

Stakeholders' comments on the consolidated draft decision

Aurizon Network considered that the overarching obligation to keep confidential information confidential and secure (cl. 3.11(a)) is too broad. This clause needs to be subject to Aurizon

Network's disclosure obligations under the undertaking, as there are other clauses in the undertaking that require disclosure of information. Aurizon Network should not be required to comply with the disclosure process where disclosure is required by the undertaking.

Aurizon Network suggested that clause 3.11(b) (that Aurizon Network is not to unfairly advantage a 'related operator' or 'related competitor' by disclosing confidential information in way that constitutes a breach under the QCA Act) is unnecessary, because the remedy for a breach of the relevant sections of the QCA Act is found under the Act. Aurizon Network stated that the QCA is attempting to obtain quasi-judicial power, where the remedy is to go to court in the case of a breach of sections 100, 104, 124 or 168C of the Act.¹⁸⁷

Table 11 Aurizon Network's detailed comments on disclosure and information registers¹⁸⁸

<i>Clause (consolidated draft decision-amended DAU)</i>	<i>Aurizon Network's comment</i>	<i>QCA response</i>
Clause 3.12(e)	Recipient of confidential information must sign a declaration confirming awareness - Aurizon Network submitted that those contracted with IT cannot comply with this clause.	Aurizon Network has not provided any explanation as to why those contracted with Aurizon IT cannot sign a declaration. It has not suggested that this problem exists within any other part of the Group.
Clause 3.12(f)	Aurizon Network said this clause for non-Aurizon Network personnel to sign a legally enforceable confidentiality agreement is unnecessary and hard to comply with. Aurizon Network proposed additional administration costs of \$120,000 per year to comply.	Aurizon Network has not substantiated why it considers the obligation to be unnecessary. We note that this is an additional process and would incur additional costs. However, we are unclear as to whether there would be an incremental cost or whether the cost could be absorbed in administration. We have therefore not included the additional amount in the MAR.
Clause 3.12(b)	Clause 3.12(b) restricts Aurizon Network's ability to disclose confidential information for proper business purposes (e.g. to the Aurizon Group board or CEO, lawyers and financiers).	We agree that the words 'the Recipient requires access to the relevant Confidential Information for the purpose of assisting Aurizon Network to comply with any of its obligations under this Undertaking' are too restrictive, and may have the effect of preventing Aurizon Network from disclosing confidential information for a proper business purpose. We have amended clause 3.12(b).
Clause 3.13(c)	Aurizon Network would need to record in the confidential information register each time confidential information was disclosed to external legal parties. Recording confidential information in the confidential information register would also apply if Aurizon Network was seeking a financier's advice. The QCA and stakeholders could view this information which could reveal the nature/content of legal	We agree with Aurizon Network's conclusion on the need to record the disclosure of confidential information to external lawyers in the confidential information register. We consider this to be reasonable and consistent with the objects of the ring-fencing regime. In order to comply with the confidentiality obligations, stakeholders would not be able to review an unredacted version of the confidential information register. They would only be able to see the part of the register that related to their information. It is reasonable for the QCA to view the

¹⁸⁷ Aurizon Network, sub. 125: 64–65.

¹⁸⁸ Aurizon Network, sub. 125: 65–69.

Clause (consolidated draft decision-amended DAU)	Aurizon Network's comment	QCA response
	advice sort.	confidential information register, otherwise compliance with the undertaking could not be monitored.
Clause 3.13(d)(v)	The need to obtain the consent of the owner of the confidential information prior to disclosure is extremely burdensome (e.g. Aurizon IT rectifying a system error).	We disagree that obtaining consent would be burdensome provided that consent was obtained once or for an extended period. We also consider it reasonable for obtain the consent of the owner, as it is ultimately the owner's decision to control the release of its sensitive information.
General	Clauses 3.12 and 3.13 would require Aurizon Network to comply with the process for each and every disclosure.	We note that nothing in the clauses prevents Aurizon Network from grouping categories of confidential information together. We propose a new clause 3.12(b) of the final amended DAU to this effect.
Declaration	Disclosure of confidential information to anyone outside of Aurizon Network but within the Aurizon Group would require the recipient to sign both a declaration and a confidentiality agreement. It is not clear why both are needed.	We consider the process should be streamlined and have made amendments accordingly (cl. 3.13(c) of the final amended DAU).
Clause 3.12(b)	Clause 3.12(b) restricts Aurizon Network's ability to disclose confidential information for proper business purposes (e.g. raising of funds). Clause 3.12(b) is inconsistent with aspects of clause 3.13.	We agree that the words 'the Recipient requires access to the relevant Confidential Information for the purpose of assisting Aurizon Network to comply with any of its obligations under this Undertaking' are too restrictive, and may have the effect of preventing Aurizon Network disclosing confidential information for a proper business purpose. We have made amendments accordingly, changing paragraph (b) to read 'access to that Confidential Information is limited so that disclosure to the Recipient is only to the extent necessary', as clause 3.12 of the final amended DAU sets out the purpose of the disclosure.
Clause 3.12(g)	Clause 3.12(g) refers to a review date recorded in the confidential information register. It is unclear how the date is determined and what happens on the expiry of the review date.	We agree that it is unclear how the review date is determined; however, we assumed it would be a date set by Aurizon Network, having regard to the circumstances (e.g. it could be an annual review or review at the end of a project). To avoid uncertainty, we recommend that we amend the undertaking so that the review date is a date to be determined by Aurizon Network, but to be no longer than a stated number of months (e.g. 12 months). (see cl. 3.12(a)(vii) of the final amended DAU).
3.13(d)(vi)	Clause 3.13(d)(vi) needs to be clarified, in particular to the drafting with reference to above rail services which is not limited to declared services.	We consider this clause to be sufficiently clear.

Clause (consolidated draft decision-amended DAU)	Aurizon Network's comment	QCA response
Clause 3.13(d)(vii)	Aurizon Network considers that the list of persons at clause 3.13(d)(vii) needs to be reconsidered or clarified.	Aurizon Network has not indicated the basis for its comment, or whether it considers the list to be restrictive. We have made no changes.
3.13(e)	Aurizon Network considers that clause 3.13(e) is circular and does not see what it is trying to achieve.	We agree that clause 3.13(e) (now clause 3.13(a)) is circular as currently drafted, as this clause does not oblige Aurizon Network to follow the process in 3.12. We propose clause 3.13(a) be changed so that it is intended to be a catch-all provision that sets out the most restrictive disclosure process.
Clause 3.13(g)(ii)	Aurizon Network states that they cannot comply with clause 3.13(g)(ii) which requires Aurizon Network to accept any request made by the owner of confidential information to limit disclosure required by the ASX listing rules.	We agree that clause 3.13(g)(ii) (now clause 3.13(f)(ii)) should be amended so that Aurizon Network is required to consider (rather than comply with) requests made by the owner of the confidential information.
Clause 3.13(f)	The restriction on disclosure of confidential information to a related operator at clause 3.13(f) is problematic, given Aurizon Group's functional model. It also queries the definition of 'related operator'—in particular what functional units within the Aurizon Group are.	We disagree and consider the clause is clear.
Clause 3.14	Aurizon Network submitted that its proposed ring-fencing register provides transparency in relation to the flow of ring-fenced information and decisions made with it.	We consider that the effectiveness of Aurizon Network's ring-fenced register is compromised by the limited definition of 'ring-fenced information'.
Clause 3.14	The ring-fencing register should only apply to information related to third party access seekers/holders. Transfers of confidential information between Aurizon Network personnel is required to be recorded in the confidential information register. Aurizon Network cannot comply with this clause in practice. Aurizon Network is required to submit the contents of the Confidential Information Register for QCA's approval. Aurizon Network cannot foresee what changes the QCA may require, therefore posing a compliance risk.	For reasons already stated in the consolidated draft decision, it is imperative that the ring-fencing regime apply internally within the Aurizon Group, as it is a vertically integrated company, which gives rise to the risk of unfair differentiation. We consider that Aurizon Network's concern is centred around the need to record each and every individual disclosure. The drafting does not require every instance to be recorded in the confidential information register, but that categories of disclosure can be recorded in the confidential information register. We consider that is reasonable for the QCA to be able to review and amend the confidential information register once the confidential information register is in the early stages of operation. It is reasonable and natural for there to be fine-tuning of a process once it is implemented.
Clause 3.14	Aurizon Network submitted that there would be additional IT costs	We acknowledge that the confidential information register would involve additional

Clause (consolidated draft decision-amended DAU)	Aurizon Network's comment	QCA response
	associated with building a database to link with internal systems and to generate reports for auditing. A cost of \$140,000 per year was estimated. Additional costs would be recovered through Schedule F.	IT related costs. We consider this cost should be recouped through the revenue cap adjustment process when fully substantiated.
Clause 3.14(b)	Aurizon Network does not consider the obligation to consult at clause 3.14(b) is necessary.	We agree that consultation with stakeholders is not necessary because of the existing obligations set out in clause 3.14(b) and (c) and have removed the consultation obligation. However, we have included a requirement that the QCA must approve Aurizon Network's proposal for a register.
Clause 3.14(f)	Aurizon Network considers that QCA's ability to require changes to the confidential information register after the approval date is beyond power.	To the extent Aurizon Network's objection to this clause relates to clause 3.14(f), we disagree that QCA's ability to require changes to the confidential information register is beyond power. However, we have amended clauses 10.6.4(k), (l) and (m) to clarify that Aurizon Network will be required to implement recommendations of the auditor to ensure compliance with the undertaking. The confidential information register is not the undertaking, but it is merely a process or mechanism set up by the undertaking. Accordingly, it is reasonable for the QCA to approve the confidential information register after the approval date. Given our view that the register is not the undertaking, but it is merely a process, we consider it appropriate to also amend clauses 10.6(k), (l) and (m) to clarify that Aurizon Network will be required to implement recommendations of the auditor to ensure compliance with the undertaking.
Clause 3.14(c)(i)	In respect of clause 3.14(c)(i) of the consolidated draft decision-amended DAU, Aurizon Network does not consider it relevant that the person who requested access be recorded, but rather a person who is given access.	We agree that people making a request for access is irrelevant. Only those that have been given access to the register should be recorded. We have made amendments in the final amended DAU accordingly.
Clause 3.14(c)(ii)(B)	Clause 3.14(c)(ii)(B), requiring details of the period that a recipient has access to information is too onerous and unworkable as it would require the confidential information register to be continually updated. The recording in the register details of the decision made in respect of the confidential information would be unworkable (cl. 3.14(c)(ii)(D) of the consolidated draft decision-amended DAU).	We consider that a continuous obligation to update the register is appropriate to aid transparency and compliance with the undertaking. However, we do not think the outcome of this clause is continuous updating in any case. While we consider that details of the decision made would be unworkable, we acknowledge that the information could be complex. We therefore propose to limit the record to the purpose of the information. See clause 3.14(c)(ii)(D) of the final amended DAU).
Disclosure to legal	Disclosure to an external legal	In the case of legal professional privilege, we

Clause (consolidated draft decision-amended DAU)	Aurizon Network's comment	QCA response
advisors	advisor is to be recorded in the confidential information register. This includes the decision made using the confidential information. Aurizon Network considers this may result in a waiver of legal professional privilege. Aurizon Network cites other examples where disclosure in the register may be problematic—e.g. confidential information shared with financiers in respect of market sensitive information.	agree with Aurizon Network's comment. Requiring Aurizon Network to disclose the decision made based on obtaining legal advice is likely to amount to a waiver of the privilege. We agree with the principle of Aurizon Network's concern as the disclosure of market sensitive information even to parties under a confidentiality obligation presents a real commercial risk.
Recording in the register	Aurizon Network submitted that recording all confidentiality agreements in the register would be onerous as most agreements would contain some confidentiality provisions.	We do not consider this to be onerous in the context of the need for effective ring-fencing under Part 3 of the final amended DAU.
clause 3.14(f)(ii)	If QCA requires amendments to the register as a result of an audit, this would be beyond power. Aurizon Network also states that an audit to 'confirm the process and procedures underpinning the collection of information for the register is fit for purpose' is unclear.	We do not consider that clause 3.14(f)(ii) is beyond power. We consider that the QCA's power under clause 3.14(f)(ii) is supported by s. 137(1A)(a) of the QCA Act.

QRC submitted that the definition of 'related competitor' needs to be clarified, in regard to what is a 'functional unit'. QRC said that the functional unit within port or mine operations undertaken by Aurizon Network needs to be separate from functional units providing below rail services.¹⁸⁹

QCA analysis and final decision

Our final decision is to refuse to approve the definition of confidential information proposed by Aurizon Network in its 2014 DAU.

We consider there needs to be an obligation to keep the confidential information confidential, subject to permitted disclosure. However, we have amended paragraph 3.11(a)(i) to clarify that this obligation is subject to the undertaking (similar to paragraph (ii)). The drafting of clauses 3.12 and 3.13 makes it clear that the disclosure process is paramount, as clauses 3.13(a) and (b) specifically deal with disclosure situations relating to the operation of the undertaking. In these cases, clauses 3.12(b) and (c) need to be complied with, which are the least onerous disclosure obligations on Aurizon Network.

In regard to clause 3.11(b), there is no prohibition on restating a relevant prohibition of the Act, provided that the restatement is clear and does not create ambiguity. In this case, the restatement is appropriate, and takes into account the interests of access seekers by allowing

¹⁸⁹ QRC, sub. 124: 10.

them to ensure compliance otherwise than by seeking Court orders (the default position under the QCA Act), that is, under Part 11 of the undertaking.

We have responded to detailed comments made by Aurizon Network in the table above, and relevant amendments are shown in the final amended DAU.

In response to QRC, we consider that both the definition of related operator and what is intended by a functional unit are sufficiently clear. We do not consider further clarification is required.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.5

- (1) After considering clauses 3.18 and 3.20 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's disclosure process and provisions regarding the protected information register.**
- (2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is set out in clauses 3.11, 3.12 and 3.13 of our final amended DAU and to:**
 - (a) replace the protected information register with the confidential information register**
 - (b) include in the confidential information register entries as set out in clause 3.14 of the final amended DAU**
 - (c) require a record of all confidentiality agreements to be maintained as part of the confidential information register.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.5.3 Exemptions, consent and confidentiality, and the disclosure process

Aurizon Network's 2014 DAU identified a number of instances when access to ring-fenced information does not have to comply with or observe the disclosure process (cl. 3.17 of the 2014 DAU). In assessing the 2014 DAU proposals regarding exemptions from the disclosure process, we considered:

- whether the list of exemptions is appropriately broad, clear and transparent
- whether the confidential information register accurately reflects the incidence of disclosure
- the appropriateness of the proposed confidentiality and consent provisions.

Breadth, clarity and transparency of the list of exemptions

Disclosure process exemptions in the 2014 DAU can be broadly split into exemptions on an 'as needs' basis and exemptions within the Aurizon Group.

The 2014 DAU broadens the scope of the activities which require access to confidential information on an 'as needs' basis. It provides Aurizon Network employees with more freedom in obtaining ring-fenced information and more discretion on the disclosure of financial

information to Aurizon Group bankers or other financial institutions. It allows disclosure on an 'as needs' basis to external third parties/advisors¹⁹⁰ and to an access seeker's customer in certain circumstances.¹⁹¹

Similarly, Aurizon Network's 2014 DAU broadens the scope of confidential information that can be disclosed across the Aurizon Group. The language describing the activities is less specific and more activities are exempt.

The 2014 DAU does not define precisely how, or who, makes the decision to exempt an individual or group of individuals from the disclosure process. There also appears to be no requirement to keep a record of individuals exempt from the disclosure process. Indeed, the protected information register in the 2014 DAU is only required for individuals who are not exempt.

Confidentiality and consent

Broadly there are three aspects to confidentiality and consent with respect to the disclosure of information, comprising:

- information flows across the Aurizon Group
- information flows on an 'as needs' basis
- overarching right to enter into a confidentiality agreement.

Information flows across the Aurizon Group

For information flows across the Aurizon Group, the proposed confidentiality and consent provisions are broadly:

- If exempt from the disclosure process, the recipient has a legitimate business purpose for requiring access to the relevant information and is informed by Aurizon Network of the need to keep protected information confidential and the prohibition of disclosure to the marketing division (cl. 3.17(d) of the 2014 DAU).
- If required to go through the disclosure process, the recipient has a legitimate business purpose requiring access to the relevant information and is required to sign a declaration that they are aware of and understand the Aurizon Group's obligations regarding protected information (cl. 3.18 of the 2014 DAU).

The disclosure of protected information to individuals within the Aurizon Group is not subject to explicit confidentiality agreements. There are also no explicit consent provisions that need to be complied with.

Information flows on an 'as needs' basis

Aurizon Network's proposed disclosure of protected information on an 'as needs' basis in the 2014 DAU has the following constraints:

¹⁹⁰ Aurizon Network may disclose information to external legal, accounting, financial, engineering, environmental or other advisors, consultants or service providers to Aurizon Network, whose role in advising or providing services to Aurizon Network requires disclosure to be made and who are under an obligation of confidentiality to Aurizon Network (cl. 3.17(b)(xiii) of the 2014 DAU).

¹⁹¹ Aurizon Network may disclose information to a customer of an access seeker for the purpose of making assessments of, and decisions on, matters required or contemplated by the undertaking (cl. 3.17(b)(xiv) of the 2014 DAU).

- For all 'as needs' disclosures, the written prior approval of the owner of the protected information is required before disclosing the information, but the owner of the protected information may not withhold approval unreasonably (cl. 3.17(b)(xv) of the 2014 DAU.)
- A consent process that deals with external third party/advisor conflicts of interest when a particular party is advising both Aurizon Network and a related operator on the same or a related matter (cl. 3.19 of the 2014 DAU).
- Bespoke confidentiality agreements/duties for the disclosure of protected information when providing such information to other railway managers for the purposes of managing access across rail networks, to other infrastructure providers for the purposes of coordinating capacity allocation and when disclosing information to external third parties/advisors.

Overarching right to enter into a confidentiality agreement

The 2014 DAU allows an access seeker or train operator to enter into a confidentiality agreement with Aurizon Network during the negotiation period of an access agreement (cl. 3.14 of the 2014 DAU). The confidentiality agreement will, unless otherwise agreed, take the form of the standard confidentiality deed (Schedule I of the 2014 DAU).

Summary of the initial draft decision

The initial draft decision did not consider that Aurizon Network's 2014 DAU proposals on these issues were appropriate as the regime was, in our view, not effective.

As noted above, we considered the 2010 AU, was a useful baseline assisting us to assess whether 2014 DAU could be approved by reference to the statutory factors in section 138(2).

With respect to information flows across the Aurizon Group, the 2010 AU includes a number of provisions restricting the flow of confidential information across the corporate group. These include:

- requiring Aurizon parties who receive confidential information to enter into a legally enforceable agreement requiring them to keep confidential and not disclose, or permit any person employed or engaged by that Aurizon party to disclose, the confidential information (cl. 3.4.2(i) of the 2010 AU)
- restricting the provision of confidential information to a related operator unless approved by the third party access seeker or access holder (cl. 3.4.2(d) of the 2010 AU)
- in the majority of cases requiring Aurizon Network to seek the consent of an access seeker or access holder to disclose confidential information and to adopt the consent process (cl. 3.4.2(g) of the 2010 AU).

In our initial draft decision, we considered that, under Aurizon Network's 2014 DAU proposals, it is possible for owners of protected information to have very little understanding of how protected information relating to them is being used throughout the Aurizon Group. We were of the view this raises legitimate concerns regarding the ability to detect discrimination, anti-competitive behaviour and the inappropriate disclosure of ring-fenced information. In our view, the 2014 DAU increases the scope of activities and potentially the pool of individuals exempt from the disclosure process, which is contrary to the balancing of the factors in section 138(2) of the QCA Act.

When compared to the 2010 AU, we considered Aurizon Network's proposals in the 2014 DAU regarding the interaction between the disclosure process, exemptions, consent and confidentiality provisions:

- provide greater scope for interpreting a particular activity as exempt from the disclosure process, thereby lowering the likelihood that the information management system will provide credible records
- in the context of the change in the organisational structure within the Aurizon Group, introduce complexity in gauging if the information captured through the disclosure process accurately reflects the incidence of disclosure and provides a meaningful benchmark for assessing the disclosure pattern of protected information through time
- adopt confidentiality and consent provisions that reduce the protections available to access seekers, access holders and train operators.

Accordingly, in our initial draft decision, we developed what we considered to be appropriate ring-fencing provisions given the new organisational structure of the Aurizon Group, rather than focusing on changes to organisational structure that may also ensure an effective ring-fencing regime.

We did not consider Aurizon Network's proposals to be in the interests of access seekers, access holders and train operators (s. 138(2)(e) of the QCA Act). Additionally, we were of the view an ineffective ring-fencing regime does not provide potential market entrants with any assurance they will be treated in a non-discriminatory manner or that credible mechanisms to investigate and redress potential cases of discrimination exist (as required by Part 5 of the QCA Act). An ineffective ring-fencing regime, could, in our view, assist to stifle upstream and downstream competition and impact negatively on the efficient operation of the CQCN and end-to-end coal supply chain (which is contrary to section 138(2)(a) and the object of Part 5 of the QCA Act).

Our approach in our initial draft decision placed considerable emphasis on the role of the confidential information register as a credible source of information and how this relates to the role of exemptions, confidentiality and consent.

Confidential information register as a credible source of information

We understood the change in the Aurizon Group's organisational structure has resulted in Aurizon Network subcontracting more services from the Aurizon Group than was previously the case.

In this context, if the confidential information register is to provide credible information we considered it has to:

- provide a sufficiently complete picture of the flow of confidential information
- be up-to-date and accurate
- be underpinned by fit-for-purpose processes and procedures that are consistently applied.

To ensure the confidential information register is seen as a credible and effective tool, we were of the view that an agreed structure and definition set for the confidential information register has to be developed.

Ideally, these should be developed by Aurizon Network in consultation with stakeholders to ensure inputs into the register are easily identifiable and commonly understood by all parties. Accordingly, we concluded that Aurizon Network should develop and submit these for our approval, within the first four months of commencement of the new access undertaking.

Further, we said that the confidential information register should be submitted to us for review every 12 months, or upon our request, with the QCA also able to undertake spot audits at its discretion.

Our view was that this provides incentives to maintain the confidential information register in an appropriate manner, so that the register provides a clear and transparent indicator of Aurizon Network's approach to its ring-fencing obligations that can be placed on public record. It provides all parties with a set of baseline information from which to consider how the ring-fencing regime is performing. We were of the view this appropriately balances the interests of access seekers, access holders and train operators, with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network supported the initial draft decision for it to consult with access holders and railway operators to inform the development and contents of the protected information register (cl. 3.13(b) of the initial draft decision-amended DAU).¹⁹² However, Aurizon Network said the stakeholder input should not be binding on Aurizon Network.¹⁹³

Aurizon Network accepted that appropriate oversight of the register is required, but questioned whether an additional administrative process needed to be completed every year. Aurizon Network suggested including this in the audit process in Part 10.¹⁹⁴

Aurizon Network agreed that the QCA could undertake spot audits at its discretion.¹⁹⁵

The QRC supported the initial draft decision proposals on the confidential information register.¹⁹⁶

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and reviewing submissions received on the initial draft decision, we refused to approve Aurizon Network's 2014 DAU in respect of the protected information register.

Overall, we did not consider that there were appropriate processes for setting out the structure of the confidential information register, for keeping this up to date, or for regular auditing. We considered these necessary to address any concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure/access of ring-fenced information. Such measures ensured the ring-fencing regime was effective, which we considered to be a material issue (s. 138(2)(h)).

In our view, without 'effective' processes for setting out the structure of the confidential information register, Aurizon Network could be in a position to use its market power such that the interests of access seekers, access holders and train operators were not being treated in balance with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Overall, we considered the confidentiality and consent provisions in Aurizon Network's 2014 DAU inappropriately reduce the protections available to access seekers, access holders and train operators, compared to those included in the 2010 AU.

¹⁹² Aurizon Network, 2014 DAU, sub. 83: 62.

¹⁹³ Aurizon Network, 2014 DAU, sub. 83: 54.

¹⁹⁴ Aurizon Network, 2014 DAU, sub. 83: 64–65.

¹⁹⁵ Aurizon Network, 2014 DAU, sub. 83: 54.

¹⁹⁶ QRC, 2014 DAU, sub. 84: 17.

Breadth, clarity and transparency of the list of exemptions

Given the change in organisational structure within the Aurizon Group and the vertically integrated nature of the organisation, we considered the lack of an effective disclosure process and protected information register relevant and material to our assessment of the 2014 DAU in light of considerations in section 138(2)(d), (e) and (h).

Information flows on an 'as needs' basis

In our view in the consolidated draft decision, the critical aspect of the authorisation process for all 'as needs' disclosures is a clear understanding of the grounds on which the owner of the protected information could legitimately refuse disclosure. The 2014 DAU does not provide any direction. Consequently, we do not consider the process provides sufficient rights and protections for access seekers, access holders and train operators (s. 138(2)(e) and (h)).

Further, the 2014 DAU does not provide a credible mechanism through which access seekers, access holders and train operators can either refuse the disclosure of protected information or have sufficient assurance about who has access to it or how it will be used when an external third party/advisor is advising both Aurizon Network and a related operator on the same or a related matter.

In addition, external third parties/advisors are only under an obligation of confidentiality to Aurizon Network, not the access seeker, access holder or train operator (cl. 3.17(b)(xiii) of the 2014 DAU).

We were of the view the 2010 AU provided a more robust approach to concerns regarding disclosure of confidential information to external third parties/advisors because it provides a prescriptive approach with respect to who will have access to the confidential information and specifies their obligations. For example, it includes a separate clause (cl. 3.4.1 of the 2010 AU) that explicitly deals with issues surrounding the provision of confidential information to third parties/advisors who are advising both Aurizon Network and a related operator on the same or related manner. Consent from the owner of the confidential information is required where an employee within the corporate group is advising a related operator in relation to the same or a related matter (cl. 3.4.2(f) of the 2010 AU). In our view, the effectiveness of the 2010 AU ring-fencing regime relative to the 2014 DAU, is a factor that we can take into account (s. 138(2)(h)).

Overarching right to enter into a confidentiality agreement

We considered that the effectiveness of this option is limited, because the confidentiality deed mirrors the exclusions and permitted disclosures of protected information discussed above.

In assessing the 2014 DAU, a relevant factor was the relative effectiveness of the existing regime compared to that proposed by Aurizon Network. Under the 2010 AU, at any time during the during the negotiation process, including prior to the submission of an access application, an access seeker can require Aurizon Network to enter into a standard confidentiality deed. Similarly, Aurizon Network can require this of the access seeker in the negotiation period (cl. 3.4(c) of the 2010 AU).

We were of the view the confidentiality deed in the 2010 AU (Schedule B1) is more transparent and robust than Aurizon Network's proposals in the 2014 DAU. Furthermore, Schedule B1 includes a suite of general obligations, as well as clauses regarding liquidated damages and compensation for breaches of the information flow obligations within the Aurizon corporate group (cls. 4 and 5 of Schedule B1 in the 2010 AU). These are excluded from the confidentiality deed included in the 2014 DAU.

Amending the 2014 DAU

In considering the way the 2014 DAU should be amended, as noted above, we had regard to the drafting of the equivalent provisions in the 2010 AU, and used those provisions as the base for proposing our amendments to the undertaking. The way to amend the 2014 DAU is set out in our consolidated draft decision-amended DAU.

We noted general acceptance of our proposed drafting changes in our initial draft decision, with qualifications by Aurizon Network in respect of the development and contents of the protected information register (see clause 3.14 of the consolidated draft decision-amended AU).

We did not consider that administrative processes proposed in our amended drafting would be significantly different whether or not the annual review of the register by the QCA is part of or separate to annual audit processes. For ring-fencing to be effective and credible, the process needs to be separate and identifiable.

By including those processes we proposed in our consolidated draft decision-amended DAU, we considered that there is an appropriate balance between the interests of Aurizon Network and access seekers and access holders, consistent with the matters set out in section 138(2) of the QCA Act.

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted:

- (a) A period of consultation to decide the content of the Confidential Information Register is not necessary.
- (b) The QCA's ability to require changes to the Confidential Information Register after the approval date is beyond power.

QCA analysis and final decision

Our final decision is to refuse to approve the definition of confidential information proposed by Aurizon Network in its 2014 DAU.

In response to Aurizon Network's comments, our views are as follows:

- (a) As noted above, the process of consultation would appear to be unnecessary, given that the additional time taken and cost would likely not result in a list of contents materially different from that already proposed. We consider that Aurizon Network would in any case consult with stakeholders as necessary. We amended clause 3.14(b) in the final amended DAU.
- (b) We disagree that we would be beyond power in requiring changes to the Register after the approval date. The most likely outcome is that if Aurizon Network's processes or procedures are not fit-for-purpose or are not allowing the objectives of the ring fencing regime to be met, the relevant processes will be updated, not that the undertaking itself is varied. In our view, the outcome of this clause is that any audit undertaking under clause 10.6 for compliance with clause 3.14(f) would only seek to ensure that the Confidential Information Register contains the minimum matters identified in clause 3.14(c), and that Aurizon Network has followed the process set out in the undertaking for maintaining the Confidential Information Register. The results of the audit may be that Aurizon Network amends its processes and/or the Confidential Information Register to conform to the undertaking. It is unclear how this would amount to a unilateral power for the QCA to amend the undertaking itself. Notwithstanding this, clauses 10.6(k), (l) and

(m) have been amended to clarify that Aurizon Network will be required to implement recommendations of the auditor to ensure compliance with the undertaking.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.6

- (1) After considering clause 3.17 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's protected information register in the 2014 DAU as a credible source of information.**
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is for:**
 - (a) Aurizon Network 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 four months of the operation of this undertaking (clause 3.14(b) of the final amended DAU)**
 - (b) the confidential information register to be submitted to the QCA, every 12 months or upon request, for review (clause 3.14(e) of the final amended DAU)**
 - (c) 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.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.5.4 The role of exemptions, confidentiality and consent

Summary of the initial draft decision

In our initial draft decision, we acknowledged that not all disclosures of confidential information need to be recorded. However, we were of the view that exemptions from the disclosure process should be narrowly defined, with the majority of confidential information disclosures being included in the confidential information register.

We considered it was appropriate the consent of the owner of the confidential information was to be obtained in a number of circumstances. This provides a meaningful veto if there are concerns with respect to how Aurizon Network and the Aurizon Group are using confidential information, and accordingly, in our view, balanced the interests of Aurizon Network and others (s. 138(2)(a) and (e) of the QCA Act). It also provides Aurizon Network and the Aurizon Group with an incentive to provide owners of confidential information with a requisite level of assurance about the reasons for the use of the confidential information and the checks in place to protect that information.

Our approach provided a pragmatic balance between allowing Aurizon Network to disclose confidential information, while providing an appropriate level of transparency and ensuring a robust, objective understanding of the flow of confidential information is developed. This is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) and aligns with Aurizon Network's legitimate business interests (s. 138(2)(b)).

Table 12 Summary of the QCA initial draft decision for disclosure process on an 'as needs' basis

<i>Reason for disclosure</i>	<i>Confidentiality, consultation and information register provisions</i>	<i>Consent provisions</i>
Required or compelled by any law, an order of a court, notice validly issued by any authority or the safety regulator.	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
Necessary for the conduct of any legal proceedings, any dispute resolution process or audit under the undertaking, QCA Act or standard agreement.	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
To any person involved in clearing an incident or emergency that is preventing the operating of train services on the rail infrastructure.	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
Required under any stock exchange listing requirement or rule.	<ul style="list-style-type: none"> no confidentiality agreement consultation with the owner of the confidential information is required, as any disclosure may impact on the owner's own listing excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
For the purposes of train control in the usual course of undertaking train services.	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
<p>To a railway manager to the extent required for the purpose of negotiating or providing access to that railway manager's rail transport infrastructure.</p> <p>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.</p>	<ul style="list-style-type: none"> confidentiality agreement required excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information not required
To a subcontractor to the extent necessary to enable subcontractors to perform the relevant subcontract.	<ul style="list-style-type: none"> confidentiality agreement is required included in the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information is required
<p>To external legal, accounting or financial, 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 Aurizon Network and have been advised of the Aurizon Group's obligations regarding confidential information.</p> <p>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.</p>	<ul style="list-style-type: none"> confidentiality agreement is not required included in the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information is not required

Table 13 Summary of the QCA initial draft decision for disclosure process across the Aurizon Group

<i>Parties</i>	<i>Confidentiality and information register provisions</i>	<i>Consent provisions</i>
Aurizon Network employees and officers may access and use confidential information to the extent necessary to perform their duties.	<ul style="list-style-type: none"> no confidentiality agreement excluded from the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information is not required
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. ¹⁹⁷	<ul style="list-style-type: none"> confidentiality agreement is required included in the confidential information register 	<ul style="list-style-type: none"> consent from the owner of the confidential information is not required
Subcontracted service provision from the Aurizon Group to Aurizon Network. ¹⁹⁸	<ul style="list-style-type: none"> confidentiality agreement is required included in the confidential information register 	<ul style="list-style-type: none"> consent of the owner of the confidential information is required
Subcontracting to an Aurizon Group entity anything associated with regulatory advice regarding the development/interpretation of the Undertaking .	<ul style="list-style-type: none"> prohibited due to a direct conflict of interest 	<ul style="list-style-type: none"> not applicable
Related operators, rail–port entities and mine–rail entities.	<ul style="list-style-type: none"> confidentiality agreement is required included in the confidential information register 	<ul style="list-style-type: none"> consent of the owner of the confidential information is required
All other confidential information flow from Aurizon Network to an individual in the Aurizon Group.	<ul style="list-style-type: none"> confidentiality agreement is required included in the confidential information register 	<ul style="list-style-type: none"> consent of the owner of the confidential information is required

¹⁹⁷ The Aurizon Group's organisational structure allows for directors/executives to sit on more than one board across the Aurizon Group. By law, any director/executive on a board has a duty to act in the interests of that company. We consider this can create conflicts of interest. In such circumstances, a potential option would be to consider the merits of prohibiting directors/executives sitting on any board in the Aurizon Group if also sitting on the Aurizon Network board. We would prefer not to adopt such a position but allow Aurizon Network and the Aurizon Group to proactively manage confidential information and its ring-fencing obligations. We consider a critical aspect of this is a rigorous disclosure process across directors/executives and those providing them with clerical and administrative assistance.

¹⁹⁸ We consider that the change in the organisational structure of the Aurizon Group results in Aurizon Network effectively subcontracting more services from the Aurizon Group. In order to develop a robust understanding of the flow of confidential information associated with the delivery of these services, we are of the view that a rigorous disclosure process needs to be adopted.

Our initial draft decision also strengthened the confidentiality agreement(s) relative to the proposals in the 2014 DAU.

Our consolidated draft decision addressed issues raised in submissions relating to:

- (a) process
- (b) disclosure exemptions
- (c) confidentiality agreements
- (d) comments on Schedule I.

Process

Stakeholders' comments on the initial draft decision

Aurizon Network said the QCA's revised drafting is complex, and that it will slow processes and add to costs. Aurizon Network said there appeared little basis for the QCA to impose these measures. Its submission included a 'disclosure matrix', which responded to the QCA's initial draft decision.

Aurizon Network submitted that the need to make an entry every time confidential information is provided to shared support services (IT, legal and safety functions), will be unduly burdensome and will slow down processes where this is required. Aurizon Network said it was essential that the QCA, Aurizon Network and stakeholders agree on a list of exceptions to these requirements.¹⁹⁹

Consolidated draft decision

In view of Aurizon Network's comments, we recognised there was a trade-off between the need for effective ring-fencing procedures and the efficiency and effectiveness of operations. However, we did not envisage that recording processes would slow down operational procedures in any material way. We noted that many of the procedures were carried over from the 2010 AU, and presumably administrative processes were already in place.

Disclosure exemptions

In our initial draft decision, we had considered that exemptions from the disclosure process should be narrowly defined, with the majority of confidential information disclosures being included in the confidential information register, and exemptions limited—that is, we did not allow an exemption for recording in the register for some items in clause 3.12(d). This was to ensure confidence in the process.

At the time of the consolidated draft decision, we reviewed the disclosure matrix submitted by Aurizon Network and concluded as set out in the table below.

Table 14 Aurizon Network's comments on disclosure exemptions for certain parties²⁰⁰

<i>Parties</i>	<i>Aurizon Network's comments</i>	<i>QCA analysis</i>
Subcontractors	Aurizon Network submitted that the new requirements relating to subcontractors may create additional difficulties for certain projects, such as IT projects, where access could be required to significant volumes of	Aurizon Network's concerns about the volume of confidential information that could require information-owners' consent were noted. However, an effective and credible

¹⁹⁹ Aurizon Network, 2014 DAU, sub. 83: 69.

²⁰⁰ Aurizon Network, 2014 DAU, sub. 83: 67–68.

Parties	Aurizon Network's comments	QCA analysis
	confidential data. The need to obtain information-owners' consent could be administratively difficult and could delay projects.	ring-fencing regime will necessarily involve additional administrative processes, and the onus would be on Aurizon Network to manage these efficiently to minimise delays.
External professional advisers or consultants	Aurizon Network said that the requirement for all transfers of confidential information to external legal, accounting, engineering or financial advisers to be recorded in the register does not assist in management of the declared service. Aurizon Network thought the removal of the exemption for engineers and environmental advisers may be an oversight and sought our confirmation. Aurizon Network also queried the deletion of the 2010 AU provision which allowed disclosure to bankers and other financial institutions from the disclosure list, and requested it be reinstated. ²⁰¹	We noted that disclosure to external legal, accounting or financial consultants would be exempt from certain processes under clause 3.13(c) of the consolidated draft decision-amended DAU, but information transfers would need to be recorded in the register. Again, we regarded this as necessary for a credible ring-fencing process. We agreed to reinstate the allowed disclosure to bankers and financial institutions for the purposes of raising funds or maintaining compliance with credit arrangements. Engineering and environmental consultants are likely to potentially be connected to other stakeholders. They typically have lower professional confidentiality obligations and therefore are not included in the exemptions.
Directors of Aurizon Network and Holdings, directors and executives of Aurizon Group, any company secretary and any administrative and clerical staff to directors	Aurizon Network submitted that the provisions for directors and executives should be targeted to specifically exclude those executives in the marketing and related operator functions, as these should not be able to access confidential information in any way. Aurizon Network further did not agree with the obligation that requires these employees to enter confidentiality deeds on top of their existing employment contracts. ²⁰²	We agreed with Aurizon Network that exemptions should not apply to those executive personnel such as marketing and related operator personnel as they should not have access to confidential information at all.
Subcontracted service provision from Aurizon Group to Aurizon Network	In regard to sub-contracted services from the Aurizon Group to Network, Aurizon Network considered that the initial draft decision places a huge administrative burden and negatively impacts any possibility of an efficient process. Aurizon Network said that the inclusion of clause 3.7(c) requiring compliance with obligations under Part 3 would include processes that are highly restrictive to efficient operations. ²⁰³ It would also involve additional costs that are not accounted for in the MAR initial draft decision.	In our view, these services, including shared services and corporate functions, need to be subject to effective ring-fencing—and for this reason, should be subject to the necessary obligations for handling confidential information. These obligations existed in the 2010 AU and no further administrative cost allowance would seem necessary.
Subcontracting to an Aurizon group	Aurizon Network said the 'blanket prohibition on disclosure of confidential information to	We considered that there should be effective and credible ring-fencing of

²⁰¹ Aurizon Network, 2014 DAU, sub. 83: 70.

²⁰² Aurizon Network, 2014 DAU, sub. 83: 71.

²⁰³ Aurizon Network, 2014 DAU, sub. 83: 71.

Parties	Aurizon Network's comments	QCA analysis
entity anything associated with regulatory advice	any other function for regulatory advice is an unnecessary and inefficient restriction'. It further said that it is entirely inappropriate for the QCA to seek to control from what source Aurizon Network receives regulatory advice or input. It said that it could lead to duplication of resources required for advice on such matters as tax, finance, company secretariat, and engineering. ²⁰⁴ Aurizon Network accepted the provision for a self-contained regulatory affairs advisor.	confidential information related to regulatory affairs. Aurizon Network can transfer relevant staff from other parts of Aurizon Group to provide regulatory advice where necessary.
Involvement of related parties in development, application and implementation of an undertaking.	Aurizon Network disagreed with restrictions on the use of resources within the broader Aurizon group for the development, application and implementation of an undertaking. It considered the development of a new undertaking involves little confidential information and that any liaisons with other parts of the business are merely inputs into the process of developing a new undertaking. ²⁰⁵	As noted above, to the extent that any confidential information is provided across the broader Aurizon Group, this needs to be recorded to maintain credibility and effectiveness of ring-fencing.
Related operators, rail/port entities and mine/rail entities.	Aurizon Network disagreed with the initial draft decision position.	As noted above, to the extent that any confidential information is provided across the broader Aurizon Group, this needs to be recorded to maintain credibility and effectiveness of ring-fencing.

Confidentiality agreement

Stakeholders' comments on the initial draft decision

Aurizon Network noted the QCA's initial draft decision to allow any relevant party, at any time during negotiations for access, to require Aurizon Network to enter into a standard form confidentiality agreement (Schedule I), which was substantially redrafted by the QCA.

While Aurizon Network agreed that access seekers should have the option of entering into a confidentiality agreement to protect information, it had concerns about how this would be implemented. Aurizon Network's and other stakeholders' comments, with our responses, are summarised in the table below.

²⁰⁴ Aurizon Network, 2014 DAU, sub. 83: 72.

²⁰⁵ Aurizon Network, 2014 DAU, sub. 83: 73.

Table 15 Stakeholders' comments on the confidentiality agreement

<i>Stakeholder</i>	<i>Comment</i>	<i>QCA analysis</i>
Aurizon Network	The QCA's redrafted clause 3.10 (of the initial draft decision-amended DAU) does not give the option of entering into an alternative agreement that could allow for variations. Aurizon Network suggested reinstating the words 'unless otherwise agreed' in clause 3.10, as used in the 2010 AU. ²⁰⁶	We considered that this clause does not prevent parties negotiating a confidentiality agreement on their own terms. However, for clarity, we proposed to reinstate drafting as suggested by Aurizon Network.
Aurizon Network	The QCA sought to use the same agreement as applies when certain parties receive confidential information from Aurizon Network. There should be two separate agreements.	We considered that the same agreement can apply—there is no need to have two separate agreements.
QRC	The QRC supported the QCA's proposal to allow an access seeker or train operator the right to require Aurizon Network to enter into a confidentiality agreement in the form set out in the undertaking. However, the QRC said that clause 3.10 unduly restricts the application of confidentiality agreements—any party should be able to enter into a confidentiality agreement ahead of lodgement of an access application, not only access seekers (who have lodged an application) and train operators. ²⁰⁷	We were concerned that widening the definition could be too ambiguous. We considered that in such cases, the onus is on third parties to manage their confidential information until they become an access seeker and the negotiation period commences. For clarity, in our revised drafting (cl. 3.9 of the consolidated draft decision-amended DAU) we considered that a third party access seeker as defined in Part 12 could enter into confidentiality agreements.
QRC	The QRC supported the disclosure of confidential information on an 'as needs' basis, but said the reference to 'legitimate business purpose' in clause 3.12(a)(ii) (of the initial draft decision-amended DAU) may be uncertain—it should be more closely linked to the purpose for which confidential information is disclosed. The QRC also said there may be an unintended consequence under clause 3.12(j) (actually cl. 3.12(i)(ii)(B)) where Aurizon Network has the right to cease negotiations even if prior consent to disclose confidential information is refused on reasonable grounds. ²⁰⁸	We noted that the content of the confidential information register includes the purpose for which information is to be used and the decisions made using the information (cl. 3.14(c)(ii)(D) of the consolidated draft decision-amended DAU). A legitimate business purpose in our view is narrow enough to ensure that information that is not relevant to decisions is excluded. We also made drafting changes to address the potential for any unintended consequences in clause 3.12(i)(ii)(B) of the initial draft decision-amended DAU.
Anglo American	Anglo American suggested parties should be allowed to provide to the QCA information that is subject to confidentiality obligations, as long as the QCA treats the information confidentially. This could be similar to a waiver as contained in clauses 3.19(b) and (c) in the initial draft decision. ²⁰⁹	We have such power under section 185 of the QCA Act once an investigation is commenced. Should confidential information be otherwise volunteered to the QCA, the QCA is obliged to assess whether it is in the public interest to retain its confidentiality.

²⁰⁶ Aurizon Network, 2014 DAU, sub. 83: 73.

²⁰⁷ QRC, 2014 DAU, sub. 84: 16.

²⁰⁸ QRC, 2014 DAU, sub. 84: 17.

²⁰⁹ Anglo American, 2014 DAU, sub. 95: 9.

Comments on Schedule I

Our responses to comments in relation to the standard form confidentiality agreement (Schedule I in the initial draft decision-amended DAU) are set out in the table below.

Table 16 Stakeholders' comments on confidentiality agreement (Schedule I)

<i>Clause in initial draft decision-amended DAU</i>	<i>Stakeholders' comments</i>	<i>QCA response</i>
General	Aurizon Network and the QRC both suggested that 'recipient' should be defined.	We included a definition of recipient in Part 12 of the consolidated draft decision-amended DAU.
Clause 5	The QRC said it is unclear whether there may be mutual confidentiality obligations between Aurizon Network and a relevant counterparty. The QRC was concerned that the confidentiality agreement could be construed to restrict an access seeker's use of information disclosed to it by Aurizon Network during negotiations. The pro forma should clarify that for negotiations of an access agreement or TOD, the recipient is Aurizon Network only.	We clarified the drafting of the consolidated draft decision-amended DAU in response to the QRC's comments.
Clause 6	Aurizon Network said that the obligation to procure the Aurizon Group's compliance should be deleted, as this is beyond the QCA's power.	We removed the obligation to procure the Aurizon Group's compliance in the consolidated draft decision-amended DAU, consistent with Aurizon Network's comment.
Clause 7	Aurizon Network said it is not appropriate for the QCA to involve itself in an agreement between Aurizon Network and an access seeker—it said the QCA's intent with clause 7 is unclear.	We removed this clause 7 in the consolidated draft decision-amended DAU, consistent with Aurizon Network's comment.
Clause 8(a)	Aurizon Network said this clause imposes a liability on Aurizon Network in respect of conduct of other Aurizon parties. The QCA does not have the power to impose such liability.	We removed this drafting in the consolidated draft decision-amended DAU (now cl. 7(a)), consistent with Aurizon Network's comment.
Clause 8(c), (d)	Aurizon Network said it is not appropriate to have a mutual confidentiality agreement with two-way obligations but only a one-way liquidated damages provision. ²¹⁰ The QRC did not agree with the clauses which seek to provide an entitlement to liquidated damages and compensation for breaches of a confidentiality agreement. It said this is unlikely to provide any incentive for Aurizon Network not to breach its confidentiality obligations.	In response to submissions, we decided to delete these clauses from Schedule I in the consolidated draft decision-amended DAU.
Clause 9	The QRC did not agree with clause 9. It said a confidentiality agreement should only be terminated by mutual consent. ²¹¹	We agreed with the QRC view that a confidentiality agreement should only be terminated by mutual consent. In our view, the drafting of clause 8 of the consolidated draft decision-amended DAU reflects this position.

²¹⁰ Aurizon Network, 2014 DAU, sub. 83: 73–74.

²¹¹ QRC, 2014 DAU, sub. 84: 19–20.

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refused to approve Aurizon Network's exemptions process, confidentiality and consent provisions in the 2014 DAU.

Aurizon Network's 2014 DAU was not appropriate because it did not provide an acceptable balance between allowing Aurizon Network to disclose confidential information where necessary, and enabling an appropriate level of transparency—thereby ensuring a robust, objective understanding of the flow of confidential information is developed. Those factors are, Aurizon Network's legitimate business interests, the interests of access seekers and the issue of having an operationally effective ring-fencing regime in place (s. 138(2)(b), (e) and (h) of the QCA Act).

Amending the 2014 DAU

The way to amend the 2014 DAU was set out in our consolidated draft decision-amended DAU at Part 3 and Schedule I.

While we considered that Aurizon Network's 2014 DAU was not an appropriate alignment of the interests of access holders, access seekers and train operators, we adopted a number of the suggested changes made in submissions by Aurizon Network and other stakeholders, as noted above.

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that a standard form confidentiality agreement is not required. Relevant information is already subject to significant disclosure restrictions.²¹²

The QRC submitted that there should be an ability for prospective access seekers to enter into a confidentiality agreement with Aurizon Network. The QRC does not support Aurizon Network having the ability to require an access seeker or train operator to enter into a confidentiality agreement as it may need to disclose that information to other parties in the supply chain (cl. 3.10).²¹³

The QRC also had drafting comments on the Schedule I confidentiality agreement (see the QRC submission). It suggested separate pro-formas for the scenarios noted above.

QCA analysis and final decision

Our final decision is to refuse to approve the exemptions process, confidentiality and consent provisions proposed by Aurizon Network in its 2014 DAU.

We disagree with Aurizon Network, as we believe that having a standard confidentiality agreement adds certainty as to the confidentiality obligations, avoids parties having to spend time negotiating an agreement, and creates a set of obligations, which are balanced between the parties.

In response to the QRC, an appropriate confidentiality exception and associated obligation to provide that those in the supply chain are under a confidentiality obligation is taken into account at clause 4(e) of the standard confidentiality agreement.

²¹² Aurizon Network, sub. 125: 44.

²¹³ QRC, sub. 124: 13.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 4.7

- (1) After considering relevant clauses of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's exemptions process, confidentiality and consent provisions.**
- (2) The way in which we consider it is appropriate that Aurizon Network amend the draft access undertaking is to:**
 - (a) replace the obligations and processes for disclosure of confidential information in accordance with our marked drafting**
 - (b) allow any relevant party, including Aurizon Network, at any time during negotiations for access, to require the other party to enter into the standard form confidentiality agreement (Schedule I)**
 - (c) replace the standard form confidentiality agreement in accordance with our marked drafting.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Decision-making principles

We considered Aurizon Network's 2014 DAU has the potential to constrain the ability of access seekers and access holders to understand the flow of ring-fenced information outside of Aurizon Network and to assess how the information has been used in the decision-making process—in circumstances where the rights of third parties may be affected.

Given the changes in the Aurizon Group's structure leading to Aurizon Network subcontracting more services from the Aurizon Group, as well as there being cross-board directorships within the Aurizon Group, we considered that the 2014 DAU, lacking any decision-making criteria, fails to appropriately balance the interest of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act), and aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Our initial draft decision was to refuse to approve the 2014 DAU, and to indicate that the way in which we consider it would be appropriate to amend the undertaking is to include decision-making principles. Given decision-making criteria were included in the 2010 AU, these provided a useful baseline for our proposed amendments. As decision-making criteria are part of the 2010 AU, we would assume Aurizon Network already complies with its obligations and that it would be relatively straightforward to continue to record the relevant information in the confidential information register.

Stakeholders' comments on the initial draft decision

Aurizon Network did not have significant concerns with the reinstatement of the decision-making process from the 2010 AU into the amended DAU.

However, Aurizon Network said that clause 3.18(a)(ii) (of the initial draft decision-amended DAU) 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 QCA Act.²¹⁴

Consolidated draft decision

In our consolidated draft decision, we continued to consider that Aurizon Network's 2014 DAU was not appropriate because in our view it failed to ensure a clear and transparent link between access to ring-fenced information and the process for Aurizon Network's decision-making. Without decision-making criteria, the 2014 DAU did not balance the interest of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act), with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

We therefore indicated that the way to amend the 2014 DAU was to reinstate the decision-making principles.

In recognition of Aurizon Network's comment, we included changes in the consolidated draft decision-amended DAU (cl.3.19(a)(ii)) to provide that a decision is made in a manner that does not unfairly differentiate between access seekers and access holders in a way that has a material adverse effect on them.

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that the consolidated draft decision-amended DAU (cl. 3.19(a)(ii)) was beyond power as the drafting did not align with the wording of the QCA Act.²¹⁵

Asciano submitted that the term 'unfairly' is difficult to interpret legally, and creates the potential for disputes between Aurizon Network access seekers and the QCA.²¹⁶

Anglo American also submitted that the requirement for Aurizon Network to not unfairly differentiate between access seekers and access holders in a materially adverse way lowers the threshold for the type of decision that Aurizon Network is required to make.²¹⁷

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's 2014 DAU in the absence of any decision-making principles.

We disagree that the consolidated draft decision-amended DAU was beyond power. However, for clarity we have amended the drafting of clause 3.19(a)(ii) of the final amended DAU. We note in response to Asciano and Anglo American that we have used the term 'unfairly differentiate' as this is the term used in the QCA Act. It is not possible to impose a more stringent test than that set out in the QCA Act.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

²¹⁴ Aurizon Network, 2014 DAU, sub. 83: 74.

²¹⁵ Aurizon Network, sub no 125: 70.

²¹⁶ Asciano, sub. 126: 10–11.

²¹⁷ Anglo American, sub. 127:14.

Final decision 4.8

- (1) Our final decision is to refuse to approve Aurizon Network's 2014 DAU in the absence of any decision-making principles.**
- (2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to reinstate the decision-making principles included in the 2010 AU (cl. 3.19).**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.5.5 Supporting provisions

Aurizon Network's 2014 DAU also included a number of other provisions associated with the information management system, such as:

- training and exit certificates
- commitments to information security
- security measures
- waiver of the undertaking.

Training and exit certificates

Unlike the 2010 AU, the 2014 DAU included provisions for the mandatory training of various groups of employees, with respect to the Aurizon Group's obligations regarding protected information (cl. 3.21(a) of the 2014 DAU).

Aurizon Network also included an exit certificate process for the circumstances where an Aurizon Network employee that has had access to protected information is either employed by another Aurizon Group business or an employer outside the Aurizon Group. In such circumstances, the employee would undergo a debriefing session regarding Aurizon Network's and their own obligations, as applicable, regarding the management of protected information. Each employee would be asked to sign an exit certificate that includes an acknowledgement of having undergone the debriefing session. A record of the exit certificates would be kept in the protected information register (cls. 3.21(b) and (c) of the 2014 DAU).

Summary of initial draft decision

In our initial draft decision, we agreed with stakeholders' views that including explicit training and exit certificate provisions in the undertaking is beneficial. We also considered there is merit in the arguments for a tiered approach to training. Training should be undertaken periodically rather than just once and a 'reasonable endeavours' approach should be adopted by Aurizon Network when obtaining exit certificates.

We were of the view that tiered training, if adopted, needs to be appropriately targeted. We were not convinced this relates to just providing more detailed and frequent training to those employed by the Aurizon Group in the performance of access-related functions, as suggested by stakeholders. We considered the undertaking should involve targeting the more detailed training requirements to high-risk personnel. In our view, this encompasses individuals who may have access to confidential information and be in a position to:

- use that information to influence train scheduling

- use that information for purposes other than supplying core Aurizon Network services
- influence or control the decisions of any Aurizon Group company that is not Aurizon Network.

We considered Aurizon Network should maintain a register of high-risk personnel, which includes a detailed explanation of why individuals are on the register. We considered the directors and executive officers of the Aurizon Group are high-risk personnel because the organisational structure of the Aurizon Group allows for directors and executive officers to sit on more than one company board across the Aurizon Group. We also considered the register should be provided to the QCA periodically for audit. Finally, we decided that Aurizon Network should adopt a 'reasonable endeavours' approach to obtaining exit certificates.

Overall, our initial draft decision was to refuse to approve the training and exit certificate provisions in clause 3.21 of Aurizon Network's 2014 DAU. We considered a targeted, tiered approach to training can be adopted through the development of a high-risk personnel register. We considered this appropriately balances the interests of access holders, access seekers and train operators, with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Stakeholders' comments and the QCA's responses are detailed in the table below.

Table 17 Stakeholders' comments on training and exit certificates

<i>Stakeholder</i>	<i>Comments</i>	<i>QCA response</i>
Aurizon Network	Aurizon Network submitted that it has a risk-based approach to training in place. Aurizon Network said the requirement for training of employees on statutory obligations (cl. 3.14(b) of the initial draft decision-amended DAU) is logistically difficult and out of scope of QCA powers to mandate. Aurizon Network was concerned with potential overreach and additional compliance costs given there are 7524 employees spread across most states of Australia. Aurizon Network suggested excluding broader Aurizon Group personnel who have no exposure to protected information or to Aurizon Network. ²¹⁸	The initial draft decision was not intended to require all of Aurizon Network's employees to undergo training on statutory obligations—we accepted that this is logistically impractical. In our view, because the undertaking relates to access to the declared service in the CQCN, the provisions only apply to relevant personnel whose role requires access to confidential information. Our consolidated draft decision-amended drafting provided clarification of this.
Aurizon Network	Aurizon Network agreed with the QCA's 'best endeavours' approach for completing exit certificates, but said it should only apply to those not on the high-risk register, with a mandatory requirement to complete an exit certificate for those on the high-risk register (cl. 3.16 of the initial draft decision-amended DAU). ²¹⁹	We agreed that a mandatory process for exit certificates (cl. 3.17 of the consolidated draft decision-amended DAU) should apply for personnel listed on the high-risk register, but that a best endeavours approach apply for other staff.
Aurizon Network	Aurizon Network submitted it is already in compliance with the requirement in relation to high-risk personnel and has a list of positions detailing how the high-risk register	We did not consider provision of the high-risk register to the QCA on request would be an onerous task, and while this provision is 'open-ended', the intent is to ensure that

²¹⁸ Aurizon Network, 2014 DAU, sub. 83: 75.

²¹⁹ Aurizon Network, 2014 DAU, sub. 83: 76.

Stakeholder	Comments	QCA response
	is currently constructed. However, Aurizon Network added that the requirement that the register be provided to the QCA on request is 'unnecessarily broad and open-ended' (cl. 3.15(d)). ²²⁰	the register is maintained and updated appropriately.
QRC	The QRC supported the QCA's amendments relating to confidential information training and exit certificates. The QRC suggested high-risk personnel may require a higher level of training. ²²¹	As noted above, we agreed that a higher level of training is required for high-risk personnel.
Other	Anglo American said the list of high-risk personnel should include all executive managers of Aurizon Network, as well as anyone else involved in the executive or management teams of Aurizon Network. ²²² Asciano said it should include personnel who manage the provision of below-rail services to third parties on a day-to-day basis, including personnel in Aurizon Network's commercial development area and network operations area. ²²³ Vale supported the training provisions. ²²⁴	We considered there is no need for all executive and management personnel of Aurizon Network to be deemed to be listed in the high-risk register or for personnel who manage below-rail services on a day-to-day basis to be listed. Many such personnel may not be exposed to confidential information. Rather, high-risk personnel in these categories can be identified under clause 3.16(b) of the consolidated draft decision-amended DAU.

Aurizon Network said that it is already in compliance with the requirement for the high-risk register, and identified a range of positions that would be included on the register. These included positions responsible for negotiation of access rights to the CQCN, management of access agreements, capacity management and assessment, network control services, procuring and managing maintenance activities, among others.²²⁵

Conclusion

After having regard to the criteria listed in section 138(2) of the QCA Act and submissions received on the initial draft decision, we refused to approve Aurizon Network's training and exit certificate provisions in the 2014 DAU. The reason for our consolidated draft decision is that we considered that processes need to ensure effective management of confidential information where it could be used by relevant personnel to provide an advantage for Aurizon Network, a related entity or a competitor. We considered that effective management of training and exit arrangements would benefit Aurizon Network's own legitimate business interests, particularly in regard to protecting intellectual property and operational information.

However, in taking account of submissions, we made a number of clarifying drafting amendments to our consolidated draft decision-amended DAU. For example, we specifically included Aurizon Network personnel who managed the negotiation and maintenance of access agreements and train operations deeds, and staff assessing and allocating capacity.

Aurizon Network's 2014 DAU training and exit certificate proposals were in our view not appropriate for the reasons noted in our initial draft decision, primarily because they did not

²²⁰ Aurizon Network, 2014 DAU, sub. 83: 77.

²²¹ QRC, 2014 DAU, sub. 84: 17.

²²² Anglo American, 2014 DAU, sub. 95: 10.

²²³ Asciano, 2014 DAU, sub. 76: 13.

²²⁴ Vale, 2014 DAU, sub. 79: 3.

²²⁵ Aurizon Network, 2014 DAU, sub. 83: 77.

target the more detailed training requirements to high-risk personnel. This could weaken the effectiveness of ring-fencing and affect the confidence of access seekers and access holders to invest. Aurizon Network's proposal was not appropriate because it did not appropriately balance the interests of access holders, access seekers and train operators, with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that requiring employees that have no involvement with the CQCN to undertake confidential information training once every two years is beyond power (cl. 3.15 of the consolidated draft decision-amended DAU). Aurizon Network interpreted a briefing session requires a face to face session. This would require substantial resources, and Aurizon Network submitted a high-level estimate of an additional \$140,000 per year.²²⁶

Aurizon Network also submitted that the definition of 'high risk personnel' is too broad (cl. 3.16). For example, an analyst may fall under this definition as they could 'influence' a decision. The CEO, CFO and all Directors of Aurizon Network should not be required to complete the ring-fencing training as they are most familiar with it.

In relation to exit certificates (cl. 3.17), Aurizon Network said that:

- (a) The exit certificate is not required to address ring-fencing issues.
- (b) Aurizon Network has no legal ability to compel high risk personnel to attend the debriefing and sign the exit certificate.
- (c) Aurizon Network cannot change the terms of employment of existing employees. And it is beyond QCA's power to determine the terms of employment for Aurizon Network personnel.

QCA analysis and final decision

Our final decision is to refuse to approve the training and exit certificate provisions proposed in Aurizon Network's 2014 DAU.

We consider that clause 3.15(a) clearly relates to the regulation of the use of confidential information in Aurizon Network's possession and control, and Aurizon Network can therefore control those that access this information including by imposing obligations on non-Aurizon Network employees who access this information via Aurizon Network systems. We do not consider that any change to clause 3.15(a) is required. We consider that the required training sessions need not be face-to-face and could be delivered electronically. The additional cost would therefore likely be much less than the \$140,000 proposed.

In respect of clause 3.15(b), we agree that 'confidential 'information awareness' training for employees that are unlikely to undertake any tasks that relate to or are derived from the declared service is not required. We therefore have amended paragraphs (A), (B) and (C) to clarify that the obligation only applies to those Group employees that perform tasks relating to below-rail services.

We have also deleted clause 3.15(b)(i)(C) of the consolidated draft decision-amended DAU, as the obligations in subsections 3.15(b)(i)(A) and 3.15(b)(i)(B) appear to be sufficient protection. However, we have also included an obligation for training when a person's role changes to allow that person to access confidential information (cl. 3.15(b)(i)(C) of the final amended DAU).

²²⁶ Aurizon Network, sub. 125: 56, 260.

In regard to the definition of high-risk personnel, we agree that the definition could unintentionally include relatively junior staff who provide information to decision-makers. We changed the definition of high-risk personnel so that it includes personnel who have the capacity to determine the outcome or participate in the decisions of any Aurizon Group entity. The CEO, CFO and all Directors are likely to be familiar with the ring-fencing obligations because they undergo training, so it is appropriate that they continue to undergo training.

On the matters relating to exit certificates:

- (a) We disagree with Aurizon Network's view—the exit certificate aids with the compliance and transparency of the undertaking.
- (b) A form of the obligation to compel high-risk personnel to attend a debriefing and sign an exit certificate was originally included in the undertaking by Aurizon Network and the QCA can therefore propose amendments. However, the QCA cannot impose an obligation on Aurizon Network if Aurizon Network cannot practically comply with the obligation. We consider that an unqualified obligation for high risk personnel to attend the debriefing and sign the exit certificate is therefore not workable in practice and we have amended the obligation to 'best endeavours' (cl. 3.17(a) of the final amended DAU).
- (c) In relation to clause 3.17(c), we consider that it is appropriate to delete clause 3.17(c) and leave it up to Aurizon Network to determine how to obtain exit certificates.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.9

- (1) **After considering section 3.21 of the 2014 DAU, our final decision is to refuse to approve Aurizon Network's training and exit certificate provisions.**
- (2) **The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:**
 - (a) **require confidential information training for all Aurizon Network personnel, as well as employees of the Aurizon Group, whose role requires access to confidential information related to the declared services of the CQCN (cl. 3.15)**
 - (b) **require Aurizon Network to adopt a 'best endeavours' approach to obtain exit certificates for Aurizon Network high-risk and other personnel who have had access to confidential information related to the CQCN (cl.3.17(a))**
 - (c) **include provisions that:**
 - (i) **require the development of a high-risk personnel register that can be used to target training requirements (cl. 3.16)**
 - (ii) **provide for a copy of the high-risk personnel register to be given to the QCA, upon request (cl. 3.16(d)).**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Commitments to information security

Aurizon Network's 2014 DAU includes the following overarching commitments regarding the flow of ring-fenced information (cl. 3.15 of the 2014 DAU):

- to keep confidential and not to disclose protected information, unless in accordance with the undertaking
- to only use protected information for the purpose for which it is disclosed to Aurizon Network, and only to the extent necessary for that purpose
- not to use or disclose protected information for the purpose of a related operator obtaining an unfair commercial advantage.

Summary of the initial draft decision

In our initial draft decision, we considered the proposed undertaking was not appropriate as the provisions appeared likely to be ineffective in achieve the objectives of Part 5 of the QCA Act. Importantly, we considered the obligation not to use confidential information for the purpose of a related operator obtaining an unfair commercial advantage should also extend to the disclosure of confidential information to associated port/rail and mine/rail entities.

We considered this is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) given Aurizon Network's strategic intent to leverage its vertically integrated structure. We were of the view this aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Stakeholders' comment on the initial draft decision

Aurizon Network agreed with the principles of the initial draft decision.²²⁷

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and submissions received on the initial draft decision, we refused to approve Aurizon Network's commitments to information security in the 2014 DAU. Aurizon Network's 2014 DAU was not appropriate because it did not extend to the disclosure of confidential information obligations to associated port/rail and mine/rail entities, which, if they obtained such information, could gain an unfair commercial advantage.

We considered that our amendments to address these concerns appropriately take account of the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act)—given Aurizon Network's changed corporate structure—and of the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that the drafting of clause 3.15 was inconsistent with the QCA Act.

QCA analysis and final decision

Our final decision is to refuse to approve the exemptions process, confidentiality and consent provisions proposed by Aurizon Network in its 2014 DAU.

We have made drafting amendments to address Aurizon Network's concerns.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 4.10

- (1) **After considering clause 3.15 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's commitments to information security.**
- (2) **The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to propose that Aurizon Network must not use or disclose confidential information if doing so would unfairly advantage a related operator.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Security measures

In the 2014 DAU, Aurizon Network committed to providing adequate security, in its major office premises, to ensure employees working for a related operator cannot access Aurizon Network offices, unless access is authorised by an Aurizon Network employee. Further, it committed to ensuring that, while in the Aurizon Network offices, an employee of a related operator will be accompanied by an Aurizon Network employee, to the extent reasonably practicable. However,

²²⁷ Aurizon Network, 2014 DAU, sub. 83: 77.

a related operator can be located in the same building as Aurizon Network (cl. 3.22(b) of the 2014 DAU).

Summary of the initial draft decision

In our initial draft decision, we indicated that we did not consider the provisions for the practical implementation of these measures to be effective. In particular, it was not appropriate that the measures focused solely on related operators, and there was ambiguity as to what 'adequate security' means and how such security can be enforced if any Aurizon Network employee can authorise access to Aurizon Network offices, and thereafter only be required to accompany the employee of the related operator 'when reasonably practicable'.

In our initial draft decision, we considered that Aurizon Network's obligations to ensure the security in respect of the confidential information it holds was not sufficiently robust to be considered credible by access holders, access seekers and train operators. In this regard we considered the way in which amendments could be made and proposed the following amendments:

- security measures to apply to all persons other than directors/employees of Aurizon Network
- security measures to apply to all Aurizon Network premises
- any person visiting an Aurizon Network premises to be accompanied by an Aurizon Network employee
- with the exception of Aurizon Network directors/employees, a record be maintained of all persons who have accessed an Aurizon Network premises, who they are, who they are affiliated to, who they were meeting and when
- an employee of Aurizon Network on secondment with another Aurizon Group company to be considered to be staff of that other Aurizon Group company, and subject to the security measures for non-Aurizon Network employees.

We considered such measures to be in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) and are compatible with the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Stakeholders' comments on the initial draft decision

Aurizon Network submitted that the initial draft decision that security measures be applied across all premises is unreasonable, as it manages a confidential information risk that is not prevalent. Of Aurizon Network's 35 premises, only three would hold confidential information—and these already have security processes in place. Aurizon Network suggested the drafting be amended to reflect that only major premises housing personnel classed as high-risk, and which could affect access holders of the CQCR, should be included.

Aurizon Network agreed that accompaniment is an appropriate control—but said to fulfil the requirement at all times is impractical and unmanageable, particularly with the broader definition of premises. Aurizon Network said it engages contractors to undertake some tasks, and they are employed under commercial contractual arrangements that prohibit disclosure of confidential information. Aurizon Network considered the risk is already addressed in clause 3.22 of the 2014 DAU.²²⁸

²²⁸ Aurizon Network, 2014 DAU, sub. 83: 77–78.

Aurizon Network agreed that a record should be maintained of all persons who have accessed Aurizon Network premises, but suggested that amendments be made to what is included within the definition of premises and their relation to ring-fenced information.

Aurizon Network agreed with the initial draft decision that an employee of Aurizon Network on secondment with another Aurizon Group company would be considered as staff of that other company, and be subject to the security measures for non-Aurizon Network employees.

The QRC agreed with the QCA's proposed amendments. The QRC also said Aurizon Network's employees' business cards should identify them as such.²²⁹

Consolidated draft decision

After considering the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refused to approve Aurizon Network's commitments regarding the security of premises in the 2014 DAU.

We considered Aurizon Network's 2014 DAU was not appropriate because the measures proposed were not sufficiently robust to:

- be considered credible by access holders, access seekers and train operators. In that regard, they did not appropriately take account of the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act);
- eliminate the opportunity for unfair differentiation of a material nature to occur between related parties and competitors (s. 137(1A) of the QCA Act).

Amending the 2014 DAU

Taking into account Aurizon Network's submissions, we clarified the way in which the 2014 DAU should be amended.

Security measures should not be applied across all Aurizon Network premises. The undertaking relates to access to the declared service in the CQCN and therefore the security provisions apply to this service. This is clarified in our amended drafting by referring to Aurizon Network offices where confidential information is located or stored.

This change solves the requirement for accompaniment of personnel visiting premises, as this requirement would only apply to premises where access-related functions occur and where confidential information is located. In regard to contractors, we maintained a view that accompaniment by an Aurizon Network employee is a reasonable security measure for effective ring-fencing of confidential information. A contractor is an agent of the relevant visiting entity and will have access to confidential information that, if used inappropriately, could result in their principal unfairly differentiating between related parties and competitors.

The security measures set out in our consolidated draft decision-amended DAU were in our view measures that were consistent with the legitimate business interests of Aurizon Network balanced between the interests of access seekers and access holders (s. 138(2)(b), (e) and (h)) and protect against unfair differentiation of a material nature (s. 137(1A) of the QCA Act).

Stakeholders' comments on the consolidated draft decision

Aurizon Network commented that²³⁰:

²²⁹ QRC, 2014 DAU, sub. 84: 18.

²³⁰ Aurizon Network, sub no 125: 70

- (a) Clause 3.18(a) requires Aurizon Network to have adequate security measures in place to ensure that only persons permitted by this Undertaking have access. Aurizon Network said the clause appears unnecessary.
- (b) The obligation for non–Aurizon Network personnel to be accompanied at all times is onerous (cl. 3.18(c)(ii)). It indicated that there would be additional costs with this stringent requirement, but did not provide an estimate.
- (c) The requirement to record all non–Aurizon Network personnel who have accessed the premises where confidential information is located or stored is extremely broad (cl. 3.18(d)). Aurizon Network said that additional costs would be incurred in recording personnel movements, and submitted a high level estimate of \$10,000 per year.
- (d) The clause 3.18 of the consolidated draft decision-amended DAU is not sufficiently targeted to ring-fencing and should restrict access to related operators and related competitors.

The QRC submitted that the definition of Aurizon Network personnel needs to be clarified to exclude Aurizon Network employees who are involved in the management and operation of other businesses, such as a port terminal. This could undo the ring fence.²³¹ The QRC concluded the best way to avoid this issue was to prohibit Aurizon Network from owning or operating related port, terminal and coal mining businesses.

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's commitments regarding security of premises proposed by Aurizon Network in its 2014 DAU.

In response to Aurizon Network's comments:

- (a) We consider it appropriate for the absolute obligation to be qualified by inserting the words 'taking all reasonable steps' (cl. 3.18(a) of the final amended DAU).
- (b) We agree that clause 3.18(c)(ii) is not practical and should be changed to 'at all reasonable times'. We do not consider the additional costs would be significant.
- (c) We accept that the requirement could be interpreted as being too broad. We therefore propose including this as a reasonable endeavours obligation. We accept that additional IT costs may be recouped through the revenue cap adjustment process. (cl. 3.18(d) of final amended DAU).
- (d) The purpose of the clause is to ensure a physical or electronic barrier is in place for non–Aurizon Network personnel. There are already ring-fencing measures in place that deal with related operators and related competitors.

In response to the QRC, we agree that there is a potential ambiguity in limb (b) of the definition of 'Aurizon Network Personnel', and have amended it accordingly.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

²³¹ QRC, sub no 124: 10

Final decision 4.11

- (1) **After considering clause 3.22 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's commitments regarding the security of premises.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is as set out in clause 3.18 of our final amended DAU:**
 - (a) **Security measures should apply to all Aurizon Network personnel and all Aurizon Network premises where confidential information is located or stored.**
 - (b) **Any person visiting an Aurizon Network premises should be accompanied by an Aurizon Network employee.**
 - (c) **A record should be maintained of all persons who have accessed an Aurizon Network premises where confidential information is located or stored, with the exception of Aurizon Network directors/employees.**
 - (d) **An employee of Aurizon Network on secondment with another Aurizon Group company should be considered as staff of that other company and be subject to the security measures for non-Aurizon Network employees.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Waiver of the undertaking

Aurizon Network's 2014 DAU provided for access holders and access seekers to voluntarily enter into a binding agreement, which excludes the operation of all, or some, of the ring-fencing provisions included in Part 3 of the 2014 DAU, with respect to protected information. It also provided for Aurizon Network and a third party access holder or access seeker to enter into a confidentiality agreement/deed or an access agreement containing confidentiality obligations in relation to the negotiation of access rights. Any such agreement would prevail over the provisions in Part 3 of the undertaking, to the extent of any inconsistency (cl. 3.13 of 2014 DAU).

Our view was that this clause could be used by Aurizon Network, as a monopoly provider, in its negotiations with an individual access holder, access seeker or train operator in order to reduce its ring-fencing obligations.

We considered, given Aurizon Network's position as the monopoly provider of access to the CQCN, the proposed clause did not appropriately balance the interests of access holders, access seekers and train operators with Aurizon Network's legitimate business interests (s. 138(2)(b) and (e) of the QCA Act).

For this reason, our initial draft decision proposed a clause prohibiting Aurizon Network requesting that an access holder, access seeker or train operator waive Aurizon Network's ring-fencing obligations, as set out in Part 3 of the undertaking. We proposed provisions to ensure the ring-fencing obligations and requirements in Part 3 of the undertaking were not superseded by a confidentiality agreement/deed or access agreement containing confidentiality provisions in relation to the negotiation or provision of access rights.

Stakeholders' comments on the initial draft decision

Aurizon Network did not agree with removal of drafting that allows for third party access seekers/holders to waive obligations to comply with ring-fencing provisions that apply to them.

Aurizon Network thought this would not allow third parties to manage information as they see fit. Aurizon Network said that a waiver provision that requires an affected party's approval must be retained within the access undertaking as it would allow timely resolution of matters without involving other external parties. Aurizon Network suggested its 2014 DAU drafting be reinstated.²³²

The QRC supported our proposed clause 3.9(a) (of our initial draft decision-amended DAU) which provides that Aurizon Network must not request a waiver from an access seeker, access holder or train operator. The QRC considered that any ability for Aurizon Network to request a stakeholder provide a waiver would create an unfair balance of power and detract from the protections offered under the undertaking.

The QRC said it may be agreeable to Aurizon Network having a right to seek a waiver from the QCA. If the QCA considers there are no circumstances which would justify approval of a waiver, then the ability of Aurizon Network to request a waiver appears harmless. The QRC was confident that the QCA would only grant such a waiver if it was fair and reasonable. For this reason, the QRC said that clause 3.3 appears unnecessary and should be deleted.²³³

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act, and considering submissions, we refused 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 the 2014 DAU.

An effective ring-fencing regime minimises the risk of monopoly behaviour and provides a balance between the interests of Aurizon Network and access seekers, access holders and train operators. Additionally, section 137(1A) of the QCA Act requires ring-fencing provisions to prevent parties such as Aurizon Network being able to act in a way proscribed by the Act. In our view, enabling a request for a waiver from an access holder, access seeker or train operator reduced the level of protection afforded to access seekers under the Act. We therefore refused to approve an undertaking that provides Aurizon Network with the ability to potentially use its position to negotiate waivers from access seekers, access holders and train operators thereby limiting the protections afforded to them.

Amending the 2014 DAU

In regard to the QRC's suggestion, we agreed that clause 3.3 of the initial draft decision-amended DAU is not necessary, and we removed this clause in the consolidated draft decision-amended DAU. The provisions of clause 3.9 of the consolidated draft decision-amended DAU provide sufficient protection to access seekers, access holders and train operators in respect of Aurizon Network requiring waivers from them.

We considered that confidentiality obligations in relation to the negotiation of access rights should not be allowed to be of lesser standard than in the confidentiality agreement, deed or access agreement. This does not prevent parties negotiating their own contractual arrangements, provided the contract applies obligations of equivalent or higher standard. Our view was that our position (see cl. 3.9(c) of the consolidated draft decision-amended DAU) provided an appropriate balance between the interests of Aurizon Network and access seekers.

²³² Aurizon Network, 2014 DAU, sub. 83: 79.

²³³ QRC, 2014 DAU, sub. 84: 13–14.

We considered that by ensuring access holders, access seekers and train operators are afforded some protection from requests by Aurizon Network to grant waivers on ring-fencing arrangements, their interests are balanced with those of Aurizon Network's legitimate business interests (s. 138(2)(b) and (e) of the QCA Act).

We considered our amendments were appropriate because they removed the risk that Aurizon Network could exercise its monopoly power in any negotiation with an individual access holder, access seeker or train operator in order to reduce its ring-fencing obligations. Such behaviour could result in, for example, related parties benefiting commercially, relative to competitors.

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that:²³⁴

- (a) It should be permitted to agree with a counterparty to waive compliance with Part 3. It may be in the counterparty's interests to do so. If the QCA is concerned that waiving a confidentiality agreement would give Aurizon Operations a potential advantage, it is within counterparty's control to give other rail operators the same information.
- (b) Clause 3.9(c) of the consolidated draft decision-amended DAU implies that parties can agree to different confidentiality arrangements, which contradicts paragraph (a) and (b). Paragraphs (a) and (b) of the clause should be removed.
- (c) It is not reasonable for Aurizon Network to comply with two sets of confidentiality obligations (cl. 3.9(c)).

QCA analysis and final decision

Our final 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.

In response to Aurizon Network's submission:

- (a) We consider that given Aurizon Network's market power, a counterparty should not be placed in a position where it feels under pressure to waive its rights. We consider that clause 3.9(b) is appropriate as it provides a reinforcement of the intent of 3.9(c). For example, a related party access seeker could agree to waive compliance with Part 3, which could have unwanted consequences.
- (b) We disagree that clause 3.9(c) contradicts the preceding clauses. Paragraph (c) outlines the procedure if there is an agreement. Paragraph (a) says Aurizon Network cannot initiate an alternative arrangement and paragraph (b) says that no matter what is agreed, the parties cannot agree to waive compliance with Part 3. We do not consider the paragraphs are contradictory.
- (c) We consider that clause 3.9(c) requires Aurizon Network to meet the more stringent obligation or standard rather than two sets of confidentiality obligations. We have clarified the drafting accordingly.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

²³⁴ Aurizon Network, sub. 125: 64.

Final decision 4.12

- (1) After considering clause 3.13 of Aurizon Network's 2014 DAU, our final 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.
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is set out in clause 3.9 of our final amended DAU, namely to:
- (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
 - (i) a confidentiality agreement/deed, or
 - (ii) an access agreement
 - (iii) containing confidentiality provisions in relation to the negotiation or provision of access rights.

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.6 Role of functional separation

4.6.1 Aurizon Network's proposal

Aurizon Network's view on its proposed approach to functional separation and how this compares with the 2010 AU is summarised in the following table (see also cls. 3.5 and 3.6 of the 2014 DAU).

Table 18 Aurizon Network's approach to functional separation in the 2010 AU and 2014 DAU

<i>Ring-fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Functional separation	In the 2010 AU, separation is achieved by a specific clause containing a requirement for prior approval by the QCA for any proposal for a related operator 'to become responsible for matters integral to the provision of below-rail services'. This is combined with a list of examples of the 'responsibilities' of Aurizon Network. ²³⁵	The 2014 DAU adopts a clear statement of core access-related functions performed by Aurizon Network (adapted from the 2010 AU), combined with an obligation that those functions will not be undertaken by, or contracted out to, a related operator—but nothing prevents Aurizon Network undertaking a non-core function or requires it to undertake a non-core function. ²³⁶

Aurizon Network said it had undergone major structural change since the 2010 AU was approved—when it was structured by business units (i.e. coal, freight, network etc.)—and it is now structured along functional lines.²³⁷ Aurizon Network said the restructure continues to separate management and operation of declared below-rail infrastructure from train services.²³⁸

²³⁵ Aurizon Network, 2013 DAU, sub. 2:61–62.

²³⁶ Aurizon Network, 2013 DAU, sub. 2:61–62.

²³⁷ Aurizon Network, 2013 DAU, sub. 2: 65–66.

²³⁸ Aurizon Network, 2013 DAU, sub. 2: 66.

Aurizon Network said the 2014 DAU provides for functional separation through clause 3.5(a). This requires that access-related functions will be performed by Aurizon Network and not transferred or delegated to, contracted out to, or otherwise undertaken, by a related operator.

According to Aurizon Network, this provides greater assurance than the 2010 AU obligation, which restricted 'matters integral to the provision of below-rail services' from becoming the 'responsibility' of a related operator, and required a draft amending access undertaking to be submitted to the QCA for prior approval of any functional change.²³⁹ Aurizon Network noted the list of access-related functions outlined in clause 3.4 of the 2014 DAU does not contemplate change—rather, they ensure certainty throughout the life of the undertaking. Aurizon Network said its proposals retained the key functions and was substantially the same as the 2010 AU.²⁴⁰

Aurizon Network noted that nothing in the 2010 AU required it to perform a function that is not an access-related function; or prevented it from performing any function which is not an access-related function, apart from commercial above-rail services.²⁴¹

Aurizon Network said that 2014 DAU contains a similar exception to the 2010 AU, whereby Aurizon Network may contract with related operators for provision of certain components of the train control service, being field incident management and yard control services at yards other than major yards.²⁴²

4.6.2 Summary of the initial draft decision

In our initial draft decision, we noted the general stakeholder view that Aurizon Network proposed a narrow interpretation of section 137 of the QCA Act, and overly relied on legal separation from its parent as a basis to reduce ring-fencing obligations. Stakeholders also suggested core access related functions concerning the declared service must be performed by Aurizon Network and separated from other commercial activities.²⁴³

We considered that the 2014 DAU adopted 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. Changes to the Aurizon Group's organisational structure appeared to result in Aurizon Network subcontracting from the Aurizon Group more of the services/functions required to operate the CQCN.

In the context of our role to approve an undertaking that contains an effective ring-fencing regime, we consider the overall impact of Aurizon Network's approach was to render the concept of 'access-related functions' or 'below-rail services' less than effective. Consequently, we were of the view that Aurizon Network's functions should be defined in a manner that encapsulates the core service it provides. We considered Aurizon Network's functional responsibilities and obligations should relate to the provision of the declared service.

Overall, our initial draft decision was to refuse to approve Aurizon Network's proposals in the 2014 DAU regarding Aurizon Network's definition of access-related functions and its obligation to perform these (cls. 3.4 and 3.5 of 2014 DAU). For the purposes of ring-fencing, our initial draft decision was that this be replaced with an overarching statement that Aurizon Network's

²³⁹ Aurizon Network, 2013 DAU, sub. 2: 66.

²⁴⁰ Aurizon Network, 2013 DAU, sub. 2: 66-67.

²⁴¹ Aurizon Network, 2013 DAU, sub. 2: 68.

²⁴² Aurizon Network, 2013 DAU, sub. 2:67.

²⁴³ QRC, 2013 DAU, sub. 46:33; QRC, 2014 DAU, sub. 42: 15–16; Anglo American, 2014 DAU, sub. 7: 13–17.

primary function is to supply the declared service. The initial draft decision also required that Aurizon Network will not:

- undertake any above-rail services
- undertake the operation or marketing of train services, unless for the purpose of providing a below-rail service or the provision of services in respect of private infrastructure
- undertake any port service (including providing access to a port service) or hold any direct or indirect (by way of a subsidiary or trust) interest in any port in Queensland
- hold any direct or indirect (by way of a subsidiary or trust) interest in any coal mine or project in Queensland.

In the context of the changes to the Aurizon Group's organisational structure and our view on the implications of this, we considered our approach appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.6.3 Stakeholders' comments on the initial draft decision

Aurizon Network questioned whether our role extended to considering what business activities Aurizon Network may undertake in addition to provision of the declared service, so long as:

- there are measures to ensure there is no unfair differentiation between operators that would have a material adverse effect on competition
- confidentiality of relevant information is respected and information is not passed to related operators
- potential conflicts of interest between related access provider and related operator are managed.

Aurizon Network rejected our proposal for an overarching statement that Aurizon Network's primary function was to supply the declared service.

Aurizon Network did not agree with the definitions of below-rail and above-rail services included in clause 3.5(d) of the initial draft decision-amended DAU. Aurizon Network said supply of electricity is not part of the declared service and its inclusion in the definition of below-rail services is inappropriate. The inclusion of provision of maintenance and renewal services (as opposed to procurement of such services) is inappropriate, as provision of services is not an integral function of an access provider, and could be sourced externally. The definition of above-rail services creates difficulties as it could prohibit Aurizon Network maintaining rollingstock used for maintenance services—Aurizon Network queried whether this was unintended.

Aurizon Network reiterated its position that restrictions on ownership of ports and mines are inappropriate and beyond power (cl. 3.5(e) of the initial draft decision-amended DAU).²⁴⁴

The QRC agreed with clause 3.6(a) of the initial draft decision-amended DAU in-principle, but considered it did not go far enough. The QRC and Anglo American submitted that the prohibition on Aurizon Network transferring or delegating below-rail activities to a 'related

²⁴⁴ Aurizon Network, 2014 DAU, sub. 83: 79–80.

operator' should be extended to a 'related competitor' (i.e. a related operator that has an interest in a port or a coal mine).²⁴⁵

4.6.4 Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refused to approve Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligation to perform these in the 2014 DAU. However, we outlined the way in which the 2014 DAU should be amended, taking into account submissions received in respect of the initial draft decision.

The QCA Act does not prohibit vertical integration. However, if Aurizon Network were to engage in vertically integrated activities related to the declared service, this would require rigorous ring-fencing arrangements to manage the greater risk of unfair differentiation of a material nature and the risk of cost shifting from unregulated to regulated services. The 2014 DAU does not however propose rigorous ring-fencing arrangements, and instead takes a light-handed approach.

In our view, Aurizon Network's 2014 DAU ring-fencing regime was not appropriate because it would allow Aurizon Network to perform functions not related to the regulated functional responsibilities, potentially to the detriment of access seekers and access holders. Aurizon Network would be in a position to shift costs to regulated activities unless there are effective ring-fencing solutions to manage the effects of functional overlaps. The 2014 DAU therefore did not appropriately balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act.

Amending the 2014 DAU

As a result of the declaration of the use of the CQCN, Aurizon Network (as the access provider for the service's activities) should focus on the delivery of those services (s. 250(1)(a) of the Act). Other activities such as above-rail, port services or coal mining are not part of the declared service and would require functional separation, supplemented by a rigorous ring-fencing regime. Absent such a regime, we considered the way to amend the 2014 DAU, so that it could be approved, was to make clarifying amendments in our consolidated draft decision-amended DAU to restrict Aurizon Network in respect of the provision of the declared service (see cl. 3.5(a) of the consolidated draft decision-amended DAU).

In regard to the supply of electricity, we discussed this in detail in section 3.6 of the consolidated draft decision, noting our view that the supply of electricity falls within the declared service that is the subject of the 2014 DAU. Accordingly, we concluded that it is appropriate to include electricity transmission and managing supply of electricity in clause 3.4 of the consolidated draft decision-amended DAU.

We included in the definition of below-rail services the provision or procurement of appropriate levels of maintenance services. This does not require the access provider to provide such services, but the access provider could choose to either provide them or procure them (from external suppliers). The option to procure remains in the drafting of clause 3.4(d)(v) of the consolidated draft decision-amended DAU.

There was no intent to exclude maintenance rollingstock from the functional definition of below-rail services. We considered that the procurement of maintenance services covers such

²⁴⁵ QRC, 2014 DAU, sub. 84: 15; Anglo American, 2014 DAU, sub. 95: 10.

activities, and they are not above-rail services. To clarify this, we revised the drafting in clause 3.5 of the consolidated draft decision-amended DAU.

In response to the QRC's comment on clause 3.6(a) of the initial draft decision amended DAU, we agreed that it is reasonable to add 'related competitor' to this provision (see cl. 3.5(a) of the consolidated draft decision-amended DAU).

Our amendments to the undertaking were designed to restore a balance between the interests of the parties—to better control the flow of confidential information between Aurizon Network and its related entities. We therefore considered our approach to be appropriate in meeting the section 138(2) requirements of the QCA Act.

4.6.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that the drafting of clause 3.4(b) of the consolidated draft decision-amended DAU is circular. Aurizon Network stated that the definition of 'below rail services' and 'access' are intending to expand what comprises the declared service. The clause should be subject to providing the services in accordance with the undertaking.²⁴⁶

In relation to clause 3.4(c)(viii), which includes the provision of electricity transmission infrastructure, Aurizon Network submitted that:

- (a) The expression 'providing electric transmission infrastructure' arguably creates an obligation to build the infrastructure. Aurizon Network said it should be limiting it to access to overhead electric power supply systems.
- (b) Procuring electric energy is not within the declared service. Aurizon Network noted also the reference to procuring is inconsistent with clause 2.7 which refers to selling or supplying electric energy.
- (c) The reference to 'managing electric supply from other parties' is unclear, and possibly outside of the declared service. The reference should be removed.
- (d) Procuring electric energy 'where requested' by an access holder or train operator is incorrect, as any request needs to arise during the negotiations of the access agreement or train operations deed, not afterwards. The obligation in respect of the access holder or train operator is beyond power.

In regard to clause 3.4(e), referring to a declaration if Aurizon Network holds an interest in a port or a coal mine, Aurizon Network stated that:²⁴⁷

- (a) The QCA is beyond power in attempting to regulate Aurizon Network providing access to port services.
- (b) The QCA is beyond power in preventing Aurizon Network from holding an interest in a mine or port.
- (c) The reference to 'unfairly differentiates in a material way' is uncertain as it does not say what Aurizon Network is differentiating between.
- (d) Clause 3.4(e)(iv) is unclear.
- (e) The reference to 'loading of vessels at a port' at clause 3.4(e)(i) is vague.

²⁴⁶ Aurizon Network, sub. 125: 59–60.

²⁴⁷ Aurizon Network, sub. 125: 60–61.

Aurizon Network submitted that clause 3.5(a) which prohibits below-rail services being performed by a related operator or related competitor except in specified circumstances makes delegation difficult, and hampers Aurizon Network's ability to achieve the objectives of Aurizon Group's functional model. Aurizon Network seeks the right to disclose confidential information where delegation is permitted under clause 3.5(a) without the need to comply with Part 3.

The QRC submitted that Aurizon Network should be restricted from acquiring an interest in a port or terminal that is, or may become, a destination for services using the rail infrastructure; providing any services from such a port or terminal; and acquiring any interest in a coal mine.²⁴⁸

The QRC supported the introduction of the 'related competitor' concept in clause 3.5(a), but had concerns regarding the extent of proposed exceptions. The exceptions allow Aurizon Network to transfer the performance of key functions in providing below-rail services to a related operator or competitor. There is no obligation on Aurizon Network to ensure that any port or mine operations undertaken by Aurizon Network are included within a functional unit separate from the unit providing below-rail services

The QRC said that where below-rail activities currently being performed by Aurizon Network are transferred to a related operator or competitor, they will fall outside the protections for behavioural undertakings under clause 2.4 of the consolidated draft decision-amended DAU and may result in confidential information being provided to the related operator or competitor. Once a related competitor or related operator receives confidential information, even if subject to ring-fencing restrictions, there is potential for misuse. The QRC suggested that the exceptions in clause 3.5(a) should be deleted other than the exception relating to corporate governance.²⁴⁹

Anglo American submitted that there is no explicit obligation on Aurizon Network to provide below-rail services as was previously set out at clause 3.4(c). By providing an explicit obligation, it would be easier for users to prosecute Aurizon Network if it failed to provide below-rail services.²⁵⁰

Anglo American submitted that the exceptions to the prohibition on subcontracting set out in clause 3.5(a), in particular the ability for Aurizon Network to subcontract for incidents or environmental related services, is inappropriate. These services are fundamental to the reliable and safe operation of a railway.²⁵¹

4.6.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligations in the 2014 DAU.

We note that paragraph 3.4(a) says that the primary function of Aurizon Network is to supply the declared service and paragraph (b) says Aurizon Network gives effect to this function by supplying the declared service. We consider that the intent of these paragraphs is clear, and we have not changed the definition of 'below rail service'.

Aurizon Network raises an issue regarding the scope of the declared services. However, we do not accept that changes need to be made to the definitions of 'below rail services' and 'access'.

²⁴⁸ QRC, sub. 124: 9.

²⁴⁹ QRC, sub. 124: 11–12.

²⁵⁰ Anglo American, sub. 127: 9–10.

²⁵¹ Anglo American, sub. 127, 14–15.

We have made an amendment to the drafting by adding the words 'in accordance with the terms of this Undertaking' at the end of clause 3.5(b) to remove any doubt.

In regard to comments on electricity:

- (a) We consider that providing use of the electric transmission infrastructure is within the declared service. We have amended clause 3.4(c)(viii) accordingly.
- (b) We agree that this clause 3.4 should be consistent with clause 2.7 of the consolidated draft decision-amended DAU (cl. 2.6 of the final amended DAU), and 'procuring' should be replaced with 'selling or supplying'.
- (c) Clause 2.7 of the consolidated draft decision-amended DAU refers to supplying electric energy. Therefore, we consider that if there are multiple suppliers, Aurizon Network will need to manage multiple suppliers. We have not made any change.
- (d) We consider our approach is appropriate by reference to the QCA Act and therefore propose no change.

On matters raised relating to Aurizon Network's interests in a port or coal mine:

- (a) The QCA's powers are specific to the declared service, and provided the obligation relates to the declared service there is scope to 'cover' related services. We note that clause 3.4(e) does not actually attempt to regulate providing access to port services, nor does it contain a prohibition. However, to remove any residual concerns, the objective sought to be achieved by the clause can be achieved by amending the words of clause 3.4(e)(iii) to align the clause more closely with section 137(1A) of the QCA Act.
- (b) Our proposed amendments clarify that the unfair differentiation in a material way obligation relates to access seekers or users of the declared service (cl. 3.4(e)(iii) of the final amended DAU).
- (c) We do not agree that the drafting of clause 3.4(e) is uncertain, but we have revised the drafting as noted above.
- (d) We do not consider that clause 3.4(e)(iv) is unclear, as the reference to 'supporting evidence' clearly refers back to the compliance report.
- (e) We do not consider that Aurizon Network has justified its contention that 'loading of vessels at a port' is vague. We therefore have made no change.

In respect of clause 3.5(a), we do not agree with Aurizon Network's view, as it is not consistent with the principles of Part 3—we consider that ring-fencing restrictions that are necessary due to the vertically integrated structure of Aurizon Group do not prevent delegatory functions.

In response to QRC, the QCA has no express statutory power in the QCA Act which allows it to prevent Aurizon Network acquiring (or building) ports or mines connected to the declared service or otherwise. Aurizon Network will remain subject to the obligations contained in the undertaking and under the Act not to unfairly differentiate between users. Accordingly, provided the obligations necessary to promote the object of Part 5 of the QCA Act are imposed on Aurizon Network, there is no need to do what the QRC requires.

In relation to the QRC's comments on clause 3.5(a):

- (a) The QCA has no power to interfere with an entity's corporate structure. However, the QCA has sought to impose obligations on Aurizon Network in respect of confidential information such that Aurizon Network, and its related entities, (whether competitors or

not), cannot misuse commercially sensitive confidential information to unfairly differentiate the provision of access to the regulated services.

- (b) Aurizon Network remains responsible for the delivery of the below -rail services. However, this has been made absolutely clear by including a 'for clarity' clause that Aurizon Network remains responsible for the delivery of any below-rail services, whether or not they are transferred, delegated to or contracted out to others, including a related operator or related competitor. (cl. 3.5(d) of the final amended DAU).
- (c) we consider that the best way to manage the risk of disclosure is by having in place a robust enforcement regime. We consider that the undertaking has an adequate regime in place.

In response to Anglo American's comments, we consider that clause 3.4(b) is a sufficiently strong obligation. The undertaking prevents unfair differentiation, so Aurizon Network could not provide below-rail services to some users and not others. Secondly, from a purely commercial perspective, Aurizon Network is incentivised to provide below-rail services to generate revenue for its shareholders and to comply with its access agreements.

In regard to subcontracting exceptions, we have allowed these to reflect the Aurizon Network structure. We consider that it may at times be appropriate for Aurizon Network to subcontract safety- and environment-related services, as these may entail specialist services that may be more efficiently provided by a related operator, and not duplicated by Aurizon Network. This would especially be the case for incidents related to these services.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.13

- (1) After considering clauses 3.4 and 3.5 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligation to perform these.
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:
 - (a) revise clauses 3.4 and 3.5 of the 2014 DAU
 - (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:
 - (i) undertake any above-rail services in respect of the Rail Infrastructure
 - (ii) undertake the operating or marketing of train services, unless for the provision of the declared service

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.7 Role of employee separation

4.7.1 Aurizon Network's proposal

Aurizon Network's view on its proposed approach to employee separation and how this compares with the 2010 AU is summarised in the following table.

Table 19 Aurizon Network's approach to employee separation in the 2010 AU and 2014 DAU

<i>Ring-fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Employee separation	The 2010 AU includes a commitment to avoid conflicts of interest for Aurizon Network employees by preventing their participation in 'working groups' that may affect access. This approach creates substantial uncertainty in practice. ²⁵²	2014 DAU has replaced the 'working group' clause with a clear commitment that access-related Aurizon Network employees work principally for Aurizon Network and do not work at the direction of a related operator, unless transferred or seconded (subject to requirements for handling protected information). ²⁵³

Aurizon Network said it requires flexibility to avoid limiting employee career advancement, and to ensure the Aurizon Group can efficiently deploy staff where this does not cause a ring-fencing risk.²⁵⁴

Aurizon Network also said the 2010 AU contained no practicable controls for employee separation, and attempted to prohibit involvement of employees in vaguely described 'working groups'.²⁵⁵

²⁵² Aurizon Network, 2013 DAU, sub. 2: 61.

²⁵³ Aurizon Network, 2013 DAU, sub. 2: 61.

²⁵⁴ Aurizon Network, 2013 DAU, sub. 2: 68.

²⁵⁵ Aurizon Network, 2013 DAU, sub. 2: 68

4.7.2 Summary of the initial draft decision

In our initial draft decision, we noted stakeholder suggestions that: stricter controls should be placed on duties Aurizon Network staff can undertake; and a prohibition should be placed on secondments to related parties.²⁵⁶

The 2014 DAU included a number of exceptions to the principle proposed by Aurizon Network that Aurizon Network employees primarily working in access-related functions will largely work in this area. The exceptions are outlined in the table below (cl. 3.6(b) of 2014 DAU).

Table 20 Exceptions allowing Aurizon Network employees to perform non-access-related functions and to move throughout the Aurizon Group

Aurizon Network employees primarily involved in access-related functions are not prevented or restricted from the following activities:

- performing functions required to negotiate for or provide access to a related operator in accordance with the undertaking
- being seconded subject to the requirements in the undertaking regarding the handling of protected information²⁵⁷
- ceasing to work for Aurizon Network and commencing work for a related operator subject to the requirements in the undertaking regarding the handling of protected information
- undertaking any function or activity:
 - required or compelled by any law
 - required or compelled by any order of a court
 - required or compelled by notice validly issued by any authority
 - necessary for the conduct of any dispute resolution process or audit under the undertaking, the QCA Act or a standard agreement
 - in the course of responding to an emergency or natural disaster
 - that does not relate, whether directly or indirectly, to the provision of below-rail services
- an employee engaged in:
 - asset construction, maintenance, renewal or repair
 - support services and/or corporate functions
- is not restricted from undertaking work for any Aurizon Group business unit or corporate functional areas, subject to the requirements in the undertaking regarding protected information.

We had concerns about the effectiveness of Aurizon Network's employee separation proposals. Further, we did not share Aurizon Network's view about our proposal for alleviating our concerns—that is, that the working group approach in the 2010 AU is vague and creates uncertainty in practice (cl. 3.4.3(c) of the 2010 AU).

While we understood the need for career advancement opportunities for Aurizon Network employees and Aurizon Network's objective to use its resources efficiently, we considered these goals need to be balanced against the credibility and effectiveness of the ring-fencing regime.

In our view, to achieve an appropriate level of credibility and effectiveness required a greater level of transparency over the secondment/transfer of employees to and from Aurizon Network and the Aurizon Group. The organisational changes implemented across the Aurizon Group and its strategic intent to leverage the benefits of vertical integration heightened our concerns that

²⁵⁶ QRC, 2013 DAU, sub. 46: 36; QRC, 2014 DAU, sub. 42: 16; Anglo American, 2014 DAU, sub. 7: 24–25.

²⁵⁷ This excludes temporary transfers/secondments to the marketing division. Temporary is defined as less than six months (cl. 3.6(c) of 2014 DAU).

2014 DAU ring-fencing proposals could not effectively restrict the flow of confidential information between Aurizon Network, the Aurizon Group and third parties.

Our initial draft decision was to refuse to approve Aurizon Network's 2014 DAU proposals regarding employee separation (cl. 3.6 of 2014 DAU) and to:

- reinstate the working group concept and extend its application to associated rail/port and rail/mine entities
- introduce measures requiring secondments/transfers of employees between Aurizon Network and an Aurizon party to be notified to the QCA prior to the secondment/transfer being undertaken
- include in the undertaking a requirement for Aurizon Network employees to have a separate email address that identifies them as Aurizon Network employees.

We considered these measures underpin a credible and effective ring-fencing regime, and balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.7.3 Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network submitted that the concept of a working group was contained within the 2010 AU, but presented Aurizon Network with unclear guidelines on employees within broader working groups and was deleted from the 2014 DAU as being unnecessary and unworkable.

Aurizon Network had issues with the working group drafting, and provided an example where an employee that manages a train control team would not be able to participate in a working group dealing with the renewal of enterprise agreements, which could reduce the likelihood of an outcome being achieved. Aurizon Network said that the drafting does not address discrimination issues that it is trying to protect against—all it does is limits Aurizon Network's legitimate business interests. It said the terminology 'affect or could affect the access of third party access holders' is too broad and could limit Aurizon Network's ability to operate.

Aurizon Network agreed to notify the QCA of secondments/transfers of employees to another Aurizon party prior to these being made. Aurizon Network advised that in the last two years, only four secondments have occurred. Secondments have been included in QCA's audit scope and no material issues have been identified.

Aurizon Network agreed that Aurizon Network employees should have a separate email address, on the proviso there is an appropriate adjustment to the MAR to allow for unaccounted costs.²⁵⁸

Other stakeholders

The QRC and Asciano supported the QCA's proposed changes in relation to controls on Aurizon Network staffing and secondments, and transfers between Aurizon Network and another Aurizon entity. However, Asciano said it did not appear the QCA has the power to prevent breaches of the secondment requirements.²⁵⁹

The QRC agreed with the QCA's proposal that below-rail services must only be performed by Aurizon Network employees, and that these employees be restricted from working for related

²⁵⁸ Aurizon Network, 2014 DAU, sub. 83: 81–82.

²⁵⁹ QRC, 2014 DAU, sub. 84: 15; Asciano, 2014 DAU, sub. 76: 12.

entities. However, the QRC suggested that, while it had no objection to assistance from the Aurizon Group in relation to shared services such as accounting and finance, clause 3.7(c) of the initial draft decision-amended DAU should clarify a defined list of services approved by the QCA, to avoid ambiguity. For example, it is not clear whether this clause would allow for shared services or corporate functions in regard to regulatory affairs to assist in the development of a replacement undertaking.

The QRC supported the requirement for separate email addresses, and suggested that it be extended to business cards.²⁶⁰

4.7.4 Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and assessing stakeholder comments, we refused to approve Aurizon Network's proposals regarding employee separation in the 2014 DAU. However, we outlined the way in which the 2014 DAU should be amended, taking into account the submissions received in respect of our initial draft decision.

We considered that the 2014 DAU does not appropriately manage employee separation. Working group provisions are a necessary and appropriate means for managing employee separation.

We considered that Aurizon Network's 2014 DAU does not provide appropriate separation given the confidential information employees have access to and the potential conflicts of interest that can arise when secondments/transfers take place. The 2014 DAU, in our view, does not incorporate sufficient measures to record transfers and involvement in working groups and for this reason the proposed 2014 DAU ring-fencing regime is not credible or effective (s. 138(2)(h) of the QCA Act).

Amending the 2014 DAU

The initial draft decision provided an option for potential Aurizon Network members of working groups that also incorporated members from a related operator or related competitor to be seconded or temporarily transferred as an advisor to the related operator or related competitor. This would enable the benefits of the working group to be realised, in examples such as that raised by Aurizon Network, while still providing credible ring-fencing arrangements.

However, given the potential problems identified by Aurizon Network in regard to negotiations of enterprise agreements, and similar circumstances, we revised our proposed amendments to ensure that the arrangements do not inhibit the effectiveness of working groups—we proposed that such involvement of Aurizon Network staff be entered into the confidential information register, rather than prohibited altogether.

We acknowledged that the phrase 'affect or could affect the access of third party access holders' (as proposed in our initial draft decision) is broad. This is intentional. We considered it was appropriate that this be used to determine whether the obligations set out in this clause applied to a particular working group (cl. 3.6(c) of the consolidated draft decision-amended DAU).

We did not consider including a defined list of exceptions for services that could be obtained from the Aurizon Group, as the QRC's suggested, was necessary.

²⁶⁰ QRC, 2014 DAU, sub. 84: 15.

We also proposed that, rather than specifically require email addresses for Aurizon Network employees, Aurizon Network should ensure that all personnel are identified as Aurizon Network personnel.

We considered that the amendments in our consolidated draft decision-amended DAU were appropriate because they addressed the above issues, and restored a balance in the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.7.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that the clause 3.6(d)—requiring that details must be inserted in the Confidential Information Register if there is a project working group regarding a supply chain that affects or could affect access of third party access holders or third party access seekers, is unworkable. Aurizon Network also said that the definition of Supply Chain is not linked to the declared service.

Aurizon Network was concerned that clause 3.6(e) would not permit a secondment between Aurizon Network and the Aurizon Group if the employee has access to confidential information unless QCA consent was given. Notice would need to be given even if there was no risk to ring-fenced information.²⁶¹

Aurizon Network was concerned about clause 3.6(f)(ii) which requires that Aurizon Network must not delegate or contract out to any Aurizon Party any regulatory function related to the application and interpretation of this undertaking in relation to Aurizon Network. It said there were ramifications this restriction will have on the provision of corporate services within Aurizon Group. Aurizon Network suggested the clause be limited to its related operator.

4.7.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding employee separation in the 2014 DAU.

We consider that clause 3.6(d) is required to achieve the objectives of Part 3. Although the definition of supply chain is not linked to declared service, we do not consider this to be necessary because the use of the term supply chain in the context of clause 3.6(d) is limited by the reference to the term 'access'. We also consider that its use elsewhere is appropriate.

Aurizon Network's objection to clause 3.6(e) is due to the breadth of the definition of 'confidential information', as it considers that personnel that have access to confidential information (as defined) may not pose a risk to the ring-fencing regime. However, while this requirement would involve administrative processes, it promotes an effective and transparent ring-fencing regime. We have made no change.

In relation to clause 3.6(f)(ii), we consider this is required to provide that Aurizon Network maintains a degree of independence in the context of regulatory affairs. However, we have made amendments to allow more flexibility.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

²⁶¹ Aurizon Network, sub. 125: 54.

Final decision 4.14

- (1) After considering clause 3.6 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposals regarding employee separation.**
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:**
 - (a) include a 'working group concept' that extends to application to related entities**
 - (b) require the details of any Aurizon Network employee's involvement in a working group to be entered into the confidential information register, if the employee has had access to confidential information (Clause 3.6(d) of the final amended DAU)**
 - (c) require Aurizon Network to notify the QCA of secondments/transfers of employees to another Aurizon party prior to them being made (Clause 3.6(e) of final amended DAU)**
 - (d) require Aurizon Network employees to be identified as Aurizon Network employees.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.8 Role of management separation

4.8.1 Aurizon Network's proposal

Aurizon Network's proposed approach to management separation in the 2014 DAU compared to the 2010 AU approach is summarised in the table below.

Table 21 Aurizon Network's approach to management separation in the 2010 AU and 2014 DAU

<i>Ring-fencing element</i>	<i>2010 AU approach</i>	<i>2014 DAU approach</i>
Management separation	The 2010 AU includes a general obligation for Aurizon Network to be managed independently from related operators, and for related operators not to participate in the supervision or appointment of the executive management of Aurizon Network. ²⁶²	The 2014 DAU replaces the general obligation of independent management with a formalisation of the current, independent management structure of Aurizon Network. It provides for the creation and maintenance of an independent network executive management team that: <ul style="list-style-type: none"> (a) does not manage a related operator (b) has independent management reporting and supervision lines that do not include any person with direct management responsibility for a related operator (c) has an executive manager of equivalent or greater seniority to the executive manager of a related operator.²⁶³

Aurizon Network said that independence of upstream from downstream interests in the 2010 AU was addressed by a high-level commitment to independence of network business senior management. It said ensuring independent management of Aurizon Network continues to be a feature of the 2014 DAU. However, Aurizon Network said the 2010 AU provisions lacked clarity, and it had developed new provisions that are simple and clear by defining the key elements of independence.²⁶⁴

4.8.2 Summary of the initial draft decision

In our view, an effective ring-fencing regime required that Aurizon Network is managed independently of related operators and also that related operators do not participate in the appointment or supervision of the executive management of Aurizon Network. Having regard to the 2010 AU (cl. 3.1.2 of the 2010 AU), we noted the 2014 DAU did not explicitly exclude related operators from directly supervising Aurizon Network's executive management team. We considered that Aurizon Network's proposal did not provide sufficient protection to access holders, access seekers and train operators.

Our concerns with the 2014 DAU approach to management separation of Aurizon Network from related operators were that it may result in unnecessary complexity, lessen clarity and increase the likelihood of disputes. For instance:

- If conflicts of interest arise, it is not clear what will be achieved in practice by having Aurizon Network's Executive Officer at equivalent or greater seniority than the most senior executive manager with direct management responsibility for a related operator
- Because related operators are excluded from the definition of direct management responsibility, it appears possible for the Aurizon Group to give direct management responsibility for a related operator to a director/managing director of Aurizon Holdings or Aurizon Operations; but not precluding them from being nominated to the Aurizon Network executive management team. This would not achieve the required management separation of Aurizon Network.

²⁶² Aurizon Network, 2013 DAU, sub. 2: 61.

²⁶³ Aurizon Network, 2013 DAU, sub2: 1.

²⁶⁴ Aurizon Network, 2013 DAU, sub. 2:69–70.

We considered Aurizon Network's 2014 DAU proposal for the independent management of access rights could allow too much flexibility in interpreting or including clauses in a related operator's access agreements. This is because the commitment to 'not act upon directions from a related operator in respect of the granting or exercise of access rights' has the caveat that:

nothing prevents a direction from a related operator, provided it is in accordance with the terms of the related operator's access agreement.

In summary, we were not convinced that Aurizon Network's 2014 DAU could be approved by reference to the factors listed in section 138(2) of the QCA Act. We considered that it results in less transparency and a potential narrowing of Aurizon Network's obligations, which are not in the public interest and do not result in an effective regime.

We also noted the stakeholder view that a focus on concerns regarding related operators is unlikely to be sufficient to cover conflicts of interest between Aurizon Network and associated rail–port and rail–mine entities within the Aurizon Group.

However, we did not consider the board of Aurizon Network should exclude directors of related parties within the Aurizon Group. This could be dealt with through a focus on the flow of confidential information, and there being appropriate recognition that any individual who holds cross-directorships should be categorised as high-risk for the purposes of ring-fencing. If these efforts prove unsatisfactory, a prohibition on cross-directorships may be considered.

For these reasons, our initial draft decision was to refuse to accept Aurizon Network's proposals in the 2014 DAU regarding the management separation of Aurizon Network. We considered that the way to amend the proposed 2014 DAU was to include updated version of clause 3.1.2 of the 2010 AU (accounting for associated rail–port and rail–mine entities, as well as related operators). We considered this appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

4.8.3 Stakeholders' comments on the initial draft decision

Aurizon Network did not have any material issue with the alternative clauses proposed by us in the initial draft decision-amended DAU. However, Aurizon Network submitted that the 2014 DAU adequately dealt with these issues and should be accepted. Aurizon Network proposed to work with the QCA on developing clearer drafting of the issues relating to:

- related operators directly supervising Aurizon Network's executive management team
- the level of the Aurizon Network Executive Officer relative to the equivalent related operator executive
- the QCA's comments about a director/managing director being appointed to the Aurizon Network management team. Aurizon Network does not have Executive Directors (excluding the CEO) on either the Aurizon Network or Holdings Boards.

Aurizon Network submitted that the QCA's view on protections in relation to access rights, and Aurizon Network not acting at the direction of the related operator to grant these access rights, are incorrect. Aurizon Network submitted that the QCA misinterpreted the drafting of the 2014 DAU.²⁶⁵

²⁶⁵ Aurizon Network, 2014 DAU, sub. 83: 82–83.

The QRC was willing to accept the drafting of clause 3.8 of the initial draft decision-amended DAU for the term of UT4, but wished to reassess in the future in regard to the: extent of cross-directorships; extent of conflict involved in cross-directorships; extent of independent directors on the Aurizon Network Board; and effectiveness of the ring-fencing arrangements. The QRC said Aurizon Network should have at least two true independent directors (i.e. directors who hold no other role within the Aurizon Group).²⁶⁶

4.8.4 Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refused to approve Aurizon Network's proposals regarding management separation in the 2014 DAU.

However, we outlined the way in which the 2014 DAU should be amended, taking into account submissions received in respect of our initial draft decision DAU.

In regard to our view on protections in relation to access rights, we did not consider that we have misinterpreted the drafting of the 2014 DAU. We considered the clause did not provide any assurance to third party stakeholders that Aurizon Network does not act at the direction of a related operator.

In response to the QRC, we considered that the independence of directors is not a matter that falls within the QCA Act but should be subject to relevant corporate governance requirements.

In conclusion, we considered that Aurizon Network's 2014 DAU narrows Aurizon Network's obligations relative to the management separation provisions in the 2010 AU and would result in unnecessary complexity, less clarity and increased the likelihood of disputes. Additionally, we considered that the 2014 was weighted in favour of the Aurizon Network's business interests and whereas we are required to balance its interests against those of access seekers and holders. For these reasons, we did not believe the 2014 DAU was appropriate.

Amending the 2014 DAU

We took into account Aurizon Network's response to our proposed initial draft decision DAU amendments. Relevant changes to drafting were incorporated into the undertaking for Aurizon Network to take reasonable steps to ensure that related operators or related competitors do not take part in appointment of senior management of Aurizon Network.

We considered our amendments in the consolidated draft decision-amended DAU provided an appropriate balance of the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.8.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network considered the term 'managed independently' to be too uncertain (cl.3.8). It considered the deleted clause 3.9(c) from Aurizon Network's drafting should be reinserted.²⁶⁷

Asciano supported QRC's previous position on the need for independent members of the Aurizon Network Board.²⁶⁸

Anglo American submitted that at clause 3.8(a)(ii) the obligation to take whatever steps it can reasonably take should be changed to an absolute obligation. Aurizon Network should be able

²⁶⁶ QRC, 2014 DAU, sub. 84: 16.

²⁶⁷ Aurizon Network, sub. 125: 63.

²⁶⁸ Asciano, sub.126: 12.

to ensure that no related operators or related competitors take part in its own process for appointment or supervision of its executive management.²⁶⁹

4.8.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding management separation in its 2014 DAU.

We consider the principle of independent management to be sufficiently clear in this context. The independence of the board of the regulated entity is not a matter that is within the QCA Act.

In response to Anglo American, we consider that Aurizon Network would not always be in a position to provide absolute assurance that a related party was not involved in some way in appointing executive management of Aurizon Network. We have therefore not made any change to the drafting.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 4.15

- (1) **After considering clauses 3.8, 3.9 and 3.10 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposals regarding management separation.**
- (2) **The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:**
 - (a) **remove clauses 3.8, 3.9 and 3.10**
 - (b) **reinstate an updated version of clause 3.1.2 of the 2010 AU (cl. 3.8 of the final amended DAU), to account for related operators and related competitors, and to prevent Aurizon Network acting on direction from a related operator.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.9 Accounting separation and financial reports

4.9.1 Aurizon Network's proposal

Aurizon Network said the 2014 DAU retained the 2010 AU accounting separation provisions, including providing annual financial accounts. It said drafting was amended to remove references to 'general purpose' statements as Aurizon Network prepares statements for the specific purpose of demonstrating costing manual compliance, and the statements exclude information relating to non-regulated activities conducted by Aurizon Network.²⁷⁰

²⁶⁹ Anglo American, sub. 127: 16.

²⁷⁰ Aurizon Network, 2013 DAU, sub. 2: 69.

4.9.2 Summary of our initial draft decision

The 2010 AU allows the creation of a hierarchical system of financial statements. Aurizon Network's general financial accounts represent the top tier. These financial statements are then split into two sub-sets relating to Aurizon Network's regulated and unregulated businesses. The costing manual is intended to set out the methodology for this process.

The 2010 AU creates a fully reconcilable system of financial statements that have a direct link back to a set of financial accounts that comply with relevant legislation and accounting standards. In our view, this approach allowed:

- a robust and transparent understanding of the costs allocated to the regulated business
- a robust and transparent audit to be undertaken with respect to the application of the methodology and rules in the costing manual
- the holistic impact of any proposed changes to the costing manual to be fully understood and objectively assessed.

We considered Aurizon Network's 2014 DAU proposal reduces robustness and transparency because it removes the link with Aurizon Network's general financial statements. Stakeholders did not support Aurizon Network's proposals for the provision of separated financial accounts, stating that Aurizon Network's regulated and non-regulated activities share common costs, and disclosure was essential to ensure transparency and no cross-subsidisation between regulated and non-regulated activities.²⁷¹

For stakeholders to have confidence that there is no cross-subsidisation, this requires a full reconciliation of the financial statements associated with the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. In our view, this represents best practice from an accounting separation perspective and therefore best balances the respective interests set out in section 138(2) of the QCA Act.

We also considered it appropriate to include amendments to require that Aurizon Network's Executive Officer should certify that the relevant financial statements have been prepared in accordance with the costing manual, rather than certifying that the financial statements are 'accurate'.

To address stakeholders' concerns that there was a lack of transparency about Aurizon Network's self-insurance arrangements, we also proposed a requirement for the financial statements to include information on self-insurance.

Overall, our initial draft decision was to refuse to approve Aurizon Network's proposals with respect to accounting separation and financial reporting. We indicated that the way we consider it appropriate to amend the 2014 DAU was to:

- delete clause 3.7 of 2014 DAU, as this will not be relevant because it primarily relates to stating that the financial statements prepared as part of the accounting separation process will not include information relating to any other business conducted by Aurizon Network
- include an accounting separation and financial reporting process similar to the process in the 2010 AU (cl. 10.1.1 of the initial draft decision-amended DAU)

²⁷¹ Asciano, 2014 DAU, sub. 22: 18–19.

- include a requirement for Aurizon Network to report on self-insurance in its financial statements, including the number of self-insurance events by type and value each year (cl. 10.1.1(c) of the initial draft decision-amended DAU)
- include a requirement for the statements to be published within four months of the end of the year.

We were of the view this will ensure relevant parties have to provide a robust and transparent understanding of the costs allocated to the regulated business and, as such, appropriately balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

4.9.3 Stakeholders' comments on our initial draft decision

The QRC²⁷² generally agreed with our initial draft decision on the financial reporting requirements. Aurizon Network disagreed with 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 said it is only required to report on regulated services.²⁷³

Aurizon Network agreed that its Executive Officer should certify that the relevant financial statements have been prepared in accordance with the costing manual, rather than certifying that the financial statements are 'accurate', but said this was not reflected in the drafting.²⁷⁴

The QRC,²⁷⁵ Anglo American²⁷⁶ and Aurizon Network²⁷⁷ agreed with the initial draft decision to propose a requirement to report on self-insurance arrangements. However, Aurizon Network proposed the aggregation of events under \$50,000, to minimise administrative requirements, while Anglo American suggested that more detailed information should be reported.

4.9.4 Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions, we refused to approve Aurizon Network's proposals regarding accounting separation and financial reporting in the 2014 DAU. However, we outlined the way in which the 2014 DAU should be amended, taking into account the submissions received in respect of our initial draft decision.

We proposed to move the requirements relating to accounting separation and financial reporting to Part 3, which is consistent with the 2010 AU. However, we proposed to retain the requirements for the certification and publishing of the statements in Part 10 (see cl. 10.4.1 of the consolidated draft decision-amended DAU).

We were of the view that the 2014 DAU ring-fencing proposals reduce transparency and increase the risk of cost shifting to regulated activities. Cost-shifting behaviour has the potential to affect the efficiency of the CQCN, and would therefore be counter to the object of Part 5 of the QCA Act—and would inappropriately favour the interests of Aurizon Network over the interests of access seekers, access holders and the public. To validate the efficient costs of the

²⁷² QRC, 2014 DAU, sub. 84: 105.

²⁷³ Aurizon Network, 2014 DAU, sub. 83: 87.

²⁷⁴ Aurizon Network, 2014 DAU, sub. 83: 87.

²⁷⁵ QRC, 2014 DAU, sub. 84: 105.

²⁷⁶ Anglo American, 2014 DAU, sub. 95: 36.

²⁷⁷ Aurizon Network, 2014 DAU, sub. 83: 87–88.

regulated business, thereby satisfying the object of Part 5 of the QCA Act, we need to be able to validate how costs are allocated between regulated and unregulated parts of the business.

To this end, section 159(3) of the QCA Act requires the QCA to take into account, as far as practicable, Aurizon Network's existing accounting system. We considered this permits us to use the costing manual to require Aurizon Network to explain how the itemised costs are reconciled against the accounts of Aurizon Network, subject to relevance to the declared service. If there are costs that are common to other parts of the Aurizon Group business, a necessary part of allocating the costs to the declared service would include identifying the common costs and their appropriate allocation. We accepted that costs that did not relate to the declared service (and are not common costs) cannot be addressed by the costing manual. It was not our intent to require non-declared service costs to be itemised and reconciled.

Further, we considered that maintaining the 2010 AU accounting separation arrangements was necessary to satisfy our consideration of section 168A(c) of the QCA Act (which indicates that the pricing principles should 'not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher'). Without detailed information on both regulated and non-regulated revenues, the QCA cannot be confident that cost shifting is not taking place.

In our view, the ring-fencing regime and associated reporting requirements in the 2014 DAU were not appropriate to address the above cost-shifting concerns, which we are entitled to take into account under section 138(2)(g) and (h) of the QCA Act.

We also maintained our initial draft decision that it is appropriate for Aurizon to report on self insurance, including details of the number of self-insurance events by type and value each year and the level of self-insurance at the end of each year. We did not consider there was sufficient justification to require more detailed reporting (as proposed by Anglo American), although Aurizon Network could voluntarily provide more information. We also accepted Aurizon Network's proposal to aggregate claims that are less than \$50,000 for administrative simplicity.

We concluded that Aurizon Network's 2014 DAU is not appropriate because it reduces robustness and transparency by removing the link with Aurizon Network's general financial statements and not providing a full reconciliation of the financial statements associated with the regulated and non-regulated businesses of Aurizon Network in order for cost allocations to be transparent and justifiable.

Amending the 2014 DAU

We maintained our initial draft decision, but proposed further drafting changes to better reflect our intention to reinstate the accounting separation and financial reporting provisions from the 2010 AU.

We proposed amendments to separately identify Aurizon Network's business in respect of the supply of the declared service from any other business conducted by the Aurizon Group and to identify how costs that are common to both Aurizon Network and Aurizon Group have been allocated. We also proposed to re-insert the audit requirements from the 2010 AU and to require the financial statements to be certified as being in accordance with the undertaking, not just the costing manual, because the statements must meet other requirements.

We also proposed to revert to Aurizon Network's proposal to publish the financial statements within six months of the end of the year, rather than four months proposed in our initial draft

decision (cl. 3.7.3 of the consolidated draft decision-amended DAU). We considered this is appropriate to allow sufficient time for the statements to be audited and certified.

We also noted that Aurizon Network has submitted a revised costing manual to us for approval, which we are reviewing under a separate consultation process.²⁷⁸ The financial statements for 2013–14, 2014–15 and 2015–16 would then reflect the final approved costing manual. Therefore, we proposed to introduce a requirement for these statements to be audited and published within six months of the costing manual being approved (cl. 10.4.1(c) of the consolidated draft decision-amended DAU).

We considered that the amendments we have included in our consolidated draft decision-amended DAU were appropriate as they enabled a balance between the interests of access holders, access seekers and train operators and those of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.9.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that:²⁷⁹

- (a) The general purpose financial statements (required under cl.3.7.1(a)(i)) are beyond power to the extent they relate to all of Aurizon Network and not just to the declared service. The QCA Act does not contemplate requesting cost information relating to other members of the Aurizon Group, and is therefore beyond power.
- (b) Common costs would be contained in the financial statement under clause 3.7.1(a)(ii)(A). However, the requirement that the financial statements separately identify other business conducted by the Aurizon Group is beyond power.
- (c) Certification by Aurizon Network's Executive Officer is unnecessary given that the financial statements are to be audited (cl.3.7.1(c)(ii)).
- (d) The QCA can only require information about self-insurance in respect of the declared service. Requesting the quantum of an insurance payout is beyond power and, in any event, should be kept confidential. It was not clear why the QCA would want information about the number, type and resolution of claims. The self-insurance information is confidential and the undertaking should make it clear that it must be kept confidential (cl. 3.7.2).
- (e) In regard to clause 3.7.3, a person with rail expertise is irrelevant to conducting a financial audit. Further, it limits the pool of auditors too much.

Anglo American considered that Aurizon Network must provide more detailed information into how, when and why users' self insurance costs have been spent. Information is required on insurable events upon which the claims are being made; whether users or the QCA has pre-approved spending self insurance on those particular activities; and the reasons for making the claim.²⁸⁰

4.9.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding the accounting separation and financial reporting arrangements in the 2014 DAU.

²⁷⁸ For more information, see our website at: www.qca.org.au.

²⁷⁹ Aurizon Network, sub. 125: 62–63.

²⁸⁰ Anglo American, sub no 127: 36

In respect of Aurizon Network's comments:

- (a) We disagree with Aurizon Network's comments in regard to clause 3.7.1(a). The clause is required and necessary to ensure that Aurizon Network is not shifting costs. This relates to ensuring the object of Part 5 of the Act is achieved, that is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. The QCA has the power to request this information. The QCA's ability to enforce the undertaking and the relevant provisions of the QCA Act (ss. 100 and 104) and prevent cost shifting requires that it has information (statements) regarding the service provided beyond the declared services.
- (b) Clauses 3.7.1(a)(ii)(A) and (B) do not set out an obligation to provide different financial statements. They both set out the detail to be contained in the supplementary financial statements. It is not clear to us how the audited accounts can be prepared in such a manner as to make it clear there is no cost shifting, if these costs and allocation are not identified. The cost allocation manual may serve this purpose.
- (c) In our view, certification and auditing serve different purposes. Certification is an internal regulatory process to force senior management to ensure that proper systems and controls are set up. Auditing is a third party independent checking process that assists in assuring the veracity of the certification. The two steps together provide the correct level of assurance and transparency that systems are in place and that they are being complied with. We have made no change.
- (d) We consider that that if self- insurance relates to the declared service and it is recoverable by Aurizon Network, self-insurance forms part of the access terms to the declared service. The clause relates to the regulation of a declared service and therefore it is within the QCA's power to regulate. However, we accept that measuring payments of insurance claims is not indicative of sufficient insurance. Details of insurance payouts can be aggregated. We consider that we need to monitor the performance of any self-insurance mechanism to provide comfort to stakeholders that it is managed appropriately. In respect of confidentiality, at the time of providing the information, if Aurizon Network does not want it disclosed publicly, it can state to the QCA that the disclosure would damage Aurizon Network's commercial activities. If the QCA considers that disclosure would likely damage Aurizon Network's commercial activities and would not be in the public interest, then the QCA is obliged to take all reasonable steps to ensure the information is not disclosed without consent (see ss. 239 and 163(4) of the QCA Act).
- (e) We agree that limiting the auditor to having rail experience is not necessary and we have made appropriate amendments in the final amended DAU. We have deleted clause 3.7.3(iii) of the consolidated draft decision-amended DAU.

In response to Anglo American, we do not consider that any further detail on self-insurance is required, and we consider providing further details would involve additional regulatory costs. The suggested additional information also does not seem to add anything to the QCA being able to establish that Aurizon Network's self insurance is adequate or being adequately managed.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.16

- (1) **After considering Aurizon Network's proposal, our final decision is to refuse to approve the accounting separation and financial reporting arrangements.**
- (2) **The way in which we consider it is appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) **delete clause 3.7 of the 2014 DAU**
 - (b) **include accounting separation, financial reporting and audit arrangements, which are based on the 2010 AU arrangements (cls. 3.7 and 10.4.1 of the final amended DAU), which include requirements on Aurizon Network to:**
 - (i) **separately identify Aurizon Network's business in respect of the supply of the declared service from any other business conducted by the Aurizon Group**
 - (ii) **identify costs common to both Aurizon Network and the Aurizon Group and the way in which such costs are allocated**
 - (c) **include a requirement to report on self-insurance arrangements (cl. 3.7.2 of the final amended DAU)**
 - (d) **make other amendments as reflected in our final amended DAU.**

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.10 Role of complaint handling and compliance

Aurizon Network said the 2014 DAU retained the 2010 AU complaint handling, reporting and audit mechanisms in a single broad mechanism encompassing all Part 3 obligations, including the prohibition of unfair differentiation between access seekers.²⁸¹

Our assessment considered complaint handling, audit and compliance separately. Financial audit issues are dealt with above in Section 4.9 of this decision and other audit issues are discussed in Chapter 5 of this decision.

4.10.1 Complaint handling

Aurizon Network's proposal

Aurizon Network's 2014 DAU proposes a broad complaints handling mechanism aimed at encompassing all its obligations with respect to ring-fencing.

Summary of the initial draft decision

In our initial draft decision, we noted that despite the 2014 DAU broadening the scope of the complaints handling process with respect to Aurizon Network, it does not apply to complaints with respect to other Aurizon parties who may have access to confidential information. We considered this responsibility extends to dealing with complaints regarding potential ring-fencing breaches by any Aurizon party, associated port/rail and mine/rail entities, as well as breaches of the UHCSO by the ultimate holding company.

Additionally, we were unconvinced that:

²⁸¹ Aurizon Network, 2013 DAU, sub. 2: 62.

- it is credible for Aurizon Network to undertake an audit of its own investigation into a complaint, when the complainant is not satisfied with that investigation. We proposed amendments to the audit process that ensure an auditor is independent of Aurizon Network and all other Aurizon parties.
- it is appropriate that a complaint (and any related information) is automatically deemed confidential. We did not want this to be a deterrent to an access seeker or holder making complaints.

Overall, our initial draft decision was to refuse to approve Aurizon Network's complaints handling process in the 2014 DAU. We considered that the way to amend the 2014 DAU was to require it to be replaced by the process outlined in the table below.

Table 22 Initial draft decision approach to complaint handling

Stage 1	<p>If an access holder or train operator considers that:</p> <ul style="list-style-type: none"> • Aurizon Network has breached one or more of its ring-fencing obligations • the ultimate holding company has breached the UHCSD • an Aurizon party or associated port/rail or mine/rail entity has breached a confidentiality deed or confidentiality provisions contained in another agreement with Aurizon Network, in accordance to which the confidential information was disclosed to it, <p>then the complainant may lodge a written complaint with Aurizon Network.</p> <p>Any accompanying information will not be considered confidential information unless objective grounds for confidentiality are provided in writing.</p>
Stage 2	Aurizon Network will advise the QCA of any complaints it receives in accordance with stage 1.
Stage 3	Aurizon Network will investigate complaints received in accordance with stage 1 and advise the complainant and the QCA in writing of the outcome of that investigation and Aurizon Network's proposed response, if any, and use best endeavours to do so within 20 business days after receiving the complaint.
Stage 4	Where the complainant is not satisfied with the outcome of Aurizon Network's investigation, the complainant can apply to the QCA seeking an audit of the relevant subject of the complaint—and that audit must be conducted in accordance with the 'compliance audit requested by the QCA' process.

We considered this approach allows the complaints handling process to be suitably inclusive, and transparent, and means the response time for dealing with complaints can be assessed. We considered this to be in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act). We also noted that, while it may be in Aurizon Network's interests to limit its responsibility for complaints handling to itself, we did not consider this a legitimate business interest of Aurizon Network (s. 138(2)(b) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network agreed with the complaints handling process outlined by the QCA, but suggested that clause 3.19(g) of the initial draft decision-amended DAU is better included within clause 10.1.2.²⁸²

The QRC supported the complaints process proposed by the QCA in clause 3.19, but submitted that it should be extended to third parties seeking access or increased access. It had concerns that:

²⁸² Aurizon Network, 2014 DAU, sub. 83: 83.

- limiting the right to lodge a complaint to access seekers, holders and train operators restricts the operation of the complaints process. For example, mining companies may wish to lodge a complaint
- the reference to ‘access seeker’ is restricting. An access seeker whose application does not comply, would not be able to lodge a complaint.²⁸³

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act, and assessing stakeholders' submissions, we refused to approve Aurizon Network's proposals regarding complaints handling in the 2014 DAU. However, we outlined the way in which the 2014 DAU should be amended, taking into accounts submissions received in respect of our initial draft decision DAU.

Our view was that Aurizon Network's 2014 DAU proposal to limit its responsibility for complaints handling to itself is not appropriate because it does not provide coverage of related entities. We considered that this could have the result that access seekers and access holders could not reasonably have confidence in the efficacy of the complaints handling process, and therefore we could not approve the 2014 DAU.

Amending the 2014 DAU

We considered that clause 3.19(g) of the initial draft decision-amended DAU (3.20(g) of the consolidated draft decision-amended DAU) is better located in Part 3, as it specifically relates to compliance requirements for ring-fencing.

In regard to the extension of the complaints handling process to other parties, our view was that such rights should not be extended to parties who are not defined as bona fide access seekers. We retained our view on the definition of access seekers, but we amended the drafting to also include third party access seekers (as defined in Part 12).

We proposed amendments to the 2014 DAU to provide an appropriate balance between the interests of access holders, access seekers and train operators and the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that²⁸⁴:

- The audit process effectively enables the QCA to rewrite the undertaking, and is therefore beyond power.
- The proposal for Aurizon Network's compulsory waiver of rights in respect of confidentiality is beyond power (cl. 3.20(b)).
- Clause 3.20(c) should not allow one party to unilaterally remove confidentiality restrictions in respect of a complaint and accompanying information. Aurizon Network also said that the reference to ‘agreed’ is unclear.
- QCA is giving itself two procedures for dealing with ring-fencing disputes—the audit provision and clause 11, in respect of the same non-compliance issue.

²⁸³ QRC, 2014 DAU, sub. 84: 18.

²⁸⁴ Aurizon Network, 2014 DAU, sub no 125: 70-71

The QRC supported the QCA's complaints process. However, it suggested that any person should be able to make a complaint given the breadth of Aurizon Network's obligations under UT4. Examples include a terminal operator or prospective access seekers.²⁸⁵

Anglo American submitted that the original position that the QCA would appoint the auditor to conduct an audit into a ring-fencing complaint should be reinstated.²⁸⁶

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding the complaints handling process in the 2014 DAU.

Our responses to Aurizon Network's comments are as follows:

- (a) The audit process is simply to audit and report. It is unclear how Part 10 by itself or in combination with clause 3.20 gives QCA unilateral power to re-write the undertaking once it is accepted. However, we have proposed amendments to Part 10 (cl. 10.6) as shown in the final amended DAU.
- (b) The QCA has the power to impose obligations to ensure the object of Part 5 of the QCA is not frustrated. Clause 3.20(b) is amended accordingly to ensure Aurizon Network does not unreasonably claim confidentiality over information for the purpose of frustrating the QCA's functions.
- (c) We agree that the purpose of making the complaint and associated information not confidential is unclear. The amendments to clause 3.20(b) provide clarity.
- (d) We disagree that we have set up two separate procedures for dealing with ring fencing disputes. The two procedures serve two different purposes. The audit provision serves to investigate the non-compliance and the dispute resolution provision serves to resolve the dispute regarding non-compliance.

In response to the QRC, we note that clause 3.20 already contains a reference to third party access seeker.

In response to Anglo American, we retain the view that approval of the auditor by the QCA under clause 10.6.4 provides sufficient safeguard. The QCA must approve the auditor and that the auditor owes the QCA a duty of care. We consider these factors mitigate any risk of a conflict of interest.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

²⁸⁵ QRC, sub. 124: 13.

²⁸⁶ Anglo American, sub. 127: 14.

Final decision 4.17

- (1) After considering clause 3.23 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposals regarding the complaints handling process.**
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to reflect the complaints handling process in clause 3.20 of our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.10.2 Compliance

Aurizon Network's proposal

Aurizon Network's 2014 DAU does not include any obligation to proactively monitor compliance with its ring-fencing obligations. Instead, the 2014 DAU includes provisions whereby Aurizon Network can apply to us to waive some, or all, of its ring-fencing obligations on either a temporary or permanent basis (cl. 3.24 of the 2014 DAU).

Summary of the initial draft decision

Given the Aurizon Group's organisational restructure, we did not consider there to be an adequate level of accurate, transparent baseline data from which to assess how confidential information flows out from Aurizon Network and across the Aurizon Group and third parties are appropriately managed.

We concluded it would not be reasonable for us to waive any of Aurizon Network's ring-fencing obligations. We also considered that, as part of the process of developing a credible baseline data set for the flow of confidential information, Aurizon Network should provide a six-monthly compliance declaration to the QCA. We considered such measures are aligned with Aurizon Network's legitimate business interests and are in the interests of access holders, access seekers and train operators (s. 138(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network submitted that the purpose of the waiver provisions was to provide flexibility to Aurizon Network, with appropriate oversight, if the circumstances of the organisation change. Waivers would enable third parties to manage their confidential information in a way they see fit. Aurizon Network considered that the QCA decision to reject the waiver will force Aurizon Network to adopt a more formal regulatory process, which could result in multiple DAAUs for minor matters.

Aurizon Network considered that an obligation for Aurizon Network to provide a six-monthly compliance declaration to the QCA duplicates the reporting requirements from clause 10.2 of 2014 DAU, that have been retained by the QCA. The addition of clause 3.4 of the initial draft decision amended DAU will not add any controls to the compliance framework. Aurizon Network suggested removing clause 3.4, and strengthening clause 10.2, to include the nature and circumstance of the breach; actions taken to mitigate the breach; whether the breach is

under investigation; any remedial actions to be implemented; and confirmation that affected parties have been advised.²⁸⁷

Consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refused to approve Aurizon Network's 2014 DAU proposals regarding compliance with ring-fencing obligations.

We were concerned that the availability of waivers could allow Aurizon Network to exert its monopoly power over access seekers/holders by requiring them to unwillingly trade-off management of their confidential information against expeditious negotiated outcomes.

In relation to Aurizon Group's obligation to proactively monitor compliance with its ring-fencing obligations:

- Given the Aurizon Group's organisational restructure, we did not consider there to be an adequate level of accurate, transparent baseline data from which to assess how confidential information flows out from Aurizon Network and across the Aurizon Group and third parties.
- We also concluded it would not be reasonable for us to waive any of Aurizon Network's ring-fencing obligations. Further, it was unclear why a waiver would, in any circumstance, be in the interests of access holders, access seekers or train operators (s. 138(2)(e) of the QCA Act).

We considered the 2014 DAU required a degree of transparency and assurance that Aurizon Network was proactively managing its ring-fencing obligations. This requirement is aligned with Aurizon Network's legitimate business interests and is in the interests of access holders, access seekers and train operators (s. 138(b) and (e) of the QCA Act).

Amending the 2014 DAU

In response to Aurizon Network, we noted that requests to the QCA for waivers of ring-fencing provisions would be not be dissimilar to formal regulatory processes using multiple minor DAAUs. However, in recognition that waiver arrangements are adequately covered in clause 3.9 of the consolidated draft decision-amended DAU, we proposed to remove clause 3.3 of the initial draft decision-amended DAU. We did not consider this change weakened the protections available to access seekers and access holders.

In regard to compliance reporting, we did not consider that clause 3.4 (cl. 3.3 of the consolidated draft decision-amended DAU), which relates to compliance reporting on ring-fencing on a regular basis, is duplicated by clause 10.2, which deals with reporting on breaches of the access undertaking generally.

We also considered that, as part of the process of developing a credible baseline data set for the flow of confidential information, Aurizon Network should provide a six-monthly compliance declaration to the QCA. This would complement the submission of the confidential information register and provide some confidence that Aurizon Network is maintaining accurate records.

We considered our amendments provide an appropriate balance between the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

²⁸⁷ Aurizon Network, 2014 DAU, sub. 83: 83–84.

Stakeholders' comments on the consolidated draft decision

Aurizon Network considered that:²⁸⁸

- (a) The absolute declaration (cl. 3.3(a)(ii) of the consolidated draft decision-amended DAU) in relation to both ring-fencing and clause 2.6(b) is not possible and should be replaced with one that states the declarant is not aware of any breaches.
- (b) The declaration regarding clause 2.6(b) of the consolidated draft decision-amended DAU is beyond power and also does not make sense, as the clause relates to the ultimate holding company and not the access provider. Executive Officers' and other members' reputations will be adversely impacted if they are deemed to have given false or misleading information.
- (c) Clause 3.3(c) is worded differently than sections 230 and 231 of the QCA Act. These sections of the Act require knowledge that the statement is false or misleading.
- (d) Clause 10.7.3 purports to give an Aurizon Network Executive Officer some protection when he/she relies on information given by an Aurizon Network personnel. Clause 3.3(c) should be made subject to clause 10.7.3, and protection should be given under clause 3.3(b) to the other member providing the declaration.

Anglo American submitted that a declaration is required stating whether any breaches of Part 3 have occurred during a six-month period. However, under clause 10.5.2, a compliance report is given on a yearly basis. Accordingly, the declaration should only be required once a year.²⁸⁹

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding compliance with ring fencing obligations in the 2014 DAU.

In response to Aurizon Network's submission:

- (a) We agree with the comment that it is reasonable that an absolute declaration not be given because of the possibility of human error. This can be addressed by making the compliance declaration subject to clause 10.7.3(b), which deems reliance by the Aurizon Network Executive Officer on information provided by others to be reasonable in certain circumstances. We have amended clause 3.3(c).
- (b) We do not consider that a declaration in respect of clause 2.6(b) (correctly 2.6(c)(i)–(iii)) is beyond power, because the clause relates to Aurizon Network, so Aurizon Network can provide a declaration to the extent that it relates to its compliance. Clause 2.6(c) of the consolidated draft decision-amended DAU (cl.2.5(c) of the final amended DAU) has been redrafted to focus on stronger reporting requirements, rather than penalising Aurizon Network in the event that Aurizon Holdings does not provide an UHCSD.
- (c) We consider that it is reasonable for a breach of the undertaking to be consistent with the equivalent prohibition under the QCA Act (ss. 230 and 231). The sections of the Act require knowledge that the statement is false or misleading. We have made an amendment to clause 3.3(c).
- (d) We consider that it is reasonable for the other members of the senior management team most directly responsible for ensuring compliance with ring-fencing arrangements to

²⁸⁸ Aurizon Network, sub. 125: 58–59.

²⁸⁹ Anglo American, sub.127: 15–16.

have the protection of clause 10.7.3. We have therefore amended the DAU (cl. 3.3(c) and (d)).

We agree with Anglo American that for consistency with reporting procedures, the declaration need only be provided once a year (cl. 3.3(a)(i) of the final amended DAU).

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.18

- (1) **After considering clauses 3.23 and 3.24 of Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's proposals regarding compliance with its ring-fencing obligations.**
- (2) **The way in which we consider it is appropriate that Aurizon Network's DAU be amended is to:**
 - (a) **include an obligation for Aurizon Network to provide a 12-monthly compliance declaration to the QCA**
 - (b) **make such other amendments to clause 3.3 and consequentially affected clauses as shown in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

4.11 Rail infrastructure and the declared service

The 2010 AU included the following provisions related to Aurizon Network's ring-fencing responsibilities for rail infrastructure relating to the provision of the declared service:

- a clause outlining Aurizon Network's responsibility for updating and maintaining the line diagrams—which outline those parts of the rail network that form part of the declared service (cl. 3.8.1 of the 2010 AU) (cl. 3.20 of the initial draft decision-amended DAU)
- a clause requiring the transfer of rail infrastructure that constitutes part of the declared service to Aurizon Network from an Aurizon party (cl. 3.8.2 of the 2010 AU).

These were excluded from the ring-fencing provisions in the 2014 DAU.

Aurizon Network said line diagrams would be provided in preliminary information and are publicly available on its website. Aurizon Network also said we had no power to require divestiture of assets from one entity to another.²⁹⁰

Stakeholders said the requirements to maintain and update line diagrams should be retained, as incorporation of rail diagrams in previous undertakings has been a transparent and clear process—with the QCA retaining oversight of corrections to the diagrams and ensuring consistency with the TIA.²⁹¹

²⁹⁰ Aurizon Network, 2013 DAU, sub. 77: 48–49.

²⁹¹ Anglo American, 2014 DAU, sub. 7: 23–24; Asciano, 2013 DAU, sub. 44: 10–11.

Our initial draft decision was to reinstate these provisions. We were of the view the line diagrams represent a valuable, transparent depiction of the boundaries of the CQCN; while the requirement to transfer rail infrastructure that constitutes part of the declared service to Aurizon Network from an Aurizon party represents a continuing commitment.

Stakeholders' comments on the initial draft decision

Aurizon Network had no objection to the initial draft decision to reinstate the provisions.²⁹²

The QRC supported the proposal with respect to rail infrastructure responsibility and ownership. Anglo American supported the reinstatement of provisions relating to line diagrams showing above- and below-rail division of assets within the Aurizon Group. It said this is essential to ensure the correct assets are accounted for, and line up with Aurizon Network's RAB.²⁹³

Consolidated draft decision

We refused to approve Aurizon Network's 2014 DAU proposals to remove ring-fencing obligations regarding the rail infrastructure associated with the declared service. In doing so, we noted general support for the initial draft decision, including the reinstatement of provisions relating to line diagrams.

Stakeholders' comments on the consolidated draft decision

Aurizon Network noted a drafting issue in clause 3.21(d)(ii), noting that there is nothing to contravene in clause 3.21(c). Aurizon Network also submitted that clause 3.22 is beyond power, as Aurizon Network cannot be compelled to acquire ownership of rail transport infrastructure. It is beyond power for the ownership issue to be resolved under Part 11.²⁹⁴

The QRC submitted that Aurizon Network should be prohibited from assigning or transferring the ownership of existing or new rail infrastructure from Aurizon Network to another Aurizon Party.²⁹⁵

Anglo American restated its support for including the line diagrams. In addition, Anglo American said that the QCA should require that the RAB is in line with the line diagrams, and that line diagrams should be completed by an independent assessor appointed by the QCA within six months of the commencement of UT4 and also prior to the commencement of each undertaking period.²⁹⁶

QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposals regarding ring-fencing obligations in the 2014 DAU.

In response to Aurizon Network's comments:

- (a) Clause 3.21(d)(ii) has been corrected and amendments have been made.
- (b) We consider that, read as a whole, clause 3.22 obliges Aurizon Network to 'use reasonable endeavours' to obtain ownership of the relevant rail transport infrastructure which is not a compulsion of the nature suggested by Aurizon Network.

²⁹² Aurizon Network, 2014 DAU, sub. 83: 84.

²⁹³ QRC, 2014 DAU, sub. 84: 18; Anglo American, 2014 DAU, sub. 95: 10.

²⁹⁴ Aurizon Network, sub. 125: 71–72.

²⁹⁵ QRC, sub. 124: 14.

²⁹⁶ Anglo American, sub. 127: 15.

- (c) As clause 3.22 has been removed from our final amended DAU, Aurizon Network's comment about ownership being resolved under Part 11 is no longer relevant.

In response to the QRC, we consider that any prohibition on assigning or transferring the ownership of existing or new rail infrastructure from Aurizon Network to another Aurizon Party is not within the QCA Act, but that Aurizon Network must in all cases be able to deliver the required declared service.

In response to Anglo American, we retain the view that an independent reassessment of RAB in each undertaking period would involve additional costs and increase regulatory uncertainty, and would not be in the legitimate business interests of Aurizon Network. The QCA's regulatory framework includes approving a RAB roll-forward, including new capital expenditure. A further process of RAB assessment would seem unnecessary.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 3 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 4.19

- (1) After considering Aurizon Network's 2014 DAU proposals to remove Aurizon Network's ring-fencing obligations regarding the rail infrastructure associated with the declared service, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to reinstate appropriately updated versions of clause 3.8.1 of the 2010 AU (cl. 3.21 of the final amended DAU).
We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

5 REPORTING, COMPLIANCE AND AUDITS

Aurizon Network's performance and compliance with the 2014 DAU can be understood and assessed through an effective reporting, compliance and audit regime. An effective reporting regime underpins the integrity of the access regime and is an essential element to provide transparency and accountability of Aurizon Network's operations.

Our final decision is to refuse to approve Aurizon Network's proposed reporting, compliance and audit regime in Part 10 of the 2014 DAU. While we accept many aspects of Aurizon Network's proposed regime, we refuse to approve the regime overall. In our view, the provisions we consider should be amended do not appropriately balance the factors in section 138(2) of the QCA Act. In particular, we have proposed amendments to:

- include a requirement for a briefing on the planned scope of maintenance before the start of each year and for a consolidated annual maintenance report to be made available to all stakeholders*
- include provision for Aurizon Network to produce a quarterly maintenance cost report, following consultation with stakeholders*
- include a requirement for Aurizon Network to maintain an issues register of breaches and written complaints*
- expand the scope and frequency of audits based on the requirements in the 2010 AU*
- include a requirement for Aurizon Network to provide a plan for the implementation of audit recommendations and evidence that the recommendations have been implemented.*

We consider that our proposed amendments are in the interests of parties affected by Aurizon Network's decisions and will provide incentives for Aurizon Network to improve its efficiency and comply with its obligations in the undertaking.

5.1 Introduction

An effective reporting, compliance and audit regime (referred to as the reporting regime) underpins the integrity of the access regime and provides transparency and accountability of Aurizon Network's below-rail operations.

An effective regime is achieved when an undertaking makes available meaningful and relevant information on Aurizon Network's performance and compliance with the undertaking in a timely manner. This allows stakeholders and the QCA to make more informed assessments and decisions on aspects of Aurizon Network's performance. It also allows Aurizon Network to demonstrate network performance, compliance with the undertaking and its commitment to non-discriminatory behaviour.

5.2 Overview

5.2.1 Aurizon Network's proposal

Aurizon Network's proposal broadly retains the 2010 AU reporting arrangements in the 2014 DAU²⁹⁷, with Aurizon Network required to report on a broad range of matters including maintenance costs and activities, regulatory asset base updates and general performance indicators for the CQCN coal systems (i.e. volumes hauled, availability and reliability of the network and track utilisation).

Aurizon Network said its reporting arrangements are part of an overall approach aimed at addressing 'risks to competition' that arise out of vertical integration²⁹⁸, promoting transparency and compliance with its access obligations, and providing relevant information to access seekers, access holders and the QCA.²⁹⁹

Aurizon Network's proposal expands on the types of matters included in the reporting arrangements. Now arrangements previously covered under different parts of the undertaking are contained in Part 10, including arrangements for assessing and reporting the condition of the network (e.g. condition based assessments, audit processes and disclosure of access agreement provisions).

The following table sets out the key components of Aurizon Network's reporting framework.

Table 23 Summary of Aurizon Network's 2014 DAU proposed reporting obligations

<i>Performance Reporting</i>	<i>Asset Reporting</i>	<i>Compliance and Information Provision</i>	<i>Auditing</i>
Annual Financial Report (cl. 10.1.1)	Annual RAB Roll-forward Report (cl. 10.1.6)	Role of Compliance Officer (cl. 10.5)	QCA Requested Reporting Audits (cl. 10.7)
Annual Maintenance Cost Report (cl. 10.1.3 and 10.1.4)	Condition Based Assessment (cl. 10.4)	Annual Compliance Report (cl. 10.1.2)	QCA Requested Compliance Audits (cl. 10.8)
Quarterly Network Performance Report (cl. 10.1.5)		Breach Reports to the QCA (cl. 10.2)	Audit Process (cl. 10.9)
		Disclosure of Access Agreements (cl. 10.3.1)	
		QCA Requested Information (cl. 10.3.2)	
Certifications required from Aurizon Network's Executive Officer (cl. 10.6)			

Note: All clause references in this table are to Aurizon Network's 2014 DAU.

²⁹⁷ Aurizon Network, 2013 DAU, sub. 2: 62.

²⁹⁸ Aurizon Network, 2013 DAU, sub. 2: 58.

²⁹⁹ Aurizon Network, 2013 DAU, sub. 2: 306.

5.2.2 QCA assessment approach

The legislative framework guiding our decisions is discussed in detail in Chapter 2. Consistent with the framework, we have assessed Aurizon Network's proposed reporting regime by having regard to the factors in section 138(2) of the QCA Act.

Taking the section 138(2) factors into account, we consider that an appropriate reporting regime should provide sufficient information about Aurizon Network's operations to allow stakeholders to make informed decisions and have confidence in the regulatory regime. It should also provide sufficient transparency and oversight of network performance and Aurizon Network's compliance with the undertaking. However, it should not impose an excessive cost or burden on Aurizon Network or the QCA or require the disclosure of sensitive commercial information of Aurizon Network or its stakeholders.

A regime with these attributes is in the interests of parties affected by Aurizon Network's decisions, including access seekers, access holders and end customers (s. 138(2)(e) and (h) of the QCA Act). It is consistent with the object of Part 5 of the QCA Act and the public interest (s. 138(2)(a) and (d)) because it provides incentives for Aurizon Network to improve its efficiency and comply with its obligations in the undertaking, and promotes competition in related markets, such as the above rail market. It also recognises Aurizon Network's legitimate business interests (s. 138(2)(b)) by not imposing an unnecessary burden or harming its commercial position.

We assessed Aurizon Network's proposed regime to determine whether it meets these objectives, by providing comprehensive and accurate information in a timely manner. Overall, for the reasons below, we refuse to approve the 2014 DAU in respect of the reporting regime and have proposed amendments. Not every amendment we have proposed is discussed in detail in this chapter, but we consider our amendments reflect changes required through the application of our assessment approach.

5.3 Structure of Part 10

For the purpose of this chapter, we first explain the way we propose to amend the structure of the reporting regime contained in the 2014 DAU, as our analysis below adopts our new proposed structure.

Given our final decision to refuse to approve Aurizon Network's reporting regime in Part 10, which has now expanded beyond pure reporting requirements, we have proposed amendments to the structure of Part 10. In particular, we propose:

- renaming Part 10 as reporting, compliance and audits
- grouping like matters together under these broad headings, including separating network performance reporting from other more ongoing reporting requirements.

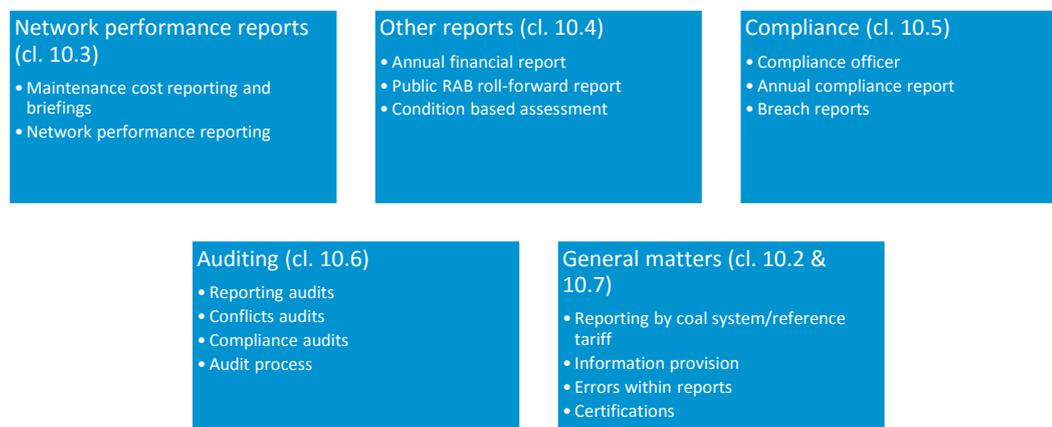
We also consider the requirements relating to accounting separation and financial reporting should be moved to Part 3 (ring-fencing). Given the nature of these requirements – i.e. the actual preparation of financial reports, we consider they are best placed in the relevant part of the undertaking that deals with such matters. However, we propose to retain the requirements for certifying and publishing the statements in Part 10 (see clause 10.4.1 of the final amended DAU). We discuss our position on financial reporting arrangements (including financial audit arrangements) in Chapter 4.

We consider it appropriate to amend the undertaking in this way because it improves the functionality and readability of Part 10 and better aligns it to its purpose, i.e. to provide

information on the content, timing and ongoing provision of reports and information under the undertaking, including the audits of them.

The figure below shows how the 2014 DAU reporting regime should be amended to reflect our final decision.

Figure 1 Proposed new structure of Part 10



Note: All clause references are to our final amended DAU.

Items in the 'General' categories (cl. 10.2 and 10.7) relate to matters that arise across a number of the reporting requirements. Clause 10.7 also includes the general information gathering provisions that allow us to request information from Aurizon Network, including access agreements. We have dealt with comments in relation to these aspects in section 5.8 below.

We did not mark-up the structural amendments to Part 10 in our drafting. This would not allow stakeholders to assess the actual drafting amendments we made to the content. However, for completeness, we have included a table explaining the structural changes in Appendix A.

The discussion below reflects the new structure and topic groupings presented in the figure above.

5.4 Network performance reporting

5.4.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU proposed to provide the following information on the performance of the network:³⁰⁰

- Maintenance costs—via an annual maintenance cost report. This shows information on actual maintenance cost and scope compared with the forecast, along with other network service and quality indicators. Aurizon Network prepares one report to publish on its website (cl. 10.1.3) and another, including a more comprehensive level of information, to provide to the QCA (cl. 10.1.4).
- Network performance—via a quarterly network performance report. This contains various key performance indicators including the reliability of train services, availability of the network and railing information (cl. 10.1.5).

These reporting arrangements largely replicate the requirements of the 2010 AU. Aurizon Network made some amendments to cost categories within the maintenance cost report and

³⁰⁰ Clause references in this section are to Aurizon Network's 2014 DAU.

also shifted some indicators between reports (for example, it proposed to report safety incidents and the track quality index annually within the maintenance cost report, rather than quarterly in the network performance report).

Aurizon Network also included a new obligation for it to provide a briefing to stakeholders on maintenance costs. Under these arrangements, within one month of providing the maintenance cost report to the QCA, it will brief relevant stakeholders on the contents of the maintenance cost report, including providing details on the scope of maintenance for the forthcoming year (cl. 10.1.4).

In terms of timing, Aurizon Network proposed to provide the maintenance cost report within 6 months of the end of the year (cl. 10.1.4(a)) and the quarterly network performance report within 20 days of the end of each quarter, or later if required by its ASX obligations (cl. 10.1.5(a)).

5.4.2 Summary of our initial draft decision

We considered stakeholder comments in forming our initial draft decision.³⁰¹ We supported Aurizon Network's general aim of maintaining the current level of information provision and including additional arrangements to provide more information on maintenance activities to stakeholders in a briefing.

However, for the reasons outlined in our initial draft decision, we refused to approve the network performance reporting regime overall. We proposed the following amendments to consolidate reporting requirements and promote the timely flow of relevant information to stakeholders:

- the preparation of one consolidated annual maintenance cost report, rather than two, to provide efficiencies for Aurizon Network in terms of producing reports, and provide all relevant parties with access to the same level of information, providing greater transparency
- provision of network performance reports on a monthly basis to provide stakeholders with regular information to make informed decisions, which may lead to improved performance in the above-rail market. We proposed that the monthly report would be provided in conjunction with the quarterly report, which contains comparative information on track performance over time.

We largely accepted the content of the reports but considered, overall, the proposed regime could not be approved. We proposed to re-instate some aspects of 2010 AU arrangements where Aurizon Network had not provided sufficient evidence as to why reporting such information was no longer necessary when considered in light of the factors in section 138(2) of the QCA Act.

In addition, we considered it was appropriate for Aurizon Network to report on renewal expenditure as part of its annual maintenance reporting requirements. We considered this would provide a greater level of transparency around the trade-offs between asset renewals and maintenance.

While we accepted Aurizon Network's proposal to introduce a stakeholder briefing into its maintenance reporting obligations, we considered amendments to specific provisions were appropriate to improve the timeliness and effectiveness of information flows. We proposed a

³⁰¹ QCA, 2015(a): 105–109.

requirement for Aurizon Network to brief stakeholders on the planned scope of maintenance three months prior to the start of the year.

We also considered it appropriate to include provisions from the 2010 AU to allow us to agree with Aurizon Network to vary the content of the maintenance cost reports from time to time, but failing agreement, as determined by us. We considered this would provide flexibility for Aurizon Network to incorporate any changes in reporting arrangements arising from consultations with relevant stakeholders.

In terms of the timing of reports, we proposed requiring Aurizon Network to provide the maintenance cost report within 4 months of the end of the year (rather than 6 months) and the monthly/quarterly network performance reports within 10 business days of the end of each month/quarter (rather than 20 business days).

We also took into account comments on drafting amendments from stakeholders and, where we considered they clarified the 2014 DAU, proposed to incorporate them.

5.4.3 Stakeholders' comments on our initial draft decision

Stakeholders broadly supported the amendments we proposed to the reporting arrangements in the 2014 DAU.³⁰² Comments on particular aspects of the arrangements are summarised in the table below.

³⁰² Anglo American, 2014 DAU, sub. 95: 36; Asciano, 2014 DAU, sub. 76: 21; BMA, 2014 DAU, sub. 78: 1.

Table 24 Summary of comments on performance reporting

<i>Report</i>	<i>Stakeholder comments</i>
Maintenance reporting	<ul style="list-style-type: none"> • Stakeholders agreed with consolidating the maintenance reports into a single report and the timeframe for providing it (within 4 months of the end of the year).³⁰³ • Aurizon Network and stakeholders largely agreed with the proposed maintenance reporting, including the level of detail and arrangements for briefing stakeholders (prior to, and after the end of year maintenance report is provided).³⁰⁴ <ul style="list-style-type: none"> – QRC suggested the briefing should provide information on the impact, if any, of the maintenance plan on coal system capacity.³⁰⁵ • Stakeholders agreed with including asset renewal information in the report.³⁰⁶ However, Aurizon Network said it could not report this in the level of detail we proposed because its systems could not distinguish whether asset renewal expenditure had been incurred in place of planned maintenance.³⁰⁷ • Stakeholders proposed some drafting amendments. Also, amendments to refine some of the indicators were suggested, such as reporting the overall track condition index (OTCI) by relevant segments within each coal system (not just by coal system).³⁰⁸
Network performance reporting	<ul style="list-style-type: none"> • Subject to some suggested drafting changes, QRC agreed with the initial draft decision, including monthly reporting.³⁰⁹ • Aurizon Network disagreed with reporting monthly. It said: <ul style="list-style-type: none"> – customers should make operational decisions based on information from the operational reporting process, not reports designed to inform the regulator and the broader public – the obligation to report monthly and provide the report within 10 days after the end of each month is not practical from a production and data integrity perspective. This information is scrutinised by external financial analysts, and must be accurate to ensure compliance with ASX obligations – it would be more reasonable for a monthly report to be provided within 20 days and proposed a quarterly report with data segregated by month.³¹⁰ • Aurizon Network also disagreed with the timeframe for providing the quarterly report, saying it was not possible to produce it within 10 days after the end of each quarter.

We have also noted a number of comments made by stakeholders in relation to drafting, including the QRC and Aurizon Network.

5.4.4 Consolidated draft decision

After having regard to the section 138(2) factors in the QCA Act and stakeholder submissions, we did not consider it appropriate to approve the 2014 DAU in respect of network performance reporting as a whole. The reasons for our refusal, along with the amendments we considered appropriate for us to approve the arrangements, are set out below.

³⁰³ Aurizon Network, 2014 DAU, sub. 83: 88; QRC, 2014 DAU, sub. 84: 106–107.

³⁰⁴ Aurizon Network, 2014 DAU, sub. 83: 88; QRC, 2014 DAU, sub. 84: 106–107; Anglo American, 2014 DAU, sub. 95: 36–37; Vale, 2014 DAU, sub. 79: 7–8.

³⁰⁵ QRC, 2014, DAU, sub. 84: 106–107.

³⁰⁶ QRC, 2014 DAU, sub. 84: 106–107; Aurizon Network, 2014 DAU, sub. 83: 88.

³⁰⁷ Aurizon Network, 2014 DAU, sub. 83: 88–89.

³⁰⁸ QRC, 2014 DAU, sub. 84: 106–107.

³⁰⁹ QRC, 2014 DAU, sub. 84: 107.

³¹⁰ Aurizon Network, 2014 DAU, sub. 83: 90–92.

Maintenance cost reporting

We did not consider the maintenance reporting arrangements in the 2014 DAU were appropriate. While we accepted some aspects of the arrangements, we did not consider they provided, as a whole, information on Aurizon Network's maintenance costs throughout the regulatory period in a way that is efficient, sufficiently comprehensive and timely.

We noted performance of maintenance activities has been a matter of interest and concern for us and stakeholders for some time. Under the 2010 AU, Aurizon Network reports information on its activities throughout the regulatory period (both publicly and to us). However, how Aurizon Network is performing against its targets is not fully evident until the next regulatory re-set – i.e. when we assess Aurizon Network's proposed maintenance costs for the coming regulatory period looking at, amongst other things, how it has performed in the past. This has been a particular issue in relation to key activities such as ballast undercutting (discussed in Chapter 23, Volume 4).

We considered Aurizon Network's proposed arrangements did not sufficiently address these concerns because they did not provide parties affected by its decisions, including access seekers and access holders, with sufficient information about maintenance costs throughout the regulatory period in a way that allows this type of assessment to be made. We considered this inconsistent with the interests of access seekers and holders (s. 138(2)(e) and (h) of the QCA Act). A lack of transparency also affects the ability of stakeholders to hold Aurizon Network accountable for its decisions, which may lead to inefficient investment in rail infrastructure (s. 138(2)(a)).

To address this, we considered the maintenance reporting regime should:

- enhance and promote genuine stakeholder engagement and information sharing
- provide stakeholders with access to relevant information in an efficient and timely manner.

We considered our proposed amendments were required to enhance transparency and improve the timeliness of information for stakeholders. This is in the interests of access seekers and access holders (s. 138(2)(e) and (h)), while recognising Aurizon Network's legitimate business interests by not imposing an excessive regulatory burden (s. 138(2)(b)). We considered the amendments proposed would also improve Aurizon Network's accountability to stakeholders, promoting efficient investment in rail infrastructure (s. 138(2)(a)).

In many instances we retained our initial draft decision position.

Stakeholder briefings

We accepted Aurizon Network's proposal to brief stakeholders on the contents of its maintenance cost report one month after the report is submitted. However, we considered the proposed briefing on the scope of maintenance was not sufficiently timely, which is not in the interests of access seekers, access holders, the QCA and other relevant parties. We proposed the briefing on the scope of maintenance for the forthcoming year would take place three months before the start of each year. We also proposed an additional requirement for Aurizon Network to provide a report as part of the briefing.

We considered our proposed amendments would provide for more timely and efficient briefings. They would have maximum relevance to stakeholders and allow Aurizon Network to provide the most relevant and up to date information on maintenance activities on the network. It also had the additional benefits of keeping stakeholders informed throughout the regulatory period and providing Aurizon Network with an opportunity to update stakeholders on any key issues affecting maintenance, such as changes in plans compared to the forecast.

We did not propose amendments to the 2014 DAU to prescribe the content of the briefings and reports on the planned scope of maintenance, but did provide some guidance as to what we considered appropriate.

We considered it would be beneficial for all parties if the briefings and reports were closely aligned to the information ultimately required to be provided under the maintenance cost report. For instance, in its annual maintenance cost report, Aurizon Network reports information on the forecast scope and cost of particular maintenance activities (included for the purpose of calculating reference tariffs). It then tracks and reports on actual maintenance spend against this forecast.

As such, it would be beneficial to include information on the planned scope of maintenance activities, particularly if this differs from the forecast used for determining reference tariffs. This would maximise the effectiveness of this information sharing through:

- efficient information provision— by minimising the administrative requirements on Aurizon Network by combining the efforts of preparing information in the briefing that will later feed into its maintenance report
- efficient stakeholder engagement and information sharing— by making it more likely that stakeholders are informed on key aspects of maintenance performance throughout the regulatory period because they have received relevant information that complements the information publicly available in the maintenance cost report.

We also noted Aurizon Network's suggestion of providing information on the location of maintenance activities planned.³¹¹ We considered this would be beneficial to parties and may be a matter Aurizon Network decides to include in its end of year briefing after publishing the maintenance cost report. This, and other items for the briefing and report, are matters for Aurizon Network and we encouraged these matters to be finalised in consultation with stakeholders as part of Aurizon Network's plans to further develop the maintenance reporting arrangements.

We considered this link was vital as the regulatory period goes on. It would assist in preventing concern among stakeholders when, at the end of the regulatory period, it is not clear why actual scope (and cost) for maintenance activities is different from the forecast; how much of any variation reflects updates in the maintenance plans; and what this means as a whole for the condition of the network. It also means administratively that Aurizon Network has, by virtue of preparing the briefing information, already completed aspects to be reported in the maintenance cost report.

Annual maintenance report

Stakeholders largely supported our amendments to consolidate the maintenance reporting arrangements so that one report is published and available to all stakeholders. Stakeholders also supported the timing arrangements so that the report is published four months after the end of each year.³¹² We considered providing one consolidated report would reduce the administrative burden on Aurizon Network in preparing both a public and regulatory report (s. 138(2)(b)) and provide all parties with access to a consistent level of information on maintenance performance. It would also provide stakeholders with more comprehensive

³¹¹ Aurizon Network, 2014 DAU, sub. 59: 116–117.

³¹² Cl. 10.1.4(a) of the IDD amended DAU.

information on maintenance costs than they have received before, which we considered appropriate to address their concerns about insufficient transparency (s. 138(2)(e) and (h)).

In terms of content, we noted Aurizon Network's concerns regarding reporting asset renewals. In particular, that its systems are unable to distinguish, and therefore report on, asset renewal expenditure that took place instead of maintenance.

While we acknowledged Aurizon Network's view, we considered that the factors in section 138(2) of the QCA Act require transparency around asset renewals, particularly given Aurizon network is proposing a significant amount of renewals expenditure over the term of the undertaking (around \$0.5 billion). Over time, it will be important for Aurizon Network to track the impact this has on maintenance activities and future capital expenditure and, at the same time, provide transparency around this to stakeholders given the potential impact on access charges.

With respect to the content of the report, we set out the way in which the provisions should be amended including by reference to provisions contained in the 2010 AU.

Quarterly maintenance report

In response to our initial draft decision on MAR, Aurizon Network indicated it was willing to work with stakeholders and us to develop an alternative framework for maintenance reporting, potentially including quarterly reporting of maintenance activities tied with financial adjustments as performance incentives.

We considered the 2014 DAU reporting regime should be amended to include arrangements for Aurizon Network to develop a template for a quarterly maintenance report following consultation with stakeholders. Given stakeholders' preference for increased maintenance performance information, we considered that these amendments were appropriate and consistent with their interests (s. 138(2)(e) and (h)).

Accordingly, we included proposed amendments for a process within the 2014 DAU to provide for Aurizon Network to develop, within six months after the 2014 DAU is approved (or longer as agreed with us), a template for a quarterly maintenance report. The template would then be subject to our approval.³¹³

Drafting amendments to the 2014 DAU

Overall, we considered our proposed amendments to Aurizon Network's network performance reporting regime would provide timely information and a process for interactive engagement that is in the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act). The proposed reporting requirements were developed with regard to the legitimate business interests of Aurizon Network, in that appropriate administration costs are accounted for in the MAR. Therefore, we considered the proposed reporting requirements provided an appropriate balance between the interests of the industry participants.

5.4.5 Stakeholders' comments on the consolidated draft decision

QRC maintained its position in its April 2015 submission with respect to reporting matters and did not provide any further comments.³¹⁴ Anglo American supported our consolidated draft decision.³¹⁵

³¹³ Cl. 10.3.2 of the CDD amended DAU.

³¹⁴ QRC, 2014 DAU, sub. 124: 5.

³¹⁵ Anglo American, 2014 DAU, sub. 127: 37.

Aurizon Network³¹⁶ said it was prepared to commit to a quarterly maintenance report if there was clarity as to its contents, suggesting that it should contain:

- (a) details of quarterly network maintenance costs; and
- (b) by coal system:
 - (i) the total quarterly maintenance costs;
 - (ii) maintenance costs by activity (ballast undercutting, rail grinding, resurfacing, and general maintenance)
 - (iii) derailments over \$100,000 and the effect of action taken to restore the network
 - (iv) overall track condition index (OTCI) and safety incidents³¹⁷
 - (v) below rail transit times.

In addition, Aurizon Network submitted that it wanted the ability to provide commentary on the relevant products.

Aurizon Network proposed amending clause 10.3.2 of the CDD amended DAU to reflect the above. These were proposed on the basis of limiting Aurizon Network's exposure to uncertain regulatory obligations.³¹⁸

Aurizon Network did not consider clause 10.3.3(c)(vii),³¹⁹ which required details of asset renewal expenditure in place of planned maintenance work, was appropriate.³²⁰ It noted that:

- (a) asset renewals and maintenance tasks are planned in tandem and maintenance forecasting takes account of the asset renewal program. That is, planned asset renewals should not result in any reduction in planned maintenance
- (b) Aurizon Network's business systems were not set up to identify asset renewals expenditure that occurs in place of planned maintenance separately from other asset renewals expenditure. Moreover, examples of asset renewals instead of planned maintenance would be relatively isolated.

Aurizon Network considered that it is not appropriate to report GAPE separately within the maintenance cost report as GAPE is not a physical coal system, but rather a theoretical system for pricing purposes.³²¹ Aurizon Network also noted that GAPE costs were already captured in reporting for the Goonyella and Newlands systems and that reporting maintenance costs for GAPE would involve double counting.³²²

³¹⁶ Aurizon Network, 2014 DAU, sub. 125: 84.

³¹⁷ Aurizon Network subsequently submitted proposed drafting that did not include did not overall track condition index or safety incidents as items for the quarterly maintenance cost report (sub. 132: 2).

³¹⁸ Aurizon Network, 2014 DAU, sub. 125: 85-86 and sub. 132: 3.

³¹⁹ While Aurizon Network's submission refers to clause 10.3.3(c)(B)(vii), we understand this is the appropriate reference (2014 DAU, sub. 125).

³²⁰ Aurizon Network's proposed drafting did not propose deleting this clause 10.3.3(c)(vii) (2014 DAU, sub. 132: 5).

³²¹ Aurizon Network, 2014 DAU, sub. 125: 84-85.

³²² Aurizon Network, 2014 DAU, sub. 125: 6.

Aurizon Network proposed the timing of the annual maintenance plan (clause 10.3.1) should be aligned with annual maintenance cost reports, being at least three months before the commencement of each financial year (by 1 April each year).³²³

5.4.6 QCA analysis and final decision

Our final decision is to refuse to approve the maintenance cost reporting arrangements proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD are, for the most part, appropriate and as a result, our analysis, reasoning and decision, for the most part, remains unchanged from that set out in our CDD analysis above.

However, we agree with stakeholders that some refinements are appropriate. For this reason, our final decision includes:

- providing for the annual maintenance plan (forward looking) and maintenance cost report (assessment of previous year actual results) to be provided at least three months before the commencement of each financial year (clause 10.3.1)
- Aurizon Network proposing a transparent approach to address presentation issues that could arise from the double counting of GAPE information with other systems. We note that there are several clauses in Part 10 that provide for agreement between the QCA and Aurizon Network on the appropriate format and content of reports, or exclusion from reporting at a coal system level that will permit Aurizon Network to address any possible double counting.³²⁴

The QCA does not accept that clause 10.3.3(c)(vii) of the CDD amended DAU should be deleted. However, the QCA may consider a transitional approach to address Aurizon Network's concern that its business systems do not distinguish between capital expenditure for asset renewals reporting provisions. This is best undertaken as part of reaching agreement to vary the format of the reports, rather than prescribing transitional provisions.

- We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 10 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the further refinements as set out above.

³²³ Aurizon Network, 2014 DAU, sub. 125: 85-86.

³²⁴ Refer to clauses 10.2, 10.3.2 and 10.3.3 of our final amended DAU.

Final decision 5.1

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the maintenance cost reporting arrangements.**
- (2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) provide for a stakeholder briefing and report on the planned scope of maintenance three months before the start of each year (cl. 10.3.1 of the final amended DAU)**
 - (b) provide for one consolidated annual maintenance cost report to be prepared and published within four months of the end of each year, including the content set out in our attached drafting (cl. 10.3.3 of the final amended DAU)**
 - (c) provide for the preparation and approval of a quarterly maintenance cost report template within 6 months of the approved undertaking (cl. 10.3.2 of the final amended DAU)**
 - (d) make any other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

Network performance reports

In response to comments received by stakeholders, particularly Aurizon Network, we re-considered our initial draft decision on the provision and timing of monthly network performance reports.

In view of the time taken to prepare information for the quarterly report, we considered that reporting on a monthly basis would impose a significant administrative burden on Aurizon Network. As such, we considered that Aurizon Network's proposal to provide the report on a quarterly basis was appropriate. However, we agreed with Aurizon Network's submission that information in the quarterly report should be segregated by month and proposed amendments to achieve this outcome. This meant the information would still be provided on a monthly basis, which was in the interests of access seekers and access holders, but reporting the information on a quarterly basis would result in a lower administrative burden on Aurizon Network (s. 138(2)(b), (e) and (h) of the QCA Act).

In terms of timing, we considered the Aurizon Network's proposal to provide the report within 20 business days of the end of each quarter was reasonable. This was consistent with the 2010 AU arrangements and would provide Aurizon Network with time to prepare the report (which included the proposed requirement to segregate information on a month basis), improve data integrity and reduce the chance of errors.

However, we maintained our position in the initial draft decision to refuse to approve Aurizon Network's proposed network performance reporting arrangements overall. We considered Aurizon Network's proposed arrangements did not require it to provide sufficiently comprehensive information on certain aspects of network performance, including safety, network service quality and speed restrictions. Therefore, we did not consider the proposed arrangements appropriately balance the interests of access holders (s. 138(2)(e) and (h)) against the legitimate business interests of Aurizon Network (s. 138(2)(b)).

We also reaffirmed our initial draft decision that proposed amendments to improve the reporting of safety and network service quality issues, including those changes that are drawn from the current arrangements in the 2010 AU.

Consistent with our views in the position paper on Aurizon Network's Northern Bowen Basin system rules,³²⁵ we also considered the report should provide information about the outcome of the Contested Train Path Decision Making Process (CTPDMP). Therefore, we proposed amendments to include a requirement to report on the number of CTPDMPs run each month and the stage of the process that the contested paths were allocated. The addition of this requirement would improve transparency (which was in the interests of stakeholders), while not imposing an excessive administrative burden on Aurizon Network (because the information should be readily available).

Our position paper also proposed improvements to the process for allocating delays and cancellations to the party(s) that cause them to reduce the incidence of 'unallocated' delays and cancellations.³²⁶ Our view was that this would increase transparency and ultimately improve supply chain coordination. To support this process, we considered that it may be useful for Aurizon Network to include more detailed information on the cause of delays and cancellations in its network performance report. However, we recognised that this could be a significant change and we sought stakeholder submissions on whether these proposed changes should be made.

We considered our proposed amendments would improve the comprehensiveness of the information provided, which was in the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act). We also acknowledged Aurizon Network's legitimate business interests and considered that the adjustments made since the initial draft decision appropriately address its concerns about the increased administrative burden of more regular reporting (s. 138(2)(b)).

Stakeholders' comments on the consolidated draft decision

QRC said it maintained its position outlined in its April 2015 submission with respect to reporting matters and did not provide any further comments.³²⁷

As noted above, Aurizon Network said it did not object to the QCA's proposal, although it suggested that reporting by each coal system was not appropriate for GAPE.³²⁸ This was because the GAPE system is not a physically distinct system, but rather a theoretical system developed for pricing purposes,³²⁹ and therefore operational decisions relating to the Contested Train Paths process meant such paths were ultimately allocated to the Newlands or Goonyella system.³³⁰

Aurizon Network also proposed removing requirements for performance reporting information being accurate and not misleading, on the basis that it already had a statutory obligation to not provide information it knows is false or misleading.³³¹

³²⁵ QCA, *Position Paper: Aurizon Network's Northern Bowen Basin system rules*, 17 September 2015, pp. 73–75.

³²⁶ *Ibid.* pp. 85–92.

³²⁷ QRC, 2014 DAU, sub. 124: 5.

³²⁸ Aurizon Network, 2014 DAU, sub. 125: 84.

³²⁹ Aurizon Network, 2014 DAU, sub. 125: 87.

³³⁰ Aurizon Network submitted proposed drafting for network performance reports but did not propose to exclude the GAPE system from network performance reporting requirements (2014 DAU, sub. 132: 5-8).

³³¹ Aurizon Network, 2014 DAU, sub. 132: 5 and 7.

QCA analysis and final decision

Our final decision is to refuse to approve the reporting arrangements proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD are, for the most part, appropriate and as a result, our analysis, reasoning and decision, for the most part, remains unchanged from that set out in our CDD analysis above.

However, we agree with Aurizon Network's reasons as to why it should not be obliged to report outcomes of the contested train paths (clause 10.3.4(i) in our final amended DAU) for the GAPE system. We consider that clause 10.2 provides the means to implement this approach as it provides for agreement between the QCA and Aurizon Network on exclusion from reporting at a coal system level. Therefore, we have not proposed any further amendments to address this issue.

Section 230 of the QCA Act applies to statements made "to the Authority". However, public performance reporting is not for the purposes of the QCA, per se, but rather for stakeholders as to the Aurizon Network's performance. On this basis, we consider it is not unreasonable for Aurizon Network to maintain obligations as to the accuracy and integrity of the information reported publicly.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 10 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the further refinements as set out above.

Final decision 5.2

- (1) **After considering Aurizon Network's proposal, our final decision is to refuse to approve the network performance reporting arrangements.**
- (2) **The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to require:**
 - (a) **key performance information to be displayed by month (cl. 10.3.4 of the final amended DAU)**
 - (b) **amendments to content of the report as provided for in our final amended DAU described above, including a new indicator that details the number of CTPDMPs run each month and the stage of the process the contested paths were allocated (cl. 10.3.4(i) of the final amended DAU) (but excluding GAPE services)**
 - (c) **other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

5.5 Asset reporting

5.5.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU proposed requirements for:³³²

- an annual report on the roll-forward of the regulatory asset base (RAB) to be published within one month of the QCA accepting the prudence of capital expenditure (cl. 10.1.6)
- a condition based assessment of rail infrastructure to be conducted towards the end of the undertaking term (cl. 10.4).

5.5.2 Summary of our initial draft decision

Our initial draft decision was to accept most aspects of Aurizon Network's proposals in relation to asset reporting. We considered this information was crucial to understand network asset performance and promote prudent asset management, which is in the interests of access seekers and access holders. However, consistent with our overall approach, we applied our discretion to propose amendments to simplify and clarify the arrangements more broadly (s. 136(5)(b) of the QCA Act).

5.5.3 Stakeholders' comments on our initial draft decision

Aurizon Network argued that it could not provide a separate RAB roll-forward report for the NAPE system (which it would be required to do if the QCA's proposed definition of 'coal system' was expanded to add NAPE as a separate system).³³³ We addressed the general issue about providing reports by coal system in section 5.8 below.

³³² Clause references that follow are to Aurizon Network's 2014 DAU.

³³³ Aurizon Network, 2014 DAU, sub. 83: 94.

Aurizon Network³³⁴, QRC³³⁵ and Anglo American³³⁶ generally supported our initial draft decision regarding the requirements for condition based assessments.

However, Anglo American was concerned that Aurizon Network had previously failed to comply with a similar provision and noted that the final condition-based assessment under the 2010 AU was yet to be completed. Anglo American considered Aurizon Network should be required to complete assessments at the beginning and end of the undertaking term to determine whether it has been complying with asset maintenance standards and is effectively utilising the maintenance funds provided by users. Anglo American also considered the assessments should be made public.³³⁷

QRC suggested Aurizon Network should be required to procure a condition based assessment for each coal system.³³⁸

5.5.4 Consolidated draft decision

After having regard to the section 138(2) factors in the QCA Act and stakeholder submissions, we did not consider it appropriate to approve the 2014 DAU in respect of asset reporting. While we acknowledged key aspects of Aurizon Network's proposals, the 2014 DAU did not provide useful information for stakeholders and was not sufficiently transparent.

We considered the proposed amendments to the 2014 DAU discussed below were required to enhance transparency and improve the usefulness of information for stakeholders. This was in the interests of access seekers and access holders (s. 138(2)(e) and (h)), while recognising Aurizon Network's legitimate business interests by not imposing an excessive regulatory burden (s. 138(2)(b)). The amendments proposed would also improve Aurizon Network's accountability to stakeholders, promoting efficient investment in rail infrastructure (s. 138(2)(a)).

Public RAB roll-forward report

We reassessed our initial draft decision to accept Aurizon Network's proposal to publish the roll-forward report after we accept the prudence of capital expenditure. We considered the report should be amended to include the provision in the 2010 AU that required the QCA's acceptance of Aurizon Network's proposed roll-forward of the RAB prior to that report being published. This meant the report provided stakeholders with information about the *approved* roll-forward, rather than the *proposed* roll-forward.

Condition based assessment

We acknowledged Anglo American's concerns about compliance and the suggestion a condition based assessment should be completed twice during an undertaking. However, these assessments take time and are costly and, in the interests of efficiency, should not need to be performed more than once during an undertaking term. Assessments at both the beginning and end of the regulatory period would mean that two assessments would occur in a relatively short period of time. We considered one assessment per period was sufficient to identify any neglect, but the frequency should be subject to review if the undertaking period was to extend beyond four years.

³³⁴ Aurizon Network, 2014 DAU, sub. 83: 85.

³³⁵ QRC, 2014 DAU, sub. 84: 108.

³³⁶ Anglo American, 2014 DAU, sub. 95: 37–38.

³³⁷ Anglo American, 2014 DAU, sub. 95: 37–38.

³³⁸ QRC, 2014 DAU, sub. 84: 108.

Subject to redactions of confidential information, we agreed with Anglo American that assessments should be made public.³³⁹ We also agreed with QRC's suggestion that a condition based assessment should be conducted for each coal system.³⁴⁰ We further considered the assessment of each coal system should be split to cover Aurizon Network funded assets and user funded assets as we considered that this would provide useful information to stakeholders, including highlighting any discriminatory treatment.

5.5.5 Stakeholders' comments on the consolidated draft decision

Anglo American noted concern that the previous condition based assessment process had been delayed and an express acknowledgement was required in clause 10.4.3, such that if Aurizon Network did not fulfil its obligations, then it should be deemed to be a breach by a responsible person and such a breach has adversely affected a person's interests.³⁴¹ Anglo American also reiterated concern with the extent of information to be made publicly available.

Aurizon Network raised concerns with the process to undertake the condition based assessment process required under clause 10.4.3 of the CDD amended DAU for it to be completed no later than 31 December 2016.³⁴² Aurizon Network said this issue was due to risks associated with the timing for approval of the 2014 DAU.³⁴³

Aurizon Network also raised concerns about the QCA's proposed confidentiality regime, namely:

- protecting confidential information of access holders
- disclosure of confidential information that is required by the access undertaking, should not be considered a breach of the ring-fencing provisions
- clause 10.4.3(k) of the CDD amended DAU should reflect a reasonable endeavours obligations as it is not practical that Aurizon Network compel a third party to agree a particular confidentiality position.³⁴⁴

QRC said it maintained its position outlined in its April 2015 submission with respect to reporting matters and did not provide any further comments.³⁴⁵

5.5.6 QCA analysis and final decision

Our final decision is to refuse to approve the reporting arrangements proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD are, for the most part, appropriate and as a result, our analysis, reasoning and decision, for the most part, remains unchanged from that set out in our CDD analysis above.

Section 158A of the QCA Act already provides for the QCA or another person to seek an order concerning a breach of the undertaking to the extent a person's interests have been adversely affected by that breach. Therefore, Anglo American's proposal is unnecessary.

³³⁹ Anglo American, 2014 DAU, sub. 95: 37–38.

³⁴⁰ QRC, 2014 DAU, sub. 84: 108.

³⁴¹ Anglo American, 2014 DAU, sub. 127: 37–38.

³⁴² Aurizon Network, 2014 DAU, sub. 125: 87–88.

³⁴³ Aurizon Network, 2014 DAU, sub. 125: 88.

³⁴⁴ Aurizon Network, 2014 DAU, sub. 125: 88.

³⁴⁵ QRC, 2014 DAU, sub. 124: 5.

We remain of the view that Aurizon Network should be required to publish a public version. However, we consider that Aurizon Network's argument about confidentiality requirements has merit and that it is appropriate to change the standard in clause 10.4.3(k) to a reasonable endeavours obligation.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 10 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the further refinements as set out above.

Final decision 5.3

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the asset reporting arrangements.**
- (2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) include a requirement for the RAB roll-forward report to be published after the QCA accepts Aurizon Network's proposed roll-forward (cl. 10.4.2 of the final amended DAU)**
 - (b) include requirements to publish condition based assessment reports, provide assessments of Aurizon Network funded assets and user funded assets for each coal system, and allow for more than one assessment per undertaking term if the term extends beyond four years (cl. 10.2(c) and 10.4.3 of the final amended DAU)**
 - (c) make other amendments as proposed in the final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

5.6 Compliance

5.6.1 Aurizon Network's proposal

Under the 2014 DAU, Aurizon Network proposed to:³⁴⁶

- Appoint a compliance officer responsible for managing the systems and practices reasonably required to oversee Aurizon Network's compliance with its obligations in the undertaking, including notifying the Executive Officer of material breaches and advising remedial action proposed or taken (cl. 10.5).
- Prepare and publish a compliance report annually, detailing its compliance with obligations in the undertaking and the outcomes of negotiations with access seekers. It will provide a supplementary report to the QCA with information separately reported for third party and Aurizon party access holders (cl. 10.1.2).
- Report breaches of the undertaking to the QCA and any remedial action proposed or undertaken (cl. 10.2):

³⁴⁶ Clause references that follow are to Aurizon Network's 2014 DAU.

- with respect to timeframes, within 10 business days after the end of each month
- with respect to other breaches, as soon as Aurizon Network becomes aware of the breach.

Aurizon Network also proposed to provide the party directly affected with information about such a breach.

5.6.2 Summary of our initial draft decision

While we accepted many aspects of Aurizon Network's proposal, overall, our initial draft decision was to refuse to approve the 2014 DAU in respect of the compliance framework. The 2014 DAU did not appear to include an obligation for Aurizon Network to proactively monitor compliance with the undertaking, including the ring-fencing obligations.

We considered the 2014 DAU compliance framework should be amended by requiring Aurizon Network to keep an issues register to record:

- any known breaches of the undertaking
- any alleged breaches of the undertaking that Aurizon Network is aware of
- any written complaints by access seekers or access holders about Aurizon Network's performance in relation to the undertaking
- the steps Aurizon Network has taken to remediate or otherwise address these issues.

We also considered the issues register should be available for audit, and would become a tool for monitoring Aurizon Network's compliance with its ring-fencing obligations.

In addition, we proposed that Aurizon Network provide its compliance report within four months of the end of the year, not six months as it had proposed. We did not consider Aurizon Network had sufficiently justified with evidence why increasing the timeframe (compared to current arrangements) provided for an effective regime, particularly given the content of the report has largely remained unchanged.

5.6.3 Stakeholders' comments on our initial draft decision

Stakeholders supported our proposal to introduce an issues register and to reduce the time for Aurizon Network to publish its annual compliance report.³⁴⁷

However, the QRC said the compliance obligations should be strengthened, particularly in relation to ring-fencing obligations. On this, the compliance report should be expanded to require Aurizon Network to disclose complaints relating to breaching confidentiality agreements or the ultimate holding company support deed. Information on the average complaint handling time should also be reported, including instances where the breach was found to be committed.³⁴⁸

5.6.4 Consolidated draft decision

We accepted many aspects of the proposed compliance requirements. However, after having regard to the section 138(2) factors and stakeholder submissions, overall we maintained our initial draft decision that it was not appropriate to approve the 2014 DAU in respect of the compliance requirements.

³⁴⁷ Aurizon Network, 2014 DAU, sub. 83: 87; QRC, 2014 DAU, sub. 84: 108.

³⁴⁸ QRC, 2014 DAU, sub. 84: 105–106.

We considered that amendments were required to achieve a sufficient level of stakeholder confidence that Aurizon Network is monitoring its compliance with the undertaking. This was in the interests of parties affected by Aurizon Network's decisions, including access seekers, access holders and end customers (s. 138(2)(e) and (h) of the QCA Act). It was also consistent with the object of Part 5 of the QCA Act (s. 138(2)(a)) by providing incentives for Aurizon Network to improve its compliance with the undertaking.

We maintained our initial draft decision position with respect to Aurizon Network's compliance arrangements and we noted that stakeholders also largely accepted these arrangements.

We considered the QRC's views, but decided not to propose amendments to further strengthen the compliance reporting arrangements. We considered the other proposed mechanisms were sufficient to highlight Aurizon Network's compliance with the obligations in the undertaking, including ring-fencing obligations. For instance, we did not limit the matters an auditor could consider when performing its annual audit (so ring-fencing matters, including any brought to our attention by stakeholders could be reviewed via that process). There was also a requirement for Aurizon Network to report on the number of complaints received about its compliance with the ring-fencing provisions. The issues register could also be audited, but would nonetheless maintain a record of the type and extent of breaches that occurred.

5.6.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network³⁴⁹ and the QRC³⁵⁰ generally supported our consolidated draft decision.

Aurizon Network submitted proposed drafting changes³⁵¹ to clause 10.4.2(c), namely:

- changing references from Dispute to 'an Access Dispute' in sub-clauses (vii) and (viii)
- limiting reporting obligations in sub-clauses (ix) and (x) to "Third Party Access Seeker, Access Holder or Train Operator".
- Aurizon Network also proposed adding a reference to "Train Operator" in clause 10.5.3(c)(iii) which requires Aurizon Network to maintain an issues register for written complaints by certain parties.
- In Aurizon Network's submission on Part 7 (Available Capacity allocation and management) it identified an inconsistency between our drafting of provisions regarding the review of the operation of the transfer provisions in clause 7.4.2 and the drafting of Part 10.³⁵²

5.6.6 QCA analysis and final decision

Our final decision is to refuse to approve the reporting arrangements proposed by Aurizon Network in its 2014 DAU.

Stakeholders did not provide any new information or arguments on this issue in response to our CDD. As such, our analysis, reasoning and decision remains, for the most part, unchanged from that set out in our CDD analysis above.

We do not accept Aurizon Network's proposed changes narrowing the annual compliance reporting to solely 'Access Disputes', nor excluding complaints made by customers or others relating to ring-fencing obligations. Our proposed approach captures access oriented disputes

³⁴⁹ Aurizon Network, 2014 DAU, sub. 125: 82.

³⁵⁰ QRC, 2014 DAU, sub. 124: 5.

³⁵¹ Aurizon Network, 2014 DAU, sub. 132: 13.

³⁵² Aurizon Network, 2014 DAU, sub. 125: 159.

as well as any other disputes in relation to the operation of the Undertaking and provides for reporting of all ring-fencing complaints from third parties.

We did not see an issue with Aurizon Network's proposed amendment to clause 10.5.3(c)(iii) and have reflected this in our final amended DAU.

We have amended clause 10.5.2(e) to reflect the issue raised by Aurizon Network with respect to the reporting and review requirements surrounding the transfer provisions in clause 7.4.2 of Part 7.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 10 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Consolidated draft decision 5.4

- (1) **After considering Aurizon Network's proposal, our final decision is to refuse to approve the compliance requirements.**
- (2) **The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) **include a requirement for Aurizon Network to maintain an issues register of breaches and written complaints (cl. 10.5.3 of the final amended DAU)**
 - (b) **include a requirement for the annual compliance report to be published within four months of the end of the year (cl. 10.5.2 of the final amended DAU)**
 - (c) **make other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

5.7 Audit requirements

5.7.1 Aurizon Network's proposal

Aurizon Network considers that auditing is an appropriate mechanism to assess systematic compliance with access obligations, particularly where the impact of non-compliance is significant. It considers that individual complaints or issues are best addressed through the dispute resolution and complaints handling mechanisms.³⁵³

Scope and frequency of audits

Aurizon Network proposed arrangements that allow the QCA to request audits of:³⁵⁴

- reporting obligations to determine compliance with reporting obligations, which will be conducted on request, but no more than once a year (cl. 10.7)
- general compliance to determine whether any specific conduct or decisions of Aurizon Network comply with the undertaking, which will be conducted on request (cl. 10.8).

³⁵³ Aurizon Network, 2013 DAU, sub. 2: 306.

³⁵⁴ Clause references that follow are to Aurizon Network's 2014 DAU.

The 2010 AU included the following audit requirements in the ring-fencing section (Part 3), which Aurizon Network decided against including in the 2014 DAU as it considered that the general audit provisions in Part 10 were sufficient:³⁵⁵

- audits of Aurizon Network's annual financial statements to assess whether they have been developed in accordance with the costing manual (cl. 3.3.2 of the 2010 AU)
- annual audits of Aurizon Network's compliance with its ring-fencing and other undertaking obligations (cl. 3.7 of the 2010 AU).³⁵⁶

We discuss our position on audits of financial statements in Chapter 4 (ring-fencing).

Audit process

Aurizon Network's proposed arrangements for the appointment of the auditor and the audit process included:³⁵⁷

- Appointing an auditor—Aurizon Network will appoint an auditor after receiving QCA approval and that auditor will remain responsible for conducting audits for the term of the undertaking (cl. 10.9(a) and (b)).
- Preparing audit plans—The auditor will agree an audit plan with Aurizon Network and obtain the QCA's approval. The audit plan will include a proposed work program and a process for consultation with the QCA during the audit to ensure particular matters are addressed (cl. 10.9(e) and (f)).
- Releasing audit findings—On completion of the audit, the auditor will provide a report to the QCA, who may provide it to appropriate parties having regard to the scope and findings of the audit (cl. 10.9(i)).

Implementation of audit recommendations

Aurizon Network proposed to include a requirement for it to use reasonable endeavours to implement the recommendations of the auditor as soon as reasonably practicable, unless non-implementation is approved by the QCA (cl. 10.9(j) of the 2014 DAU).

5.7.2 Summary of our initial draft decision

Stakeholders were concerned that Aurizon Network had weakened the audit requirements relative to the 2010 AU and argued that the requirements should be strengthened³⁵⁸ to improve transparency, identify discrimination and increase stakeholder confidence.³⁵⁹

We shared stakeholder concerns that Aurizon Network's 2014 DAU audit requirements did not appropriately take into account stakeholder interests. Our initial draft decision therefore concluded that it was not appropriate to approve the audit requirements proposed by Aurizon

³⁵⁵ Aurizon Network, 2013 DAU, sub. 2: 62.

³⁵⁶ This included auditing whether Aurizon Network was: engaging in cost shifting or margin squeezing; discriminating in the provision of associated facilities; discriminating between train operators with respect to live run variations from train plans; complying with the capacity allocation process/negotiation process/investment obligations in the undertaking. It could also include auditing: Aurizon Network's conduct if we received a complaint or a breach report in relation to the undertaking; or any other issue for which the QCA reasonably believes that an audit is necessary.

³⁵⁷ Clause references that follow are to Aurizon Network's 2014 DAU.

³⁵⁸ Asciano, 2013 DAU, sub. 43: 25; Anglo American, 2013 DAU, sub. 78: 40; QRC, 2014 DAU, sub. 42: 51.

³⁵⁹ Asciano, 2013 DAU, sub. 43: 25, 80; QRC, 2014 DAU, sub. 42: 51.

Network. We considered the way that the 2014 DAU audit provisions should be amended was to strengthen the audit requirements by:

- re-introducing the 2010 AU requirements for:
 - annual audits of Aurizon Network's financial statements and compliance with ring-fencing and other obligations
 - audits (at least annually) of Aurizon Network's compliance with its reporting obligations
- including a requirement that the QCA would be responsible for appointing the compliance auditor, rather than Aurizon Network
- requiring Aurizon Network to provide a plan for the implementation of audit recommendations and to provide evidence that the recommendations have been implemented.

We addressed stakeholder submissions on our initial draft decision in the QCA analysis section below.

5.7.3 Consolidated draft decision

After having regard to the section 138(2) factors in the QCA Act and stakeholder submissions, we did not consider it appropriate to approve the 2014 DAU in respect of audit requirements.

We did not consider that the audit requirements proposed by Aurizon Network were appropriate because they would not provide sufficient oversight of Aurizon Network's compliance with its obligations. Insufficient oversight could lead to the undertaking not functioning as intended, which is detrimental to the interests of access seekers, access holders and other stakeholders (s. 138(2)(e) and (h) of the QCA Act) and inconsistent with the object of Part 5 of the QCA Act (s. 138(2)(a)).

To address this issue, we considered the audit arrangements proposed in the 2014 DAU should be amended to provide improved oversight. The amendments we considered appropriate to approve the 2014 DAU are explained below.

Scope and frequency of audits

QRC and Aurizon Network³⁶⁰ supported our initial draft decision to propose amendments to include similar conflicts audit provisions to the 2010 AU, including the requirement for audits to be conducted annually.³⁶¹

Aurizon Network said the proposed requirement for the auditor to take into account its compliance with relevant internal procedures was outside the audit scope and should not be a factor in an audit of its compliance.³⁶² We disagreed with Aurizon Network and considered compliance with internal procedures is directly relevant to an assessment of Aurizon Network's compliance with its obligations in the undertaking.

As set out in our initial draft decision, we considered the appropriate way to amend the proposed audit requirements was to include audit provisions that are based on those in the 2010 AU. Including requirements for an annual audit of Aurizon Network's compliance with ring fencing and other obligations; and an audit (at least annually) of compliance with its reporting obligations. Regular audits would provide appropriate oversight of Aurizon Network's

³⁶⁰ QRC, 2014 DAU, sub. 84:109; Aurizon Network, 2014 DAU, sub. 83: 93.

³⁶¹ Cl. 10.9 of the IDD amended DAU.

³⁶² Aurizon Network, 2014 DAU, sub. 83: 93.

compliance with its obligations. This promotes stakeholder confidence and means access seekers and access holders have transparency on Aurizon Network's operations and compliance with its undertaking (taking into account the factors in section 138(2) of the QCA Act).

However, we proposed to simplify the audit provisions (cl. 10.6.2 of the CDD amended DAU) by removing the list of items that may be audited. We considered the provision allowing an audit of any issues we reasonably consider necessary is sufficient.

As discussed above and in Chapter 4, we considered the requirements relating to the preparation of the annual financial report (including the audit requirements) should be moved to Part 3, because they are directly relevant to Aurizon Network's ring fencing obligations.

Audit process

Our initial draft decision proposed for us to be responsible for appointing the compliance auditor. QRC largely agreed with the initial draft decision, but considered we should also pay for the auditor to provide increased independence and avoid conflicts of interest.³⁶³ On the other hand, Aurizon Network disagreed with our position, because it would not be able to plan for costs, nor is it clear who would be liable should the auditor be negligent or incompetent.³⁶⁴

After further consideration, we agreed that it should not be our responsibility to appoint the compliance auditor. This would increase the regulatory burden, which is inconsistent with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act), while not significantly improving our oversight of the audit process. As such, we accepted Aurizon Network's proposal that it would appoint the auditor, subject to our approval.

However, we considered the audit process in clause 10.9 of the 2014 DAU was not appropriate to approve overall. To promote stakeholder confidence and Aurizon Network's accountability, our oversight of the audit process should be improved, including requiring the auditor to provide any draft reports to us at the same time they are provided to Aurizon Network.

Implementation of audit recommendations

Aurizon Network agreed we should be able to request a plan for the implementation of audit recommendations. However, it proposed amendments to enable Aurizon Network and the QCA to agree to relax the 3-month period for requesting evidence that recommendations have been implemented.³⁶⁵

QRC supported allowing the QCA to obtain evidence regarding the implementation of audit recommendations and to direct Aurizon Network to take any necessary actions.³⁶⁶

We referred to our initial draft decision that Aurizon Network should be required to provide a plan for the implementation of audit recommendations and to provide evidence that the recommendations have been implemented. However, as this position was not accurately reflected in our IDD amended DAU, we proposed further amendments to ensure our position was properly reflected in the CDD amended DAU (see clause 10.10(k) to (m) of the CDD amended DAU).

³⁶³ QRC, 2014 DAU, sub. 84: 109.

³⁶⁴ Aurizon Network, 2014 DAU, sub. 83: 93.

³⁶⁵ Aurizon Network, 2014 DAU, sub. 83: 94.

³⁶⁶ QRC, 2014 DAU, sub. 84: 110.

We also proposed to remove the three-month period for requesting evidence that recommendations have been implemented and leave it to QCA discretion. The timeframe for requesting evidence is likely to depend on the implementation plan.

5.7.4 Stakeholders' comments on the consolidated draft decision

QRC said it maintained its position outlined in its April 2015 submission with respect to reporting matters and did not provide any further comments.³⁶⁷

Asciano raised concerns that the auditor appointment and replacement process effectively allows Aurizon Network to direct the selection of an auditor favoured by it. Asciano's preference is for the QCA to make such decisions and reiterated its previous proposals it said would improve the transparency of the audits.³⁶⁸

Aurizon Network said that it was:

- unnecessary for the QCA to be provided with draft audit reports at the same time as Aurizon Network as this could slow down the process, or result in the QCA receiving factually incorrect or misleading information
- appropriate to give Aurizon Network a right to request the appointment of a replacement Auditor for QCA approval
- concerned about obligations requiring Aurizon Network to implement the auditor's final recommendations
- of the view that an auditor should not be able to effectively require an amendment to the undertaking.

A primary concern for Aurizon Network was that requiring clauses 10.6.4(k), (l), and (m) of the CDD amended DAU were beyond the power of the QCA.³⁶⁹

Separately, Aurizon Network submitted drafting amendments to audit requirements.³⁷⁰ This included changing the title of "Conflicts audit" to "Ring-fencing audit" and consequential amendments in light of its proposed amendments to clauses 10.6.4(k), (l), and (m).

5.7.5 QCA analysis and final decision

Our final decision is to refuse to approve the audit arrangements proposed by Aurizon Network in its 2014 DAU.

We do not accept that providing copies of draft audit reports would slow down the audit process and that the QCA being kept informed would be an overly onerous burden on Aurizon Network.

We consider that our proposed approach addresses Asciano's substantive concerns as to the appropriate auditor selection and replacement processes as well as development of an effective audit plan.

We consider the right to request the appointment of a replacement auditor is workable, noting Aurizon Network can approach the QCA to approve a replacement auditor.

³⁶⁷ QRC, 2014 DAU, sub. 125: 5.

³⁶⁸ Asciano, 2014 DAU, sub. 126: 16-17.

³⁶⁹ Aurizon Network, 2014 DAU, sub. 125: 89-90.

³⁷⁰ Aurizon Network, 2014 DAU, sub. 132: 16-19.

Aurizon Network has raised concerns with clauses 10.6.4(k), (l) and (m) of the DAU with regard to obligations requiring Aurizon Network to implement an auditor's final recommendations. We have amended these provisions in our final amended DAU where we consider Aurizon Network's concerns are valid.

The objective and focus of these provisions provides for an auditor to identify and suggest ways in which Aurizon Network can improve its compliance with the DAU. We consider that it is important for the QCA to have information regarding Aurizon Network's failure to comply with its undertaking obligations and to progress remedial steps towards implementation. To ensure this is the effect of the clause, we have re-focused clause 10.6.4 to emphasise the need for Aurizon Network to use reasonable endeavours to take appropriate steps to implement the auditor's recommendations and to provide all documents and information in its possession that relate to its failure to comply with a direction from the QCA to use reasonable endeavours to implement the auditor's recommendations. This is an appropriate position having regard to the QCA's power under section 150AA of the QCA Act to investigate and compel the production of information.

Overall, we propose amendments that seek to balance Aurizon Network's concerns against the need for effective implementation of the obligations set out in the DAU.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 10 of the 2014 DAU in order for it to be approved are set out in final amended DAU.

Final decision 5.5

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the audit arrangements.**
- (2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) include requirements for annual audits of Aurizon Network's compliance with its ring-fencing and other obligations, and audits (at least annually) of its reporting obligations (cl. 10.6.1 and 10.6.2 of the final amended DAU)**
 - (b) include a requirement for the auditor to provide draft reports to the QCA (cl. 10.6.4(i) of the final amended DAU)**
 - (c) include a requirement for Aurizon Network to prepare a plan for the implementation of audit recommendations and to provide evidence that the recommendations have been implemented (cl. 10.6.4(k)-(m) of the final amended DAU)**
 - (d) make other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

5.8 General matters and information provision

Issues dealt with in this section relate to general requirements, namely correcting errors in public reports; how performance information will be provided in the reports (i.e. by coal system

or disaggregated further); and certifications provided with some reports from Aurizon Network's Executive Officer to verify the information.

Also dealt with are requirements allowing the QCA to request information from Aurizon Network throughout the regulatory period if reasonably required, including signed access agreements.

5.8.1 Aurizon Network's proposal

Under the 2014 DAU, Aurizon Network proposed the following general requirements relating to reporting to:³⁷¹

- correct material errors in its annual compliance, maintenance and quarterly reports within three months of identifying the error. This relates to numerical errors of more than 2%, or otherwise errors determined as material by the QCA (cl. 10.1.2(b), 10.1.3(d), 10.1.5(k))³⁷²
- provide information in the reports separately for each coal system for the maintenance and quarterly network performance reports and the RAB roll-forward report, with the exception of GAPE³⁷³ for reporting maintenance (e.g. cl. 10.1.3(c) and 10.1.4(c)) and most of the quarterly performance indicators (cl. 10.1.5)
- provide certifications of accuracy with the financial report and the maintenance cost report to the QCA (cl. 10.11 and 10.1.4(b)), noting that in providing certification, the Executive Officer relies on information prepared by others and this reliance is deemed reasonable unless proved otherwise.

The 2014 DAU also contains information gathering powers for the QCA. These arrangements allow us to request information from Aurizon Network reasonably required to perform our functions (cl. 10.3.2), including signed access agreements (cl. 10.3.1). On this, the QCA must not publish (or disclose) information provided, except where the undertaking already provides for that information to be public.

5.8.2 Summary of our initial draft decision

Our initial draft decision accepted many aspects of Aurizon Network's proposals. In particular, we accepted:

- there would be some exclusions to the separate reporting of the GAPE (and NAPE) coal systems in the maintenance cost and network performance reports
- it was appropriate for Aurizon Network's Executive Officer to certify relevant reports as accurate, including reasonably relying on information or advice provided by others.

Notwithstanding our acceptance of most of Aurizon Network's proposals, our initial draft decision refused to approve specific provisions (taking into account the factors in section 138(2) of the QCA Act), which we considered did not sufficiently achieve the objectives outlined above. We considered the 2014 DAU should be amended to:

- Streamline the error provisions by removing them from multiple reporting requirements and including one general error provision to apply to all reporting.

³⁷¹ Clause references in this section refer to Aurizon Network's 2014 DAU.

³⁷² These clauses refer to the annual compliance report, annual maintenance cost report and quarterly network performance report respectively.

³⁷³ The Newlands to Abbot Point System (NAPE) was not included as a separate system in Aurizon Network's definition of 'Coal System'.

- Further disaggregate information. For instance, while we accepted the GAPE information reporting requirements, we proposed a requirement so that, unless agreed between Aurizon Network and QCA, it would report maintenance information separately for rail infrastructure where scope and cost estimates have been accepted for the purpose of determining reference tariffs.

With regard to information gathering requirements, we proposed amendments to require Aurizon Network to disclose non-standard access agreements to us within five days of signing them. We also proposed amendments to require Aurizon Network to provide an explanation of substantial differences between the non-standard and standard agreements. We considered this would give confidence to access holders and their customers that information is available to allow an assessment of non-discrimination obligations in the undertaking.

5.8.3 Stakeholders' comments on our initial draft decision

Stakeholders' comments largely focussed on information gathering powers and, in particular, the disclosure of access agreements.

Aurizon Network disagreed with the proposed requirements on non-standard access agreements. It said our role is to ensure there is no unfair differentiation between access holders that has a material impact on their ability to compete, not to review every access agreement to ensure no discriminatory treatment between access holders, particularly where the provisions have been negotiated and agreed between the parties. In addition, it noted section 103 of the QCA Act could be used by the QCA to request copies of an access agreement.³⁷⁴

Stakeholders supported the arrangements, but raised concerns around the broader restrictions of disclosing access agreements and what actions were available to us in the event we found discriminatory treatment.

The QRC said our right to publish the 'below rail' aspects of access agreements that existed under the 2010 AU should be reinstated. It also said that the proposed provisions could result in unreasonable withholding of information and loss of transparency because the QCA cannot publish access agreements without the consent of Aurizon Network and the access holder. This gives stakeholders no confidence about the non-discriminatory treatment by Aurizon Network.³⁷⁵

Asciano said we should explain the consequences of obtaining a non-standard agreement showing Aurizon Network to be in breach of obligations relating to non-discriminatory treatment. It also queried whether parties to non-standard access agreements would be obliged to re-negotiate terms to reflect the standard access agreement, or whether Aurizon Network would be required to offer the same non-standard terms to other parties.³⁷⁶

On other matters, QRC said it agreed with our changes to consolidate the error provisions, but Aurizon Network should be given one month (not three), to rectify material errors in reports and should notify the QCA of errors promptly.³⁷⁷ QRC also said that the QCA should be able to request advice relied upon by the Executive Officer when providing certification.³⁷⁸

³⁷⁴ Aurizon Network, 2014 DAU, sub. 83: 92–93.

³⁷⁵ QRC, 2014 DAU, sub. 84: 108.

³⁷⁶ Asciano, 2014 DAU, sub. 76: 21.

³⁷⁷ QRC, 2014 DAU, sub. 84: 108.

³⁷⁸ QRC, 2014 DAU, sub. 84: 109.

5.8.4 Consolidated draft decision

We largely accepted Aurizon Network's proposed arrangements. In reaching our consolidated draft decision, we considered the QRC's comments about reducing the time to rectify material errors, but have maintained our view that the requirement for Aurizon Network to correct material errors in reports within three months is reasonable. It is less than the six-month timeframe that currently applies, and means corrected information is made public in a timelier manner. We also did not consider it appropriate to include a provision for the QCA to request advice relied upon by the Executive Officer, as suggested by the QRC, because there are already information gathering powers in the 2014 DAU (see cl. 10.7.1 of the CDD amended DAU).

With respect to non-standard access agreements, we no longer considered our initial draft decision amendments appropriately balanced the interests we were required to take into account under section 138(2) of the QCA Act. We can request information, including agreements, from Aurizon Network at any time under our general information gathering powers and, as such, this is all that is required to meet the interests of all parties, including Aurizon Network's legitimate interests and our interests in an effective regime.

However, having taken into account stakeholder comments, and having regard to the factors in section 138(2) of the QCA Act, we maintained our initial draft decision to not approve certain provisions, being those marked-up in the CDD amended DAU. In reaching our view, an issue we considered relevant was the degree to which the 2014 DAU was effective, transparent and promoted confidence in the regime (s. 138(2)(h) of the QCA Act). We further considered and agreed with stakeholders that transparency is important and assists in providing confidence that access holders and access seekers are being treated equally. We considered the provisions identified fail to achieve a sufficient degree of confidence and transparency.

Drafting changes to the 2014 DAU

The way in which we considered it appropriate to amend Aurizon Network's 2014 DAU was as follows.

Consistent with our initial draft decision, we proposed the 2014 DAU be amended to include consolidated error provisions. This provides consistency and avoids unnecessary duplication.

In our consolidated draft decision, we proposed consolidating all provisions relating to how information in reports would be presented, by removing the requirements from each of the individual reports (where relevant) and having one provision in this 'general matters' section. This provision sets out a default position that information will be reported by coal system and separately for rail infrastructure for which one or more reference tariffs apply, unless otherwise agreed between Aurizon Network and the QCA.

This default position does two things. It acts as a minimum level of information to be provided to stakeholders over time and provides us and Aurizon Network with flexibility to change if needed. This provides greater clarity and avoids unnecessary duplication of drafting.

We also considered there was merit in amending the current 2014 DAU provisions, by adopting provisions from the 2010 AU to:

- Allow the below-rail aspects of signed access agreements to be published. As such, we proposed amending the information gathering provisions to allow for this.
- Allow for parties to request certain information not be disclosed when it would be likely to damage their commercial interests.

We considered the proposed amendments appropriately balance the interests of the various parties and protect the legitimate business interests of Aurizon Network and access holders.

5.8.5 Stakeholders' comments on the consolidated draft decision

QRC said it maintained its position outlined in its April 2015 submission with respect to reporting matters and did not provide any further comments.³⁷⁹

Asciano suggested that clause 10.7.1 (a) should be amended to require Aurizon Network to provide the QCA with an explanation of the differences between a non-standard agreement and the standard access agreement where these were substantial.³⁸⁰

Aurizon Network reiterated its position that reporting on coal system basis was not appropriate for GAPE in all circumstances.³⁸¹

5.8.6 QCA analysis and final decision

Our final decision is to refuse to approve the reporting arrangements proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. However, we remain of the view our analysis, reasoning and decision in our CDD remains appropriate and the additional issues raised do not require further amendment to the proposed undertaking contained in our CDD. As such, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above.

We note that our proposed CDD amended DAU drafting required a minor amendment to achieve our policy intent to streamline the error provisions. That is, having one general error provision to apply to all reports published under Part 10. This issue has been addressed in clause 10.7.2(b).

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 10 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

³⁷⁹ QRC, 2014 DAU, sub. 124: 5.

³⁸⁰ Asciano, 2014 DAU, sub. 126: 17.

³⁸¹ Aurizon Network, 2014 DAU, sub. 125: 83.

Final decision 5.6

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the general reporting arrangements.**
- (2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) consolidate provisions relating to:**
 - (i) errors in reports – one provision applies to all reports in Part 10, that requires Aurizon Network to rectify material errors found in reports within three months (cl. 10.7.2 of the final amended DAU)**
 - (ii) reporting by coal system – all reports require Aurizon Network to provide information by coal system, and separately for rail infrastructure where one or more reference tariff applies, unless agreed otherwise between Aurizon Network and the QCA (cl. 10.2 of the final amended DAU)**
 - (iii) information gathering – general information gathering powers and disclosing access agreements is provided for. At the same time, include requirements that allow us to publish below-rail aspects of the access agreements, subject to certain conditions as discussed above and set out in our drafting (cl. 10.7.1(c)-(d) of the final amended DAU)**
 - (b) make other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

6 DISPUTE RESOLUTION AND DECISION MAKING

A robust, cost-effective and binding dispute resolution mechanism is an important part of the undertaking. When disputes are resolved in a fair and timely way, parties can be confident that negotiations will proceed in a meaningful manner in accordance with the intent, obligations and processes of the undertaking. An effective dispute resolution mechanism also makes parties accountable for their conduct.

Our final decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism in Part 11 of the 2014 DAU. In our view, the proposed mechanism does not provide an appropriate balance between the rights and interests of Aurizon Network and other parties. We have proposed amendments to:

- *broaden the scope of the dispute resolution mechanism so that it can be accessed for a broader range of disputes by a broader range of parties*
- *refine the processes, procedures and obligations on parties to resolve disputes, including providing for disputes to be referred to the QCA when the parties cannot agree on how to progress the dispute.*

Our final decision is consistent with our draft decisions, although we have made some further amendments to reflect the intent of our decision, and to clarify and refine the arrangements. A key issue raised by Aurizon Network in response to our consolidated draft decision was that the QCA does not have the power to broaden the scope of the dispute resolution mechanism to include disputes not covered by the arbitration regime in the QCA Act. While we disagree with Aurizon Network's contention, we consider that further amendments are required to reflect the intent of our decision.

We consider that our amendments will result in a dispute resolution mechanism that more appropriately balances the rights and interests of the various parties. This will promote successful negotiations and increase stakeholder confidence, which will in turn promote the efficient use of the declared service.

The detailed drafting of Part 11 in the final amended DAU is consistent with our approach and shows all the amendments required for us to consider the drafting appropriate in accordance with section 138(2) of the QCA Act.

6.1 Introduction

The third party access regime in the QCA Act is underpinned by a negotiate–arbitrate approach to regulation, which acknowledges the 'primacy of contractual negotiations'. Parties negotiate with Aurizon Network to, among other things, access and operate on the CQCN, develop funding arrangements for network expansions, and connect private infrastructure.

The dispute resolution mechanism in the access undertaking plays two critical roles:

- supporting the 'negotiate–arbitrate' framework by providing a formal process for the resolution of disputes
- maintaining Aurizon Network's accountability by providing parties with a means to instigate formal investigations on potential breaches of the undertaking.

A robust and cost-effective process, which stakeholders can rely on to achieve timely resolution of disputes, is consistent with the overarching objective of providing access to the relevant services efficiently.

6.2 Overview

6.2.1 Aurizon Network's proposal

Aurizon Network sought to move away from the 2010 AU approach of providing 'umbrella' provisions to deal with all disputes under the undertaking.³⁸² Aurizon Network proposed a framework to provide for the resolution of disputes:

- between Aurizon Network, access seekers and train operators about the negotiation of access and train operations agreements, and Aurizon Network's obligations in the undertaking
- between Aurizon Network and other parties in relation to matters that are required by the undertaking to be resolved in accordance with Part 11.

Aurizon Network proposed that the dispute resolution framework would not apply to disputes about Aurizon Network's compliance with ring-fencing and reporting obligations. It instead proposed to rely on the complaint and audit mechanisms in the ring-fencing and reporting parts of the 2014 DAU (Parts 3 and 10).

It also proposed that the dispute resolution framework would not apply to disputes under executed agreements, such as access agreements, which would be dealt with in accordance with the provisions in those agreements.³⁸³

For most disputes, Aurizon Network proposed a staged resolution process. This would begin with the parties attempting to resolve the dispute between themselves (chief executive resolution), followed by mediation and then external determination (by an expert or the QCA).³⁸⁴ Aurizon Network considered that this approach was cost-effective and maximised the likelihood that parties would resolve the issue between themselves for mutual benefit rather than escalating disputes to third parties for resolution.³⁸⁵

Part 11 of the 2014 DAU also sets out procedures where a dispute is referred to an expert or the QCA for determination (cl. 11.1.4, 11.1.5 and 11.1.6). These include obligations intended to replicate the *Judicial Review Act 1991* (Qld), which the QCA is required to follow when making any decision under the access undertaking (cl. 11.2). Aurizon Network said that replicating these obligations is necessary because decisions in relation to the undertaking are not made 'under an enactment'.³⁸⁶

6.2.2 Legislative framework

We are required to assess Aurizon Network's dispute resolution proposals having regard to the factors in section 138(2) of the QCA Act, as set out in Chapter 2.

³⁸² Aurizon Network, 2014 DAU, sub. 3: 271–272.

³⁸³ This could include access agreements, TOAs, rail connection agreements and agreements for user-funded expansions.

³⁸⁴ Some disputes under the 2014 DAU can be fast-tracked to the QCA or expert.

³⁸⁵ Aurizon Network, 2013 DAU, sub. 2: 311.

³⁸⁶ Aurizon Network, 2014 DAU, sub. 4: 284.

Section 138(2)(a) of the QCA Act requires the QCA to have regard to the object of Part 5 of the QCA Act. We consider this means the dispute resolution mechanism should be sufficiently transparent, timely and effective to provide confidence and certainty to Aurizon Network and other parties, to promote efficient use of and investment in the declared service and effective competition in related markets. This is also consistent with section 138(2)(d) of the QCA Act, which requires the QCA to have regard to the public interest, including the public interest in having competition in markets.

Section 138(2)(b) of the QCA Act requires the QCA to have regard to the legitimate business interests of Aurizon Network. Aurizon Network's legitimate business interests include resolving disputes in a timely and cost-effective way and dealing only with genuine disputes, but do not extend to delaying negotiations to extract higher access charges or better terms and conditions.

Section 138(2)(e) of the QCA Act requires that we have regard to the interests of access seekers. We also consider the interests of other parties are relevant under section 138(2)(h). Access seekers and other affected parties need to be confident that the dispute resolution mechanism will operate transparently and effectively, including resolving disputes in a timely manner. Among other things, it provides greater certainty in negotiations and outcomes, saves additional time and cost and promotes a more even bargaining position. Section 138(2)(h) is also relevant because we consider that clarity and certainty are important considerations in our assessment of the dispute resolution mechanism.

We consider these various interests are appropriately balanced when the dispute resolution mechanism:

- clearly identifies the matters that can be disputed, and those who can be party to a dispute
- provides a simple and timely process for resolving disputes, which is cost-effective and available to all relevant parties
- clearly defines processes, procedures and obligations, so that they are readily understood by parties and relatively simple to administer
- enhances the balance of information between parties and provides transparency and accountability of Aurizon Network's decision-making
- encourages effective negotiation and customer engagement, maximising the opportunity for a negotiated outcome—while resolving remaining disputed matters in an expedient and balanced way
- discourages frivolous or vexatious disputes.

6.2.3 QCA's approach

We assessed Aurizon Network's proposed dispute resolution process against the matters outlined above. This was necessary for us to consider that the process is appropriate under section 138(2) of the QCA Act.

Having considered the section 138(2) factors, as applied in the manner set out above, our final decision is to not approve Aurizon Network's proposed dispute resolution mechanism. We have proposed amendments in the final amended DAU, which address the reasons why we do not consider it appropriate to approve Aurizon Network's proposal. These include:

- broadening the Part 11 dispute resolution provisions to apply generally to Aurizon Network's obligations in the access undertaking and ensuring dispute resolution is available to all relevant parties

- amending the processes, procedures and obligations on parties to resolve disputes, to provide certainty should the matter come to dispute, without being unnecessarily prescriptive or onerous.

We have also proposed drafting amendments to simplify the access undertaking and improve clarity and certainty.

Further detail of the reasons for our final decision is set out in this chapter. Our more detailed consideration is reflected in the marked-up drafting of Part 11 of the final amended DAU.

6.3 Scope of the dispute resolution process

6.3.1 Aurizon Network's proposal

Part 11 of the 2014 DAU provides a dispute resolution mechanism that applies to disputes between Aurizon Network, access seekers and train operators about Aurizon Network's obligations under the undertaking. However, disputes about ring-fencing and reporting obligations are dealt with by the accountability mechanisms in Parts 3 and 10.³⁸⁷

Disputes with other parties (including access holders) are dealt with under the Part 11 provisions to the extent they are related to matters the 2014 DAU expressly requires to be resolved in accordance with Part 11.³⁸⁸

The 2014 DAU also provides that the dispute provisions in an executed access agreement or train operations agreement take precedence over Part 11 provisions, unless the disputing parties agree otherwise.³⁸⁹

The Part 11 provisions in the 2014 DAU have moved away from the 2010 AU 'umbrella' approach to disputes (where any party could dispute a matter) to primarily addressing concerns of access seekers and train operators.

6.3.2 Summary of the initial draft decision

Our initial draft decision was to refuse to approve the scope of Aurizon Network's proposed dispute resolution mechanism, because we did not consider it appropriate to do so having regard to the factors in section 138(2) of the QCA Act.

While we considered that Part 11 of the 2014 DAU was comprehensive from the perspective of access seekers and train operators, we considered it did not adequately accommodate other parties, such as access holders. To address this, we proposed amendments to the 2014 DAU (having regard to these factors and the views of stakeholders)³⁹⁰ to:

- broaden the scope of the dispute resolution mechanism to allow any party to refer any dispute about the operation of the undertaking³⁹¹
- consolidate dispute resolution arrangements in the undertaking and streamline the approach in other parts of the 2014 DAU.

Our proposed amendments largely reinstated the 2010 AU approach to dispute resolution. We also proposed amendments to address Aurizon Network's concerns that a broader scope would

³⁸⁷ Clause 11.1.1(a) of the 2014 DAU.

³⁸⁸ Clause 11.1.1(a) of the 2014 DAU.

³⁸⁹ Clause 11.1.1(b) of the 2014 DAU.

³⁹⁰ Anglo American, 2013 DAU, sub. 78: 42; Asciano, 2014 DAU, sub. 22: 43, 130; QRC, 2014 DAU, sub. 42: 55–6.

³⁹¹ Clause 11.1.1(a) of the IDD amended DAU.

result in frivolous or vexatious disputes. For disputes that are unresolved at the chief executive resolution stage and directly escalated to us for determination, we noted that we could order full costs to the referring party if we considered the dispute to be vexatious.³⁹² We considered that this approach was consistent with the rights and interests of Aurizon Network and other parties.

We also proposed drafting amendments to related provisions in the 2014 DAU³⁹³ to improve clarity and certainty.

6.3.3 Stakeholders' comments on the initial draft decision

Aurizon Network considered that the scope of the dispute resolution mechanism set out in the IDD amended DAU was too broad. In particular, it considered that the only parties that should have the right to dispute are users.³⁹⁴

Anglo American supported the QCA's proposed amendments³⁹⁵, but QRC and Vale considered the QCA's proposed approach did not accommodate a sufficiently broad range of disputes.³⁹⁶

Specific issues raised by stakeholders are addressed below. Issues raised by Aurizon Network regarding the application of Part 11 to disputes about the sale and supply of electricity and SUFA are addressed in Chapters 3 and 12.

6.3.4 Consolidated draft decision

Having regard to the criteria in section 138(2) of the QCA Act and stakeholder submissions, we did not consider it appropriate to approve the scope of Aurizon Network's 2014 DAU dispute resolution mechanism. However, we proposed some further amendments in response to submissions. The reasons for our consolidated draft decision are set out below, along with the amendments we considered appropriate to approve it.

Matters that can be the subject of disputes

Vale suggested there should be no restriction on the matters that may be referred for resolution.³⁹⁷ We did not consider it appropriate to expand the scope of disputes to matters beyond access negotiations and obligations in the undertaking because it would be inconsistent with the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act). We considered that there should be an appropriate restriction on the types of matters the mechanism can resolve. Expanding the scope would also potentially exceed our powers under the QCA Act.

QRC contended that a dispute would not accommodate anything required 'not to be done' in the undertaking.³⁹⁸ We disagreed with this contention. However, we proposed amendments to clause 11.1.1(a)(ii) of the CDD amended DAU to avoid doubt.

³⁹² QCA Act, section 208.

³⁹³ Parts 2, 3, 8, 11 and Schedule G.

³⁹⁴ Aurizon Network, 2014 DAU, sub. 83: 97.

³⁹⁵ Anglo American, 2014 DAU, sub. 95:38–39.

³⁹⁶ QRC, 2014 DAU, sub. 84: 111–112; Vale, 2014 DAU, sub. 79: 8.

³⁹⁷ Vale, 2014 DAU, sub. 79: 8.

³⁹⁸ QRC, 2014 DAU, sub. 84: 112.

Parties that have the right to dispute

Aurizon Network considered that allowing any party to raise a dispute would increase the risk of frivolous and vexatious claims. Aurizon Network raised the possibility that a party could make a claim with the aim of delaying a competitor's development because the commercial benefits may outweigh the costs.³⁹⁹

While we acknowledged this possibility, we considered that identifying all parties that may have legitimate grounds to raise a dispute about matters in the undertaking risked excluding parties that have a legitimate claim. We also considered that the requirement to keep the QCA informed about disputes, starting from when they are first notified⁴⁰⁰, would help us to quickly identify disputes of a frivolous or vexatious nature if they were referred to us.

In contrast to Aurizon Network, QRC and Vale argued that dispute rights should be further expanded to other parties.⁴⁰¹ After reconsidering our position, we were of the view that prospective access seekers may also have legitimate disputes in relation to the negotiation of access and proposed amendments to accommodate them.

The QRC also considered that the clause allowing train operators and access seekers to become parties to a dispute by election does not go far enough.⁴⁰² We considered that customers may have legitimate reasons to join a dispute and proposed the amendments we considered necessary, but did not consider there was justification to expand dispute resolution rights further.

Having regard to the factors in section 138(2) of the QCA Act, we considered that the scope of the dispute resolution mechanism in terms of the parties that have the right to access the process needed to be broader than that proposed by Aurizon Network. It was our view that the dispute resolution mechanism should allow any party to refer any dispute about the operation of the undertaking in accordance with the dispute resolution provisions. We considered this would adequately balance Aurizon Network's legitimate business interests (s. 138(2)(b)) and the interests of access seekers and other relevant parties (s. 138(2)(e) and (h)) since it would allow equal access to a formal dispute resolution mechanism.

Disputes about Access Agreements and Train Operations Deeds

Aurizon Network considered the proposed approach of incorporating certain provisions in the AA and TOD by reference to the undertaking duplicates dispute resolution provisions, making it unclear which procedure would apply in the event of a dispute. Aurizon Network argued that this ambiguity should be resolved so that it is clear that disputes about an executed AA or TOD are to be resolved in accordance with the provisions in the executed agreement. To address this ambiguity, Aurizon Network supported retaining the position under the 2010 AU.⁴⁰³

On the other hand, Asciano considered that there should be an option to resolve disputes about a Standard Access Agreement (SAA) or Standard Train Operations Deed (STOD) in accordance with the undertaking because they are instruments under the access undertaking.⁴⁰⁴

³⁹⁹ Aurizon Network, 2014 DAU, sub. 83: 97.

⁴⁰⁰ See clause 11.1.1(g) of the CDD amended DAU.

⁴⁰¹ QRC, 2014 DAU, sub. 84: 111; Vale, 2014 DAU, sub. 79: 8.

⁴⁰² QRC, 2014 DAU, sub. 84: 111.

⁴⁰³ Aurizon Network, 2014 DAU, sub. 83: 96–97.

⁴⁰⁴ Asciano, 2014 DAU, sub. 76: 21–22.

We maintained our view that disputes about access agreements should be resolved in accordance with the provisions in the agreement, unless otherwise agreed by the disputing parties. Having regard to the factors in section 138(2) of the QCA Act, we considered this was appropriate as it adequately balanced Aurizon Network's legitimate business interests under section 138(2)(b) with the interests of access seekers, access holders and train operators (under s. 138(2)(e) and (h)), since it would provide greater certainty in contractual negotiations. We also considered this would support the public interest (s. 138(2)(d)) since it would allow parties to negotiate contracts freely and with certainty, without causing unnecessary regulatory intervention. We proposed amendments to clause 11.1.1(c) and (d) in the CDD amended DAU to make this clearer, particularly in response to Aurizon Network's concerns.

Conclusion

Overall, for the reasons set out above, we did not consider it appropriate to approve the 2014 DAU in respect of the scope of the proposed dispute resolution mechanism. We considered that the scope of the mechanism was not appropriate, as it was too narrow. We noted that the proposed mechanism only accommodated disputes about Aurizon Network's obligations in the undertaking that are referred by access seekers and train operators and excluded other relevant parties such as access holders, prospective access seekers and customers. We considered this would potentially enable Aurizon Network to exercise market power by limiting the scope for dispute resolution.

As a result, we considered the mechanism did not adequately balance the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act) with the interests of other parties (s. 138(2)(e) and (h)). We also considered that the mechanism was insufficiently clear and certain (s. 138(2)(h)).

Therefore, we maintained our initial draft decision that an appropriate mechanism would have a wider scope than proposed by Aurizon Network, and also proposed some amendments in response to submissions to clarify the process.

6.3.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network again raised concerns about broadening the scope of the dispute resolution mechanism. Aurizon Network submitted that the QCA does not have the power to broaden the scope of the mechanism beyond disputes covered by the arbitration regime in Division 5 of Part 5 of the QCA Act.⁴⁰⁵

Aurizon Network was also concerned that the drafting in the CDD amended DAU would not prevent disputes in relation to agreements (such as access agreements and train operations deeds) from being covered by Part 11 of the undertaking.⁴⁰⁶

Anglo American submitted that an access holder should be able to bring a dispute where a decision relates to its coal system.⁴⁰⁷

- Aurizon Network also raised the following drafting issues:⁴⁰⁸

⁴⁰⁵ Aurizon Network, 2014 DAU, sub. 125: 91, 93–95.

⁴⁰⁶ Aurizon Network has proposed to address this issue by removing clause 11.1.1(d) of the CDD amended DAU. Aurizon Network, 2014 DAU, sub. 125: 93–95.

⁴⁰⁷ Anglo American, 2014 DAU, sub. 127: 6, 39.

⁴⁰⁸ Aurizon Network, 2014 DAU, sub. 125: 93, 95.

- The term 'prospective access seeker' should be defined (Aurizon Network proposed a definition that it considered would be consistent with the definition of 'access seeker' in the QCA Act).⁴⁰⁹
- References to 'customer' in clause 11.1.1(e) of the CDD amended DAU are inappropriate and should be deleted given the way that customer is defined.

6.3.6 QCA analysis and final decision

We disagree with Aurizon Network's contention that the QCA does not have the power to broaden the scope of the dispute resolution mechanism beyond those disputes covered by the arbitration regime in Division 5 of Part 5 of the QCA Act. We are satisfied that our proposal to expand the scope of the mechanism as set out in the final amended DAU is permissible under the QCA Act.

However, we consider that amendments to clause 11.1.5(c) of the CDD amended DAU are required to clarify that a dispute referred to the QCA for determination will be dealt with:

- in accordance with the arbitration procedures in the QCA Act, where it is a dispute for the purposes of Division 5 of Part 5 of the QCA Act
- in accordance with any process we consider appropriate, where it is not a dispute for the purposes of Division 5 of Part 5 of the QCA Act. Consistent with our view that the QCA should be allowed to order full costs to the referring party if the dispute is considered vexatious (see section 6.3.2 above), we also propose to incorporate section 208 of the QCA Act by reference.

We acknowledge Aurizon Network's concerns that our proposed amendments to clauses 11.1.1(c) and (d) of the CDD amended DAU may not be sufficient to prevent disputes in relation to agreements (such as access agreements and train operations deeds) from being covered by Part 11.

We maintain our view that disputes about agreements should be resolved in accordance with the provisions in those agreements (unless otherwise agreed by the disputing parties) and do not consider that clauses 11.1.1(c) and (d) extend to cover these disputes. Rather, we introduced paragraph (d) to clarify that parties to an agreement are not prohibited from raising a dispute by virtue of having an agreement, as long as the dispute does not relate to any right, obligation under, or enforcement of, that agreement. However, to address Aurizon Network's concerns, we have proposed further minor amendments to clarify the intent of these clauses.

We have addressed Aurizon Network's concerns about disputes in respect of provisions in the undertaking incorporated by reference into the AA and TOD in Chapter 8 (Access Agreements).

We do not consider that amendments are required to address Anglo American's concern that that an access holder should be able to bring a dispute where a decision relates to its coal system. This right already exists under clause 11.1.1(a)(ii) and (iii).

In response to the drafting matters raised by Aurizon Network:

- (a) we propose to accept the proposed definition of 'prospective access seeker' as it helps to clarify the meaning of the term and is consistent with the definition of 'access seeker'

⁴⁰⁹ We also note that Asciano supported allowing prospective access seekers to be parties to disputes (Asciano, 2014 DAU, sub. 126: 17).

- (b) we do not consider that Aurizon Network has justified removing 'customers' from clause 11.1.1(e).

Aurizon Network's submission highlighted that the current drafting of clause 11.1.1(e) may not be sufficient to capture all interested parties that may have legitimate reasons to be notified of, and be able to join, a dispute. We have therefore proposed further amendments to clause 11.1.1(e) to include prospective access seekers and access holders and to change references to 'train operator' to 'railway operator'. We consider our proposed amendments better reflect the intent of this clause and clause 11.1.1(a).

Conclusion

Our final decision is to refuse to approve the scope of the dispute resolution mechanism proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in the CDD are appropriate. In particular, we disagree with Aurizon Network's contention that the QCA does not have the power to broaden the scope of the dispute resolution mechanism to include disputes not covered by the arbitration regime in the QCA Act. However, we have proposed further drafting amendments to reflect the intent of our decision and to improve clarity, as discussed above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above. The amendments we consider appropriate to be made to Part 11 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 6.1

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the scope of the dispute resolution mechanism.**
- (2) The way in which we consider it appropriate that Aurizon Network amends its draft access undertaking is to:**
 - (a) expand the scope of the dispute resolution mechanism so that it accommodates disputes about:**
 - (i) the operation of, or anything required to be done or not done by Aurizon Network, under the undertaking**
 - (ii) the negotiation of access to prospective access seekers, not just access seekers and railway operators**
 - (iii) any matter expressly required by the Undertaking.**
 - (b) make other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

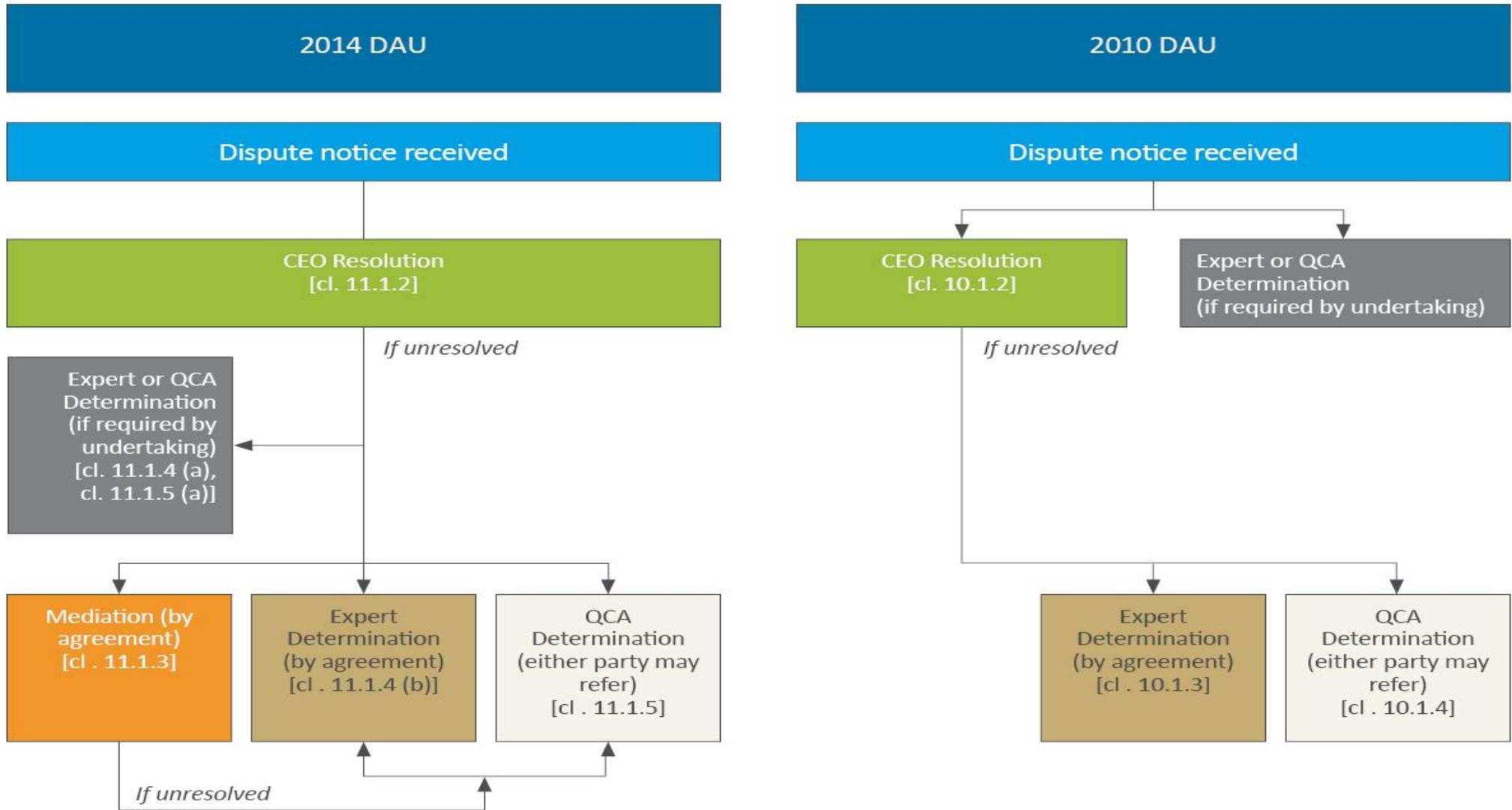
6.4 Refining processes, procedures and obligations

6.4.1 Aurizon Network's proposal

Aurizon Network's proposed dispute resolution mechanism provides a staged process for the resolution of disputes (Figure 2), timeframes for each stage of the process and guidance on allocating the costs of resolving disputes between the parties.⁴¹⁰

⁴¹⁰ Clauses 11.1.3(a), 11.1.4, 11.1.5 and 11.1.6 of the 2014 DAU.

Figure 2 Aurizon Network's proposed dispute resolution processes compared to the 2010 AU



6.4.2 Summary of our initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposed processes, procedures and obligations in the dispute resolution mechanism, because we did not consider it appropriate to approve them, having regard to the factors in section 138(2) of the QCA Act.

As discussed in more detail in section 6.4.3 of the initial draft decision, we proposed the following amendments:⁴¹¹

- limiting delays by providing for disputes to be referred to the QCA for resolution if parties cannot agree how to proceed (cls. 11.1.2(d), 11.1.3(d)(iv), 11.1.4(g), 11.1.5)
- improving transparency about the operation of the undertaking and incentivising the timely resolution of disputes by requiring Aurizon Network to keep the QCA informed about the progress of a dispute, including its outcome (cl. 11.1.1(g))
- avoiding duplication by simplifying processes and procedures for QCA determinations (cls. 11.1.5, 11.1.6)
- improving certainty and the meaningful resolution of disputes by clarifying that disputes resolved by an expert or the QCA are binding (cl. 11.1.6(b)).

These amendments also sought to address the key issues raised by stakeholders concerning the need to increase the effectiveness and efficiency of the dispute resolution mechanism. We considered these amendments were required to make the 2014 DAU appropriate for our approval under section 138(2) of the QCA Act, particularly with regard to the need to appropriately balance the rights and interests of Aurizon Network and other parties.

6.4.3 Stakeholders' comments on the initial draft decision

The QRC and Asciano⁴¹² were generally supportive of the QCA's proposed amendments. Aurizon Network supported the rationale for making dispute resolution processes more robust and cost effective, but did not consider this would be achieved by the proposed amendments.⁴¹³ Our response to specific issues raised by stakeholders is provided below.

6.4.4 Consolidated draft decision

Staged dispute process

As discussed in section 6.4.3 of the initial draft decision, we considered a staged resolution process, with an emphasis on commercial negotiation and appropriate timeframes, was appropriate, cost effective and consistent with the timely resolution of disputes. We therefore considered a staged approach would be consistent with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act), the interests of access seekers and access holders (s. 138(2)(e) and (h)), and the public interest (s. 138(2)(d)).

However, we maintained our initial draft decision that it was not appropriate to approve Aurizon Network's proposed dispute resolution process overall on the basis that it did not:

- include a provision for either party to refer a dispute to the QCA if the parties could not reach a resolution and could not agree how to proceed. We considered this provision was required for the timely and effective resolution of disputes. It was our view that this would

⁴¹¹ Clause references that follow refer to the IDD amended DAU.

⁴¹² QRC, 2014 DAU, sub. 42: 111–117; Asciano, 2014 DAU, sub. 76: 7, 21–22.

⁴¹³ Aurizon Network, 2014 DAU, sub. 83: 95.

provide confidence and certainty to both Aurizon Network and other parties, which would be in their interests (s. 138(2)(b), (e) and (h) of the QCA Act) and would promote efficient use of and investment in the declared service (s. 138(2)(a))

- provide an option for the QCA to refer a matter to an expert if requested by the parties, which we considered would recognise that some matters are best determined by experts.⁴¹⁴ It was our view that this would serve the interests of Aurizon Network and other parties (s. 138(2)(b), (e) and (h)) as it would provide for a dispute to ultimately be resolved by the independent party most qualified to resolve it.

The amendments we proposed in the IDD amended DAU addressed these issues, and we considered these amendments remained appropriate in the context of our consolidated draft decision.

Keeping the QCA informed about the progress and outcome of disputes

Aurizon Network disagreed with our initial draft decision not to approve its proposed dispute resolution process because it did not include a requirement to keep the QCA informed about the progress of a dispute. Aurizon Network also disagreed with the amendments we proposed to address this issue, which required Aurizon Network to provide any notices and formal correspondence about the dispute to the QCA, including its outcome (cl. 11.1.1(g) of the IDD amended DAU). Aurizon Network argued that this requirement would be impractical, time consuming and increase its administrative burden.⁴¹⁵

We reiterated our view in the initial draft decision that we did not consider it appropriate to approve a dispute resolution process that provided for insufficient transparency and oversight. We considered that an appropriate level of transparency and oversight would encourage the timely resolution of disputes and provide insights into the operation of the undertaking, which would be in the interests of Aurizon Network and other parties (s. 138(2)(b), (e) and (h) of the QCA Act), as well as the public interest (s. 138(2)(d)). We considered that the benefit of increased transparency would outweigh the administration costs.

However, we agreed with Aurizon Network that the inclusion of 'question' in the definition of 'dispute' could mean that the QCA must be advised of any questions formally raised by a party on Aurizon Network's obligations.⁴¹⁶ This was not our intention. We only considered it necessary for the QCA to be informed about disputes, not questions. Therefore, we proposed to revert to Aurizon Network's proposed definition of 'dispute', which does not include questions.⁴¹⁷

The QRC preferred clear timeframes for providing information to ensure certainty of process.⁴¹⁸ We agreed that, to overcome the issue of insufficient transparency and oversight, notices and correspondence needed to be provided in a timely manner. Therefore, we proposed amendments to require the information to be provided promptly.

Procedures for QCA determinations

As in our initial draft decision, we did not approve the proposed procedures for QCA determinations (cls. 11.1.5 and 11.1.6 of the 2014 DAU). Having regard to section 138(2)(h) of

⁴¹⁴ Cl. 11.1.5(b) of the CDD amended DAU. As suggested by the QRC, we proposed a change to clarify that the parties must 'jointly request' the QCA to refer a matter to an expert.

⁴¹⁵ Aurizon Network, 2014 DAU, sub. 83: 98.

⁴¹⁶ Aurizon Network, 2014 DAU, sub. 83: 98.

⁴¹⁷ Cl. 11.1.1(a) of the CDD amended DAU.

⁴¹⁸ QRC, 2014 DAU, sub. 84: 112.

the QCA Act, we did not consider it appropriate or necessary for the undertaking to set out the procedures we would follow to make a determination, as any discrepancies between these procedures and the procedures in Division 5 of Part 5 of the QCA Act would result in a lack of certainty and clarity about the applicable procedures. Instead, we proposed that the procedures in the QCA Act would apply when disputes were referred to the QCA (cl. 11.1.5(c) of the CDD amended DAU). We also proposed to reinstate clause 11.1.5(c) to (e) from Aurizon Network's 2014 DAU, with amendments.⁴¹⁹ We considered that these amendments did not change the rights or obligations of any party, but would help to clarify the determination process.

We did not set out how we would allocate costs arising from our determination because we considered that section 208 of the QCA Act would allow the QCA to make an order about the payment of costs associated with a determination. However, we generally supported the equal sharing of costs, including Aurizon Network's proposal that costs of mediation and expert determinations should be borne by the parties in equal shares, with each party bearing its own participation costs. We considered this was appropriate, having regard to the factors in section 138(2) of the QCA Act. In particular, it was our view that this approach would balance the legitimate business interests of Aurizon Network (s. 138(2)(b)) with the interests of other parties, including access seekers, access holders and train operators (s. 138(2)(e) and (h)).

Resolutions should be binding

Having regard to the factors in section 138(2) of the QCA Act, we considered that the dispute resolution process should provide for a binding resolution because it would improve confidence and the certainty of outcomes for the parties involved, while reducing costs and delays. It was our view that this would promote the efficient use of, and investment in, the declared service (s. 138(2)(a) of the QCA Act) and meet the interests of Aurizon Network and other parties (s. 138(2)(b), (e) and (h)). Therefore, we maintained our proposal set out in the IDD amended DAU that disputes resolved by an expert⁴²⁰ or the QCA would be binding.

Aurizon Network argued that the binding nature of determinations should be subject to exclusions for fraud (in addition to the exclusion for manifest error already proposed).⁴²¹ We considered this appropriate and proposed amendments to clauses 11.1.4 and 11.1.6 of the CDD amended DAU.

Other issues raised in submissions

Our response to other issues raised in submissions to the initial draft decision is set out in the table below. We also proposed amendments to improve clarity and correct errors.

⁴¹⁹ See cl. 11.1.5(d) to (f) of the CDD amended DAU.

⁴²⁰ We acknowledged Aurizon Network's submission that it had already proposed that expert determinations should be binding (in the absence of manifest error). See Aurizon Network, 2014 DAU, sub. 83: 99.

⁴²¹ Aurizon Network, 2014 DAU, sub. 83: 99.

Table 25 Processes, procedures and obligations—QCA responses to submissions on the IDD

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
Clause 11.1.2—Chief executive resolutions			
Documenting agreement cl. 11.1.2(c)	Aurizon Network	Aurizon Network said that our proposed requirement to document chief executive resolutions was inconsistent with the purpose of the process, which is to facilitate a timely and cost-effective resolution of disputes. It would be inefficient and lead to protracted negotiations on the terms of the agreement. ⁴²²	<p>The purpose of this requirement was to establish a history of the resolution of disputes so that we could understand whether the mechanism was working effectively.</p> <p>It was not our intention to include a requirement that could disrupt or frustrate negotiations. Therefore, we proposed to remove the requirement for a signed agreement. However, we proposed that Aurizon Network would still be required to provide evidence of the resolution (cls. 11.1.1(g) and 11.1.2(c)).</p> <p>We did not consider this requirement would be onerous because we expected that Aurizon Network would document the resolution for internal purposes.</p> <p>Amendment to IDD position</p> <p>We maintained our initial draft decision that Aurizon Network should be required to provide evidence that agreement has been reached. However, we considered it appropriate to amend clause 11.1.2(c) to clarify that this did not need to be a signed settlement agreement.</p>
Timeframe for providing agreement cl. 11.1.2(c)	QRC	The QRC submitted that Aurizon Network should be required to provide a copy of the signed agreement to the QCA no later than three days after it had been signed by all parties. ⁴²³	<p>We agreed that Aurizon Network should be required to advise the QCA in a timely manner, but not necessarily within three days.</p> <p>Amendment to IDD position</p> <p>We considered it appropriate to amend this clause to require Aurizon Network to provide the information promptly.</p>
Clause 11.1.3—Mediation			
Timeframe cl. 11.1.3(d)	Asciano	Asciano said that the four-month timeframe for mediation was excessive. It considered a party should be able to progress to the next stage if mediation fails earlier. ⁴²⁴	<p>We did not consider this necessary because there is a provision to move to the next stage earlier if:</p> <ul style="list-style-type: none"> (a) the mediator considers the parties cannot achieve a mediated outcome, or (b) a party fails to participate in the process in good faith. <p>Amendment to IDD position</p> <p>None. We did not consider it appropriate to amend our CDD amended DAU to</p>

⁴²² Aurizon Network, 2014 DAU, sub. 83: 98–99.

⁴²³ QRC, 2014 DAU, sub. 84: 112.

⁴²⁴ Asciano, 2014 DAU, sub. 76: 22.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
			include Asciano's proposal.
Clause 11.1.4—Expert determination			
Expert appointment and requirements cl. 11.1.4(b)	QRC	The QRC submitted that clause 11.1.4(b)(ii) to (iv) of the IDD amended DAAU should be deleted for clarity and cohesion and to simplify the expert selection process. It considered this was consistent with the QCA-proposed simplification of the expert selection process. ⁴²⁵	We agreed that the clause unnecessarily complicated the expert selection process. Amendment to IDD position We considered it appropriate to delete clause 11.1.4(b)(ii) to (iv) of the IDD amended DAAU.
Written notice cl. 11.1.4(b)(vi) of the IDD amended DAAU	QRC	The QRC said that cl. 11.1.4(b)(vi)(B) and (D) of the IDD amended DAAU should be amended to require written notice for record-keeping purposes. ⁴²⁶	We considered that amendments were not necessary because notices must be in writing to have legal effect—see clause 12.3(a). Amendment to IDD position None. We did not consider it appropriate to make the changes proposed by the QRC.
Expert appointment cl. 11.1.4(b)(vi) of the IDD amended DAAU	QRC	The QRC suggested reinstating the requirement that the appointed expert cannot have provided services to any party to the dispute within the previous 12 months (to ensure the impartiality of the expert). ⁴²⁷	It was our view that this would be too restrictive as it would limit the pool of experts available. We noted there was already a requirement for experts to disclose conflicts of interest and to be appointed by agreement between the parties. We considered these requirements sufficiently addressed concerns about impartiality. Amendment to IDD position None. We did not consider it appropriate to make the changes proposed by the QRC.
Information and materials required cl. 11.1.4(e)	QRC	The QRC submitted that the obligation for the parties to assist an expert in determining a dispute should be limited to what is reasonable. ⁴²⁸	We noted there was already a provision in this clause for the parties to do what is reasonably requested by the expert, which we considered sufficient. Amendment to IDD position None. We did not consider it appropriate to make the further changes proposed by the QRC.
Appointment of multiple experts cl. 11.1.4(f)	QRC	The QRC sought clarity on the scenarios where multiple experts would be appointed to examine a dispute. ⁴²⁹	We considered that it may be necessary to appoint more than one expert depending on the expertise required. However, it was our view that appointing

⁴²⁵ QRC, 2015, sub. 84: 113.

⁴²⁶ QRC, 2015, sub. 84: 114.

⁴²⁷ QRC, 2015, sub. 84: 114.

⁴²⁸ QRC, 2015, sub 84: 114.

⁴²⁹ QRC, 2015, sub. 84: 115.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
			<p>multiple experts should be subject to agreement between the parties.</p> <p>Amendment to IDD position</p> <p>We considered it appropriate to amend this clause to require that multiple experts could only be appointed if the parties agreed.</p>
Clause 11.1.6—Procedure			
Oral submissions cl. 11.1.6(a)(i)	QRC	The QRC said that there should be flexibility to make a written or oral submission provided the oral submission was made in the presence of all other parties to the relevant dispute. It said this could apply in time sensitive scenarios. ⁴³⁰	<p>We acknowledged that allowing oral submissions could speed up the dispute resolution process. However, we pointed out that it was unclear how this would work in practice. For example, we noted it would be difficult for the QCA to make decisions based on oral submissions and that it may not be possible for all parties to be present when oral submissions are delivered.</p> <p>Amendment to IDD position</p> <p>None. We did not consider it appropriate to make the changes proposed by the QRC.</p>
Obligation to give effect to QCA determination cl. 11.1.6	QRC	<p>The QRC submitted that the following additional provisions should be included:⁴³¹</p> <p>(a) parties to a dispute make reasonable endeavours to implement a determination as soon as practicable following notification of a decision</p> <p>(b) where a party to a dispute delays or frustrates implementation, that party bears the costs of the party associated with the delay.</p>	<p>In relation to the first point, we did not consider this necessary because the determination could include timeframes for implementation, which were likely to vary depending on the nature of the issues disputed.</p> <p>In relation to the second point, we considered it was beyond the QCA's power to include such a provision.</p> <p>Amendment to IDD position</p> <p>None. We did not consider it appropriate to make the changes proposed by QRC.</p>
Clause 11.2—QCA decision-making			
QCA decision-making cl. 11.2	QRC	QRC considered that the restrictions on the decision-making power of the QCA and the right to seek a stay of a decision should be extended to decisions that affect parties other than Aurizon Network. ⁴³²	<p>We did not consider it necessary to expand this clause to other parties. It was our view that, as the regulated entity, Aurizon Network would be the party most likely to be affected by the QCA's decisions. We considered that expanding this clause could allow other parties to seek a review of the QCA's decision without establishing that their interests are adversely affected.</p>

⁴³⁰ QRC, sub. 84: 116.

⁴³¹ QRC, sub. 84: 116–117.

⁴³² QRC, sub. 84: 117.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
			<p>We noted that it may be open for other parties to seek a review of a decision by the QCA under the <i>Judicial Review Act 1991</i> (Qld).</p> <p>Amendment to IDD position</p> <p>None. We did not consider it appropriate to make the changes proposed by QRC.</p>

Note: Clause references in this table are to the CDD amended DAU (unless otherwise stated).

Conclusion

For the reasons outlined above, we did not consider it appropriate to approve the 2014 DAU in respect of the processes, procedures and obligations of the dispute resolution mechanism. Having regard to the factors in section 138(2) of the QCA Act, we considered it was not appropriate because it would result in unnecessary delays, insufficient transparency and uncertainty. We also considered it would adversely affect the legitimate interests of both Aurizon Network and other parties, including access seekers, access holders and train operators. We noted these issues would undermine the section 138(2) factors in the manner discussed above.

To address these issues, we proposed to amend the staged process proposed by Aurizon Network as set out in the CDD amended DAU. Without these amendments, our view was that Aurizon Network's proposed mechanism would not provide an appropriate balance between the legitimate business interests of Aurizon Network and the interests of other parties (s. 138(2)(b), (e) and (h) of the QCA Act). We considered the proposal was inappropriately weighted in Aurizon Network's favour and did not provide an appropriate level of certainty, clarity and transparency. We considered a balanced framework would provide other parties with more confidence and certainty, thereby promoting the efficient use of, and investment in, rail infrastructure (s. 138(2)(a)) and the public interest (s. 138(2)(d)).

6.4.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network raised a number of specific issues in response to our CDD, which we have addressed below. No other stakeholders made submissions on our CDD relating to the processes, procedures and obligations of the dispute resolution mechanism.

6.4.6 QCA analysis and final decision

Our response to specific issues raised in Aurizon Network's submission are addressed in the table below.⁴³³

Table 26 Processes, procedures and obligations—QCA responses to submissions on the CDD

<i>Issue</i>	<i>Aurizon Network's comment</i>	<i>QCA response</i>
Clause 11.1.1—Disputes		
Provision of information cl. 11.1.1(g)	The requirement to provide notices and correspondence could include information that has the effect of waiving legal professional privilege or incriminating a	As explained in our draft decisions, we consider that an appropriate level of transparency and oversight will encourage the timely resolution of disputes and

⁴³³ Aurizon Network proposed drafting amendments to address these concerns (Aurizon Network, 2014 DAU, sub. 125: Vol. 2).

<i>Issue</i>	<i>Aurizon Network's comment</i>	<i>QCA response</i>
	person. Providing this information is also unnecessary since the QCA will be kept informed about progress to resolve the dispute. ⁴³⁴	provide insights into the operation of the undertaking. This will be supported by the provision of notices and correspondence exchanged between the parties to a dispute. However, we acknowledge that there may be instances where it would not be appropriate for Aurizon Network to provide certain information and have proposed amendments to allow for this. Amendment to CDD position We have proposed amendments to allow Aurizon Network to agree with the QCA that certain documents will not be provided.
Clause 11.1.2—Chief executive resolutions		
Timeframe for parties to meet cl. 11.1.2	There should be a requirement for the parties to meet within 10 business days of receiving the dispute notice (for consistency with the approach taken to the dispute resolution provisions in the AA and TOD). ⁴³⁵	We agree with this suggestion to make the provisions consistent and to promote the timely resolution of disputes. Amendment to CDD position We consider it appropriate to accept Aurizon Network's proposal to include new clause 11.1.2(b). As a result of accepting this amendment, we also consider it appropriate to amend the timeframes in clause 11.1.2(e).
Clause 11.1.3—Mediation		
Referring disputes to an expert or the QCA cl. 11.1.3(d)	Changes should be made to allow the parties to refer a dispute to an expert or the QCA (for consistency with cl. 11.1.2(d) of the CDD amended DAU). ⁴³⁶	We agree that the clauses should be consistent. Amendment to CDD position We have proposed amendments to make the clauses consistent.
Clause 11.1.4—Expert determination		
Appointing experts cl. 11.1.4(b)(i)	The QCA does not have the power to be involved in the appointment of an expert if the parties cannot agree. ⁴³⁷	We do not agree that it is beyond the power of the QCA to be involved in the appointment of an expert. We also consider it appropriate to give the QCA this ability to make the process workable. Amendment to CDD position None. We do not consider it appropriate to make the changes proposed by Aurizon Network.
Power of experts to make a decision	The expert should only be allowed to make a determination that the QCA could make if the matter was arbitrated by the QCA	We consider it is appropriate and permissible under the QCA Act for an expert to determine matters, even if they

⁴³⁴ Aurizon Network, 2014 DAU, sub. 125: 91, 95.

⁴³⁵ Aurizon Network, 2014 DAU, sub. 125: 95–96.

⁴³⁶ Aurizon Network, 2014 DAU, sub. 125: 96.

⁴³⁷ Aurizon Network, 2014 DAU, sub. 125: 91, 96.

Issue	Aurizon Network's comment	QCA response
cl. 11.1.4(b)(iii)	under the QCA Act (Subdivision 3, Division 5 of Part 5). ⁴³⁸	are not covered by the arbitration provisions in the QCA Act. The changes we have proposed to clause 11.1.5(c) (see section 6.3.6 above) will allow the QCA to determine matters outside the arbitration provisions of the QCA Act. It is appropriate that an expert is also able to determine these matters. Amendment to CDD position None. We do not consider it appropriate to make the changes proposed by Aurizon Network.
Matters an expert can decide cl. 11.1.4(b)(iii)(F) of the CDD amended DAU	Amendments have been suggested to: ⁴³⁹ (a) clarify when an expert may make a determination on the matters in subparagraphs (1) and (2) (b) exclude the matters in paragraphs (3) and (4) because they do not fall within the definition of 'dispute'.	In relation to point (a), we agree that Aurizon Network's suggested amendments improve clarity. In relation to point (b), we agree that the matters in these paragraphs should not be the subject of a dispute determinable under Part 11. Amendment to CDD position We consider it appropriate to accept the amendments proposed by Aurizon Network.
Expert determination rules cl. 11.1.4(c) of the CDD amended DAU	The reference to the Expert Determination Rules of the Resolution Institute should be removed. It creates uncertainty and the process in the undertaking is sufficient and appropriate. ⁴⁴⁰	We consider that failing to establish the rules that will apply could lead to inefficiencies in the dispute resolution process. We also note that no other stakeholders have raised the same concern as Aurizon Network. Amendment to CDD position None. We do not consider it appropriate to make the changes proposed by Aurizon Network.
Clause 11.1.5—Determination by the QCA		
Referring disputes to an expert cl. 11.1.5(b)	The QCA does not have the power to stop disputes being referred to an expert (if this is what the parties have agreed). ⁴⁴¹	We consider that the QCA is permitted to decide whether to resolve the dispute or to refer the dispute to an expert. It is also appropriate that the QCA retains its discretion to determine certain matters. However, we have proposed amendments to require the QCA to make its decision having regard to the object of Part 5 of the QCA Act. Amendment to CDD position We have proposed amendments to require the QCA to make its decision about whether to refer a matter to an expert having regard to the object of Part 5 of the

⁴³⁸ Aurizon Network, 2014 DAU, sub. 125: 96.

⁴³⁹ Aurizon Network, 2014 DAU, sub. 125: 97.

⁴⁴⁰ Aurizon Network, 2014 DAU, sub. 125: 97.

⁴⁴¹ Aurizon Network, 2014 DAU, sub. 125: 91, 97.

<i>Issue</i>	<i>Aurizon Network's comment</i>	<i>QCA response</i>
Application of Part 5 of the QCA Act cl. 11.1.5(c)	The parties do not have the power to agree that a legislative provision applies (in this case Division 5 of Part 5 of the QCA Act). This clause may also extend the QCA's jurisdiction beyond that which exists under the QCA Act. ⁴⁴²	QCA Act. We consider that the changes we have proposed to clause 11.1.5(c) will address this issue (see section 6.36 above). These changes will allow the QCA to determine matters outside Division 5 of Part 5 of the QCA Act, while not extending the QCA's jurisdiction beyond that which exists under the QCA Act. Amendment to CDD position We have proposed amendments to clause 11.1.5(c) that we consider will address this issue (see section 6.36 above).
Consistency of the determination with the undertaking cl. 11.1.5(g)	This clause should be removed because: (a) it is clear that the QCA is exercising its arbitral jurisdiction under the QCA Act ⁴⁴³ (b) it is beyond the QCA's power to insulate itself from the requirements of the QCA Act and judicial review by providing that any determination will be consistent with the undertaking and not subject to challenge on that basis. ⁴⁴⁴	Our proposed amendments to clause 11.1.5(c) allow matters to be determined outside Division 5 of Part 5 of the QCA Act, while not extending the QCA's jurisdiction beyond that which exists under the QCA Act. We also note that clauses 11.1.6(b)(ii) and 11.2(a)(v) prevent the QCA from making a determination that involves an improper use of the QCA's powers, while clause 11.2(c) preserves Aurizon Network's judicial review rights. Amendment to CDD position None. We do not consider it appropriate to make the changes proposed by Aurizon Network.
Clause 11.1.6—Procedure		
When decisions are binding cl. 11.1.6(b)	This clause is unnecessary because: ⁴⁴⁵ (a) the QCA's determinations will have effect in accordance with the terms of the QCA Act (which provides grounds for invalidating a determination beyond manifest error) (b) clause 11.1.4(g) of the CDD amended DAU implicitly provides for an expert's decision to be binding, although clarifying amendments would make it more explicit.	In relation to point (a), we note that our proposed amendments to clause 11.1.5(c) allow matters to be determined outside Division 5 of Part 5 of the QCA Act, while not extending the QCA's jurisdiction beyond that which exists under the QCA Act. In relation to point (b), while we do not agree with Aurizon Network's proposal to remove clause 11.1.6(b), we have proposed amendments that acknowledge the grounds for invalidating determinations are covered by clause 11.1.4 (in respect of expert determinations) and clause 11.2 (in respect of QCA determinations). Amendment to CDD position We have deleted the words 'in the absence of manifest error or fraud' from clause

⁴⁴² Aurizon Network, 2014 DAU, sub. 125: 97–98.

⁴⁴³ Aurizon Network, 2014 DAU, sub. 125: 98.

⁴⁴⁴ Aurizon Network, 2014 DAU, sub. 125: 29.

⁴⁴⁵ Aurizon Network, 2014 DAU, sub. 125: 91, 98.

<i>Issue</i>	<i>Aurizon Network's comment</i>	<i>QCA response</i>
		11.1.6(b) on the basis that the grounds for invalidating determinations are covered by clauses 11.1.4 and 11.2. We have also proposed amendments to clause 11.1.4(h) to clarify the drafting and reduce ambiguity.
Clause 11.1.7—Application to Part 8 Disputes		
Potential inconsistency between Part 8 and Part 11. cl. 11.1.7(b)	This clause should be removed because it is unclear what the potential inconsistency might be until the final form of Part 8 is decided. ⁴⁴⁶	While Part 8 no longer contains alternative dispute resolution processes, it still includes requirements around timeframes for raising certain disputes. Therefore, we consider this clause should remain. Amendment to CDD position None. We do not consider it appropriate to make the changes proposed by Aurizon Network.

Note: Clause references in this table are to the final amended DAU (unless otherwise stated).

Our final decision is to refuse to approve the processes, procedures and obligations of the dispute resolution mechanism proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by Aurizon Network in response to our CDD. We remain of the view that our analysis, reasoning and decision in the CDD are appropriate. However, having regard to Aurizon Network's concerns, we have proposed further drafting amendments to reflect the intent of our decision, and to improve the clarity and workability of the dispute resolution mechanism.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above. The amendments we consider appropriate to be made to Part 11 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

⁴⁴⁶ Aurizon Network, 2014 DAU, sub. 125: 98.

Final decision 6.2

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the processes, procedures and obligations of Aurizon Network's proposed dispute resolution mechanism.**
- (2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) provide for disputes to be referred to the QCA for resolution if the parties cannot agree how to proceed**
 - (b) require Aurizon Network to keep the QCA informed of the progress of a dispute, including its outcome**
 - (c) simplify the expert appointment process**
 - (d) allow for the appointment of multiple experts**
 - (e) simplify the processes and procedures for disputes referred to the QCA to resolve**
 - (f) make the outcome of disputes resolved by the QCA binding on parties, with some exceptions**
 - (g) make other amendments as proposed in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7 NEGOTIATION FRAMEWORK

Part 4 of the 2014 DAU provides a framework for the negotiation of access rights. The 2014 DAU also outlines the key steps in the negotiation process and the information access seekers and Aurizon Network may be required to provide as part of these negotiations.

A robust and effective negotiation framework can promote fair and balanced negotiations that deliver timely outcomes and respond to changing circumstances. It can also help to address concerns that Aurizon Network could use negotiations to 'pick winners', delay proceedings or extract higher charges or better terms and conditions for itself.

Our final decision is to refuse to approve Aurizon Network's proposed negotiation framework because we consider it: does not provide sufficient clarity and certainty, does not appropriately balance the rights and interests of stakeholders, and will constrain competition between above-rail operators.

We consider it appropriate that Aurizon Network amends Part 4 and Schedules A, B, C and H to its 2014 DAU to:

- *provide greater clarity and certainty about the obligations and processes for applying for access and negotiating agreements*
- *better balance the rights and interests of Aurizon Network and other parties, by addressing Aurizon Network's ability to use its unique position and increasing the transparency and accountability of its decision-making*
- *improve information flows so parties have sufficient information to make informed and timely decisions*
- *improve competition between above-rail operators (e.g. when tendering for rail haulage contracts).*

The detailed drafting of Part 4 and Schedules A, B, C and H attached to this final decision is consistent with our approach and shows the amendments we consider appropriate to approve the 2014 DAU.

7.1 Introduction

Access seekers⁴⁴⁷ negotiate with Aurizon Network to agree the terms and conditions of access. A robust and effective negotiation framework can promote more successful negotiations, while protecting Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or present a commercial risk.

7.2 Overview

7.2.1 Aurizon Network's proposal

The 2014 DAU sets out Aurizon Network's proposed process for negotiating access and developing access agreements with access seekers. Part 4 proposes a framework for negotiating access, including processes, information requirements and timeframes for action. Also relevant to the negotiation framework are:

⁴⁴⁷ The QCA Act defines an access seeker as 'a person who wants access, or increased access, to the service'.

- Schedules A and B, which include the information that access seekers and Aurizon Network may be required to provide
- Schedule C, which includes the requirements for an operating plan
- Schedule H, which contains a diagram that outlines the key steps in the negotiation process.

Aurizon Network responded to stakeholders' comments on the 2013 DAU by seeking to provide additional rigour to the process and an increased obligation for it to negotiate reasonably and in good faith.⁴⁴⁸ Aurizon Network accepted there is a role for regulation to provide for balanced commercial negotiations, but argued that extending regulation beyond the point proposed would be inefficient and distort commercial decision making.⁴⁴⁹

The Part 4 provisions are also linked to other elements of the 2014 DAU, including ring-fencing⁴⁵⁰, access agreements and Standard Access Agreements (SAAs)⁴⁵¹, available capacity allocation and management⁴⁵², and network development and expansions.⁴⁵³

7.2.2 Stakeholders' position

In their initial submissions, stakeholders considered the 2014 DAU had addressed some of their concerns, but suggested further amendments were required to:⁴⁵⁴

- clarify the obligations and processes in the negotiation framework, including the information required and timeframes for its provision
- address Aurizon Network's ability to use its market power, by increasing the transparency and accountability of its decision making
- facilitate competition in above-rail markets.

Stakeholders considered these amendments would support successful negotiations by increasing certainty, transparency and regulatory oversight.

7.2.3 QCA assessment approach

The legislative framework guiding our decisions is discussed in detail in Chapter 2. Consistent with the framework, we have assessed Aurizon Network's proposed negotiation framework by having regard to the factors in section 138(2) of the QCA Act.

The relevance of these factors to our assessment of Aurizon Network's proposed negotiation framework is discussed below.

Promoting successful negotiations

We consider that the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act) and the public interest in having competition in markets (s. 138(2)(d)) are met when the negotiation framework:

- allows parties to negotiate access in a timely manner and at a reasonable cost

⁴⁴⁸ Aurizon Network, 2014 DAU, sub. 3: 3.

⁴⁴⁹ Aurizon Network, 2013 DAU, sub. 2: 86.

⁴⁵⁰ Part 3 of the 2014 DAU; see Chapter 4.

⁴⁵¹ Part 5 and Volume 3 of the 2014 DAU; see Chapter 8.

⁴⁵² Part 7 of the 2014 DAU; see Chapter 11.

⁴⁵³ Part 8 of the 2014 DAU; see Chapter 12.

⁴⁵⁴ Anglo American, 2014 DAU, sub. 7: 6–7, 31–34; Asciano, 2014 DAU, sub. 22: 30–34, 80–96; QRC, 2014 DAU, sub. 42: 20–23.

- provides some certainty over processes and obligations in negotiations, without being unnecessarily prescriptive or onerous
- facilitates customer engagement by removing barriers to participation, whether actual or perceived
- does not unnecessarily constrain competition between above-rail operators (e.g. when tendering for rail haulage contracts).

Rights and interests of Aurizon Network and other parties

We are required to have regard to the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act). For instance, it is in Aurizon Network's legitimate business interests to recover the efficient costs of negotiations and to receive some protection from negotiating with access seekers that are unlikely to use the access sought. We are also required to have regard to the interests of access seekers (section 138(2)(e)) and have also considered the interests of access holders⁴⁵⁵, to the extent they are not already 'access seekers' (under s. 138(2)(h)).

We consider that the various interests of Aurizon Network and other parties are balanced when the negotiation framework:

- clearly defines negotiation procedures, including timeframes for action
- balances the exchange of information between parties
- addresses Aurizon Network's ability to use its position to delay negotiations, extract a higher price or better terms and conditions for itself, or favour its related above-rail provider
- has mechanisms to promote accountability and transparency of Aurizon Network's decision making
- includes measures to prevent unfair differentiation in the treatment of access seekers
- protects Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or represent a poor commercial risk
- fairly prioritises access seekers.

Pricing matters

We are required to have regard to the effect of excluding existing assets for pricing purposes (s. 138(2)(f) of the QCA Act), and the pricing principles in section 168A of the QCA Act (s. 138(2)(g)). We consider these matters to be less relevant for the purposes of assessing the negotiation framework.

Summary of assessment approach

In assessing the appropriateness of Aurizon Network's proposed negotiation framework, we gave appropriate consideration to the factors in section 138(2) of the QCA Act by assessing whether it:

- provides a simple and timely process for applying for access and negotiating agreements
- provides relevant and accurate information in a timely manner

⁴⁵⁵ Section 138(2)(h) of the QCA Act.

- promotes effective competition between train operators.

We address each of these considerations in the following sections.

7.2.4 Interplay between Parts 4, 7 and 8 of the 2014 DAU

We have developed flowcharts to provide an overview of the processes in Part 4, and the interplay between Part 4, Part 7 (available capacity allocation) and Part 8 (network development and expansions). The flowcharts are provided in Appendix A (Volume 2) and reflect our final amended DAU.

7.3 A streamlined process for applying for access and negotiating agreements

7.3.1 Aurizon Network's proposal

Aurizon Network sought to promote balanced commercial negotiations by providing a clear and efficient path for parties to negotiate access rights, but without substantially altering the process in the 2010 AU.⁴⁵⁶ This is summarised in the following table.

Table 27 Applying for access and negotiating agreements—Aurizon Network's proposal

<i>Stage</i>	<i>Effect</i>
Initial inquiries cl. 4.2, Sch A	Provides for preliminary meetings to seek clarification over the process and an exchange of preliminary information.
Application submitted cl. 4.3, 4.9, Sch B	A prospective access seeker (or train operator) can submit an access application (or request to enter a Train Operations Agreement (TOA)). Any such application must meet minimum information requirements. Aurizon Network must notify a party where the application is incomplete, specifying what information is required for the application to be complete. Aurizon Network can also request additional evidence required to assess capacity allocation related issues and to prepare the Indicative Access Proposal (IAP).
Acknowledgement of access application cl. 4.4	Aurizon Network will acknowledge a properly completed access application and confirm it will prepare an IAP. Aurizon Network can suspend negotiations for access where capacity is not available, pending agreement on the scope and terms of the required expansion. Aurizon Network can reject an application for access rights commencing more than 5 years after the application was received. It can also reject applications proposed to commence between 3 and 5 years away in certain circumstances.
Revisions cl. 4.5, 4.10.2	An access seeker can revise its access application, provided that the revision does not represent a material variation.
IAP cl. 4.6	Aurizon Network will develop an IAP for the access rights sought. An access seeker can notify Aurizon Network if it believes the IAP is not an appropriate basis for continuing negotiations. Aurizon Network will respond, and may revise the IAP in response to those concerns.
Negotiation process cl. 4.7, 4.10, 4.11, 4.12, Sch. A, Sch. C	The negotiation period for an access seeker (or train operator) commences when it provides a notification of intent (or provides all the relevant information for a TOA). During the negotiation period the parties endeavour to agree on the terms and conditions of access. Unless otherwise agreed, the terms and conditions are those provided in the relevant SAA. During the negotiation period, parties will commence an interface risk assessment and may prepare an Interface Risk Management Plan

⁴⁵⁶ Aurizon Network, 2013 DAU; sub. 77: 26

<i>Stage</i>	<i>Effect</i>
	(IRMP). The negotiation period for an access seeker (or train operator) ceases in defined circumstances. Aurizon Network can recover its reasonable costs if it ceases negotiations because it believes the access seeker does not intend to obtain, or fully use, the access rights at the level sought.
Primacy for end users cl. 4.8, 4.9, 4.10	Provides primacy to end users (or a railway operator nominated by the end user). A train operator must include a copy of their nomination by an end user as part of its request to enter a TOA.

Note: Clause references in this table are to the 2014 DAU.

7.3.2 Summary of our initial draft decision

In our initial draft decision, we acknowledged Aurizon Network's endeavours to improve the efficacy of Part 4. However, we made an initial draft decision to refuse to approve Aurizon Network's proposed approach. We then indicated the amendments we considered were appropriate to simplify and provide a timely process for negotiations (as discussed in more detail in section 7.3.3 of the initial draft decision).

Improving the balance between the rights and interests of Aurizon Network and other parties

We were concerned that Part 4 of the 2014 DAU did not adequately balance the rights and interests of Aurizon Network and other parties, and continued to provide Aurizon Network with significant discretion in decision making. We determined that it was appropriate for a number of amendments⁴⁵⁷ to be made to increase the transparency and accountability of decision-making.

Recovery of costs

We did not accept Aurizon Network's proposal that it was appropriate to recover its costs if it ceased negotiations on the basis that the access seeker did not intend to obtain or use access rights at the level sought.

Negotiating with access seekers is Aurizon Network's core business, and we considered these activities are sufficiently accounted for as part of its operating costs. Moreover, given the significant information requirements that access seekers must meet, we considered the likelihood of negotiating with a party that does not intend to use the access rights sought, is low.

Cessation of negotiations

We did not accept the provisions that dealt with disputes over whether Aurizon Network was entitled to cease negotiations. We agreed with stakeholders⁴⁵⁸ that they were unduly in Aurizon Network's favour because they substantially softened Aurizon Network's obligations to comply with the negotiation cessation provisions. We considered it was appropriate that Aurizon Network amend its draft access undertaking so that it would still be in breach of its obligations even if it made a good faith and reasonable attempt to comply.

⁴⁵⁷ Including to clauses 4.3(c), (c)(ii), (e); 4.4 (d), (e), (g), (j); 4.5(c), (d), (f); 4.10.1 (d)(iii), 4.10.2(c); 4.8 and 4.12 of the 2014 DAU.

⁴⁵⁸ Anglo American, 2014 DAU, sub. 8; QRC, 2014 DAU, sub. 42: 23; sub. 37; Asciano, 2014 DAU, sub. 22: 33—34.

Clarity and certainty

We considered it was appropriate that Aurizon Network amend its draft access undertaking to improve clarity and allow negotiations for access to proceed quicker and with greater certainty for all parties.⁴⁵⁹

We also considered it was appropriate that Aurizon Network amends its draft access undertaking by updating Schedule H of the 2014 DAU to reflect the amended arrangements, including clearly identifying linkages between the negotiation framework and other parts of the undertaking. We considered that diagrams of the negotiation process would provide greater clarity and certainty over the processes and links to other parts of the undertaking, which is in the interests of all parties. The diagrams are particularly important given the strong linkages between the negotiation framework and the processes for the allocation of available capacity⁴⁶⁰ and network development and expansions.⁴⁶¹

7.3.3 Stakeholders' comments on the initial draft decision

Aurizon Network substantially agreed with the initial draft decision, but commented on specific issues.⁴⁶² Aurizon Operations also expressed broad support, noting that it was representative of the interests of all stakeholders, but raised concerns that it was overly prescriptive and restrictive, both in terms of how a negotiation is conducted and the scope of matters subject to negotiation.⁴⁶³

Aurizon Network and other stakeholders commented on specific aspects of our initial draft decision. We have addressed these comments in Table 24 further below.

7.3.4 Consolidated draft decision

After having regard to the QCA Act section 138(2) factors and stakeholder submissions, we did not consider it appropriate to approve the 2014 DAU in respect of the process for applying for access and negotiating agreements.

Consistent with our views in the initial draft decision, we acknowledged Aurizon Network's efforts to improve the negotiation framework, but refused to approve the process as a whole, because we considered the following:

- The process did not adequately balance the rights and interests of Aurizon Network and other parties and continued to provide Aurizon Network with significant discretion in its decision-making.
- The negotiation cessation provisions were substantially in Aurizon Network's favour.
- There was too little certainty, clarity and transparency around the negotiation process.

We maintained our initial draft decision that Aurizon Network's proposal did not appropriately balance the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act) against the legitimate business interests of Aurizon Network (s. 138(2)(b)). It was our view that a lack of confidence and transparency in negotiations is inconsistent with promoting efficient

⁴⁵⁹ See clauses 4.3(c); 4.4(a), (c), and (d); 4.5; and 4.12 of the 2014 DAU.

⁴⁶⁰ Part 7 of the 2014 DAU; see Chapter 11.

⁴⁶¹ Part 8 of the 2014 DAU; see Chapter 12.

⁴⁶² Aurizon Network, 2014 DAU, sub. 83: 100—104.

⁴⁶³ Aurizon Operations, 2014 DAU, sub. 93: 6.

investment in significant infrastructure (ss. 138(2)(a) and 69E) and the public interest (s. 138(2)(d)).

The way in which we considered it appropriate for Aurizon Network to amend its draft access undertaking was set out in our consolidated draft decision-amended DAU. These amendments substantially reflected the initial draft decision-amended DAU, except that they addressed specific issues raised by stakeholders since our initial draft decisions, most notably those outlined in the table below. Clause references are to our consolidated draft decision-amended DAU (unless otherwise stated).

Table 28 Applying for access and negotiating agreements—stakeholders' comments

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comment</i>	<i>QCA response</i>
Clause 4.1—Overview			
Extensions for disputes cl. 4.1(f)	Aurizon Network	The clause should clarify how the proposed time extension applies. It seems to apply to the negotiation period, even if the dispute is raised during the (earlier) IAP development phase. In this situation, the extension should apply to the timeframe for developing an IAP. ⁴⁶⁴	We agreed that extensions should apply to the stage in the process that the dispute is raised and proposed amendments to the relevant clauses.
Clause 4.4—Acknowledgement of Access Application			
Joining a queue—contingent on receiving acknowledgement notice cl. 4.4(b)	Anglo American	Joining the queue should not be contingent on the receipt of an acknowledgement notice. If Aurizon Network does not issue a notice, an access seeker may lose its position in a queue. ⁴⁶⁵	We did not consider that amendments were necessary. We noted that an access seeker could bring a dispute if it does not receive a notice in accordance with the undertaking and their position in the queue would be determined as part of that process (if applicable).
Joining a queue—where expansion is required cl. 4.4(b)(ii) and 4.4(c)(ii)	Asciano	Changes that clarify the process for access applications requiring an expansion are supported. Clarification is sought about whether an application for access rights that can only be provided with an expansion would automatically join the queue. ⁴⁶⁶	We proposed clarifying amendments to clause 7.5.2 in respect of the formation of the queue.
Resumption of negotiations when expansion is required cl. 4.4(d)(vi)(A)	QRC	Providing for the suspension of negotiations until there is agreement on how the expansion is funded, is too vague and uncertain. The suspension should be lifted where 'planned capacity' exists and it is possible for it to be allocated to the relevant access seeker ⁴⁶⁷	In our view, suspension until agreement is reached was not vague and uncertain. However, we proposed amendments to clarify that the suspension would be lifted when the parties entered into an agreement in accordance with clause 8.8.1. We considered that deferring negotiations until planned

⁴⁶⁴ Aurizon Network, 2014 DAU, sub. 83: 106.

⁴⁶⁵ Anglo American, 2014 DAU, sub. 95: 45.

⁴⁶⁶ Asciano, 2014 DAU, sub. 76: 14.

⁴⁶⁷ QRC, 2014 DAU, sub. 84: 23.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comment</i>	<i>QCA response</i>
			capacity was in place and could be allocated may not be in the interests of either access seekers or Aurizon Network. We accordingly proposed no change to reflect the QRC's proposal.
Lead time when lodging an application cl. 4.4(g)	QRC	The QCA's proposal to allow a lead time of five years for lodging an application is supported. A compromise whereby an access seeker would be required to justify a lead time of more than three years would also get support. ⁴⁶⁸	We maintained our initial draft decision to propose to extend the lead time to five years, because we considered it would better accommodate long lead times in mine assessment and development. We considered this was in the interests of access seekers.
Clause 4.5—Revisions to access applications			
Provisions for revisions to an access application cl. 4.5(a)	Aurizon Network	Access seekers should be limited to requesting material variations prior to the acceptance of the IAP. Allowing access seekers to request material variations after this point means they still maintain their place in the queue, which may adversely impact other access seekers. ⁴⁶⁹	We agreed with Aurizon Network that an access seeker should not maintain its place in the queue if it requests a material variation after accepting the IAP. We considered this was not in the interests of other access seekers. We sought to address this issue in clause 4.5(j).
Extension of the time to develop an IAP cl. 4.5(d)	Aurizon Network	If a material variation to the access application is requested, the proposed five-day extension to develop an IAP is insufficient. ⁴⁷⁰	We did not consider there was a requirement for the IAP to be developed within five days, but rather for the IAP to be provided within a reasonable time.
Various proposed drafting amendments cl. 4.5	QRC	The QRC supported attempts to streamline processes for revisions to access applications, but proposed a number of drafting amendments to: <ul style="list-style-type: none"> • make the process and timeframes for requesting a variation clear • prevent unintended consequences of the treatment of variations, particularly in the context of the reinstatement of the queuing mechanism.⁴⁷¹ 	We considered the QRC's proposed changes and proposed amendments where we considered they improved clarity and better reflected the intent of the provisions.
Clause 4.6—Indicative Access Proposal			
Timeframe for expiry of an IAP	Asciano	The timeframe for the expiry of an IAP should be 90 days, not 60 days,	Asciano did not provide a strong case to change to 90 days, so we

⁴⁶⁸ QRC, 2014 DAU, sub. 84: 23.

⁴⁶⁹ Aurizon Network, 2014 DAU, sub. no. 83: 103–104.

⁴⁷⁰ Aurizon Network, 2014 DAU, sub. no. 83: 104.

⁴⁷¹ QRC, 2014 DAU, sub. 84: 23–24; sub. 85.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comment</i>	<i>QCA response</i>
cl. 4.6(e)		which would be consistent with the 2010 AU. ⁴⁷²	proposed to maintain the 60 day timeframe.
Obligation to prepare an IAP cl. 4.6(h) of the 2014 DAU	Aurizon Network	It appears that the proposed deletion of this clause is an error as it is unreasonable to require Aurizon Network to continue negotiations without a counter-party. ⁴⁷³	We proposed to reinstate this clause, as it appeared to have been deleted in error.
Clause 4.8—Multiple applications for the same Access			
Negotiating with multiple access seekers cl. 4.8(a)(ii)(B)	QRC	It is unclear why Aurizon Network would be required to negotiate with multiple train operators when one of those operators is a party to an existing haulage agreement with the customer in respect of the access rights being sought. ⁴⁷⁴	We considered that negotiations with a railway operator may only relate to part of the access rights sought or may relate to an existing agreement with a railway operator that is due to expire or requires revision to accommodate the access rights sought.
Clause 4.10—Negotiation Process			
Extensions for disputes cl. 4.10.1(c)(iv)(D)	Aurizon Network	Changes 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. ⁴⁷⁵	Consistent with the proposed amendments discussed above in relation to clause 4.1(f), we proposed amendments to clarify the drafting.
Confidential information cl. 4.10.1(d)(iii)	Aurizon Network	The requirement to provide an evidence-based explanation as to why available capacity is being reduced may require disclosure of information about the access rights of other parties. Evidence should be limited to information that can be provided within the confidentiality provisions in the undertaking. ⁴⁷⁶	We accepted that confidential information should not be disclosed and proposed amendments to clarify the drafting.
Ceasing negotiation period cl. 4.10.1(e)	Asciano	If it is not possible to enhance rail infrastructure to provide the access rights sought, the access seeker should be placed in the queue until available capacity can potentially be created in the future. ⁴⁷⁷	We acknowledged Asciano's view, but considered that it is reasonable for the negotiation period to cease in situations where infrastructure cannot be enhanced (e.g. no party is willing to fund it or it is technically impossible). We also noted that this was not raised as a concern by other stakeholders, such as the QRC.

⁴⁷² Asciano, 2014 DAU, sub. 76: 14.

⁴⁷³ Aurizon Network, 2014 DAU, sub. no. 83: 106.

⁴⁷⁴ QRC, 2014 DAU, sub. 84: 24.

⁴⁷⁵ Aurizon Network, 2014 DAU, sub. 83: 106.

⁴⁷⁶ Aurizon Network, 2014 DAU, sub. 83: 102.

⁴⁷⁷ Asciano, 2014 DAU, sub. 76: 14.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comment</i>	<i>QCA response</i>
Limitation of IRMP development cl. 4.10.2(c) and Schedule A, cl. 1(n)	Aurizon Network	Aurizon Network disagreed with the proposal that it could only undertake an IRMP when there are material differences between proposed and existing operations. That could reduce Aurizon Network's ability to effectively manage risk and safety interfaces, as required under legislative obligations. It also disagreed with proposed changes to Schedule A for similar reasons. ⁴⁷⁸	We considered that the safety management issues would likely constitute material differences between existing and proposed operations. However, we noted Aurizon Network's concerns and accepted the importance of the issues raised. Therefore, we proposed clarifying amendments to address Aurizon Network's concerns.
Non-availability requirements cl. 4.10.2(e)	Aurizon Network	Aurizon Network agreed to this clause in the interests of resolving Part 4, but considered it may lead to inefficient capacity allocation. For example, capacity may be allocated on the basis of information being provided in the future, or there may be impediments to allocating capacity to users who are ready and able to operate. ⁴⁷⁹	We acknowledged this view, but considered that it was appropriate to retain this clause in the interests of access seekers. We sought evidence from Aurizon Network that the clause was leading to the inefficient allocation of capacity.
Clause 4.12—Cessation of negotiations			
When a negotiation cessation notice may be given cl. 4.12(c)(ii)(B)	Aurizon Network	Aurizon Network queried whether proposed amendments to exclude railway operators were in error. Railway operators should provide evidence they have secured rail haulage rights for a customer's mine. ⁴⁸⁰	We agreed and proposed drafting changes to address this concern.
Wrongful cessation of negotiations cl. 4.12(d) of 2014 DAU	Aurizon Network	Aurizon Network disagreed with the proposed removal of this provision (relating to wrongful cessation of negotiations and allocation of liability where a dispute is resolved in favour of the access seeker). The provision does not adversely affect access seekers because the cessation is not valid until the dispute is resolved in Aurizon Network's favour. However, removing the provision increases Aurizon Network's risk, with the potential consequence of a breach of the undertaking, even where its actions were in good faith. ⁴⁸¹	We maintained our view that this clause unduly favours Aurizon Network at the expense of access seekers. Wrongfully ceasing negotiations is not costless to access seekers. For instance, there are direct costs of resolving disputes, as well as indirect costs of delays while the dispute is resolved. We maintained our view that Aurizon Network should be considered in breach of its obligations even if it made a good faith and reasonable attempt to comply.
Recovery of costs cl. 4.12(e) of 2014	Aurizon Network	There is broad stakeholder agreement for direct cost recovery	We considered that it was difficult and impractical to

⁴⁷⁸ Aurizon Network, 2014 DAU, sub. 83: 102–103.

⁴⁷⁹ Aurizon Network, 2014 DAU, sub. 83: 102.

⁴⁸⁰ Aurizon Network, 2014 DAU, sub. 83: 106.

⁴⁸¹ Aurizon Network, 2014 DAU, sub. 83: 103.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comment</i>	<i>QCA response</i>
DAU		rather than socialising the costs across access holders. ⁴⁸²	separate out a direct charge from Aurizon Network's mostly overhead costs. We were also concerned that there was scope for Aurizon Network to over-recover its costs.
Proposed reinstatement of queuing mechanism			
Related provisions to support reintroduction of queuing mechanism cls. 4.6 and 4.10	Anglo American	The QCA did not reintroduce all of the provisions relevant to the reinstatement of the queuing mechanism (see chapter 11 of the consolidated draft decision). In particular: ⁴⁸³ <ul style="list-style-type: none"> there should be a requirement (in cl. 4.6) for the IAP to include a response regarding the position of the access seeker in the capacity queue there should be a requirement (in cl. 4.10) for Aurizon Network to notify an access seeker if they are going to be moved or removed from the queue and to allow the access seeker time to rectify any problems with its access application. 	In relation to the first dot point, we did not consider this necessary because there was already a provision in clause 7.5.2(g) to provide access seekers with enough certainty as to their position in the queue. In relation to the second dot point, we considered that it would be difficult for Aurizon Network to manage this in practice. We noted that the process for managing the queue was set out in clause 7.5.2 and that we considered it appropriate.

We considered that our proposed amendments addressed the reasons for refusing to approve Aurizon Network's proposal, by providing an appropriate balance between the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act) and the legitimate business interests of Aurizon Network (s. 138(2)(b)). We also considered that providing confidence and transparency in negotiations was consistent with promoting efficient investment in significant infrastructure (ss. 138(2)(a) and 69E) and the public interest (s. 138(2)(d)).

We also proposed amendments to clarify the drafting of some clauses in response to issues raised by stakeholders, which were not discussed.

7.3.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network supported our consolidated draft decision, but identified some areas of concern. Aurizon Network submitted that in general:

- imposition of further timeframes has led to inconsistencies and errors
- processes have been overcomplicated leading to a process that is difficult to comprehend and creates errors
- as currently drafted, in certain circumstances Aurizon Network is required to provide information before it could reasonably be known so Aurizon Network will be unable to comply with the undertaking

⁴⁸² Aurizon Network, 2014 DAU, sub. 83: 101.

⁴⁸³ Anglo American, 2014 DAU, sub. 95: 30–31.

- the drafting is unacceptable from a practical sense, due to unachievable timeframes.

Aurizon Network has provided a mark-up of Part 4 with suggested amendments to provide clarity and realign processes while retaining the overall policy intent of the QCA.

Other specific matters raised by Aurizon Network are addressed in the table below.

The QRC's expressed the following views:

- It was concerned that the definitions of access seeker, access holder and train operator could overlap, and suggested drafting amendments.⁴⁸⁴
- It suggested inserting at the end of the clause 4.5(e)(i) 'and clause 4.5(j) will apply to that portion of the access rights sought which cannot be provided in the absence of an expansion'.
- It submitted concerns with clause 4.4(d)(vi) which provides that a suspension ends when Aurizon Network and the access seeker enter into an agreement as to how an expansion would be funded under clause 8.8.1. It suggested that funding of the expansion may be resolved without the parties entering an agreement or an agreement may be entered into that is not in accordance with clause 8.8.1. It suggested drafting amendments.⁴⁸⁵
- It disagreed with the proposed amendments made for revisions to an access application being deemed to be withdrawn if a material variation is made after an IAP. An access seeker should have the ability to decide whether or not to proceed with a variation after it is notified that it is a material variation. This right should exist even after the acceptance of the IAP. The QRC suggested drafting amendments.⁴⁸⁶

Asciano agreed with our amendments to clause 4.1(f) to clarify time extensions when a dispute arises. However, Asciano suggested that the time extension should be the time between the issuing of the dispute notice and the resolution of the dispute between the parties (and not simply when findings are made).⁴⁸⁷ Aurizon Network also considered that the extension may not be adequate to enact any requirements following resolution of a dispute.⁴⁸⁸

7.3.6 QCA analysis and final decision

Our final decision is to refuse to approve the process for applying for access and negotiating agreements proposed by Aurizon Network in its 2014 DAU.

We note Aurizon Network's general comments. In particular, Aurizon Network has proposed a new clause 4.8 to clarify the process relating to expansions, drawing together the relevant paragraphs of Part 4. We consider there is benefit in separating out the expansion process in the spirit of clarity and simplification, subject to specific amendments being made to Aurizon Network's drafting.

Our responses to the drafting issues raised by Aurizon Network are in the table below.

⁴⁸⁴ QRC, 2014 DAU, sub. 124: 16.

⁴⁸⁵ QRC, 2014 DAU, sub no 124: 17

⁴⁸⁶ QRC, 2014 DAU, sub. 124: 17.

⁴⁸⁷ Asciano, 2014 DAU, sub. 126: 12.

⁴⁸⁸ Aurizon Network, 2014 DAU, sub. 125: 101–104.

Table 29 Applying for access and negotiating agreements—issues raised by Aurizon Network⁴⁸⁹

<i>Clause (consolidated draft decision- amended DAU)</i>	<i>Issue</i>	<i>QCA response</i>
4.1(b)(i)	There is inconsistent use of the term 'prospective access seeker'. Aurizon Network proposed to include a definition of prospective access seeker.	We agree to include the definition as suggested by Aurizon Network in the interests of clarity. (Part 12)
4.1(e)	It is unclear why there are separate dispute resolution mechanisms when Part 11 provides a process. Aurizon Network included drafting to refer to Part 11.	While we consider this amendment is not necessary, we have accepted it to assist with clarity.
4.1(f) 4.6(h) 4.10.1(c)(iv)(D)	Aurizon Network commented on the practicalities of extending the relevant timeframe when there is a dispute. The drafting fails to address the concern that the timeframe may be inadequate. Aurizon Network proposed to delete clause 4.1(f), and amend 4.6(h) and 4.10.1(c)(iv)(D) so that in making a decision about extending timeframes, the QCA must have regard to the tasks required	We agreed to delete clause 4.1(f) as it is not intended to have any operative effect. It is the case that the timeframe as drafted in the consolidated draft decision-amended DAU would not be adequate. We have made subsequent amendments for consistency.
4.3(d)(e) (g)	Aurizon Network proposed clarifying amendments as shown in their marked-up draft.	We agree that these amendments provide clarification and we therefore accepted them.
4.4(a)	The use of the term 'non-availability requirements' is incorrect. As drafted, the QCA's drafting proposes that non-availability requirements are met where a notice is provided. Aurizon Network proposed changes to the definition to include a requirement that Aurizon Network notify customers that the non-availability circumstances exist.	We agree to adopt the term non-availability 'circumstances'. (Part 12) However, we consider the suggested notification process should be in the undertaking rather than the definition. (see cl. 4.3(c)(ii)). We have amended clause 4.4(a) accordingly.
4.4(g)	The timeframe that an access seeker can submit an access application should not have been extended from 3 to 5 years. This timeframe does not align with Part 5 of the DAU whereby an access agreement may only be entered into within 2 years of commencement. It prefers 3 years (with flexibility for longer timeframes where there is sufficient justification) as agreed with the QRC.	We note that the QRC supported the 5-year proposal but is willing to accept the three-year option. However, we maintain the view that for consistency with mine development processes, a 5-year period is necessary. We do not consider that the 2-year timeframe for executing an access agreement in Part 5 is inconsistent. The timeframes apply to different purposes. In any case, a longer timeframe may be agreed with the access seeker under Part 5 (cl. 4.4(c) of the final amended DAU).
4.4(h)(ii)	The terminology is incorrect that an access application is 'suspended' rather than withdrawn when submitted too far in advance. Aurizon Network suggested it be	We agree with the term 'withdrawn' as this relates to access applications submitted too far in advance rather than the suspension of the negotiation process under clause 4.4(d)

⁴⁸⁹ Aurizon Network, 2014 DAU, sub. 125: 101–104.

Clause (consolidated draft decision- amended DAU)	Issue	QCA response
	deemed as withdrawn.	(cl. 4.4(d)(ii) of the final amended DAU). With this change, we also deleted clauses 4.4(i) and (j) of the CDD amended DAU.
4.5	<p>Aurizon Network proposes various amendments, including:</p> <ul style="list-style-type: none"> (a) deletion of requirement for Aurizon Network to notify the access seeker of the extent: (b) to which the material variation causes or contributes to the access application relating to access rights which cannot be provided in the absence of an expansion (cl. 4.5(c)(iii)) (c) that available capacity exists which can satisfy part of the access rights sought by the access application with the proposed material variation (cl. 4.5(c)(iv)) (d) simplification/clarification of amendments to clause 4.5(d)–(f). 	<p>Aurizon Network's comment (a) does not seem consistent with their view in the new clause 4.8(a) that it does not apply in respect of a material variation.</p> <p>We have been unable to justify the amendments on the basis of comments in Aurizon Network's submission.</p> <p>We have made clarifying amendments to clause 4.5(d), (e) and (f).</p>
4.5(h) and 4.5(i)	<p>The process that provides for an access seeker that has made a material variation to their access request to proceed with a revised IAP or revert to their original request is not needed. An access seeker already has the ability to choose to proceed with its variation following Aurizon Network determining if that variation is material. Aurizon Network said the process imposes additional administration.</p> <p>Aurizon Network recommended that this process is removed—once an access seeker chooses to proceed on the basis of the variation, any previous IAPs would be overwritten. Alternatively, should the process be considered necessary, Aurizon Network requires drafting to recognise that an original IAP may not have been developed and additional time may be required to do so.</p>	<p>The current drafting balances the competing submissions by Aurizon Network and the QRC.</p> <p>The ability for access seekers to choose to proceed with a material variation needs to be balanced with ensuring other access seekers are not disadvantaged and that Aurizon Network is not subject to significant administrative burdens. The current position represents a compromise position and we propose not to change the drafting.</p> <p>We have made no changes aside from some clarifying amendments as noted above.</p>
4.5(j)	<p>Drafting changes are required to remove complexity. Aurizon Network said that this clause is seeking to provide that a request to vary an application will not be accommodated after a notice of intent has been provided by the access seeker. Aurizon Network suggested deleting clause 4.5(j) or a drafting change to clause 4.5(a) was suggested to clarify that a request can be made at any time after an acknowledgement notice is issued.</p>	<p>This proposal seems unreasonable, as clause 4.5(j) deals with other matters as well.</p> <p>On current drafting, an access seeker can make a variation after an IAP is issued. However, in order to balance the administrative burden on Aurizon Network, the access seeker takes a risk on being bound by this decision.</p>

Clause (consolidated draft decision- amended DAU)	Issue	QCA response
4.5(j)(vii)	<p>Aurizon Network submitted that the drafting seeks to set a deemed date that the application was received for requests that have been withdrawn.</p> <p>Aurizon Network proposed drafting to ensure that where an access seeker chooses to proceed with a material variation, the date on which the material variation was made is the date that the access application will be deemed to be received for the purposes of the queue.</p>	<p>In our view, the relevant date is when it is determined to be a material variation, which is the position Aurizon Network appears to have in their submission.</p> <p>We have made no change.</p>
4.9.1(d)(e)(f)	Aurizon Network proposed deletion of (d)(iv) and consequential amendments.	<p>This appears to be a non-essential deletion.</p> <p>We do not fully understand the basis of this amendment as it is not justified in Aurizon Network's submission.</p>
4.10.1(f)(v)	<p>Aurizon Network provided a clarification amendment that provides that a train operator's negotiation period ends:</p> <p>'(v) on the Access Seeker being given a Negotiation Cessation Notice in respect of its Access Application and that Negotiation Cessation Notice has taken effect in accordance with clause 4.12.'</p>	We consider the drafting suggestion is appropriate (cl. 4.11.1(f)(v) of the final amended DAU).
4.10.2(e)	<p>Aurizon Network should not be required to enter into an agreement with an access seeker where the non-availability requirements have been met. This clause can lead to hoarding and inefficient use of capacity. The QCA has removed the mechanism for Aurizon Network to alter the queue, to provide scope for an access seeker that is more advanced in the process to be given capacity ahead of others.</p> <p>Aurizon Network proposed drafting to ensure that Aurizon Network is not obliged to execute an access agreement or TOD unless the parties have terms under which the required information will be provided.</p>	<p>We maintain the view that there should not be an active process for Aurizon Network to re-order the queue. This could enable Aurizon Network to unfairly differentiate between access seekers.</p> <p>We consider that the queuing mechanism should not lead to hoarding as an access seeker's position in the queue would normally be automatically re-ordered if a more advanced access seeker is ready to take up capacity. The only cost to this is the administrative process required to request access seekers to clarify whether they are ready to take up capacity.</p>
4.11.1(d)(iii) Correctly 4.10.1(d)(iii)	<p>It is concerned with the proposed requirement for Aurizon Network to provide an evidence based explanation of why available capacity is reduced. A concern is how to include confidentiality provisions. The current drafting is unworkable.</p> <p>Aurizon Network proposed drafting to ensure information is still provided but is not required to be evidentiary.</p>	<p>In our view the consolidated draft decision-amended DAU provided sufficient flexibility for Aurizon Network to manage confidentiality obligations according to the circumstances of each case. For example, information would be provided to the extent possible, and aggregated if this enables information to be provided without breaching confidentiality. However, we have provided clarifying amendments (cl. 4.11.1(d)(iii) of the final amended DAU).</p>
4.10.2(a)(iii)	Aurizon Network suggested an amendment that adds that the access seeker must prepare an operating plan consistent with	Although this suggested amendment seems reasonable, we do not consider it to be necessary as the requirement that the

<i>Clause (consolidated draft decision- amended DAU)</i>	<i>Issue</i>	<i>QCA response</i>
	the Access Rights sought under the Access Application	operating plan should be consistent with the access rights sought is in our view implicit. (cl. 4.11.2(a)(iii) of the final amended DAU).
4.10.2(e)	<p>There is no protection for Aurizon Network—it should not be required to enter into an agreement where the information has not been provided, unless the situation can be addressed through conditions precedent clauses.</p> <p>Aurizon Network resubmitted that the operation of the clause can lead to hoarding and inefficient allocation of capacity, particularly as the QCA has removed the mechanism for AN to alter the queue</p> <p>Aurizon Network proposed new drafting in clause 4.11.2(e) to ensure information is provided prior to operation of train services.</p>	<p>This submission relates to Aurizon Network’s submission on being able to re-order the queue.</p> <p>We do not see how the amendments proposed by Aurizon Network would address their concern unless it was coupled with the reinstatement of the provisions relating to re-ordering the queue in UT3 (primarily cl. 7.3.4(c)) on the basis that execution of an access agreement with conditions precedent provides Aurizon Network with protection in respect of its obligation to provide access rights under that access agreement, but still commits access rights to an access seeker who may not yet be in a position to utilise them.</p> <p>We have made no change.</p>
4.12	Aurizon Network suggested a number of clarifying amendments in regard to cessation of negotiations.	We have accepted most of these amendments as shown in our final amended DAU (cl. 4.13).

In relation to QRC's comments:

- We have accepted some of the QRC's suggested drafting amendments.
- We agree with amendments to clause 4.5(e)(i), as this clarifies the process.
- The QRC's has restated its concerns with clause 4.4(d)(vi), but has clarified that its concern relates the method of how an expansion is to be funded, as opposed to the timing. As the QRC noted, the current clause reference does not cover all the ways in which an expansion can be agreed to be funded. Clause 8.2.1(c)(ii) sets this out more fully. We have accepted the suggested amendments, now included in clause 4.8 of the final amended DAU.
- Currently, an access seeker is already provided with two opportunities to choose whether to proceed with a variation (i.e. at the point of notification that it a variation is material, and when an IAP or revised IAP is issued).

We agree with Asciano that given Part 4 links to the Part 11 dispute resolution process, the drafting terminology should be consistent.

We have made clarifying amendments to the definitions of access application, access seeker and train operations deed in our final amended DAU in response to submissions from Aurizon Network and QRC.

Aside from the drafting adjustments, our analysis, reasoning and decision remain unchanged from that set out in our consolidated draft decision analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 4 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

Final decision 7.1

- (1) **After considering Aurizon Network's proposal, our final decision is to refuse to approve the process for applying for access and negotiating agreements.**
- (2) **The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (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**
 - (c) **make other amendments as reflected in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.4 Providing relevant and accurate information in a timely manner

Parties should have access to relevant, accurate and up-to-date information. Negotiations are more likely to be effective and to be concluded quickly when parties have the information they need to make decisions. However, parties should not be obliged to provide any more information than what is reasonably available and necessary, particularly in the earlier stages of the process.

The information required to negotiate access should take account of information made available elsewhere in the 2014 DAU. This includes information related to network development and expansions⁴⁹⁰, the Network Management Principles⁴⁹¹, and information provided through public reporting requirements.⁴⁹²

7.4.1 Aurizon Network's proposal

Part 4 of the 2014 DAU obliges Aurizon Network, access seekers and train operators to provide information throughout the application and negotiation process to facilitate negotiations and support transparent decision making. Aurizon Network's proposal is summarised in the following table.

⁴⁹⁰ Part 8 of the 2014 DAU; see Chapter 12.

⁴⁹¹ Schedule G of the 2014 DAU; see Chapter 13.

⁴⁹² Part 10 of the 2014 DAU; see Chapter 5.

Table 30 Information requirements—Aurizon Network's proposal

<i>N</i>	<i>Stage</i>	<i>Information provided/required/requested</i>
<i>O</i> <i>t</i> <i>e</i> <i>:</i>	Initial inquiries cl. 4.2, Sch A	Aurizon Network must provide information to prospective access seekers either on its website (technical and operational information and standards) or on request (capacity information including the Master Train Plan (MTP) and the Daily Train Plan (DTP)).
<i>C</i> <i>/</i> <i>a</i> <i>u</i> <i>s</i> <i>e</i> <i>r</i> <i>e</i> <i>f</i>	Application submitted cls. 4.3, 4.9, Sch B	An access application (or a request to enter a TOA) includes detailed information on planned operations (and also confirms that the train operator has been nominated by the end user). Schedule B sets out the access application information requirements including specific arrangements for transfers and renewals. Aurizon Network must notify a party where the application is incomplete, specifying what information is required for the application to be complete. Aurizon Network can cease negotiations if the requested information is available, but is not provided.
<i>f</i> <i>e</i> <i>r</i> <i>e</i> <i>n</i> <i>c</i> <i>e</i> <i>s</i>	Acknowledgement of access application cl. 4.4	Aurizon Network will acknowledge a properly completed access application and confirm it will prepare an IAP. Parties can suspend negotiations for access where capacity is not available, by written notice giving reasons. If access negotiations are suspended, the access seeker must confirm its ongoing requirement for access rights and any material change to the information contained in their access application; and provide information of their ability to fully use the requested access rights.
<i>i</i>	Revisions cls. 4.5, 4.10.2	Aurizon Network will give a written notice of its view that a revision is a material variation.
<i>n</i> <i>t</i> <i>h</i> <i>i</i>	IAP cl. 4.6	Aurizon Network will prepare an IAP for the rights sought. This includes an initial capacity assessment except where the system rules indicate, or Aurizon Network considers, such an assessment is not required (and Aurizon Network has notified the access seeker of the reasons why the assessment is not required).
<i>s</i> <i>a</i> <i>b</i> <i>l</i> <i>e</i> <i>a</i> <i>r</i> <i>e</i>	Negotiation process cls. 4.7, 4.10, 4.11, 4.12, Sch A, Sch C	An access seeker must notify Aurizon Network of its intention to progress its access application under the IAP prior to the expiry of the IAP. Aurizon Network will provide the access seeker relevant additional information and any requested capacity information (as set out in Schedule A). The access seeker (other than end user) or train operator must prepare an operating plan (as set out in Schedule C) and demonstrate the rolling stock and rolling stock configurations meet the required standards. Aurizon Network can seek further information from the access seeker on any matter to be addressed during negotiations, or on the access seeker's ability to fully use the requested access rights.
<i>t</i> <i>o</i> <i>t</i> <i>h</i> <i>e</i>	Primacy of end users cls. 4.8, 4.9, 4.10	Aurizon Network may disclose to a customer that a railway operator has submitted an access application for the same access or that there are multiple access applications for the same access. Such disclosures will not constitute a breach of the confidentiality obligations owed. A train operator must provide a copy of its nomination as part of its application for a TOA.

Note: Clause references in this table are to the DAU 2014.

Schedules A and B of the 2014 DAU set out the specific information requirements to support the application process. Schedule C sets out the operating plan requirements. Aurizon Network advised that Schedule C seeks to expand the 2010 AU requirements to reflect best practice arrangements for providing a detailed description of how the train service will operate.

In response to stakeholder comments on the 2013 DAU, Aurizon Network also included provisions in Part 4 of the 2014 DAU that require it to provide access seekers with relevant and

accurate information in a timelier manner, and appropriately constrain the nature and type of information that it can request and require from access seekers.⁴⁹³

7.4.2 Summary of the initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposal in relation to information requirements. We supported Aurizon Network's objective for access applications to provide sufficient information to progress the application process, but considered that the undertaking should account for circumstances where information is not reasonably available.⁴⁹⁴

We were also concerned that Part 4 and Schedule B did not adequately balance the rights and interests of Aurizon Network and other parties. To address this imbalance we considered it appropriate that Aurizon Network amends its draft access undertaking to better focus information requests⁴⁹⁵, limit the additional information Aurizon Network may request from access seekers⁴⁹⁶ and remove the requirements for an access seeker to confirm their ongoing requirement for access rights.⁴⁹⁷ We also considered that Aurizon Network's obligations to provide accurate and up-to-date information⁴⁹⁸ and to advise access seekers of decisions should be strengthened.

We proposed these amendments having regard to other parts of the 2014 DAU, namely network capacity, network development, expansions and reporting. We also sought to provide for confidential information to be dealt with appropriately.⁴⁹⁹

7.4.3 Stakeholders' comments on the initial draft decision

Aurizon Network substantially agreed with the QCA's proposed amendments.⁵⁰⁰ However, Aurizon Network and other stakeholders made a number of specific comments, which we have outlined and addressed in Table 26 below.

7.4.4 Consolidated draft decision

After having regard to the QCA Act section 138(2) factors and stakeholder submissions, we did not consider it appropriate to approve the 2014 DAU in respect of information requirements.

Consistent with the reasons in our initial draft decision (see section 7.4.3 of our initial draft decision), we refused to approve Aurizon Network's proposed arrangements because the proposal did not appropriately balance the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act) against the legitimate business interests of Aurizon Network (s. 138(2)(b)).

The way in which we considered it appropriate for Aurizon Network to amend its draft access undertaking was set out in the consolidated draft decision-amended DAU. These amendments substantially reflected the initial draft decision-amended DAU, except that they addressed specific issues raised by stakeholders since the initial draft decision, most notably those outlined

⁴⁹³ Aurizon Network, 2014 DAU, sub. 3: 44, 46, 53, 55–57, 69, 75, 78.

⁴⁹⁴ Clauses 4.3(g), 4.4(k), 4.5(f) and 4.10.2(e) of the initial draft decision-amended DAU.

⁴⁹⁵ Clauses 4.4(i)(i) and 4.12(c) of the initial draft decision-amended DAU.

⁴⁹⁶ Clauses 4.3(c) and 4.4(i) and Schedule B of the initial draft decision-amended DAU.

⁴⁹⁷ Clauses 4.4(i)(i) and (j) of the initial draft decision-amended DAU.

⁴⁹⁸ Clauses 4.2(d) and 4.4(i)(ii) of the initial draft decision-amended DAU.

⁴⁹⁹ Schedule A, cl. 2 of the initial draft decision-amended DAU.

⁵⁰⁰ Aurizon Network, 2014 DAU, sub. 83: 104.

in the table below. Clause references are to the consolidated draft decision-amended DAU (unless otherwise stated).

Table 31 Information requirements—stakeholders' comments

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
Cl. 4.3—Access Application and cl. 4.5—Revisions to an Access Application			
Level of information in access applications cls. 4.3(c)(ii)(A) and 4.5(f)(ii)	Asciano	Access seekers should not be required to provide information in their application about their ability to use the requested access rights. This information is not necessary to develop an initial response, has the potential to delay the process and allows Aurizon Network to deem an application withdrawn if the information is not received. ⁵⁰¹	We considered this information is important, even at an early stage of the process. Otherwise, it may be a waste of time and money for Aurizon Network to develop an IAP. We considered this in the interests of Aurizon Network, other access seekers and access holders. We noted that the provision was limited to information that is 'reasonably required' and accommodated circumstances where the information was not available.
Cl. 4.4—Acknowledgement of Access Application			
Information about joining a queue cl. 4.4(b)(ii)	Aurizon Network	It is premature to provide information in an Acknowledgement Notice as to whether the access seeker has joined the queue, because a capacity analysis may need to be undertaken before it can be determined that a queue is required. The IAP is a more appropriate stage to provide this information. ⁵⁰²	We were of the view that the queue can be formed regardless of whether or not a capacity analysis is required. We considered it to be in the interests of access seekers that, if relevant, they join the queue when their application is deemed to have been received in accordance with clause 4.4(b).
Information about mitigating capacity constraints cl. 4.4(e)	Aurizon Network	It is unreasonable to explain in an Acknowledgement Notice why an identified capacity constraint cannot be mitigated. This may require an assessment of operational improvements with third parties or changes to existing contracts, which cannot be done within the timeframes for providing the notice. ⁵⁰³	We considered that Aurizon Network should be sufficiently aware of its capacity and operational capability to be able to reasonably provide information about possible capacity constraints. It was our view that the provision of such information would be in the interests of access seekers. Notwithstanding this, we proposed amendments to require information to be provided to the extent that it is available.

⁵⁰¹ Asciano, 2014 DAU, sub. 76: 13–14.

⁵⁰² Aurizon Network, 2014 DAU, sub. 83: 104.

⁵⁰³ Aurizon Network, 2014 DAU, sub. 83: 104.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
Timeframe for providing certain information cls. 4.4(i)(i) and 4.4(j)	Aurizon Network and QRC	Aurizon Network: There is no timeframe specified for the customer to provide the required information, even though the information must be provided within the required timeframe (cl. 4.4(j)). ⁵⁰⁴ Aurizon Network and the QRC: A timeframe of 20 business days is proposed. ⁵⁰⁵	We accepted the inclusion of a 20-business-day timeframe, noting that it was proposed by both Aurizon Network and the QRC.
Notice period when changes to an expansion impact access application cl. 4.4(i)(ii)	Aurizon Network	The obligation to provide notice within 10 business days of becoming aware of a change is too onerous. Also, notice provisions should be dealt with in Part 8, not Part 4, since a customer may choose to participate in accordance with the principles in Part 8 if it is seeking access as part of an expansion. ⁵⁰⁶	We proposed amendments to require information to be provided as soon as practicable, but considered that the requirement appropriately fits in Part 4.
Schedule A—Preliminary, Additional and Capacity Information			
Information on track segments and mainline paths cl. 1(h)	Asciano	Asciano was concerned about the non-provision of maps and diagrams regarding track segments and mainline paths and the exact intent of the concepts of track segments and mainline paths. ⁵⁰⁷	We proposed to retain the 2010 AU provisions about line diagrams in Part 3.
Restricting information for confidentiality reasons	QRC	The QRC disagreed with broad exclusions to provide information to access seekers. This information is essential to ensure transparency and open access and should not be subject to broad confidentiality obligations. ⁵⁰⁸	We considered that the confidentiality of information takes precedence over transparency.
Schedule B—Access Application Information Requirements			
Operators seeking access rights for customers cl. 3(a)	QRC	Where an access seeker is seeking access rights that will be used by a customer, it should be required to provide evidence that the proposed customer agrees to the access seeker acting on its behalf. ⁵⁰⁹	We agreed with this proposal in the interests of certainty and clarity for customers.
Power to obtain further information cl. 6(g)	QRC	The clause should restrict Aurizon Network's power to obtain further information, consistent with proposed restrictions in Part 4. ⁵¹⁰	We considered further information should only be provided if it is reasonably available (in line with the non-availability requirements in Part 4). We agreed it was

⁵⁰⁴ Aurizon Network, 2014 DAU, sub. 83: 105

⁵⁰⁵ Aurizon Network, 2014 DAU, sub. 83: 105; QRC, 2014 DAU, sub. 83: 5.

⁵⁰⁶ Aurizon Network, 2014 DAU, sub. 83: 105.

⁵⁰⁷ Asciano, 2014 DAU, sub. 76: 23.

⁵⁰⁸ QRC, 2014 DAU, sub. 84: 25.

⁵⁰⁹ QRC, 2014 DAU, sub. 84: 26.

⁵¹⁰ QRC, 2014 DAU, sub. 84: 26.

<i>Issue</i>	<i>Stakeholder</i>	<i>Stakeholder's comments</i>	<i>QCA response</i>
			appropriate for consistency between Part 4 and Schedule B.
Footnote about renewals (footnote 5 in the IDD amended DAU)	QRC	The footnote about when a renewal exists should be deleted to avoid confusion. Whether or not a renewal exists should depend on the operative provisions of the undertaking. ⁵¹¹	We agreed with deleting the footnote.
Information requirements are excessive	Asciano	The additional information required by Aurizon Network is excessive and unnecessary. ⁵¹²	We assessed the information requirements and considered them reasonable for the purposes of an access application.
Schedule C—Operating Plan and Other Plan Requirements			
Information on profiling and veneering cl. 1.1	Asciano	Asciano was concerned that profiling and veneering are required in a train operator's plan as these functions are typically controlled by miners at the mine load out. ⁵¹³	While noting that profiling and veneering are controlled by mines, we considered that train operators would need this information as part of the operating plan. We considered that this obligation could be managed by passing the requirement through to customers in their haulage agreements.

We considered that the amendments contained in our initial draft decision-amended DAU, as refined in our consolidated draft decision-amended DAU, appropriately addressed the reasons for refusing to approve Aurizon Network's proposal, by providing an appropriate balance between the rights and interests of the various parties (s. 138(2)(b), (e) and (h) of the QCA Act). We considered our proposed amendments would enable stakeholders to access information to make informed decisions in a timely manner, and improve the efficiency of the negotiation process, which would promote the economically efficient use of, and investment in, rail infrastructure (s. 138(2)(a)) and the public interest (s. 138(2)(d)).

We also proposed amendments to clarify the drafting of some clauses in response to issues raised by stakeholders, which were not discussed.

7.4.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network is prepared to agree to the majority of changes made in the consolidated draft decision, but identified the following two key issues that could not be accepted:⁵¹⁴

- (a) The QCA has misunderstood Aurizon Network's concerns (raised in response to the initial draft decision), with the drafting of clause 4.4(b). As drafted, it provides that Aurizon Network must confirm whether an access seeker has entered the queue in the acknowledgement notice. Aurizon Network's position is that an access seeker is only

⁵¹¹ QRC, 2014 DAU, sub. 84: 26.

⁵¹² Asciano, 2014 DAU, sub. 76: 23.

⁵¹³ Asciano, 2014 DAU, sub.76: 23.

⁵¹⁴ Aurizon Network, 2014 DAU, sub. 125: 106–107.

placed in a queue when it has issued a notice of intent in accordance with clause 4.7. As the drafting currently stands, Aurizon Network would be required to advise every access seeker in the queue of each individual change—which is unnecessary and impractical to implement. It proposed minor drafting amendments in clause 4.4(b) to address this.

- (b) The proposed requirement to provide information regarding expansions and whether capacity is constrained within 10 days of an access application is not practical. The 10-day timeframe is the time required by Aurizon Network to determine whether there is sufficient information to assess the application. Static baseline capacity information cannot be used to make such decisions. The initial capacity assessment is undertaken at the IAP phase. Aurizon Network proposed drafting amendments to provide information on whether an expansion is required to be a step in the IAP development process. It created a new clause 4.8 for this purpose in its amended undertaking.

Aurizon Network also submitted in regard to Schedules A and B:

- (a) Schedule A, Part 2—Where Aurizon Network is providing information on a land owner to an access seeker, it is unlikely the confidentiality provisions of the undertaking will apply. Aurizon Network proposed drafting to ensure that its confidentiality obligations relating to the landowner are taken into consideration.⁵¹⁵
- (b) Schedule B, Parts 2, 3— Aurizon Network proposed amendments removing 'prospective customer' from the provisions.
- (c) Schedule B, Parts 6(e) and 7(e)—The QCA changed drafting so as to remove the requirement for an access seeker to provide information regarding its ability to use access rights where its request is a transfer or renewal. Aurizon Network considered this must be an error—where an access seeker is renewing its access rights, it must be able to demonstrate that it has obtained port rights to unload.⁵¹⁶

Anglo American did not agree with the QCA's insertion of a new test to determine when an Access Seeker joins the queue. While the old test required that the Applicant provide a 'substantially compliant' access application, the new test provides that the access seeker joins the queue when it provides Aurizon Network with a 'properly completed' access application. Anglo American submitted that the new test gives Aurizon Network the discretion to refuse the application where it considers the application does not meet the criteria, which will impact on a party's place in the queue. Anglo submitted that it would prefer this be reverted to the previous test.⁵¹⁷

7.4.6 QCA analysis and final decision

Our final decision is to refuse to approve the information requirements for negotiating access proposed by Aurizon Network in its 2014 DAU.

In our view, Aurizon Network's proposal does not change the intent of the provisions. The access seeker's position in the queue will still reflect the date it was received, however, confirmation of the access seeker's place will only be confirmed after it has provided its notice of intent. This will reduce Aurizon Network's administrative burden, but does not appear to disadvantage other access seekers (as their position in the queue will still be taken to be the date their application is received).

⁵¹⁵ Aurizon Network, 2014 DAU, sub. 125: 101–104.

⁵¹⁶ Aurizon Network, 2014 DAU, sub. 125: 101–104.

⁵¹⁷ Anglo American, sub. 127: 25

We propose that information regarding expansions be provided as soon as reasonably practicable but in any event no later than the date on which the relevant IAP is issued. We have no concerns with the concept of moving the provision to be a step in the IAP development phase, provided the information is eventually provided (cl. 4.6(b) of the final amended DAU). We also accept the inclusion of a new clause 4.8 to separate out more clearly the process for access applications that require expansions, and we have made amendments to move relevant provisions to clause 4.8.

We consider Aurizon Network's amendments to Schedule A are reasonable.

The amendments to clauses 2 and 3 of Schedule B were added into the consolidated draft decision as part of the QCA's proposal to alleviate the QRC's concerns with the ability of an operator to progress an access application without specific support from the intended customer. Aurizon Network has rejected most of these amendments without specific explanation. We propose no change to the consolidated draft decision-amended DAU.

In regard to clauses 6(e) and 7(e) of Schedule B, it does not seem unreasonable for this information to be provided as part of a transfer or renewal request. We therefore reinstated these references in our final amended DAU.

In response to Anglo American, we consider that the process in clause 4.4 is sufficient to address Anglo American's concerns, while balancing Aurizon Network's need for complete access applications so that it can appropriately allocate capacity. On current drafting, Aurizon Network has to notify an access seeker if an access application is not properly completed and specify the information required to make it complete and compliant clause 4.3(c)(i). This process is adequate to allow sufficient opportunity for the access seeker to provide the necessary information.

Aside from drafting adjustments, our analysis, reasoning and decision remains unchanged from that set out in our consolidated draft decision analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 4 of the 2014 DAU (and the relevant schedules) in order for it to be approved are set out in the final amended DAU

Final decision 7.2

- (1) **After considering Aurizon Network's proposal, our final decision is to refuse to approve the information requirements for negotiating access.**
- (2) **The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (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 in our final amended DAU)**
 - (c) **make other amendments as reflected in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

7.5 Facilitating competition in above-rail markets

7.5.1 Aurizon Network's proposal

Part 4 of the 2014 DAU separately sets out how Aurizon Network will deal with parties that want to:

- negotiate an access agreement (as an operator, access holder or end user)
- enter into a TOA under the alternative form of SAA.⁵¹⁸

A train operator wishing to enter into a TOA under the alternative SAA is not treated as an access seeker.⁵¹⁹ Instead, the 2014 DAU outlines how a train operator will participate in the negotiation process. Aurizon Network sought to establish a structure that gives primacy to the end user as the 'access seeker', because it is the party who will eventually contract for the access rights.

Part 4 also requires a train operator to be nominated by an end user for particular functions in the negotiation process, including:⁵²⁰

- requiring a prospective train operator to provide Aurizon Network with notification that it has been nominated by an end user as part of its request to enter a TOA (cl. 4.9(a)(ii))
- requiring an end user to nominate a train operator as an access seeker where there are multiple applications from train operators for the same access (cl. 4.8(a)(ii)) and allowing Aurizon Network to suspend negotiations until an operator is nominated (cl. 4.8(c))
- providing for an end user to nominate an operator to act on its behalf for the purposes of assisting it with its access application, including in negotiations with Aurizon Network (cl. 4.8(b))

⁵¹⁸ These agreements allow an end user to contract for long-term access rights while its operator contracts with Aurizon Network regarding the operational requirements of running train services using those access rights.

⁵¹⁹ Although a railway operator can be treated as an access seeker in certain circumstances (e.g. if it has been nominated by the customer as the access seeker; see cl. 4.8 of the 2014 DAU).

⁵²⁰ Clause references that follow are to the 2014 DAU.

- providing for an end user to nominate its train operator during the negotiation period, if it has not already done so (cl. 4.10.2(a)(i)).

7.5.2 Summary of our initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposal to require a customer to nominate a train operator, when there are multiple applications for the same access rights. We considered that Aurizon Network's proposal may restrict competition between train operators and proposed amendments to require Aurizon Network to continue negotiating with all train operators until a nomination is made.

However, we acknowledged that this may increase the complexity and costs of negotiations and we proposed amendments to mitigate these costs. These included requiring Aurizon Network to only continue negotiations with multiple train operators if they are negotiating (or a party to) a haulage agreement with a customer (cl. 4.8 of the IDD amended DAU). We agreed with Aurizon Network's proposal that a train operator should be allowed to negotiate access on a customer's behalf, but proposed amendments to simplify and streamline processes (cl. 4.9.1 of the IDD amended DAU).

Overall, we considered our proposed amendments would maintain the benefits of providing for competition between operators while minimising the costs of progressing multiple negotiations for the same access rights.

7.5.3 Stakeholders' comments on our initial draft decision

Aurizon Network submitted that the amendments proposed in our initial draft decision would not impact on competition in the above-rail market given the prescriptive nature of the TOD, but accepted the initial draft decision subject to the resolution of specific issues.⁵²¹

The QRC⁵²² and Vale⁵²³ supported the proposed amendments to clause 4.9.1 as providing greater flexibility for customers regarding the progression of an access application.

We have addressed specific issues raised by Aurizon Network and QRC in the QCA analysis section below.

7.5.4 Consolidated draft decision

After having regard to the QCA Act section 138(2) factors and stakeholders' submissions, we maintained our initial draft decision (see section 7.5.3 of our initial draft decision) that it is not appropriate to require a customer to nominate a train operator, when there are multiple applications for the same access rights. Consistent with our position in the initial draft decision, we considered that this may restrict competition between train operators, which is inconsistent with the object of Part 5 of the QCA Act, and not in the public interest or the interests of access seekers and customers (s. 138(2)(a), (d), (e) and (h) of the QCA Act).

We maintained our initial draft decision that competition in the above-rail market will be promoted if Aurizon Network makes amendments to the draft access undertaking to require Aurizon Network to continue negotiating with all train operators until a nomination is made. We also maintained our position to make other amendments to streamline the process and minimise the costs of progressing multiple negotiations for the same access rights. This

⁵²¹ Aurizon Network, 2014 DAU, sub. 83: 105.

⁵²² QRC, 2014 DAU, sub. 84: 24.

⁵²³ Vale, 2014 DAU, sub. 79: 4.

appropriately balances the factors in section 138(2) of the QCA Act by promoting competition (s. 138(2)(a) and (d)) and recognising the legitimate business interests of Aurizon Network (s. 138(2)(b)).

We disagreed with Aurizon Network that our proposed changes would not positively impact on competition in the above-rail market, given the prescriptive nature of the TOD. Train operators can differentiate themselves from their competitors in many ways, including through the terms and conditions of haulage agreements, cost and service quality.

The way in which we considered it appropriate for Aurizon Network to amend its draft access undertaking was set out in our consolidated draft decision-amended DAU. These amendments substantially reflected the initial draft decision-amended DAU, except that they addressed specific issues raised by stakeholders since our initial draft decision, most notably those outlined in the table below. Clause references are to our consolidated draft decision-amended DAU (unless otherwise stated).

Table 32 Nomination of train operators by customers—stakeholders' comments

<i>Issue raised</i>	<i>QCA Response</i>
Aurizon Network argued that it should not be required to prepare an IAP if a customer fails to nominate a rail operator (cl. 4.8(b) of the initial draft decision-amended DAU). ⁵²⁴	We did not agree that a customer should be required to nominate a rail operator before an IAP is issued. This is consistent with our position that Aurizon Network should continue negotiating with all train operators until the customer makes a nomination. However, we proposed to amend this provision so that Aurizon Network is not obliged to enter into an access agreement with a railway operator until the operator is nominated by the relevant customer.
The QRC was concerned that a train operator could progress an access application without specific support from the intended customer. ⁵²⁵	While we would not expect a train operator to seek access rights without the support of a customer, we considered that this issue is adequately addressed by: <ul style="list-style-type: none"> • our proposed amendments to require evidence in an access application that the customer (or prospective customer) has authorised the access seeker to apply for the access rights (see Schedule B) • the requirement for a properly completed access application (see cl. 4.3) to progress through the negotiation process.
Aurizon Network considered that, where a customer nominates both train operators to use a part of their access rights, the provisions dealing with revisions to an access application (cl. 4.5) should apply. ⁵²⁶	We considered that clause 4.5 would apply where a customer nominates both train operators as it broadly applies to any variation, including a change to a train operator nomination under the original access application.
To limit duplication of effort, Aurizon Network considered it should be allowed to immediately stop negotiating with a train operator when a customer nominates another train operator. ⁵²⁷	We considered that this concern is already addressed by cl. 4.8(a)(ii)(D).

We proposed drafting changes in our consolidated draft decision as explained above.

⁵²⁴ Aurizon Network, 2014 DAU, sub. 83: 105.

⁵²⁵ QRC, 2014 DAU, sub. 84: 22.

⁵²⁶ Aurizon Network, 2014 DAU, sub. 83: 105.

⁵²⁷ Aurizon Network, 2014 DAU, sub. 83: 105.

7.5.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed with the principles, but suggested minor drafting changes.⁵²⁸ While agreeing to facilitate the proposed requirement to negotiate with multiple train operators, Aurizon Network reiterated its concern that negotiating with multiple operators for the same access rights is inefficient. Aurizon Network said the QCA has failed to provide valid reasons for rejection of these concerns.⁵²⁹ It further submitted that an additional cost of \$130,000 would be incurred and would need to be included in the MAR. This cost was based on assuming 10 concurrent negotiations each year and covers legal and administration costs.⁵³⁰

QRC reiterated its preference for a clear prohibition on a train operator progressing an access application for coal-carrying train services without support from a customer. An operator could secure available capacity and new and expanding mines would have a choice of offering above rail contracts to that operator or having to wait for new capacity.⁵³¹ The QRC also suggested a drafting amendment to clause 4.12(c)(ii) to ensure the effect of granting the access rights is disregarded from any consideration of the reasonable likelihood of a railway operator securing a rail haulage agreement with a customer.⁵³²

7.5.6 QCA analysis and final decision

Our final decision is to refuse to approve the arrangements that require a customer to nominate a train operator for particular functions in the negotiation process proposed by Aurizon Network in its 2014 DAU.

Aurizon Network has not provided any further argument or evidence to support its position in regard to negotiating with multiple train operators. While Aurizon Network was willing to accept the drafting if QCA appropriately considers the additional costs Aurizon Network will face, we question how significant those costs would actually be and whether they would be absorbed as part of administration overheads. We have made no further changes.

The QRC's concern seems to be that above-rail operators (including Aurizon Operations) are able to bank access rights and that Aurizon Network will favour Aurizon Operations as it is still in their discretion to continue negotiation, even if an access seeker has not provided the necessary information. Under the QCA Act and Part 2 of the undertaking, Aurizon Network must comply with unfair differentiation obligations in providing access and negotiating access. This is sufficient to ensure that Aurizon Network cannot favour a related entity.

Aside from drafting adjustments, our analysis, reasoning and decision remains unchanged from that set out in our consolidated draft decision-analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 4 of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

⁵²⁸ Aurizon Network, 2014 DAU, sub. 125: 100.

⁵²⁹ Aurizon Network, 2014 DAU, sub. 125: 103.

⁵³⁰ Aurizon Network, sub. 125: 261

⁵³¹ QRC, 2014 DAU, sub. 124: 16.

⁵³² QRC, sub. 124: 17.

Final decision 7.3

- (1) After considering Aurizon Network's proposal, our final decision is to refuse to approve the arrangements that require a customer to nominate a train operator for particular functions in the negotiation process.**
- (2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:**
 - (a) require Aurizon Network to continue negotiating with all train operators until the customer makes a nomination**
 - (b) make other amendments as reflected in our final amended DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8 ACCESS AGREEMENTS

Part 5 of the 2014 DAU provides a framework for the development of access agreements between Aurizon Network and access seekers. The 2014 DAU includes standard access agreements (SAAs) which, amongst other things, sets out the standard terms for access rights to the CQCN under different contracting scenarios and the standard terms on which access holders may exercise those rights through an accredited railway operator.

Our final decision is to not approve Part 5 of the 2014 DAU and SAAs proposed by Aurizon Network. The amendments we require to approve these arrangements are set out in a streamlined framework, including a standard Access Agreement (AA) and a standard Train Operations Deed (TOD) in which we have clarified the rights and obligations of parties, established an appropriate balance between the parties' interests and removed unnecessary duplication. Our final proposed DAU sets out the terms of the AA/TOD to govern access to the CQCN, unless an access seeker negotiates alternative terms with Aurizon Network.

The detailed drafting of Part 5 and the standard AA and TOD attached to this final decision is consistent with our approach and shows all of the amendments required.

8.1 Introduction

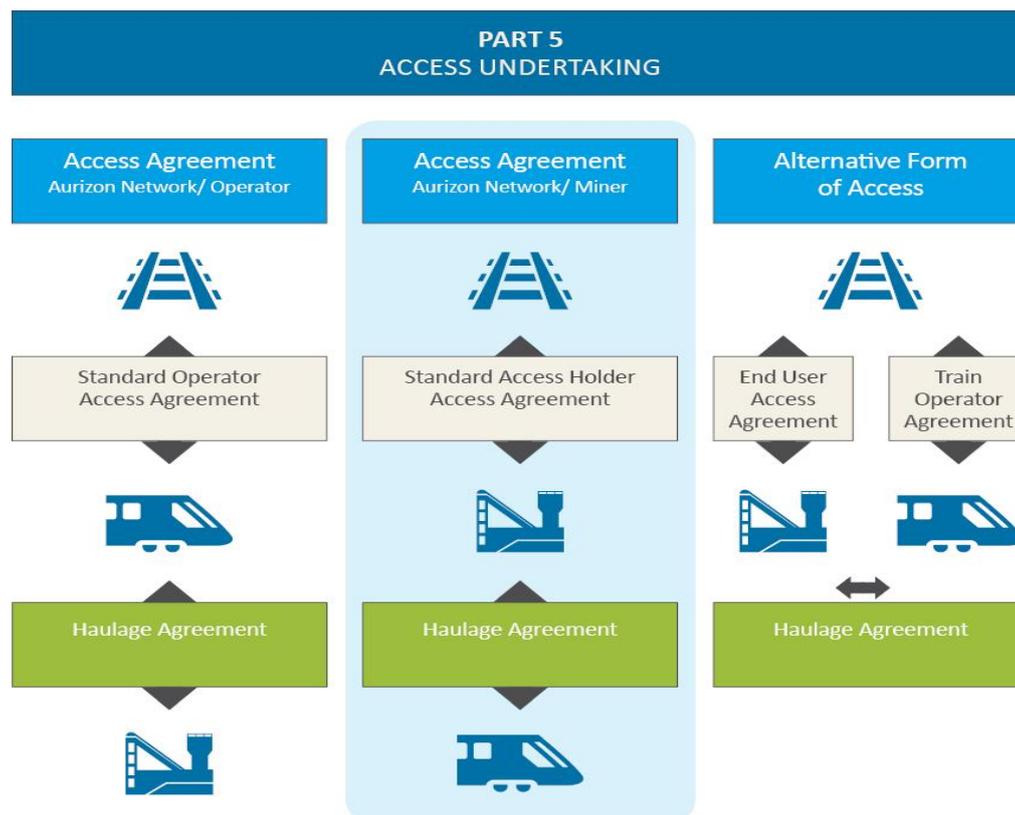
Part 5 of the 2014 DAU sets out provisions proposed by Aurizon Network for the development and execution of access agreements required for access seekers to obtain access to the CQCN. Volume 3 of the 2014 DAU also includes a suite of four SAAs which contain standard terms and conditions on which Aurizon Network proposes to provide access under different contracting scenarios (see Figure 3 below).⁵³³

There are important linkages between the SAAs and other matters in the 2014 DAU, including capacity allocation⁵³⁴ and reference tariffs.⁵³⁵

⁵³³ The suite of SAAs included as part of the 2014 DAU are the Standard Operator Access Agreement (SOAA), the Access Holder Access Agreement (AHAA), the End User Access Agreement (EUAA) and the Train Operator Agreement (TOA). These have been developed specifically for coal-carrying services.

⁵³⁴ Part 7 of the 2014 DAU, see Chapter 11.

⁵³⁵ Part 6 and Schedule F of the 2014 DAU, see Chapter 17 and 18.

Figure 3 2014 DAU SAA contracting scenarios

8.2 Overview

8.2.1 Aurizon Network's proposal

Aurizon Network proposed the terms of the access agreement be negotiated between Aurizon Network and an access seeker. It also establishes the SAAs as a set of 'safe harbour' arrangements.

Aurizon Network said it had reviewed the SAAs to reflect the new policy positions adopted for the 2013 DAU (and carried over into the 2014 DAU).⁵³⁶ It also reviewed a number of clauses in the 2014 DAU SAAs in response to stakeholder comments on the 2013 DAU SAAs.

One of Aurizon Network's more significant amendments was to have some matters exclusively addressed in the SAAs, rather than in the undertaking. Aurizon Network intended this to facilitate negotiation by removing 'standard outcomes' of negotiations from the main body of the undertaking and to avoid uncertainty where matters are duplicated across the undertaking and agreements (see Section 8.5).⁵³⁷

8.2.2 Legislative framework and QCA assessment approach

Legislative framework

In assessing Aurizon Network's arrangements for the development and execution of access agreements, we have had regard to the criteria in section 138(2) of the QCA Act.

⁵³⁶ Aurizon Network, 2013 DAU, sub. 2: 11, 325.

⁵³⁷ Aurizon Network, 2013 DAU, sub. 2: 14, 99–100.

We consider in our assessment of Aurizon Network's arrangements for access agreements that:

- sections 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) is relevant to the extent access charges levied under an access agreement should be consistent with the pricing principles
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

In certain circumstances the factors to which we have assigned weight may conflict. As noted in our analysis of the legislative framework (Chapter 2) when these circumstances arise, the QCA, as decision maker, is required to exercise judgement, having regard to the factors relevant in the circumstances.

Facilitating access to the network

Section 138(2)(a) requires us to have regard to the object of Part 5 of the QCA Act (set out in section 69E), namely to promote the economically efficient operation of, use of and investment in the CQCN. Section 138(2)(d) of the QCA Act requires us to have regard to the public interest, including the public interest in having competition in markets.

As access agreements are essential for the provision of access to the service, we consider sections 138(2)(a) and (d) are likely to be best met when an access seeker can enter into an access agreement with Aurizon Network in a timely manner and on reasonable terms and conditions.

Aurizon Network's and users' rights and interests

Section 138(2)(b) requires us to have regard to the legitimate business interests of Aurizon Network. We have discussed what we consider constitutes Aurizon Network's legitimate business in Chapter 2. In the context of access agreements, we consider this suggests that we should have regard to ensuring that the terms and conditions within an SAA would reflect a risk/liability split between the parties to the SAA that could be reasonably expected in a competitive market.

Sections 138(2)(d) and (e) require us to have regard to the public interest, and the interests of access seekers. In broad terms, we consider these various interests are most likely to be met within a framework that:

- facilitates parties developing and entering into an access agreement in a timely manner
- uses the SAAs as default agreements or, where parties prefer to negotiate alternative terms of access, as a benchmark for the negotiations
- promotes flexible use of access rights
- provides opportunities for greater competition between railway operators
- ensures a transparent and consistent approach to matters which affect all access holders, or where there is a public interest in adopting this approach.

QCA assessment approach

Our approach to assessing Aurizon Network's arrangements for developing and executing access agreements is set out in the table below. Taken as a whole, this assessment approach allows for an appropriate balancing of the criteria as set out in section 138(2) of the QCA Act.

Table 33 QCA approach to assessing access arrangements

Do the arrangements facilitate the timely development and execution of access agreements?	<p>Does Part 5 facilitate the timely development and execution of access agreements by, amongst other things:</p> <ul style="list-style-type: none"> • allowing the SAAs to be used as a 'safe harbour' agreement that an Aurizon Network and an access seeker can adopt without the need for further negotiation, unless the parties wish to negotiate alternative terms? • establishing appropriate review mechanisms to ensure that an SAA remains a relevant and effective agreement over the term of the undertaking? • clearly defining terms and conditions so they are readily understood by parties and relatively simple to negotiate and administer?
Do the arrangements appropriately balance Aurizon Network's and users' rights and interests?	<p>Does Part 5 appropriately balance Aurizon Network's and users' rights and interests by, amongst other things:</p> <ul style="list-style-type: none"> • balancing the allocation of rights, obligations and risks between parties in a manner that would be reasonable in a competitive market? • providing clarity and certainty of each party's rights and obligations in relation to the development and execution of an access agreement? • establishing processes under which access rights can be varied, or other rights and obligations of the parties may be affected are transparent and clearly defined? • recognising the interests of users of non-coal services are adequately provided for?
Do the arrangements promote effective competition in the above-rail market?	<p>Do the SAAs promote effective competition in the above-rail market by, amongst other things:</p> <ul style="list-style-type: none"> • providing a clear separation of roles relating to the management of access rights and the operation of train services on the network? • providing opportunities for customers (i.e. mining companies) to switch railway operators?
Do the arrangements promote efficient use of the network?	<p>Do the SAAs promote efficient use of the network by, amongst other things:</p> <ul style="list-style-type: none"> • providing an access holder with flexibility in the use and management of its access rights? • facilitating consistency of arrangements between access holders, where appropriate?

Key issues for consideration

In this final decision, we have explained the way in which we consider it appropriate for Aurizon Network to amend the 2014 DAU where we consider the proposed arrangements omit or do not satisfactorily deal with any of the matters above. This includes:

- amending the process for developing and executing an access agreement under Part 5 of the 2014 DAU, to clarify the rights and obligations of parties in relation to the standard arrangements
- establishing an AA and a TOD to simplify existing arrangements and to clearly separate roles between the management of access rights and the operation of train services
- requiring matters best dealt with in the undertaking being retained in the undertaking with appropriate linkages in the AA/TOD and undertaking to reduce duplication and any uncertainty arising out of such duplication.

The above are addressed in the remainder of this chapter based on the following four sections:

- an effective process for developing access agreements

- simplification of standard access agreements
- matters moved from the undertaking to the SAAs
- standard access agreements—terms and conditions.

8.3 An effective process for developing access agreements

8.3.1 Aurizon Network proposal

Part 5 of the 2014 DAU requires that access to the CQCN be underpinned by an access agreement, with terms agreed between Aurizon Network and the access seeker. Under these arrangements:

- if parties cannot agree on the terms of an access agreement, an access seeker may require, and Aurizon Network must offer to provide, access on the terms contained in the relevant SAA (modified, where required, for non coal-carrying services) (cl. 5.1(c))
- disputes in relation to the development of an access agreement will be resolved by the QCA or an expert under Part 11 of the 2014 DAU having regard to the relevant SAA (cl. 5.1(d)).

Aurizon Network said these arrangements reinforce the ability of parties to commercially negotiate terms and conditions of access, with the SAAs providing a 'clear fallback position in the event that negotiations on non-standard terms fail'.⁵³⁸ Compared to the 2010 AU, Aurizon Network's proposed Part 5 of the 2014 DAU no longer:⁵³⁹

- sets out general principles to be included in SAAs—because Aurizon Network considered it is more informative to use the comprehensive SAA as a baseline for non-coal services⁵⁴⁰
- requires the development of new coal-related SAAs—because Aurizon Network considered this is unnecessary given the suite of SAAs directly addresses the vast majority of access negotiations Aurizon Network conducts.⁵⁴¹

In addition, following its submission of the 2014 DAU, Aurizon Network indicated it supported the principle of giving existing access holders the ability to migrate access agreements developed under the previous undertakings into the 2014 DAU form of SAA, and would consult further with stakeholders on how this would be achieved.⁵⁴²

8.3.2 Summary of the initial draft decision

We considered stakeholder submissions on the 2014 DAU in reaching our initial draft decision.⁵⁴³

We refused to approve Part 5 of the 2014 DAU as we were not satisfied an access seeker's rights were adequately provided for. We considered it appropriate that Aurizon Network amended it so the terms of access will be those under the relevant AA/TOD, unless otherwise agreed by the access seeker and Aurizon Network (i.e. so an access seeker could adopt the standard at the

⁵³⁸ Aurizon Network, 2013 DAU, sub. 2: 98.

⁵³⁹ Part 5 of the 2014 DAU omits other provisions previously included in Part 5 of the 2010 AU relating to protections against unfair differentiation (e.g. publication of access agreements and arrangements for access agreements with a related operator). See Chapters 3 and 5 of this final decision.

⁵⁴⁰ Aurizon Network, 2013 DAU, sub. 2: 99.

⁵⁴¹ Aurizon Network, 2013 DAU, sub. 2: 100, 101.

⁵⁴² Aurizon Network, 2014 DAU, sub. 48: 11.

⁵⁴³ QCA 2015(a), Vol 1: 159–161.

outset, rather than necessarily having to negotiate and only adopt the standard if alternative terms could not be agreed).

We accepted Aurizon Network's proposal that, if a dispute arose during the negotiation of an AA/TOD, it would be resolved through the adoption of the standard arrangements. We considered this approach to be appropriate as it reinforced the role of standard arrangements as a default and would minimise delays and uncertainty about how these disputes may be resolved.

To ensure the standard arrangements were effective over the life of the undertaking, we also proposed a mechanism to review the standard AA/TOD during the term of the undertaking and, if necessary, develop amendments to improve their workability. This mechanism was intended to be triggered sparingly and only in limited circumstances.

Aurizon Network comments on the initial draft decision

Aurizon Network agreed in concept to our proposed amendments to Part 5 of the 2014 DAU for the standard arrangements to govern the terms of access to the CQCN (unless otherwise agreed between the parties) and to establish a review mechanism for the SAAs, subject to agreeing the terms of the new standard arrangements.⁵⁴⁴

However, with respect to the review mechanism, Aurizon Network did not support our ability to develop our own amendments to the SAAs if we refuse to approve amendments proposed by Aurizon Network. Instead, it considered the SAA as previously approved should remain in place in these circumstances.⁵⁴⁵

Stakeholder comments on the initial draft decision

Most stakeholders supported the amendments we considered were appropriate to be made to Part 5 of the 2014 DAU. Remaining key concerns stakeholders considered should be addressed were:

- the regime for providing security should be included in the undertaking itself, including to apply where Aurizon Network requires security before the commencement of train services (relating to non-expansion access rights)⁵⁴⁶
- requiring the scope of the review mechanism to be clearer and that access seekers/holders have the opportunity to initiate a review of the workability of access agreements, not just Aurizon Network.⁵⁴⁷

Aurizon Operations did not agree that the AA/TOD should default to the standard terms of access, unless otherwise agreed between Aurizon Network and an access seeker. It said proposing a one size fits all contracting structure to be applied (even if it is able to be varied) is restrictive and prevents parties from being able to negotiate a form of contract that better addresses their commercial needs.⁵⁴⁸

⁵⁴⁴ Aurizon Network, 2014 DAU, sub. 83: 107.

⁵⁴⁵ Aurizon Network, 2014 DAU, sub. 83: 38.

⁵⁴⁶ QRC, 2014 DAU, sub. 84: 29.

⁵⁴⁷ QRC, 2014 DAU, sub. 84: 30–31; Asciano, 2014 DAU, sub. 76: 15.

⁵⁴⁸ Aurizon Operations, 2014 DAU, sub. 93: 7.

The QRC also proposed a number of drafting amendments it considered would clarify or improve the operation of Part 5, including the process for resolution of disputes about the negotiation of access agreements.⁵⁴⁹

8.3.3 Consolidated draft decision

After having regard to the section 138(2) factors and stakeholder submissions, we did not consider it appropriate to approve Part 5 of the 2014 DAU.

Standard arrangements as a safe harbour

In particular, we did not consider it appropriate for an access seeker only to have the right to enter into an access agreement on the terms of the standard arrangements once it has been unsuccessful in negotiating alternative terms with Aurizon Network.

We agreed that parties should have the ability to negotiate the terms of access agreements. However, we did not consider it was in the interests of access seekers (s. 138(2)(e)), or the legitimate business interests of Aurizon Network (s. 138(2)(b)), for access seekers to be compelled to negotiate, if they are satisfied with entering into an access agreement on the standard terms and conditions. In our view, this may unnecessarily prolong negotiations in circumstances where the other party does not wish to accept terms different from the standard arrangements. This increases transaction costs and the length of time needed to enter into an access agreement, which we also considered was not consistent with the object of Part 5 of the QCA Act (s. 138(2)(a)) or the public interest (s. 138(2)(d)) as it could impact the efficient provision of the service and increase barriers to entry in related markets.

We also considered it was overly complicated. This creates uncertainty and could lead to otherwise avoidable disputes about when negotiations are taken to have been unsuccessful, or when the standard arrangements become available to an access seeker. In addition to not serving the interests of parties efficiently, we also considered that it was not appropriate with respect to the issue of simplification of the drafting of the undertaking (s. 138(2)(h)).

On this basis, and having refused to approve Aurizon Network's proposal for Part 5 of the DAU, we maintained our view that access seekers should have the right to enter into an access agreement on the terms of the standard arrangements, without the need to first attempt to negotiate with Aurizon Network.

Accordingly, we considered it appropriate that Aurizon Network amend Part 5 of the 2014 DAU to reflect this, so that the terms of an access agreement (or TOD) will be those set out in the standard arrangements, unless otherwise agreed between Aurizon Network and the access seeker (clause 5.1(c) and (d) of our marked up 2014 DAU). We considered this would balance the interests of all parties and facilitate the timely development and execution of access agreements by providing an access seeker with the right to enter into the standard arrangements and that Aurizon Network will only have to negotiate with access seekers that are willingly and genuinely seeking alternative terms and conditions.

Importantly, this would not prevent parties from negotiating alternative terms and conditions or mean Aurizon Network will be in breach of the undertaking if it does participate in negotiations. However, it does make clear that the access seeker is not obliged to negotiate at the outset, and can elect to adopt the standard arrangements if they choose to do so thereby truly having the benefit of the concept of a 'safe harbour', whereby intensive negotiations are not required in order for the access seeker to receive standard terms.

⁵⁴⁹ QRC, 2014 DAU, sub. 84: 27–32.

Review mechanism for the AA and TOD

As part of our initial draft decision we decided not to approve the proposed suite of SAAs contained in Aurizon Network's 2014 DAU (our reasons appear in Section 8.4 of this decision). Instead, our initial draft decision proposed these arrangements be simplified into two documents (the AA and TOD). In light of this change, we also considered it appropriate to include a review mechanism in Part 5 as a safety net to facilitate a review of the AA and TOD during the term of the undertaking and, if necessary, develop amendments to improve their 'workability'.

Our intent for the review mechanism was to provide a means for any issues which affect the workability of the AA and TOD to be reviewed and, if appropriate, for amendments to be made to resolve the issues. The issues we intended to be reviewed were ones which affect the ability of the document to function effectively on an operational level. We did not intend to use this process to facilitate more fundamental reviews or changes to the SAAs that are best left for consideration as part of the development of the next access undertaking or as part of a draft amending access undertaking (DAAU).

We noted Aurizon Network's comments that we should not have the ability to develop our own amendments to the AA and TOD at the conclusion of the review process in the event that we are not aligned with Aurizon Network as to the appropriate way to resolve a workability issue. However, we considered it necessary for the effectiveness of this process that we have ability to develop amendments in these circumstances.

Having considered Part 5 and the SAAs proposed by Aurizon Network in the 2014 DAU, and determining to refuse to approve Aurizon Network's proposal, we are required under section 136(5)(b) of the QCA Act to indicate the way in which we consider it appropriate for Aurizon Network to amend Part 5 and its SAAs. In acknowledging that the amendments to the SAAs (including the change to their number and structure) could have unforeseen workability implications, it is open for us to include a regime for amending the SAAs and an ability for us to act as an objective circuit breaker in the narrow circumstances where unresolvable issues arise. This can also be justified as appropriate, having regard to the section 138(2) factors.

We considered this was in the interests of access seekers (s. 138(2)(e)), as well as the object of Part 5 of the Act (s. 138(2)(a)) and the broader public interest (s. 138(2)(d)), for there to be certainty that the types of issues intended to be addressed by the mechanism are resolved in a timely manner. This was necessary to ensure the SAAs remain an effective and credible 'safe harbour' over the term of an undertaking, in that parties have the ability to enter into an access agreement on the standard terms and conditions without having to negotiate amendments to address issues with the workability of the SAAs. We also considered it was consistent with the legitimate business interests of Aurizon Network (s. 138(2)(b)) for any issues with the workability of the SAAs to be resolved upfront through this process in a timely manner, as it would avoid Aurizon Network having to negotiate amendments with individual access seekers to address common issues with the SAAs.

It should also be noted that there is precedent in the 2010 AU for the ability for the QCA to impose terms, following due consideration of issues and a decision not to approve arrangements proposed by Aurizon Network, such as for the development of the standard alternate form of access agreement and the standard user funding agreement.

However, we acknowledged the need for certainty, to the extent practicable, over the circumstances in which the AA and TOD may be reviewed during UT4. We therefore made some further changes to clarify the drafting of clause 5.4 of the CDD amended DAU, including:

- defining what 'workability' means in the context of the review mechanism (cl. 5.4(g) of our CDD amended DAU)
- strengthening consultation requirements with stakeholders throughout the review mechanism process
- expressly requiring us to have regard to the section 138(2) factors when assessing Aurizon Network's proposal.

With those further revisions since our initial draft decision, we considered the proposed review mechanism would provide sufficient certainty to all parties as to the circumstances in which the AA and TOD may be reviewed and any amendments made. In particular, we noted the review mechanism could only be triggered:

- by Aurizon Network or the QCA. We did not consider it appropriate for stakeholders to have the ability to trigger a review, as our intent was for a review to occur only if required in limited circumstances. However, we considered the interests of access seekers are still accounted for, given we would consider information from stakeholders alerting us to the need for a review to be undertaken
- twice over a two-year rolling period.

We considered our proposed process had appropriate regard to the legitimate business interests of Aurizon Network (s. 138(2)(b)) by providing certainty over the circumstances in which the AA/TOD may be reviewed.

Other aspects of Part 5 of our IDD amended DAU

We noted the QRC's comments that Part 5 of the 2014 DAU should contain provisions with respect to an access seeker's obligations to provide security to Aurizon Network. However, we did not consider it appropriate to include these provisions in the main body of the undertaking, as we considered this was a matter properly dealt with under an access agreement.

Stakeholders also made a number of detailed drafting comments on other aspects of Part 5 of our IDD amended DAU seeking to clarify the operation of the clauses or otherwise enhance their operation. We considered these comments and, where we considered it appropriate, incorporated these into Part 5 of the CDD amended DAU.

8.3.4 Stakeholders' comments on the consolidated draft decision

Aurizon Network generally agreed with our consolidated draft decision in respect of Part 5 of the 2014 DAU, subject to its comments in relation to the review mechanism (discussed below). However, it considered the obligation for parties to act reasonably and in good faith when negotiating variations to the standard AA and TOD should be amended to reflect section 100 of the QCA Act. That is, parties should be obliged to negotiate such variations in good faith.⁵⁵⁰

The QRC reiterated previous comments it had made in relation to other aspects of Part 5, including:

- amending Aurizon Network's obligation to execute an access agreement up to two years prior to commencement of train services, so that it does not apply to access agreements conditional on an expansion (cl. 5.1(i)). It also considered this timeframe should be amended for consistency with Aurizon Network's obligation to negotiate access applications up to five years before commencement of the relevant access rights (cl. 4.4(g))

⁵⁵⁰ Aurizon Network, 2014 DAU, sub. 125: 109; Volume 3, Appendix 5.

- that Part 5 should include provisions relating to security for an access seeker's financial obligations under an access agreement, which should then be incorporated by reference into the standard AA
- clarification of the timing for executing a TOD to account for circumstances where an access holder seeks to nominate a subsequent railway operator after train services have already commenced under the access agreement (cl 5.3(h)).⁵⁵¹

Review mechanism for the AA and TOD

Aurizon Network made several comments in relation to the review mechanism:

- it disagreed with the QCA having the ability to impose amendments to the standard AA or TOD in the event the QCA does not accept Aurizon Network's proposed changes. It considered this was beyond our power under the QCA Act
- although it supported the inclusion of a definition of 'workability' for the purposes of the review mechanism, it considered the definition should be clarified to overcome uncertainty about what types of issues would constitute issues that affect the ability of the standard AA or TOD to function effectively
- it also considered the review mechanism was beyond our power as it purports to limit Aurizon Network's ability to seek amendments through the DAAU process under the QCA Act.⁵⁵²

The QRC reiterated its previous comments that access holders and train operators should have a right to request a review of the standard AA or TOD.⁵⁵³

8.3.5 QCA analysis and final decision

Our final decision is to refuse to approve Part 5 of the 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD are, for the most part, appropriate and as a result, our analysis, reasoning and decision, for the most part, remains unchanged from that set out in our CDD analysis above.

We note Aurizon Network's concerns in relation to the review mechanism. As discussed in our CDD, this mechanism was intended to be triggered only sparingly and in limited circumstances. However, in light of Aurizon Network's concerns about the potential use of this mechanism, we no longer require inclusion of this mechanism. To the extent any workability issues with the AA/TOD arise during the UT4 period, we consider Aurizon Network can seek to amend these in accordance with statutory processes under the QCA Act.

We have also agreed with stakeholders that some further refinements to Part 5 of the undertaking are appropriate. For this reason, our final decision includes clarifying drafting for the timing of executing TODs in circumstances where an access holder seeks to nominate additional railway operators after an access agreement has already commenced.

We note Aurizon Network's comments about aligning each party's obligations to negotiate variations to a standard AA or TOD with section 100 of the Act by removing reference to 'acting reasonably'. However, we do not consider Aurizon Network has provided sufficient explanation

⁵⁵¹ QRC, 2014 DAU, sub. 124: 18-19.

⁵⁵² Aurizon Network, 2014 DAU, sub. 125: 24-25, 113; Volume 3, Appendix 5.

⁵⁵³ QRC, 2014 DAU, sub. 124: 19.

as to why this qualifier is inappropriate, noting the term was proposed in the 2014 DAU and retained in our previous decisions. Accordingly, we have not excluded this reference.

We note stakeholders have re-iterated other concerns previously raised in response to our CDD. As no new information or arguments have been provided, our analysis, reasoning and decision remain unchanged from that set out in our CDD analysis above. In particular, we do not consider it necessary to amend Aurizon Network's obligation to execute access agreements up to two years prior to commencement of train services, noting the current drafting allows parties to agree a longer period.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 5 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the further refinements as set out above.

Final decision 8.1

- (1) **After considering Aurizon Network's 2014 DAU, our final decision is to refuse to approve Part 5 of the 2014 DAU.**
 - (2) **We consider it appropriate for Aurizon Network to amend Part 5 to provide for the standard access agreement to govern the terms of access to the QCN, unless otherwise agreed by the access seeker and Aurizon Network.**
 - (3) **The amendments we consider to be appropriate to achieve the above are set out in Part 5 of our final amended DAU.**
- We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

8.4 Simplification of Standard Access Agreements

8.4.1 Aurizon Network's proposal

The four SAAs included in the 2014 DAU are the:

- Access Holder Access Agreement (AHAA)
- Standard Operator Access Agreement (SOAA)
- alternative form of access agreement comprising the End User Access Agreement (EUAA) and the Train Operator Agreement (TOA).

Aurizon Network's inclusion of these SAAs is consistent with the 2010 AU and reflects current practice with respect to the forms of SAAs made available to parties. However, following its submission of these four SAAs under the 2014 DAU, Aurizon Network later noted (in response to our Stakeholder Notice)⁵⁵⁴ that the suite of SAAs could be simplified to an EUAA and TOA

⁵⁵⁴ This stakeholder notice sought (among other things) stakeholders' views on whether there was merit in adopting a simpler approach to the SAAs by consolidating the proposed suite of four agreements into two agreements based on the EUAA and the TOA (i.e. the two agreements would separately deal with (a) holding access rights; and (b) train operations matters) (Stakeholder Notice 2, 26 August 2014).

model only (excluding the AHAA and SOAA), subject to certain amendments being made.⁵⁵⁵ Further, it considered not having to administer different forms of agreements would assist railway operators in the administration and implementation of these provisions on a day to day basis.⁵⁵⁶

8.4.2 Summary of the initial draft decision

Our initial draft decision proposed to refuse to approve Aurizon Network's proposed SAAs for the 2014 DAU. We considered the suite of SAAs had become highly complex and was unlikely to meet future needs or facilitate flexibility in the management and use of access rights, including through capacity trading. We therefore proposed a streamlined framework comprising two key documents, based on the EUAA and TOA model of SAA:⁵⁵⁷

- an AA—that allows either a mining company or a railway operator to contract directly with Aurizon Network for access rights only. This agreement does not deal with above-rail operations
- a TOD—that allows a nominated railway operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited railway operator, to contract with Aurizon Network to operate train services in connection with access rights granted under an AA.

Our proposed arrangements did not affect the contracting options already available to access seekers⁵⁵⁸ or a person's status as an access seeker.⁵⁵⁹

Stakeholder comments on the initial draft decision

Aurizon Network agreed in concept to simplification of the access agreements, subject to agreeing the terms and conditions of the new standard arrangements.⁵⁶⁰

We also had general support from most other stakeholders for a streamlined approach to the standard access agreement framework comprising only two key documents—the AA and TOD.⁵⁶¹ Vale said now was a good time to do a full review of access arrangements to ensure operational efficiency and appropriate risk allocation.⁵⁶²

⁵⁵⁵ Aurizon Network, 2014 DAU, sub. 48: 6–7. These amendments provide for the situation where a train operator is both an 'End User' under the EUAA and the 'Operator' under the TOA by including certain customer related provisions (such as including an Access Interface Deed and customer initiated capacity transfers).

⁵⁵⁶ Aurizon Network, 2014 DAU, sub. 48: 8.

⁵⁵⁷ This approach was selected as it reflects the delineation of roles we considered important, and represented an appropriate split between the rights, obligations and risks of all parties. Additionally, these documents were developed relatively recently and with the benefit of extensive stakeholder consultation.

⁵⁵⁸ Both an end user (i.e. mining company) and a train operator retains the ability to hold access rights, and an end user will be able to assume responsibility for operating train services if it elects to do so.

⁵⁵⁹ Regardless of whether a person is seeking to enter into an AA or a TOD, they are still seeking access to the declared service and the protections afforded to access seekers under the QCA Act and the undertaking should apply in each case.

⁵⁶⁰ Aurizon Network, 2014 DAU, sub. 83: 107.

⁵⁶¹ Vale, 2014 DAU, sub. 79: 4; Asciano, 2014 DAU, sub. 76: 7, 26; QRC, 2014 DAU, sub. 84: 3, Anglo American, 2014 DAU, sub. 95: 11.

⁵⁶² Vale, 2014 DAU, sub. 79: 4.

Aurizon Operations did not support our decision to remove the SOAA. It said the new arrangements do not provide the flexibility, suitability and workability of the single operator agreement, including the ability for the operator to:

- bundle access rights within a single access agreement across multiple customers without requiring the written consent of each customer every time the operator seeks to vary that agreement
- provide value added services relating to access management and manage access rights of all producers in a consistent and balanced manner
- contract with the access provider using a simplified single contractual document and where the train consist comprises products from multiple customers.⁵⁶³

Aurizon Operations said it is also not apparent why we proposed the train operations agreement be changed to a deed, submitting that:

- the TOD provides for the potential payment of ancillary charges to Aurizon Network and so not all access charges would be payable directly by the end user
- stakeholders have not sought to change the TOA to a TOD, nor has it been demonstrated the TOA is ineffective
- additional governance requirements come with the execution of a Deed. Time critical changes required from time to time for minor operational variations can potentially expose customers and operators to additional risks.⁵⁶⁴

8.4.3 Consolidated draft decision

Having regard to section 138(2) and stakeholder submissions, we did not consider it appropriate to approve the suite of four SAAs proposed by Aurizon Network as part of the 2014 DAU.

We noted the suite of agreements proposed by Aurizon Network reflected the history and evolution of different types of access agreements over time.

However, we maintained our position from the initial draft decision that having a suite of four SAAs creates complexity, in that the number of SAAs included in an access undertaking has the potential to require Aurizon Network to administer different types of SAAs. We considered this approach can result in ambiguity and inconsistencies with how particular matters are dealt with in the various agreements. This is not in the interests of having clarity and certainty in regulatory arrangements (s. 138(2)(a), (d) and (h)). We did not consider it to be in the interests of Aurizon Network or access seekers to have this potential uncertainty or complexity in arrangements (s. 138(2)(b) and (e)).

We considered it appropriate for Aurizon Network to amend the 2014 DAU to reduce the level of complexity by basing the standard access agreements on the alternate form of access agreement (EUAA/TOA), with amendments to those previously settled documents to accommodate the same access contracting options currently available to parties through the existing SAAs.

Using this system will also promote flexibility in the management and use of access rights, and facilitate greater competition in the usage of railway operators over time, given its separation of access rights from train operations matters, which we considered consistent with the object of

⁵⁶³ Aurizon Operations, 2014 DAU, sub. 93: 7.

⁵⁶⁴ Aurizon Operations, 2014 DAU, sub. 93: 8.

the Part 5 of the Act and the public interest in having competition in markets (s. 138(2)(a) and (d)).

Accordingly, we maintained our view in the initial draft decision that the SAAs included as part of the access undertaking should consist of the AA and TOD.

In coming to this conclusion we considered Aurizon Operations concerns about not having the SOAA, particularly given its use is well established and the effect its removal may have on the business offerings it can provide to its customers. However, we remained of the view that the SOAA contracting scenario, and the business offerings underpinned by this, can still be achieved under our proposed arrangements by the railway operator entering into both the AA and TOD. We did not consider the fact that a railway operator will have to enter into two documents will impose unreasonable costs or administrative burdens.

Additionally, we noted some stakeholders raised concerns regarding our initial draft decision to change the TOA to a deed. This amendment was made for practical reasons to ensure the legal validity of the standard contract for train operations. By making the train operations agreement a train operations deed, the fact that no payments are required to be made by the train operator to Aurizon Network is not relevant to the effectiveness of the agreement or 'contract' in place. Further, whilst we agreed that there was potential for this amendment to result in increased administration and governance, we believed this was offset by the fact that it was not in the interests of any parties for there to be any doubt as to the legal validity of the standard contract for train operations (s. 138(2)(b), (e) and (h) of the QCA Act). Moreover, we understood that any additional administrative and governance burden might be minimised by appropriately delegating decision-making powers. This was likely to ensure there was no practical difference in the administration of a 'deed' compared with an 'agreement'.

8.4.4 Stakeholders' comments on the consolidated draft decision

Aurizon Network supported the simplification of the SAAs but proposed drafting changes to the AA and TOD to ensure it is still appropriate for an operator to enter into the AA and TOD on behalf of an end user in lieu of an SOAA.⁵⁶⁵ Asciano supported the proposed simplification of the SAAs.⁵⁶⁶

Anglo American did not support the ability for a train operator to hold access rights in its own right, as it considered it could incentivise the train operator to engage in anti-competitive conduct. It submitted that train operators should be permitted to hold access rights only on behalf of an end user.⁵⁶⁷

BMA did not support changing the TOA into a deed on the basis that, if it creates additional administrative complexities, it may impact the ability of parties to make necessary changes to agreements that are time critical.⁵⁶⁸

8.4.5 QCA analysis and final decision

Our final decision is to refuse to approve the suite of SAAs included as part of the 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. However, we remain of the view our analysis, reasoning and decision in our CDD are, for the most part,

⁵⁶⁵ Aurizon Network, 2014 DAU, sub. 125: 109.

⁵⁶⁶ Asciano, 2014 DAU, sub. 126: 12.

⁵⁶⁷ Anglo American, 2014 DAU, sub. 127: 16-17.

⁵⁶⁸ BMA, 2014 DAU, sub. 122: 7.

appropriate and as a result, our analysis, reasoning and decision, for the most part, remain unchanged from that set out in our CDD analysis above. In response to stakeholder submissions, clause 4.4 of the final amended AA has been amended to clarify when an Access Interface Deed is required, with the terms of the Access Interface Deed amended as well to clarify that the access holder is also the train operator.

We do not consider it appropriate to restrict a railway operator's ability to hold access rights in its own right. As discussed above in our CDD, the simplification of the suite of SAAs is not intended to reduce the business offerings a railway operator may provide to its customers. We also consider concerns about vertical integration that promotes anti-competitive behaviour are adequately addressed through the obligations dealing with unfair differentiation and the preventing or hindering of access.

We note BMA's concerns about the administrative burden caused by having a deed rather than a contract for train operations. As discussed in our CDD, we maintain our view that any increased administrative burden associated with a deed can be minimised by the parties and is otherwise offset by the interests in having certainty over the binding nature of the arrangement for train operations in the absence of consideration.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to reflect the simplification of the suite of SAAs in order for it to be approved are set out in the final amended DAU, AA and TOD.

Final decision 8.2

- (1) After considering Aurizon Network's 2014 DAU, our final decision is to refuse to approve the suite of standard access agreements included as part of the 2014 DAU.**
- (2) The way in which we consider it appropriate to amend the DAU is to provide the following standard access agreements, as set out in our final amended DAU attached to this final decision:**
 - (a) an Access Agreement (AA)—that allows either a mining company or a railway 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 railway operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited railway operator to contract with Aurizon Network to operate train services in connection with access rights granted under an AA.**
- (3) The amendments that we consider to be appropriate to achieve the above are set out in our final DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8.5 Matters moved from the undertaking to the SAAs

8.5.1 Aurizon Network's proposal

Aurizon Network proposed a number of matters be dealt with solely in the SAAs and not in the body and schedules of the 2014 DAU. These relate to:

- train operations—including requirements for rollingstock authorisation and development of operating plans
- capacity management arrangements—including train service specification and train scheduling, capacity resumptions, capacity relinquishments and transfers
- interface and environmental management processes—including the development of plans to manage interface and environmental risks and the amendment of plans and systems to manage compliance.

Aurizon Network said including these provisions solely in the SAAs would:

- simplify and streamline the undertaking, better aligning it to its key purpose
- remove duplication and reduce uncertainty, by having matters dealt with in only one document
- encourage open and effective commercial negotiations (rather than prescribed regulatory outcomes) in the first instance.⁵⁶⁹

On this, Aurizon Network considered provisions relating to access holders (i.e. users of the network that have already entered into a contract) are appropriately addressed in the SAAs, not the access undertaking.

Where processes set out in the SAA commence during the negotiation of the access agreement (e.g. the interface and environmental processes), the 2014 DAU provided for these to be conducted in accordance with the provisions set out in the SAAs (cl. 4.10.2(b), (c)).

8.5.2 Summary of the initial draft decision

We considered stakeholder submissions in reaching our initial draft decision.⁵⁷⁰

We refused to approve Aurizon Network's proposal to have the matters that, in previous undertakings had been included within the body of the undertaking, included in the SAAs only. We considered key rights and obligations for access should not be included solely within the SAAs where:

- it is in the public interest the arrangements apply consistently across all access seekers/holders, including enforcement under the QCA Act
- the matter has impacts beyond the interests of the parties to the contract and is relevant to the ongoing relationship of all parties in the industry operating within the CQCN and across the supply chain in general
- the resolution of disputes on the matter should take account of, and apply more broadly to, parties beyond the contract (i.e. safety or environmental obligations).

We therefore considered it appropriate for Aurizon Network to amend the 2014 DAU to introduce particular SAA provisions into the body of the undertaking itself. We also considered it appropriate to incorporate some provisions from the undertaking into the AA/TOD (i.e. provide a direct reference in the AA and TOD to provisions from the undertaking), so the SAAs could change through time, aligning with any changes to the undertaking. This approach is currently used for some matters (e.g. reference tariffs), but we proposed to extend it to include matters such as:

⁵⁶⁹ Aurizon Network, 2013 DAU, sub. 1: 10; sub. 2: 99–100.

⁵⁷⁰ QCA 2015(a), Volume 1: 166–167.

- transfers (AA)
- relinquishment (AA)
- the reduction factor (AA)
- conditional access rights (AA)
- interface risk matters (TOD).

We did not include drafting in the AA linking reference tariffs, and calculations, to the undertaking. Instead, we proposed to finalise Schedule 4 of the AA once policy positions on Schedule F (see Chapter 17) of the undertaking were settled.

Aurizon Network's comments on the initial draft decision

Aurizon Network did not support our initial draft decision to move matters back to the body of the undertaking and incorporate them by reference into the AA/TOD. It said the appropriate place for standard provisions was in the AA/TOD and not the undertaking, as it considered it should have the ability to agree to different terms and conditions and not be in breach of the undertaking.

Aurizon Network also submitted that linking matters in the AA/TOD to the undertaking:

- introduces uncertainty as to what the terms of the AA/TOD will be in future, noting an access agreement typically has a 10-year term, while each undertaking typically has a three/four year term. It considered this did not provide access holders with sufficient certainty over their access rights and how they may be affected over time, and could also lead to increased administrative costs for parties.
- increases its risk profile by making it subject to remedies available under the QCA Act for any breach of obligations without the benefit of the contractual limitations of liability included under the AA/TOD.⁵⁷¹

Aurizon Network also had concerns about specific aspects of our proposal, including the breadth of provisions incorporated and how they would operate in practice. For instance, it said the AA incorporates all provisions relating to access charges in the undertaking, and some of these are not appropriate to be included in an access agreement.⁵⁷² Aurizon Network also considered there is uncertainty about whether the dispute resolution process in the undertaking or under the AA/TOD would apply in the event of a dispute. It said disputes in relation to an executed AA should be resolved in accordance with the dispute resolution procedure in the AA, with no avenue for an access holder to raise a dispute under the undertaking.⁵⁷³

Stakeholder comments on the initial draft decision

Most stakeholders supported our approach and said having matters dealt with in the SAAs or the undertaking (or both) ensures a robust and consistent approach to access.⁵⁷⁴

In particular, Asciano and the QRC strongly supported maintaining the provisions relating to capacity allocation and management in the access undertaking.⁵⁷⁵ The QRC considered this

⁵⁷¹ Aurizon Network, 2014 DAU, sub. 83: 109.

⁵⁷² Aurizon Network, 2014 DAU, sub. 83: 110.

⁵⁷³ Aurizon Network, 2014 DAU, sub. 83: 110–111.

⁵⁷⁴ Vale, 2014 DAU, sub. 79: 4; Asciano, 2014 DAU, sub. 76: 15; QRC, 2014 DAU, sub. 84: 49–50.

would increase transparency and consistency across different generations of access agreements and allow access holders to benefit from continuous improvements and refinements made to these processes over time.⁵⁷⁶

The QRC said further clarification on the application of these clauses would be beneficial, namely:

- how the new provisions interact with existing and new access agreements, including clarification on which mechanisms operate as an additional right available to access holders, compared to the mechanisms which should only apply to the extent they are incorporated into an access agreement
- whether incorporated provisions can be varied by parties when entering into an access agreement in accordance with the rights under Part 5 of the 2014 DAU to negotiate amendments to a standard access agreement.⁵⁷⁷

Aurizon Operations did not support having arrangements that allow for the terms and conditions of an access agreement to be varied with changes to an access undertaking, as it considered:

- the potential for key commercial terms of an access agreement to be varied in such a way substantially and unnecessarily increases regulatory risk, noting that access agreements (and corresponding rail haulage agreements) are often entered into for extended periods of time with some reliance and confidence that the terms not be subject to potentially significant change
- the statutory framework recognises that once an access agreement is entered into, it should not be able to be amended by changes to an access undertaking, with the primacy of commercially negotiated terms and conditions of access reflected in section 168 of the QCA Act.⁵⁷⁸

Aurizon Operations also said linking matters to the undertaking may limit our regulatory discretion when approving an undertaking or changes to it, as any changes to an access undertaking that amend the terms of access for existing access holders would require the QCA to consider the right of those access holders and how they would be adversely affected. For example, if a variation in those commercial terms had material adverse financial effects on an existing access holder then this potentially places additional limits on the regulatory discretion to the terms of an access undertaking that apply to new access rights.⁵⁷⁹

8.5.3 Consolidated draft decision

Having regard to section 138(2) and stakeholder submissions, we did not consider it appropriate to approve the 2014 DAU in respect of Aurizon Network's proposal to include particular matters solely in the SAAs.

⁵⁷⁵ Asciano, 2014 DAU, sub. 76: 15.

⁵⁷⁶ QRC, 2014 DAU, sub. 84: 49.

⁵⁷⁷ QRC, 2014 DAU, sub. 84: 50.

⁵⁷⁸ Section 168 of the QCA Act provides that: 'A term of an access agreement relating to a declared service is not invalid merely because it excludes, changes or restricts the application or operation of, or is otherwise inconsistent with, a provision of an approved access undertaking for the service.'

⁵⁷⁹ Aurizon Operations, 2014 DAU, sub. 93: 10.

Matters to be included in the access undertaking

As discussed in our initial draft decision, we acknowledged the role that commercial negotiation plays in securing access rights. However, there are particular matters which should not be dealt with solely in the SAAs but instead should be included in the access undertaking, where there is a broader interest in having greater transparency and consistency in arrangements across access holders.

Specifically, we noted the matters Aurizon Network has proposed be dealt with solely in the SAAs include key capacity-related matters, such as parties' rights and obligations with respect to the transfer, resumption and relinquishment of access rights, and capacity shortfalls.

We did not consider it appropriate these matters be omitted from the body of the access undertaking. These are important matters which define the circumstances in which access rights may be affected or otherwise dealt with by an access holder and Aurizon Network. An absence of transparency and consistency in these arrangements and how they will apply across access seekers/holders is not in the public interest in having competition in markets (s. 138(2)(d)). It is important from a competition perspective that access seekers/holders, as a whole, have confidence that there is consistency in how each access holder's access rights may be dealt with.

Moreover, an absence of consistency in these arrangements is not in the broader interest of promoting the efficient operation of the network (s. 138(2)(a)). It does not sufficiently enable Aurizon Network to facilitate capacity related processes, such as transfers, resumptions and relinquishment of access rights, in an efficient manner with less need to consider differences to the relevant processes that may be contained in individual access agreements.

Similarly, we did not consider it appropriate for other matters (i.e. operating plan requirements and interface risk management processes) to be omitted from the body of the access undertaking. These matters relate to safety, operational and environmental requirements and processes which should apply consistently to all access seekers/holders.

Accordingly, we maintained our initial draft decision and considered it appropriate that Aurizon Network amend the 2014 DAU to include matters in the body of the undertaking where they affect access seekers/holders more broadly and where there is an overall interest in providing greater transparency and certainty around the arrangements that apply. It is not inconsistent with Aurizon Network's legitimate business interests for there to be consistent processes and requirements for these matters (s. 138(2)(b)).

We acknowledged Aurizon Network's concerns that matters contained in the access undertaking only bind Aurizon Network and cannot be enforced against access seekers/holders, and that including these matters in both the undertaking and SAAs may create duplication and uncertainty. However, we considered these issues could be addressed through the use of incorporation clauses (discussed below).

'Incorporation' clauses

In our initial draft decision, we considered that it was appropriate that Aurizon Network amend the 2014 DAU to include 'incorporation' clauses which enshrine particular matters in the undertaking as contractual commitments in the AA/TOD. That is, the AA and TOD incorporate by reference defined provisions of the undertaking, so that changes to those provisions in the approved undertaking will be reflected in an AA or TOD that is in force.

We proposed the following matters would be incorporated:

- pricing related matters—access charges and reference tariff provisions

- operational related matters—interface risk provisions
- capacity related matters—transfers of access rights, relinquishment of access rights (and the reduction factor), resumption of access rights and conditional access rights.
- other matters—force majeure.

These largely reflected matters that Aurizon Network had included in its SAAs and which we determined were appropriate to be moved back into the body of the undertaking, as well as some additional matters (i.e. relating to access charges and force majeure).

We also noted provisions of this nature already applied to some matters under the 2010 AU arrangements (e.g. reference tariffs and take-or-pay provisions). We saw no reason why this could not be extended to other matters, where appropriate.

We noted stakeholders were broadly supportive of the use of incorporation clauses, although some sought clarification over how these clauses would operate in practice. Aurizon Network and Aurizon Operations did not support our approach and expressed concerns that including incorporation clauses in the AA/TOD would increase uncertainty, regulatory risk and potentially administrative costs, with Aurizon Network concerned its limitations of liability under the AA/TOD would not apply should it be found liable for a breach of an incorporation clause.

We recognised Aurizon Network's comments that including particular matters in both the body of the undertaking and the SAAs could create uncertainty and unnecessary duplication. We agreed duplicating matters in such a way was not appropriate from the perspective of having clarity and certainty in regulatory arrangements (s. 138(2)(h)). It was also important that inter-generational issues did not emerge with how these matters were provided for under access agreements (i.e. where executed access agreements reflect different arrangements based on the access undertaking in place at the time). For example, we considered it would be difficult for a practical capacity trading framework to operate in future if different generations of access agreements have different terms and conditions for such trading.

Accordingly, we proposed the use of incorporation clauses to give effect to the inclusion of matters in the undertaking without duplicating the words in the AA/TOD. We also considered this has the benefit of facilitating the ability for incorporated matters to reflect changes made to the access undertaking over time, thereby minimising inter-generational issues.

We considered stakeholder comments regarding the incorporation clauses, including that they may create a level of uncertainty for parties over the life of an AA/TOD, if the underlying provision in the body of the undertaking changes.

We did not consider this a reasonable basis on which to discount using incorporation clauses. We noted the matters subject to potential change covered by the incorporation clauses were limited and defined, and related to matters, such as processes for the transfer and relinquishment of access rights, which were typically not administered by an access holder on a regular basis. While these were important matters for access holders, we did not consider these were matters which undermined the operation or commercial certainty of an access agreement, as a whole, if they were linked to the access undertaking, nor did we consider these incorporation clauses will substantially increase administrative costs for access holders or Aurizon Network.

Further, while the matters covered by these incorporation clauses can be subject to change through the undertaking approval processes in the QCA Act, parties will know which arrangements may be subject to change and know that any changes will apply equally to all parties. It would be in this context that revisions to the undertaking would be made. We also

noted that access holders were already exposed to matters that affect parties on a more direct level, such as revenue cap arrangements, reference tariffs and take or pay provisions changing during the term of an agreement. These matters change each regulatory period (as well as potentially during regulatory periods) and impact access holders far more greatly than the arrangements for determining relinquishment fees, or how the transfers must occur.

Accordingly, we maintained our initial draft decision to incorporate particular matters contained in the access undertaking into the AA/TOD through the 'incorporation' clauses.

However, we acknowledged Aurizon Network's and other stakeholder concerns about how the incorporation clauses will operate in practice. We revised the drafting of the AA/TOD to clarify that:

- Aurizon Network's limitations and exclusions of liability under the AA/TOD would apply for breaches of the terms of an incorporation clause
- the dispute resolution process under the AA/TOD, not the access undertaking, would apply to disputes related to the terms of an incorporation clause
- if there was a change in a relevant clause in the undertaking itself, it would not automatically flow through to a previously agreed AA/TOD (with the exception of changes to access charges and take-or-pay arrangements). However, if either party notifies the other they wish to incorporate the new clause from the undertaking, it must be incorporated and the parties must negotiate amendments the AA/TOD accordingly. To reflect existing arrangements, we proposed for changes in the undertaking relating to access charges and take-or-pay arrangements to flow through automatically to the AA.

We considered these changes would ensure the use of incorporation clauses were an appropriate way to ensure particular matters were included within the body of the undertaking, without causing unnecessary duplication, uncertainty or disruption to the risk balance contained in the SAAs proposed by Aurizon Network.

8.5.4 Stakeholders' comments on the consolidated draft decision

Aurizon Network disagreed with the use of incorporation clauses and reiterated its view standard provisions that act as a 'safe harbour' should be contained in the AA/TOD and not the undertaking. However, in the event these clauses were retained in our final decision, it proposed a number of amendments to address its concerns with the use of incorporation clauses. These amendments include:

- reinstatement of access charge provisions as a schedule of the AA – it considered including these provisions as part of the incorporation clauses would make it challenging and cumbersome for access holders and Aurizon Network to administer the calculation of access charges for billing purposes. It considered it logical for these provisions to remain in the AA
- reinstatement of force majeure provisions within the AA and TOD – it considered there was no justification for including these provisions in the undertaking, given these provisions are only of relevance to parties when an access agreement is on foot and train services have commenced

- addressing uncertainty caused by incorporation clauses, including with respect to Aurizon Network's liability for breaches, disputes and the process for giving effect to changes to these clauses over time.⁵⁸⁰

BMA also did not support the use of incorporation clauses and considered certainty of contractual terms are of key importance from a risk perspective, particularly given the long term nature of access arrangements.⁵⁸¹

Anglo American supported reinstatement of key provisions from the access agreement into the undertaking, as well as the inclusion of incorporation clauses, subject to specific comments it has in relation to access charges and pricing.⁵⁸² However, Asciano did not support changes made in our CDD to expressly provide for parties to agree to vary the provisions of the undertaking incorporated by reference into the SAAs. It considered transfers, relinquishments and capacity resumption provisions of access agreements should reflect the provisions of the access undertaking in force at the time and should be applied consistently across all system users.⁵⁸³

The QRC sought a number of amendments to how changes to incorporated clauses over time will be reflected in the access agreements, including clarifying the rights of parties to dispute changes and the consequences of changes to the CQC declaration over time.⁵⁸⁴

8.5.5 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's 2014 DAU in respect of its decision to not include particular matters within the main body of the undertaking.

We have considered the concerns raised by stakeholders in response to our CDD and consider our analysis, reasoning and decision in our CDD require further refinement to address those concerns.

In particular, our analysis, reasoning and decision have changed from that set out in our CDD analysis above with regard to:

- the inclusion of access charge and force majeure provisions as part of the incorporation clauses – we accept Aurizon Network's comments that these provisions ought to be included in the SAAs and not incorporated by reference to the undertaking. We acknowledge that including these as part of the incorporation clauses would create difficulties on a practical and operational level and would not provide a net-benefit for parties. Accordingly, we have reinstated these provisions within the SAAs.
- additional clarifying drafting amendments to clause 3 of the final amended AA and TOD.

We have considered Aurizon Network's submission with respect to when the changes to the incorporated provisions as a result of a 'change in the access undertaking' take effect (in accordance with cl. 3.2 of the AA and TOD). However, it could result in the retrospective application of provisions and create uncertainty, unless transition arrangements were included. Aurizon Network did not propose any details as to the structure of such arrangements. Also, we believe the approach in the final decision AA and TOD which provides for amendments to a

⁵⁸⁰ Aurizon Network, 2014 DAU, sub. 125: 110-113; Volume 3, Appendix 1: 8-9.

⁵⁸¹ BMA, 2014 DAU, sub. 122: 7.

⁵⁸² Anglo American, 2014 DAU, sub. 127: 16.

⁵⁸³ Asciano, 2014 DAU, sub. 126: 12-13.

⁵⁸⁴ QRC, 2014 DAU, sub. 124: 42-43.

signed agreement to come into effect from the date the parties agree to such amendments is not unreasonable. For these reasons, we decided it is appropriate to maintain our CDD position.

We acknowledge Asciano's concerns about variations being made to the incorporation clauses and its view that consistency in these types of arrangements is important. However, we have had to balance the interests in promoting greater consistency in these arrangements with the interests of allowing parties to have contractual certainty, a concern expressed by BMA in particular. On this point, we note the risk Asciano raises with respect to different transfer, relinquishment and capacity resumption regimes applying at the same time is no different to what the parties are currently exposed because of the different generations of SAAs. Also, parties may negotiate variations to the standard AA/TOD, including by establishing incorporation clauses as stand-alone clauses within the agreement.

With respect to the QRC's comments querying the consequences of the services provided by Aurizon Network no longer being declared under the QCA Act, these matters would be subject to resolution between the parties depending on the relevant circumstances at the time.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 5 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 8.3

- (1) **After considering Aurizon Network's 2014 DAU, our final decision is to refuse to approve Aurizon Network's 2014 DAU, in respect of its decision to not include particular matters within the body of the undertaking.**
- (2) **The way in which we propose it is appropriate to amend the DAU is to include the following matters in the body of the undertaking and then incorporate them by reference, as set out in the AA and TOD attached to this decision:**
 - (a) **reference tariff provisions**
 - (b) **interface risk provisions**
 - (c) **transfer, relinquishment (and reduction factor), resumption and conditional access provisions**
- (3) **The amendments that we consider to be appropriate to achieve the above are set out in our final DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

8.6 Standard Access Agreements—terms and conditions

The SAAs include standard terms and conditions on which Aurizon Network will provide access to the CQCN, including:

- administration (e.g. billing, invoicing)
- access rights (e.g. transfers, relinquishment, suspension and termination)
- pricing (e.g. access charges, take-or-pay and other charges)
- risk allocation (e.g. security, insurance, liability and indemnities)

- train operations (e.g. train scheduling and planning and operation of ad hoc services)
- dispute resolution.

This section of our final decision addresses the substantive drafting of the terms and conditions of the SAAs, rather than the structural/simplification matters discussed in the previous sections.

8.6.1 Aurizon Network's proposal

Aurizon Network said its proposed terms and conditions represented a balanced and flexible framework for negotiating access,⁵⁸⁵ including improving the operation of the access arrangements⁵⁸⁶ and aligning the terms and conditions to reflect how access agreements are administered in practice.⁵⁸⁷ In addition, Aurizon Network:

- introduced new concepts to maximise the efficient use of the network, ensure users are accountable for their capacity rights and prevent unnecessary network expansion⁵⁸⁸
- aimed to appropriately allocate risks between parties⁵⁸⁹, including retaining a number of terms consistent with the 2010 SAAs, where it considered these remained appropriate⁵⁹⁰
- clarified drafting and processes contained in the SAAs⁵⁹¹ and addressed key concerns and issues raised by stakeholders on its previous 2013 DAU SAAs.⁵⁹²

Aurizon Network considered the proposed 2014 DAU SAAs contained reasonable terms, if parties could not reach agreement on non-standard terms.⁵⁹³

8.6.2 Summary of the initial draft decision

We considered stakeholder submissions in reaching our initial draft decision.⁵⁹⁴

We indicated our intention to refuse to approve Aurizon Network's proposed terms and conditions of the SAAs, as a whole, as we did not consider them sufficiently workable, effective and commercially balanced and did not provide a credible model parties could rely on as a 'safe harbour' to meet the criteria in section 138(2). Stakeholders were similarly not convinced the SAAs provided a commercially feasible set of standard terms and conditions. Stakeholders also noted the changes to the SAAs weakened users' rights and security over those rights.⁵⁹⁵

We considered it to be appropriate that Aurizon Network make amendments to the 2014 DAU SAAs:

- for certainty and security—to provide a clear and more certain framework so that parties have a better understanding of their rights and obligations, and how these may be affected over the life of the contract. This included amendments around supply chain rights,

⁵⁸⁵ Aurizon Network, 2013 DAU, sub. 2: 14.

⁵⁸⁶ Aurizon Network, 2014 DAU, sub. 5: 118.

⁵⁸⁷ Aurizon Network, 2013 DAU, sub. 2: 366.

⁵⁸⁸ Aurizon Network, 2013 DAU, sub. 2: 112.

⁵⁸⁹ Aurizon Network, 2013 DAU, sub. 2: 367, 375–6.

⁵⁹⁰ Aurizon Network, 2013 DAU, sub. 2: 313, 367.

⁵⁹¹ Aurizon Network, 2013 DAU, sub. 2: 366–381.

⁵⁹² Aurizon Network, 2013 DAU, sub. 77: 113–143.

⁵⁹³ Aurizon Network, 2013 DAU, sub. 2: 98.

⁵⁹⁴ QCA 2015(a), Vol 1: 170–176.

⁵⁹⁵ QRC, 2013 DAU, sub. 46: 46–48; Rio Tinto, 2013 DAU, sub. 73: 11, 22, 106, 107; Asciano, 2013 DAU, sub. 43: 86, 90; Anglo American, 2014 DAU, sub. 7: 7,35; Asciano, 2014 DAU, sub. 22: 169; Anglo American, 2013 DAU, sub. 78: 17.

removing the process Aurizon Network had included to reduce nominated monthly train services based on payloads and removed the requirement to provide security under a TOD

- to better balance the interests of Aurizon Network and those of an access seeker—if Aurizon Network had proposed amendments inconsistent with the risk profile established under the 2010 AU SAAs without sufficient justification, or to provide a better commercial balance between parties. This included some amendments to the liability and indemnity provisions, reducing the threshold for which Aurizon Network is responsible for failing to provide access from 10 per cent to 5 per cent and reducing the amount of security payable by an access holder to an amount equivalent to six months take-or-pay charges
- to streamline the arrangements—consolidating arrangements to increase their useability and workability, both now and in the future and provide a clearer delineation of roles between an access holder and a train operator. This included making the access holder responsible for payment of all charges associated with access and, as a consequence, changing the TOA to a TOD (deed)
- to simplify and provide greater clarity of the arrangements—to assist parties in understanding the arrangements and to provide more confidence and certainty on how the AA/TOD operate in practice. This included accepting the new 'train service type' concept introduced by Aurizon Network, incorporating provisions in the AA/TOD by reference to the undertaking (discussed in the previous section) and streamlining processes (e.g. the rollingstock authorisation process and the emergency response and operating plan approval process).

Aurizon Network comments on the initial draft decision

Aurizon Network had significant concerns with the terms and conditions we proposed under the AA and TOD. It did not consider the AA and TOD represented a reasonable and commercially balanced allocation of rights, obligations and risks between the parties.⁵⁹⁶

Aurizon Network said it was unclear why some amendments had been made, including to matters broadly agreed with industry (i.e. the provisions concerning train pay loads). On that basis, Aurizon Network said a number of its proposals should be re-instated to enhance the operation of the network, including:

- supply chain rights—it should have the ability to resume access rights for an access holder's failure to hold (or have the benefit of) supply chain rights. It considered this would promote efficient utilisation of the network and, unlike current (UT3) arrangements, allows it to proactively respond and allocate capacity to access seekers / holders most likely to use it, particularly in the short term⁵⁹⁷
- reduction of nominated monthly train services—it considered these provisions allowed it to:
 - free up spare train paths for use by others on the network, including via a contractually agreed mechanism
 - promote above-rail efficiencies without interfering with above-rail operations

⁵⁹⁶ Aurizon Network, 2014 DAU, sub. 83: 114.

⁵⁹⁷ Aurizon Network, 2014 DAU, sub. 83: 111–112.

- create capacity through increasing the maximum payload of trains where this is more cost effective than a below-rail expansion.⁵⁹⁸

Aurizon Network also said it could not accept amendments we made that increase its risk and potential liability without providing it any additional return, including amendments to the:

- allowable threshold—reducing the threshold from 10 per cent to 5 per cent is not acceptable as it increases potential liability for non-provision of access⁵⁹⁹
- security requirements—reducing the security amount from 12 to 6 months take-or-pay exposes it to increased risks for two reasons:
 - there is potential for it to be out of pocket—if an access holder is liable for 12 months take-or-pay, but Aurizon Network can only recover half, the revenue cap mechanism would still recognise the full 12 months take-or-pay, resulting in Aurizon Network being out of pocket for the remainder
 - increased credit risk—there is an increasing trend for end users to be access holders. Many do not have the financial capability of incumbent operators and therefore pose a greater credit risk to Aurizon Network.⁶⁰⁰
- liability provisions—the amendments in relation to liability for accreditation, removal of rollingstock, provision of ad hoc train services and consequential loss do not provide a reasonable balance of risks between the parties and, in some instances, are unjustified and unnecessary.⁶⁰¹

Stakeholder comments on the initial draft decision

In general, stakeholders broadly supported our decision to streamline the SAAs. In particular, Anglo American said the majority of our amendments were sustainable and addressed real problems, including ensuring users are free to determine the most appropriate manner of holding and dealing with access rights.⁶⁰²

In a number of instances, stakeholders considered amendments to specific aspects of the AA/TOD were still required to address outstanding issues, including balancing parties' rights, increasing flexibility and ensuring capacity was used in an efficient manner.

Across both the AA and TOD, the QRC said a range of clauses need to be amended to balance the rights of the parties with that of Aurizon Network. For instance, the indemnity and limitation of liability clauses (cl. 17.3) and restrictions on assignment are balanced in Aurizon Network's favour (cl. 26).⁶⁰³ Also, exclusions for consequential loss should not apply if a party has committed fraud, gross negligence or wilful default (cl. 18.1).⁶⁰⁴

For the AA, the QRC said the access interface deed (AID) is not required in all circumstances, only where the access holder is the same as the operator. Also, the QRC included a recommended form of the pro-forma AID attached to its submission.⁶⁰⁵ It was also concerned

⁵⁹⁸ Aurizon Network, 2014 DAU, sub. 83: 112–113.

⁵⁹⁹ Aurizon Network, 2014 DAU, sub. 83: 115.

⁶⁰⁰ Aurizon Network, 2014 DAU, sub. 83: 115.

⁶⁰¹ Aurizon Network, 2014 DAU, sub. 83: 113–114.

⁶⁰² Anglo American, 2014 DAU, sub. 95: 11.

⁶⁰³ QRC, 2014 DAU, sub. 84: 138, 165.

⁶⁰⁴ QRC, 2014 DAU, sub. 84: 134, 160.

⁶⁰⁵ QRC, 2014 DAU, sub. 84: 128; QRC, 2014 DAU, sub. 87.

there were no provisions to review access charges, even though the undertaking provides for it.⁶⁰⁶ In addition, for the TOD, the QRC said it was concerned with allowing Aurizon Network to pass through obligations from its electricity retailer. It said this should only occur if the obligations are relevant to the train operator's operations.⁶⁰⁷ Also, it considered suspension and termination events needed redrafting and some aspects deleted to make them more reasonable.⁶⁰⁸

Anglo American considered arrangements for holding access could be made more flexible to maximise supply chain efficiency and capacity. For instance, the ability to flex by ± 10 per cent in a month would provide flexibility by allowing users to catch-up or surge as required to meet annual port entitlements, rather than relying on ad hoc pathing.⁶⁰⁹

Sojitz said the arrangements for reducing nominated monthly train services should be reinstated. This would allow additional capacity to be freed up for other users and, potentially, defer unnecessary capital expenditure.⁶¹⁰ Also, Vale said the AA should include the short-term transfer mechanism once it has been finalised.⁶¹¹

8.6.3 Consolidated draft decision

In coming to our consolidated draft decision, we have considered the access arrangements as a whole, having regard to the section 138(2) criteria, Aurizon Network's 2014 DAU proposal and the detailed comments from stakeholders.

We remained of the view that, in order to be appropriate, the terms of the standard access arrangements needed to provide:

- certainty and security over access arrangements (s. 138(2)(a) and (d))—to provide parties with adequate specification over factors affecting the holding or use of access rights. This includes transparent and clearly defined processes around how access rights can vary over the life of the contract (e.g. resumptions, relinquishments and transfers) and an access holder alternating between railway operators
- appropriate terms and conditions (s. 138(2)(b) and (e))—that represent a reasonable and commercially balanced allocation of rights, obligations and risks between parties and ensures risks are allocated to those best able to manage them
- workable arrangements that are not overly complex (s. 138(2)(a) and (h))—where possible, simplifying and streamlining processes to promote ease of use, understanding and administration, including by clearly defining the rights and responsibilities associated with access rights from train operations.

We did not consider the terms and conditions of the 2014 DAU SAAs met these objectives. Accordingly, we refused to approve the SAAs as proposed by Aurizon Network.

The discussion below focuses on a number of key issues raised by stakeholders within the above broad categories (consistent with the format of our initial draft decision) and our consideration of these matters in forming our consolidated draft decision.

⁶⁰⁶ QRC, 2014 DAU, sub. 84: 130.

⁶⁰⁷ QRC, 2014 DAU, sub. 84: 147.

⁶⁰⁸ QRC, 2014 DAU, sub. 84: 169–170.

⁶⁰⁹ Anglo American, 2014 DAU, sub. 95: 12.

⁶¹⁰ Sotijz, 2014 DAU, sub. 97: 1–2.

⁶¹¹ Vale, 2014 DAU, sub. 79: 4.

Stakeholders also raised a number of detailed comments on the individual clauses of the AA and TOD, many of which are of a drafting nature, seeking to clarify the operation of clauses, or otherwise enhance the rights and obligations of parties. We considered these comments and, where we considered appropriate, incorporated them into the CDD amended AA and TOD attached to the consolidated draft decision. The changes we made to the AA and TOD reflected the amendments we considered required to be made by Aurizon Network to the 2014 DAU in order for us to be in a position to approve the terms and conditions of the SAAs in accordance with section 138(2) of the QCA Act.

Certainty and security

In order for parties to properly assess and manage their risks, it is in the interests of all parties for access arrangements to clearly define:

- rights and responsibilities in providing access or holding access rights
- how access rights can be varied over time, including the processes for to effect any variation (i.e. relinquished, transferred or resumed).

We considered it appropriate that Aurizon Network made a number of changes to the agreements to provide greater certainty and security, with key matters including processes for variations to nominated payloads and supply chain rights. These matters are discussed in turn below.

Processes for the reduction of nominated monthly train services

In our initial draft decision, we did not accept Aurizon Network's proposed processes for reducing nominated monthly train services based on train payloads under different circumstances,⁶¹² as we considered these would adversely impact on access holders' certainty and security of contracted access rights. Accordingly, we removed these processes from the AA/TOD in our initial draft decision.

We noted Aurizon Network and Sojitz said these mechanisms should be retained to encourage more efficient use of capacity. We accepted that Aurizon Network introduced these mechanisms to benefit the supply chain and provide a means for it to assist and optimise utilisation of capacity. However, we remained of the view it was not appropriate to include these mechanisms, in addition to those already available, within the access agreements at this time. We maintained our view from the initial draft decision that these processes would adversely impact on access holders' certainty and security of contracted access rights.

A focus of our assessment of the 2014 DAU has been to promote more flexibility in the use of access rights and, in turn, allow access holders to better manage their access rights. For instance, the short term transfer mechanism would allow for transfers to occur for certain periods with no transfer fee, subject to conditions. Also, the AA and TOD has clearly separated the roles of holding access rights from train operations to provide greater flexibility and ability to better meet the needs of their business.

Given this, and the fact these arrangements have not been implemented or tested, there was no evidence to suggest these additional processes are necessary, or that such mechanisms

⁶¹² That is, reductions of nominated monthly train services if: (1) Operator exceeds maximum payload on an average annual basis (cl. 8 of the 2014 DAU EUAA); (2) access holder requests an increase to maximum payload (cl. 9 of the 2014 DAU EUAA); and (3) Aurizon Network notifies its intention to increase nominal payload (cl. 10 of the 2014 DAU EUAA).

would genuinely assist and complement the regime, rather than just adding additional layers of complexity or avenues for access rights to be affected.

In addition, we queried why Aurizon Network considered it necessary to introduce arrangements to deal with train services exceeding the maximum payloads. Given other provisions in the undertaking and access arrangements, we would have considered overloading would not have been a persistent and prevalent issue. For instance, Schedule F of the 2014 DAU sets out the reference tariff train service criteria, including the maximum axle load for train services travelling within each of the coal systems. It then states 'loading in excess of this maximum axle load dealt with in accordance with the relevant Load Variation Table'. As such, it was not clear how these two mechanisms would work concurrently.

Supply chain rights

In our initial draft decision, we proposed to accept Aurizon Network's concept of including obligations for an access holder to demonstrate it holds, or has the benefit of, the necessary supply chain rights to use its access rights (e.g. access to relevant private infrastructure or port facilities). However, we considered that an access holder's failure to demonstrate such rights should not be grounds for resumption.

We noted Aurizon Network's comments that providing it with the ability to resume access rights if an access holder failed to hold or have the benefit of supply chain rights would promote the efficient operation of the network, particularly in the short term.⁶¹³ The promotion of the efficient use of the CQCN underpins the object of Part 5 of the QCA Act and is a relevant factor under section 138(2) of the QCA Act to which we must have regard. However, this must be considered with the other factors under section 138(2), including the interests of access seekers. In particular, we considered that it was in the interests of access seekers to have certainty and security over their access rights for the term of their access agreement, including the ability to determine how best to manage their own access rights. This also promotes efficiency in the longer term.

We maintained our view that it was not appropriate to provide Aurizon Network with the ability to resume access rights on the basis of a failure to demonstrate supply chain rights. While we noted Aurizon Network's concerns about ensuring unused capacity could be re-allocated in a timely manner, we were not satisfied there was sufficient justification to introduce a further mechanism to allow Aurizon Network to resume access rights, in addition to the existing resumption process. We remained of the view that there were already sufficient incentives and tools in place for access holders to appropriately manage their access rights, such as take-or-pay obligations, and relinquishment and transfer mechanisms. We also considered the introduction of the short term capacity trading framework (as discussed in Chapter 11 of this decision) would assist in this regard.

Overall, we considered the introduction of an additional resumption process would detract from the certainty and security of access rights, and impinge on the ability of access holders to manage their own access rights, including determining how best to deal with circumstances that affect their ability to use access rights. We considered it appropriate to rely on these existing arrangements to promote the efficient utilisation of the network in the short term, noting existing resumption processes will apply if access rights are not utilised in the long term. We considered this provides an appropriate and balanced means for ensuring access rights are used efficiently.

⁶¹³ Aurizon Network, 2014 DAU, sub. 83: 111–112.

An appropriate balance between the interests of an access seeker and the legitimate business interests of Aurizon Network

It is important for access arrangements to include terms and conditions that reflect a reasonable and commercially balanced allocation of rights, obligations and risks between parties to reflect what would have been the outcome in a competitive market. This is necessary to ensure these arrangements appropriately balance the interests of access seekers/holders with the legitimate business interests of Aurizon Network. We considered an appropriate balance between these interests was essential for ensuring that the SAAs provided a credible and effective 'safe harbour' or default negotiating platform for all parties that would facilitate the development and execution of access agreements in a timely and efficient manner. We proposed a number of changes to the 2014 DAU SAAs where we considered the terms and conditions were not reasonable as they did not appropriately balance these interests. In particular, discussed below is our decision in relation to the following issues:

- the allowable threshold
- security amount for an access holder
- compliance with Aurizon Network's accreditation.

Allowable threshold

The AA sets out the circumstances in which Aurizon Network may be liable to the access holders for claims in respect of non-provision of access, including an 'allowable threshold' for cancelled train services. We maintained our decision that the 'allowable threshold' be reduced from 10 per cent to 5 per cent of the total number train services scheduled for a billing period.

We recognised that, given the nature of the operation and maintenance of a rail network, Aurizon Network would not always be able to make the infrastructure available for access, and that it had a legitimate business interest in managing its potential liability in this regard.

However, we also considered it important that Aurizon Network was accountable to its customers in its delivery of contracted services, as access holders have a legitimate expectation that the infrastructure will be made available for the delivery of contracted services. Greater accountability in this regard is not only in the interests of access holders but is also important to promote the efficient use of the service in that it provides increased incentive for Aurizon Network to make the infrastructure available for the provision of access.

We did not consider the inclusion of an allowable threshold of 10 per cent, when combined with the other circumstances in which Aurizon Network's liability for non-provision of access is excluded,⁶¹⁴ represented an appropriate balance between the interests of access seekers/holders and the legitimate business interests of Aurizon Network. We considered these interests would be appropriately balanced where Aurizon Network's liability is excluded due to the occurrence of defined events, rather than also relying on an allowable threshold of 10 per cent.

In taking this approach, we noted an allowable threshold was included in the 2010 AU SAAs, although the percentage was left undefined and subject to negotiation between the parties. Given its previous use, we considered a reduction of the threshold proposed by Aurizon Network, rather than its complete removal, is appropriate in the context of UT4. We considered a reduction to 5 per cent is appropriate, as it provides greater accountability for Aurizon

⁶¹⁴ See clause 21.4(b)(iii)(A)–(G) of the AA.

Network, while still providing it with some margin for the non-provision of access, in addition to the other circumstances set out in the clause where liability is specifically excluded.

We noted the allowable threshold links to the breach mechanism in Schedule F of the undertaking.⁶¹⁵ This mechanism ensures Aurizon Network does not use the revenue cap mechanism to recover access charges which it is not entitled to under an access agreement.

We amended the breach threshold in the Schedule F revenue cap provisions to align with the allowable threshold we have proposed in the access agreement (i.e. 5 per cent). This meant Aurizon Network would not be entitled to recover revenues via the revenue cap more (or less) than it was entitled to under its contractual arrangements.

Security amount

We did not consider the 12 months take-or-pay security amount proposed by Aurizon Network to be appropriate, as we did not consider this appropriately balanced the interests of an access holder with the legitimate business interests of Aurizon Network. As such, we maintained our decision that the equivalent of 6 months take-or-pay charges be the security amount an access holder may be required to provide Aurizon Network.

We considered that security in the amount equivalent of 12 months take-or-pay charges is significant and potentially burdensome for an individual access holder, and we did not consider that such an amount is necessary in order to sufficiently protect the legitimate business interest Aurizon Network has in mitigating its exposure to credit risk.

We considered Aurizon Network already has significant protection from credit risk through the revenue cap form of regulation under which it operates, as this would allow it to recover any unrecovered revenue through the existing revenue adjustment mechanisms already in place.⁶¹⁶ In this way the credit risk is socialised across system users, rather than borne by Aurizon Network.

In light of the above, we saw no reason to link the security amount with the annual take-or-pay charge. We considered the equivalent to 6 months take-or-pay charges a more reasonable amount, noting it still represents an increase from the three months that was used in previous undertakings and is an amount stakeholders have indicated they consider reasonable to pay.⁶¹⁷

Compliance with Aurizon Network's accreditation

In our initial draft decision we did not consider it appropriate to approve the inclusion of clause 16.2 of the 2014 DAU EUAA (cl. 14.6 of the 2014 DAU TOA),⁶¹⁸ as we were concerned with the effect it would have on the contractual certainty of the standard arrangements and were not satisfied its inclusion had been sufficiently justified by Aurizon Network.

We noted Aurizon Network's comments that this clause should be reinstated as the terms of its safety accreditation may change over time and it cannot accept a position where compliance with its accreditation causes it to be in breach of a AA/TOD.⁶¹⁹

⁶¹⁵ Clauses 4.3(d)(iii) and 4.3(g)(ii) of Schedule F of the 2014 CDD amended DAU (relating to the non-electric and electric revenue cap calculations, respectively).

⁶¹⁶ Revenue cap adjustment mechanisms are detailed in Schedule F of the DAU.

⁶¹⁷ QRC, 2014 DAU, sub. 28: 25.

⁶¹⁸ This clause can affect whether or not Aurizon Network or an access holder/train operator is in breach of the AA/TOD depending on whether an act or omission (including those done in accordance with the AA/TOD) conflicts with, or may otherwise affect, Aurizon Network's accreditation.

⁶¹⁹ Aurizon Network, 2014 DAU, sub. 83: 113, 290.

We acknowledged safety is an important concern that is in the interests of all parties. However, the clause proposed by Aurizon Network has a broad application that would have a significant effect on the contractual certainty for access holders (and train operators), including in relation to fundamental matters such as each party's liability to each other under the AA/TOD. This went to the core of our consideration of whether the terms and conditions of the SAAs are commercially reasonable and balanced.

In light of this significance, we considered that Aurizon Network must justify the need for this clause, including by demonstrating the types of risks to Aurizon Network's accreditation this clause is intended to address and how these risks are not already addressed within the existing framework of the SAAs. In particular, we noted this clause has not been included in SAAs under previous access undertakings.

We remained of the view that Aurizon Network had not provided sufficient justification for the inclusion of this clause. In the absence of such justification, we did not consider the inclusion of this clause was appropriate in respect of the interests of access seekers (and holders), as it introduces significant contractual uncertainty for access holders (and train operators) and did not reflect an appropriate allocation of risks and liabilities between the parties.

Streamlining the agreements

It is in the interests of all parties for access arrangements to be workable and not overly complex. Access arrangements that best meet the needs of Aurizon Network and access seekers/holders will include terms and conditions that can be easily understood, readily entered into and able to be administered effectively over the life of the contract.

Accordingly, we proposed a number of changes to the AA and TOD to streamline the agreements, including clearly separating rights and obligations associated with access rights from train operations. We have also proposed changes to simplify processes and provide greater clarity more generally.

Clear separation of rights and responsibilities

We proposed a number of changes to the AA/TOD to promote a clearer separation of rights and responsibilities associated with access rights from train operations matters. We considered this important from the perspective of promoting effective competition in the above-rail market by ensuring access arrangements reflected the separate roles of the management of access rights and the operation of train services.

In addition, we considered that access arrangements which conflate these rights and obligations across the AA and TOD were not in the interests of access holders or train operators, as they created complexity and could result in parties under either agreement being allocated responsibilities for matters they are not best placed to perform or manage.

We were accordingly of the view that it is appropriate that Aurizon Network amend the 2014 DAU to more clearly separate rights and obligations associated with access rights and train operations. We maintained our reasoning from the initial draft decision that the access holder be responsible for the payment of all access charges (removing the option for the train operator to pay all or part of the access charges under a TOD). As a result of this change, we also removed the requirement for train operators to provide security to Aurizon Network. Stakeholders did not indicate any opposition to this proposal.

However, we revised amendments proposed in our initial draft decision, where appropriate, in response to stakeholder submissions. These included:

- reinstating an access holder's obligation to participate in the IRMP development process and comply with the IRMP—we acknowledged Aurizon Network's comments about the importance that it actively manages interface risks to comply with safety requirements, and that such interface risks are not limited to Aurizon Network and a train operator.⁶²⁰ In this context, we considered it appropriate for the access holder to have these obligations with respect to the IRMP (we have incorporated these in cls. 15.1 and 18.1 of the AA and schedule C of the undertaking)
- reinstating the ability for an operator to request an ad hoc train service under the TOD—in our initial draft decision, we provided for all requests for ad hoc train services to be made by the access holder, as we considered this would reinforce the separate role of managing access rights from that of operating train services. However, we noted Aurizon Network's comments that it was impractical and not reflective of current train ordering practices for the operator to not be able to order ad hoc train services in its own right.⁶²¹ On this basis, we reinstated this ability in the TOD (see cl. 4.3 of the TOD).

Simplifying processes and providing greater clarity

We considered it appropriate that Aurizon Network make a number of amendments to the AA/TOD where it may assist parties in understanding the arrangements and to provide more clarity and certainty on how the AA and TOD operate in practice.

We considered clarity and certainty in regulatory arrangements to be a relevant factor for us to consider as part of our assessment of the 2014 DAU (s. 138(2)(h) of the QCA Act). We did not consider it appropriate for access arrangements to be unclear or uncertain in meaning, as this could lead to misunderstandings and ambiguity over the terms of the SAAs. This could increase transaction costs in administering the access agreements, as well as increasing the potential for disputes between parties.

In our assessment of whether there is clarity and certainty in the terms and conditions of the 2014 DAU SAAs, we maintained our initial draft decision to accept the 'train service type' concept proposed by Aurizon Network. We continued to consider this concept has merit, insofar as it would:

- better reflect how access agreements are administered in practice
- clearly separate the various train services (e.g. multiple origin-destination pairs) that can be included in an agreement over time
- provide greater clarity around how this links to the concept of a reference train in the undertaking.

However, we revised amendments proposed in our initial draft decision, where appropriate, in response to stakeholder submissions. These included re-instating Aurizon Network's ability to accept or reject the decision of an independent certifier to certify rollingstock. In our initial draft decision, we considered providing the decision of an independent certifier to be binding on parties (absent fraud or manifest error) would streamline the process for the authorisation of rollingstock and rollingstock configurations. However, we noted Aurizon Network's comments that it needs to have input and control over the certification process, given the safety implications involved and its ultimate responsibilities as rail infrastructure manager.⁶²² On this

⁶²⁰ Aurizon Network, 2014 DAU, sub. 83: 290–291

⁶²¹ Aurizon Network, 2014 DAU, sub. 83: 283.

⁶²² Aurizon Network, 2014 DAU, sub. 83: 299.

basis, we considered it appropriate to re-instate this ability for Aurizon Network, although we did not accept the inclusion of a 'deemed refusal' should it not make this decision within the required timeframe (see cl. 15 of the TOD).

8.6.4 Stakeholders' comments on the consolidated draft decision

Stakeholders made a range of detailed comments on our CDD in relation to the terms of the AA and TOD, raising both new issues and reiterating comments previously made in response to our IDD. These included a number of comments that were of a drafting nature, seeking to clarify the operation of clauses, or otherwise enhance the rights and obligations of parties.

Aurizon Network raised a number of issues, including:

- security – Aurizon Network said it would accept the QCA's proposal to increase the security amount to six months' take or pay charge, but also proposed amendments to the revenue-cap provisions in relation to deeming of security payments to make clear Aurizon Network may recover any shortfall in revenue. It also proposed amendments to the security clause under the AA, including reinstating an access holder's failure to hold an acceptable credit rating as a trigger for review of security during the term of an agreement⁶²³
- force majeure – Aurizon Network did not support a number of changes made to the force majeure provisions, including the 48-hour timeframe for providing a force majeure notice and the triggers for the suspension of an affected party's obligations. It proposed 5 business days as an appropriate timeframe for notification of a force majeure event, which it considered could be met within its existing resources and IT systems. It also proposed other changes which it considered would reflect the usual formulation of force majeure provisions⁶²⁴
- reinstatement of provisions that provided for Aurizon Network not to be in breach of the AA and TOD to extent reasonably required to comply with its accreditation or ensure its accreditation is not at risk (cl. 16.2(a) of the 2014 DAU EUAA / cl. 14.6(a) of the 2014 DAU TOA) – Aurizon Network largely reiterated its previous comments that these clauses should be included in the AA and TOD given Aurizon Network's compliance with its accreditation is a paramount obligation⁶²⁵
- liability and indemnity provisions – Aurizon Network sought a number of amendments to liability and indemnity provisions, including the reinstatement of the carve-out with respect to Aurizon Network's liability for operational constraints and the deletion of Aurizon Network's specific indemnity to a train operator in connection with the exercise of its inspection and audit rights⁶²⁶
- notification requirements under the AA and TOD – Aurizon Network made comments about changes made to various notification requirements in the AA and TOD. In particular, it did not support removal of a materiality threshold for notifying an operator of delays to train services (cl. 14.4 of the TOD). Aurizon Network said notification of minor deviations from scheduled times would impose an unreasonable administrative burden for all parties and

⁶²³ Aurizon Network, 2014 DAU, sub. 125: 113-114; Volume 3, Appendix 1: 12-13.

⁶²⁴ Aurizon Network, 2014 DAU, sub. 125: 112-113; Volume 3, Appendix 1: 21-22.

⁶²⁵ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 13, 27.

⁶²⁶ See, for example, Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 17-18, 28, 33 and 35.

that a more holistic approach is required taking into account a variety of factors, such as impacts to planned loading/unloading times at the mine or port⁶²⁷

- reiterating comments made in response to our IDD seeking reinstatement of its right to resume access rights on a forward looking basis and provisions related to the reduction of nominated monthly train services based on train payload. It also provided further clarification about the intent of these payload provisions in response to our CDD.⁶²⁸

Aurizon Network also maintained its position the allowable threshold for claims relating to the non-provision of access in the AA should be 10%.⁶²⁹ It did not agree that the AA and revenue-cap provisions were necessarily linked and raised concern as to the QCA's proposal for alignment of the respective materiality thresholds (i.e. 5%).⁶³⁰ On this basis Aurizon Network proposed amendments to the revenue-cap provisions⁶³¹ used to determine appropriate reductions in system allowable revenues (SAR) for Aurizon Network's breach or negligence in the performance of its contractual obligations, namely:

- setting the annual materiality threshold also at 10%. Aurizon Network said that the QCA's proposed 5% materiality threshold should be increased in order to maintain regulatory and contractual certainty⁶³²
- introducing limitation of liability clauses as exceptions from the prevailing SAAs when determining the annual materiality threshold, so as to align the provisions of the AA and revenue-cap provisions.⁶³³

The QRC made a number of comments, including reiterated concerns previously raised in response to the IDD. In particular, the QRC:

- sought amendment to various liability and indemnity provisions across the AA and TOD, including to the circumstances in which Aurizon Network is liable following inspection of rollingstock and Aurizon Network's liability in respect of the infrastructure standard, as well as opposing the inclusion of an allowable threshold⁶³⁴
- reiterated its previous comments that Aurizon Network should have consultation obligations when seeking amendments to system wide requirements (cl. 16 of the CDD amended TOD). It considered there should be a 20 business day consultation period before amendments may be implemented (except in case of emergency)⁶³⁵
- expressed concerns about the changes made to the rollingstock certification process in our CDD to provide Aurizon Network with the ability to dispute a certification of compliance, which it considered would cause significant delays⁶³⁶
- proposed amendments to clarify the circumstances in which an AID is required to be executed, as well as to the provisions of the pro forma AID itself.⁶³⁷

⁶²⁷ Aurizon Network, 2014 DAU, sub. 125: 116-117; Volume 3, Appendix 1: 30-31.

⁶²⁸ Aurizon Network, 2014 DAU, sub. 125: 117; Volume 3, Appendix 1: 14.

⁶²⁹ Aurizon Network, 2014 DAU, sub. 125: 108, 111; Volume 3, Appendix 1: 18.

⁶³⁰ Aurizon Network, 2014 DAU, sub. 125: 115-116 and 240.

⁶³¹ Aurizon Network, 2014 DAU, sub. 125: 240; sub. 129: 25-27.

⁶³² Aurizon Network, 2014 DAU, sub. 125: 111.

⁶³³ Aurizon Network, 2014 DAU, sub. 125: 240; sub. 129: 25-26.

⁶³⁴ QRC, 2014 DAU, sub. 124: 46-47, 54-55.

⁶³⁵ QRC, 2014 DAU, sub. 124: 53-54.

⁶³⁶ QRC, 2014 DAU, sub. 124: 52-53.

BMA also considered the provisions that would allow for the reduction in nominated monthly train services based on train payload should be reinstated to allow access holders to capture productivity benefits.⁶³⁸

Asciano noted our changes regarding the treatment of ad hoc train services under the AA and sought clarification on how these would be treated for take or pay purposes. It supported ad hoc train services offsetting the take or pay of existing contracted services.⁶³⁹

8.6.5 QCA analysis and final decision

Our final decision is to refuse to the terms of the SAAs proposed by Aurizon Network in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. We remain of the view that our analysis, reasoning and decision in our CDD are, for the most part, appropriate and as a result, our analysis, reasoning and decision, for the most part, remain unchanged from that set out in our CDD analysis above.

In particular, we note stakeholders' comments on the reinstatement of provisions related to reductions of nominated monthly train services based on train payload and Aurizon Network's right to resume access rights on a forward looking basis. However, we remain of the view our analysis, reasoning and decision in our CDD on this matter remain appropriate. As such, our analysis, reasoning and decision remain unchanged from that set out in our CDD analysis above.

We agree with stakeholders that some changes to particular clauses are appropriate. We have considered the detailed drafting comments proposed by Aurizon Network and other stakeholders, and where we considered it appropriate, have incorporated these comments into the final amended AA and TOD attached to this final decision.

The table below sets out our decision with respect to some, but not all, matters we have addressed as part our revised drafting contained in this final decision.

Table 34 Revised final decision drafting for certain matters

<i>Matter</i>	<i>QCA analysis and final decision</i>
Access interface deed (cl. 4.4 / schedule 7 of the AA)	In response to stakeholder comments, we have clarified the circumstances in which an access interface deed will be required (cl. 4.4 of the AA). We have also made changes to the content of the pro forma access interface deed in response to stakeholder comments (schedule 7 of the AA). These include amendments to provisions for indemnities for personal injury and property damage, provisions for joint ventures and other clarifying drafting changes. We have also included a duty on parties to mitigate their losses, noting the duty is consistent with that under the AA.
Nominations with different train descriptions (cl. 4.6 of the AA)	In reference to amendments made to this clause in the CDD amended AA, we note Aurizon Network's submission that, to the extent an operator proposes to operate a train service which increases the risk or utilisation of capacity, it should be entitled to recover this through the access charge rates, which would be calculated in accordance with the relevant pricing principles. ⁶⁴⁰ We accept that Aurizon Network should be entitled to vary the access charge rates under this clause in accordance with the pricing principles. As such, we have amended this clause to provide that variations to access charges under

⁶³⁷ QRC, 2014 DAU, sub. 124: 44, 48-49.

⁶³⁸ BMA, 2014 DAU, sub. 122: 3-5.

⁶³⁹ Asciano, 2014 DAU, sub. 126: 20.

⁶⁴⁰ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 11.

Matter	QCA analysis and final decision
	this clause must be in accordance with the pricing principles set out in part 6 of the undertaking.
Treatment of ad hoc train services	<p>We note Asciano's comments regarding the treatment of ad hoc train services. In our IDD and CDD, we proposed changes that, for the purposes of the SAAs, would provide more accountability for the operation of ad hoc train services, once scheduled by Aurizon Network. This was not intended to affect the treatment of ad hoc train services for the purposes of the network management principles, nor the operation of take-or-pay.</p> <p>We discuss the treatment of ad hoc train services for take or pay purposes further in Chapter 19. We have amended clause 4.8 of the AA to clarify that, in accordance with schedule F of the undertaking and the intent in previous undertakings, if an ad hoc train service has a different origin and destination than that of the relevant train service type it is taken to be (except for the difference in description), then the ad hoc train service must not be taken into account for the purposes of take-or-pay charges.</p>
Demonstration of supply chain rights (cl. 4.9 of the AA)	<p>In response to the QRC's submission and request for clarification,⁶⁴¹ we have further considered Aurizon Network's entitlement to request evidence of supply chain rights during the term of an AA. As discussed in our IDD, this entitlement may assist in identifying supply chain capacity issues in the longer term and promote greater supply chain coordination. For this reason, we consider it appropriate that Aurizon Network's entitlement not be limited to the period before the commencement of the operation of the first train service for the train service type and have amended clause 4.9 accordingly. We also consider there are adequate mechanisms in place to prevent vexatious requests for evidence, including the requirement for Aurizon Network to act reasonably.</p>
Security (cl. 6 of the AA)	<p>We concur with Aurizon Network that the revenue-cap provisions (schedule F of the undertaking) may not socialise all credit risk. Nonetheless, the fundamental design of the revenue-cap mechanism provides significant revenue protection where Aurizon Network is entitled to recoup revenue through the adjustment process. Given this, we do not accept Aurizon Network's proposals for deeming of security amounts within the revenue-cap arrangements.</p> <p>We also maintain our CDD decision in respect of the use of failure to hold an acceptable credit rating as a separate circumstance in which security may be required during the term of an access agreement. We note this is still a factor that may be taken into account by Aurizon Network in determining whether security can be required due to the circumstances listed in clause 6.2(a)(iii) of the AA. Nonetheless, we would be minded to consider this matter further in a future regulatory period.</p>
Compliance with Aurizon Network's accreditation (cl. 16.2 of the 2014 DAU EUAA / cl. 14.6 of the 2014 DAU TOA)	<p>In our IDD and CDD, we sought justification from Aurizon Network for the inclusion of these clauses, including a demonstration of the types of risks to Aurizon Network's accreditation that was intended to be addressed and how these risks are not already addressed within the existing framework of the SAAs.</p> <p>We maintain that this justification is necessary given the potentially significant impact of these clauses, noting they have not been included in previously approved SAAs.</p> <p>While we acknowledge Aurizon Network's compliance with its accreditation is an important concern, the proposed clauses have not been sufficiently justified. In particular, Aurizon Network has not demonstrated how compliance with the terms of the AA or TOD can risk Aurizon Network's accreditation and how these risks are not already adequately addressed in the SAAs. In the absence of a detailed explanation in this regard, we do not consider the inclusion of these clauses is appropriate.</p>
Weighbridges and over	We note Aurizon Network's comments that the Operator's obligation not to

⁶⁴¹ QRC, 2014 DAU, sub. 124: 44.

Matter	QCA analysis and final decision
load detectors (cl. 16 of the AA / cl. 17 of the TOD)	<p>exceed the maximum allowable gross tonnage should be an absolute (rather than reasonable endeavours) obligation, because it is an important safety requirement and is consistent with the current UT3 position.⁶⁴²</p> <p>However, Aurizon Network has not adequately justified its proposal. In particular, Aurizon Network has not shown how the reasonable endeavours obligation used in the equivalent clause in the 2010 AU SAAs (see, for example, cl. 3(d) of the 2010 AU TOA), is inconsistent with our proposal.</p> <p>We also note:</p> <ul style="list-style-type: none"> • if a weighbridge or overload detector determines the maximum allowable gross tonnage has been exceeded, the Operator is under an absolute obligation to reduce the mass to a level below the relevant limit, with Aurizon Network able to issue directions in this regard • the Operator's liabilities and indemnities to Aurizon Network under the SAAs. <p>We consider these represent a reasonable balance between the risks and responsibilities of the parties and do not consider sufficient justification has been presented as to why these arrangements are no longer appropriate.</p> <p>However, we do consider it appropriate to include the operational obligations to weighbridges and overload detectors identified by Aurizon Network (cl. 16.1 of the AA / cl. 17.1 of the TOD).</p>
Notification requirements under the AA / TOD	<p>We have made some amendments to notification requirements under the AA / TOD in response to stakeholder comments, including:</p> <ul style="list-style-type: none"> • reintroduction of a materiality threshold for the notification of delays to the Operator (cl. 14.4 of the TOD) – we accept Aurizon Network's comments about the administrative burden that would be caused by not including a materiality threshold in this clause. However, we have included additional drafting to clarify this clause does not affect the train controller's obligations to provide advice under clause 1.3 of the Interface Coordination Arrangements (which we do not consider would be Aurizon Network's intention to affect and which we understand would not give rise to the administrative burden outlined in Aurizon Network's submission). • amendments to the notification obligation in respect of harm to the environment (cl. 17.1 of the AA / cl. 20.3 of the TOD) – we note Aurizon Network's comments that it should be notified of any harm to the environment the access holder's operator is aware of on, or in the vicinity of, the nominated network.⁶⁴³ However, we are concerned the drafting of this obligation is too broad, noting a failure to comply would be a breach of the AA / TOD and may be grounds for suspension. Accordingly, we have amended the drafting to provide for Aurizon Network to be notified of any harm to the environment within the area of the nominated network caused or contributed to by the Access Holder's use of its access rights or the operator's running of train services. We also note the access holder and operator have other obligations to notify obstructions, incidents and damage to the network under this clause. <p>We note Aurizon Network's comments regarding the mutual notification obligation between Aurizon Network and an Operator under clause 22.11(d) of the TOD.⁶⁴⁴ However, we consider it is important that Aurizon Network be under a positive obligation to provide the operator with any relevant notice received from an environmental authority, particularly given a failure by the Operator to comply with such a notice could be grounds for suspension or termination of the TOD (see Item 7, Part B under Schedule 9).</p>

⁶⁴² Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 16.

⁶⁴³ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 16.

⁶⁴⁴ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 34.

Matter	QCA analysis and final decision
<p>Allowable threshold and revenue cap (cl. 21.4 of the AA / cl. 26.4 of the TOD)</p>	<p>After consideration of the overall balance of risks and responsibilities, we maintain our CDD position on this matter.</p> <p>While previous SAAs included the concept of an allowable threshold but did not prescribe a percentage, we understand the common practice has been for the threshold to be set at 10 per cent. We consider 10 per cent is excessive given all other carve-outs and reliefs from non-performance under the AA. At this stage, an allowable threshold of 5 per cent is a reasonable compromise (and in any event parties can negotiate a different percentage, or none at all). We also note that the QRC opposes the concept of an allowable threshold altogether. Future review processes may consider this matter in greater detail.</p> <p>We concur with Aurizon Network that this threshold is not explicitly interrelated with the breach mechanism that applies to revenue cap processes. Nonetheless, we maintain our CDD that the allowable threshold links with the revenue cap breach mechanism, in so far as this mechanism seeks to reduce system allowable revenue to avoid Aurizon Network recovering revenue that has already been recouped via a contractual mechanism.⁶⁴⁵</p> <p>In this regard, we do not accept Aurizon Network's proposed amendments to the revenue-cap arrangements. In particular:</p> <ul style="list-style-type: none"> • Aurizon Network not reducing its reduce system allowable revenue for its breach or negligence means the revenue cap adjustment mechanism could be used to recoup revenue which it is not entitled to earn under an access agreement because of Aurizon Network's breach or negligence. • While we could seek to achieve greater alignment between the prevailing SAA and the revenue-cap breach mechanism, in doing so we may be required to align the breach or negligence test more frequently (i.e. monthly). Nonetheless, we maintain the breach mechanism threshold being set at 5% still means that Aurizon Network is able to recoup via the revenue cap, that which has been lost due its breach or negligence, albeit within lower materiality threshold. On this basis, we maintain our CDD position and note that future review processes may consider these matters in greater detail.
<p>Adjustment for a material change (cl. 23 of the AA)</p>	<p>Aurizon Network has clarified that, while most material changes that affect its financial position could also be characterised as affecting its costs, it is possible that a material change could occur which affects Aurizon Network's financial position without affecting its costs (e.g. the removal of an existing tax benefit or future changes to taxes or laws to address carbon pollution).⁶⁴⁶ As the objective of this clause is that Aurizon Network is kept whole, on further consideration we decided it is appropriate not to limit the material changes to those that affect Aurizon Network's direct costs and to revert to the 2014 DAU position.</p>
<p>Force majeure (cl. 25 of the AA / cl. 29 of the TOD)</p>	<p>As discussed above, we have removed force majeure provisions from the 'incorporation clauses' and have reinstated these provisions within the AA and TOD.</p> <p>We have also made further changes to the substance of these provisions, including amending Aurizon Network's obligation to notify a force majeure event to an access holder as soon as reasonably practicable (or within 5 business days) of becoming aware of the event. However, we maintain our CDD position with respect to the consequences of failing to give notice within the prescribed time frame. The approach adopted prevents an affected party from seeking at a later stage excuses for its non-performance. It also allows the other</p>

⁶⁴⁵ The AA and TOD permits Aurizon Network relief from liability for cancelled trains where the infrastructure is not available (except if as a result of force majeure, operational constraints, maintenance, safety or other emergency reasons) where the cancelled trains do not exceed 5 per cent of the trains scheduled for the relevant period.

⁶⁴⁶ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 19-20.

Matter	QCA analysis and final decision
	party to either try to mitigate or to reduce any foreseeable losses or reserve its rights. We consider the force majeure provisions provide a reasonable balance between the interests of parties, and reflects best drafting practices.
Access charge provisions (schedule 4 of the AA)	<p>As discussed above, we have reinstated the access charge provisions within the AA (schedule 4). However, we have made amendments to these provisions to more closely align with the corresponding provisions and concepts within Schedule F of the undertaking.</p> <p>We also note QRC's comments regarding the inclusion of access charge review provisions in the AA.⁶⁴⁷ These have also been included within this schedule.</p>
Use of regenerative brakes (cl. 10.5 of the TOD)	<p>We note Aurizon Network's comments that clause 10.5 of the 2014 DAU TOA should be reinserted, given the electric power generated by the use of regenerative brakes may have implications for Aurizon Network's obligations under its connection agreements with electricity retailers.</p> <p>Aurizon Network said it should be made aware of all rollingstock on the network that use such brakes and indicated current operators have been facilitative of this approach.⁶⁴⁸</p> <p>In light of the new justification provided by Aurizon Network for the purpose of this clause, we consider its inclusion is appropriate. However, we have amended the clause to clarify the purpose of this clause and provide that any conditions on the use of regenerative brakes must be reasonable and, to the extent practicable, be applied consistently among operators.</p>
Amendments to system wide requirements (cl. 16 of the TOD)	<p>We note the QRC's comments reiterating the need for inclusion of specific consultation obligations under this clause.</p> <p>In our CDD, we sought to address these comments by including a requirement for an amendment notice to be given at least 20 business days prior to implementation.</p> <p>On reflection, we consider this approach may have affected Aurizon Network's ability to implement amendments in response to safety issues in a timely manner. Our final amended TOD provides for such notice to be given 'reasonably in advance' of the proposed implementation.</p> <p>While we understand the QRC's concerns about the need for mandated consultation timeframes, we are mindful that system wide requirements cover important operational and safety matters that may need to be amended over time and affect multiple parties across the system. We consider this clause, as a whole, is appropriate and provides reasonable opportunities for operators to be provided information about proposed amendments, as well as dispute and compensation rights in particular circumstances.</p>
Right of inspection of trains and rollingstock (cl. 23 of the TOD)	<p>In response to comments from the QRC⁶⁴⁹ and Aurizon Network⁶⁵⁰ regarding Aurizon Network's rights to inspect an operator's rollingstock, we have clarified the drafting to make clear that Aurizon Network may only exercise its rights under clause 23.2(b) if the conditions under clause 23.2(a) apply.</p> <p>We have also revised the drafting for Aurizon Network's liability in this clause. We considered Aurizon Network's proposal reasonable and have removed the specific liability provision that had been included in our CDD amended TOD in response to previous stakeholder comments. We consider this may hinder Aurizon Network's exercise of inspection and audit rights which ultimately address important matters of safety.</p> <p>To provide certainty to stakeholders, we have amended the clause to provide additional conditions for the carrying out of inspections by Aurizon Network,</p>

⁶⁴⁷ QRC, 2014 DAU, sub. 124: 44.

⁶⁴⁸ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 28.

⁶⁴⁹ QRC, 2014 DAU, sub. 124: 54.

⁶⁵⁰ Aurizon Network, 2014 DAU, sub. 125; Volume 3, Appendix 1: 34.

Matter	QCA analysis and final decision
	including providing reasonable notice of an inspection, which must take place at and within a reasonable time and in the presence of a representative of the operator.
Operating plan and other requirements (schedule C of the undertaking)	<p>Having regard to stakeholder submissions, we have also amended schedule C of the final amended DAU (Operating plan and other requirements), which contains matters that are incorporated into the AA and TOD.</p> <p>In the 2014 DAU, schedule 7 of the train operations agreement contained a list of the minimum environmental matters which must be addressed in an interface risk assessment. As indicated in our IDD,⁶⁵¹ we considered it was more appropriate that those matters be set out in the undertaking, together with other matters relevant to the interface risk assessment. Stakeholders did not object to our proposal in this regard.⁶⁵² We have therefore decided to include the environmental matters in schedule C of the final amended DAU (item 2.2 of schedule C). We have also made other amendments to schedule C where appropriate to clarify or to enhance the operation of the existing provisions, including in respect of audit and inspections. We consider these provisions provide a reasonable balance between the interests of parties and we otherwise maintain our CDD.</p>

Note: Clause references in this table refer to our final amended AA or TOD (unless otherwise indicated).

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to the SAAs included as part of the 2014 DAU in order for it to be approved are set out in the final amended DAU.

⁶⁵¹ See schedule 7 of the IDD amended TOD.

⁶⁵² Asciano supported our proposed approach as it considered that all operators should be subject to the same environmental management standards (Asciano, 2014 DAU, sub. 76: 45). Other stakeholders did not raise any concerns.

Final decision 8.4

- (1) After considering Aurizon Network's proposal for the terms and conditions of SAAs under the 2014 DAU, our final decision is to refuse to approve the proposal.**
- (2) The way in which we consider it appropriate that Aurizon Network amend the terms and conditions of the 2014 DAU SAAs is to:**
 - (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**
 - (d) simplify arrangements and provide greater clarity around the rights and obligations of parties to an AA / TOD, reflecting our broader structural reforms.**
- (3) The amendments we consider to be appropriate to achieve the above are set out in our final DAU.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

9 CONNECTING PRIVATE INFRASTRUCTURE

The connection of private infrastructure to the rail network is dealt with in two sections of the 2014 DAU. The circumstances under which Aurizon Network will consent to a connection of private infrastructure to the rail network are identified in Part 9 of the 2014 DAU. The standard terms and conditions for connection are set out in the Standard Rail Connection Agreement (SRCA).

Our initial draft decision was to refuse to approve Aurizon Network's arrangements for connecting private infrastructure. We required amendments to Part 9 and the SRCA that focused on arrangements that allow connections to the network to be designed and developed efficiently and with greater certainty for all parties.

Our final decision generally adopts our initial draft decision except for the manner in which we consider the 2014 DAU and the SRCA should be amended with respect to Aurizon Network's obligations to forecast connection milestones.

9.1 Introduction

Third parties are increasingly required, and want the option, to develop and own private infrastructure that is connected to Aurizon Network's existing rail track.⁶⁵³ They therefore require the ability to connect to the network (on reasonable terms and within a reasonable time). The arrangements for such connections are an important component of the regulatory framework.

Including provisions in the undertaking to deal with the process of connecting private infrastructure to the network constrains Aurizon Network's ability to use its monopoly power beyond its current network by:

- allowing third parties to construct, own and operate private infrastructure that connects to the network
- specifying a process to underpin the connection of private infrastructure to the network
- imposing obligations on Aurizon Network in its dealings with these matters, particularly in relation to timing.

The SRCA assists negotiations by setting out standard terms and conditions for the connection. Parties can agree to other terms and conditions on a case-by-case basis—but in the event that negotiations fail, the SRCA provides a fall-back position for resolving a dispute. The SRCA was approved under the 2010 AU and has applied from April 2013.⁶⁵⁴

Overall, the provisions in the undertaking and the SRCA facilitate timely and efficient connections of private rail infrastructure—and so underpin the economically efficient operation and use of the network.

⁶⁵³ The development of mine-specific infrastructure is a competitive service. Aurizon Network said it will not necessarily undertake the development, construction and management of spur lines through the UT4 period (Aurizon Network, 2013 DAU, sub. 2: 101).

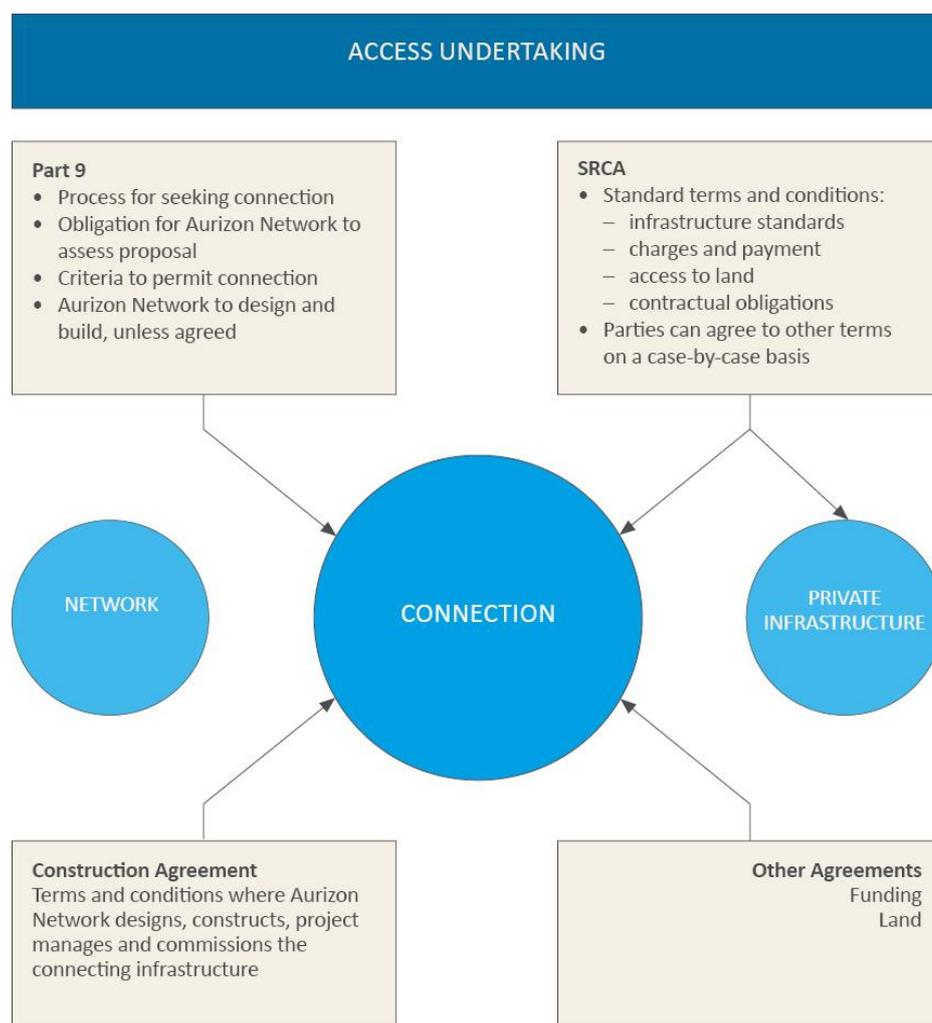
⁶⁵⁴ QCA 2013(a).

9.2 Overview

9.2.1 Aurizon Network's proposal

Part 9 of the 2014 DAU sets out the process for connecting private infrastructure to the network. The 2014 DAU also includes a SRCA with standard terms and conditions for connection. Parties also need to reach agreement on other matters for the connection to go ahead, including construction, land and funding (see figure below)

Figure 4 Connecting private infrastructure



Connecting infrastructure

Aurizon Network said the 2014 DAU arrangements for connecting private infrastructure represent a material simplification of existing arrangements in the 2010 AU.⁶⁵⁵ This includes removing a number of obligations from the body of the undertaking on the basis these are now generally dealt with in the 'safe harbour' of the SRCA (see Section 9.6) and dealing with disputes under Part 11 (dispute resolution).⁶⁵⁶

⁶⁵⁵ Aurizon Network, 2013 DAU, sub. 2: 102.

⁶⁵⁶ Aurizon Network, 2013 DAU, sub. 2: 102, 312, 345.

These arrangements set out a framework to connect private infrastructure to the rail network, including identifying the circumstances where Aurizon Network will consent to a connection. These arrangements apply to a private infrastructure owner (PIO): a person proposing to construct and own private infrastructure which will connect to the network in order to allow trains to enter and exit the network for the purpose of access.

SRCA

Volume 3 of the 2014 DAU includes a SRCA that sets out standard terms and conditions for connecting private rail infrastructure to the network. Aurizon Network said the SRCA ensures no party is disadvantaged with regard to the requirements for interconnection of rail infrastructure when electing to construct and own its own infrastructure.⁶⁵⁷

Aurizon Network intends the SRCA to cover the connection of private rail infrastructure to the network for the purpose of entering loaded coal trains into the relevant individual coal system. While the proposed SRCA largely reflects the existing approved SRCA arrangements⁶⁵⁸, it adopts a different approach to coal loss mitigation provisions (CLMPs) and includes a number of new provisions that clarify interpretation of the SRCA or otherwise reflect consequential amendments.⁶⁵⁹

Aurizon Network said the SRCA is not intended to apply to the connection of major new expansions (which will require varied terms and conditions) or to the connection to the rail network for services other than coal services (which would be dealt with under separate contractual agreements).⁶⁶⁰

9.2.2 Legislative framework and QCA assessment approach

In assessing Aurizon Network's 2014 DAU, we have had regard to all of the factors in section 138(2) of the QCA Act. In doing so, we have applied to each matter a weighting we consider appropriate based on the practical relevance of that matter.

Against this background, we consider that in our assessment of Aurizon Network's arrangements for connecting private infrastructure:

- section 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, which we consider relevant to the extent that a connection agreement should only allow Aurizon Network to recover the costs of a connection not already built into access prices
- section 138(2)(c) and (f) should be given less weight, as they are less relevant to the matter of connecting private infrastructure.

Section 138(2)(a)

Within the context of Part 9 of the 2014 DAU, we are of the view that the object of Part 5 of the QCA Act is taken into account when it:

- minimises total economic costs (including commercial risks) associated with building and connecting private infrastructure

⁶⁵⁷ Aurizon Network, 2013 DAU, sub. 2: 330.

⁶⁵⁸ Aurizon Network, 2013 DAU, sub. 2: 332.

⁶⁵⁹ Aurizon Network, 2013 DAU, sub. 2: 332; Aurizon Network, 2014 DAU, sub. 3: 242–243.

⁶⁶⁰ Aurizon Network, 2013 DAU, sub. 2: 330–331.

- promotes an efficient allocation of economic costs and rights associated with building and connecting private infrastructure between Aurizon Network and PIOs
- minimises the ability of Aurizon Network to behave in a manner that unfairly differentiates between PIOs in a materially adverse way
- promotes user participation by being simple and effective.

The 2014 DAU approach to connecting private infrastructure should minimise and efficiently allocate economic costs associated with a project to build private infrastructure. Economic costs include costs associated with delay, administration costs, transactional costs and build cost. Minimising total economic costs means that private infrastructure projects are more affordable, which promotes greater user participation, and hence promotes competition in related markets. We consider this is best achieved by a framework that appropriately allocates these costs between the parties so that they are incentivised to keep costs as low as possible.

The most efficient allocation of costs (including commercial risks) occurs when it is determined by the parties themselves rather than by regulation. Therefore, our approach is to examine the process rather than attempt to shape results according to what we believe is an efficient outcome.

In our view, the process outlined in Part 9 of the 2014 DAU should not allow Aurizon Network to misuse its monopoly power to unreasonably shift economic costs to a PIO. This will promote the object of Part 5 of the QCA Act.

As a monopoly, Aurizon Network has significant bargaining power and could leverage that power to extract significant concessions from PIOs. We consider that the process should take into account the difference in bargaining power; for example, setting out timeframes where possible so that parties are incentivised to proceed with the project in a timely manner.

The framework for connecting private infrastructure should maximise effectiveness by being sufficiently clear and flexible in order to encourage investment and participation by giving users and access seekers adequate confidence in the system.

[Section 138\(2\)\(b\)](#)

We consider Aurizon Network's legitimate business interests include:

- having infrastructure connected to its network that is built and maintained appropriately
- being able to recover the reasonable costs for work undertaken
- operating within a framework that is sufficiently flexible to allow a tailored approach to connecting private infrastructure
- not being subject to unnecessary and over-burdensome regulation, thereby increasing compliance and transactional costs.

Aurizon Network has a legitimate business interest in having private infrastructure connected to its network that is fit for purpose, that is, it facilitates entry and exit from the CQCN, the operation of the connecting infrastructure is sound and safe, and its connection does not adversely affect the network and other users of the network.

We also consider that it is in the legitimate business interest of Aurizon Network to be able to recover the reasonable costs it incurs for participating in a relevant project, including the design, construction, project management and commissioning of the connecting infrastructure. However, in having regard to this factor alongside the other section 138(2) factors, we consider that it would not be appropriate to approve an undertaking that allowed Aurizon Network to

charge a margin on costs associated with these tasks. Aurizon Network earns a regulated return on providing access rights to the CQCN. PIOs (to the extent that they are the associated access holder), or a relevant access holder will incur a cost in seeking access from Aurizon Network that is a direct result of connecting private infrastructure. Aurizon Network therefore will gain an access charge associated with a connection which includes a regulated return on investment.

We further consider that a flexible approach to its role in a project is in the legitimate business interest of Aurizon Network. Connecting private infrastructure is a complicated process that may take a significant time from inception to completion. No two projects are likely to be the same. It is therefore in Aurizon Network's interest to be able to develop a tailored approach to connecting private infrastructure for a PIO.

Finally, we consider that it is in Aurizon Network's legitimate business interests to not be subject to unnecessary and over-burdensome regulation, thereby increasing compliance and transactional costs. We consider that this interest is served by a simple, flexible regulatory approach that may be tailored in the manner set out above.

[Section 138\(2\)\(d\)](#)

We consider that it is in the public interest for private infrastructure to be able to connect to the CQCN, and that the process for connecting private infrastructure is efficient and effective. This is best served by an undertaking that minimises costs and promotes competition in related markets. The discussion above regarding section 138(2)(a) is relevant and applicable here.

[Section 138\(2\)\(e\)](#)

We consider it is in the interests of access seekers if the process for connecting private infrastructure to the CQCN is flexible, timely, does not unfairly differentiate to a material extent, and allows connection at a reasonable cost (irrespective of who designs, constructs, maintains or upgrades the infrastructure).

We consider that omitting or insufficiently developing a process, including applicable timeframes for connecting private infrastructure may, of itself, hinder or prevent access against the interests of access seekers—in particular if it allows Aurizon Network to extract monopoly rents, delay connections or favour a related party. The discussion above regarding section 138(2)(a) is relevant and applicable here.

We also consider that effectiveness will be achieved by maximising transparency and certainty of the process. PIOs should have confidence that the process works and does not allow Aurizon Network to use its monopoly power to behave in an anticompetitive manner. In practical terms, this means the process should be to some extent mechanical, with Aurizon Network required to provide an up-front commitment to timeframes for steps involved in the process. However, it is also in stakeholder's interests to have a process that is sufficiently flexible to accommodate their individual needs. An effective process will balance certainty and flexibility.

[Section 138\(2\)\(g\)](#)

We also consider that Part 9 of the 2014 DAU should provide a way for economic costs to be appropriately shared between Aurizon Network and a PIO. This will align interests of the parties to reduce costs. The discussion above regarding section 138(2)(a) is relevant and applicable here. The discussion above regarding section 138(2)(b) is relevant and applicable here.

[Section 138\(2\)\(h\)](#)

Section 138(2)(h) of the QCA Act requires us to have regard to any other issues that we consider relevant. We note that this broad discretion should be used appropriately. We include in this

criterion the interests of access holders as these are not specifically addressed in section 138(2). Where applicable, we have identified issues that we consider relevant in the circumstances.

Conclusion

Having had regard to the factors outlined in section 138(2) of the QCA Act, we have assessed Aurizon Network's proposed Part 9 of the 2014 DAU with a view to balancing the aims of:

- having infrastructure that is built and maintained to a standard that meets minimum technical, operational and safety requirements (including not adversely affecting the safety and operation of the network)
- providing a process that aligns the interests of Aurizon Network and PIOs
- achieving an appropriate balance between flexibility and certainty of the process for connecting private infrastructure
- minimising Aurizon Network's ability to unfairly differentiate in a materially adverse way
- enabling Aurizon Network to recover reasonable costs.

The chapter should be read in conjunction with our specific analysis in the sections below and our overarching approach in Chapters 2 and 3.

9.3 Summary of the initial draft decision

Stakeholder submissions on the 2014 DAU did not support Aurizon Network's proposal for connecting private infrastructure.⁶⁶¹ They said amendments were necessary to support successful negotiations between Aurizon Network and PIOs to ensure connections to the network are designed and developed more quickly and with greater certainty for all parties. The amendments they sought included providing:

- further detail around the obligations and processes included in the Part 9 framework
- greater certainty over terms and conditions where Aurizon Network constructs the connecting infrastructure
- changes to the proposed treatment of CLMPs.

After considering the section 138(2) factors and having regard to stakeholder submissions, our initial draft decision was to refuse to approve Aurizon Network's proposed arrangements for connecting private infrastructure. We considered it appropriate that Part 9 of the 2014 DAU and the SRCA should be amended to balance Aurizon Network's and PIOs' rights and interests and simplify and speed up the negotiation process.

9.4 Consolidated draft decision

Having had regard to the section 138(2) factors and stakeholders' submissions we refused to approve Aurizon Network's proposed framework for dealing with connecting private infrastructure, composed of Part 9 of the 2014 DAU and the SRCA.

We considered that while the general framework proposed by Aurizon Network is acceptable, it would be inappropriate to approve the following two matters:

⁶⁶¹ Anglo American, 2014 DAU, sub. 7: 57–60; sub. 11; Asciano, 2014 DAU, sub. 22: 41–42; 125–126; QRC, 2014 DAU, sub. 42: 50; sub. 36.

- the clarity of the negotiation process (milestones) between Aurizon Network and a PIO set out in the 2014 DAU and the SRCA. This is referenced in our consolidated draft decisions 9.2 and 9.3
- the inclusion of CLMPS in the SRCA. This is referenced in our consolidated draft decision 9.4.

9.4.1 Connection milestones

We considered that the process by which Aurizon Network may design, construct and commission the connecting infrastructure was inappropriate. The process proposed by Aurizon Network gives it total discretion as it is only obligated to review a PIO's proposal in a timely fashion under clause 9.1(c) of Aurizon Network's proposed 2014 DAU. This obligation is subjective and lacks certainty. We considered that this worked against the interests of access seekers and was not outweighed by the legitimate business interests of Aurizon Network.

Further, it does not promote the object of Part 5 of the QCA Act because it would allow Aurizon Network an opportunity to unfairly differentiate between PIOs in a materially adverse manner, which may adversely affect competition in related markets. For example, Aurizon Network could under its proposal prioritise projects undertaken by a related party over a non-related party, or simply delay progress on a non-related party's project.

Such delays have potential to cause suboptimal outcomes for the CQCN as PIOs may become discouraged from investing due to the lack of certainty and transparency in the process.

The lack of certainty under the process proposed by Aurizon Network may also allow it to engage in tactics like delaying a project until a PIO accepts unfair or unreasonable terms. For example, Aurizon Network could delay work until a PIO agrees to absolve Aurizon Network from any compensation claims, even if Aurizon Network was at fault. A more overt example is that Aurizon Network could extract excessive payments from PIOs to review a PIO's proposal in a 'timely fashion'.

A framework that has the potential for such outcomes would not be consistent with the object of Part 5 of the QCA Act or be in access seekers' interests or in the public interest.

However, we recognised that the more the process is regulated the less flexible it becomes, leading to unnecessary increases in regulatory and transactional costs. We also recognised that each project to connect private infrastructure is likely to be unique, and that a 'one-size-fits-all' approach is undesirable as it may be too inflexible to deal with unforeseen circumstances.

The access undertaking should not impose all the economic costs of a project on Aurizon Network. A project which connects private infrastructure is by nature speculative and forward-looking, and carries real associated commercial risks. Where possible, costs due to delays should be attributed to the party that caused the delay. Where fault cannot be attributed, the costs of a delay should be borne by both parties. Aurizon Network's proposed process did not articulate how such costs would be attributed between the parties.

Aurizon Network's proposed SRCA is drafted in a manner that reflects the approach Aurizon Network has taken in respect of Part 9 of its proposed 2014 DAU. We considered that the proposed SRCA is not sufficiently clear in respect of timeframes. For example, where a PIO is responsible for the design, construction, project management, and commissioning of connecting infrastructure, the only requirement on Aurizon Network is to 'promptly' provide assistance to a PIO (cl. 6(a) of SRCA). We considered the concern about the lack of certainty in the 2014 DAU outlined above to be relevant and equally applicable here.

Section 9.5 outlines how we considered Aurizon Network should amend the 2014 DAU in regards to clarifying the process.

9.4.2 Coal loss mitigation provisions

We considered Aurizon Network's proposal in relation to the CLMPs in the 2014 DAU to be inappropriate due to the potential for Aurizon Network to unfairly differentiate between PIOs in a materially adverse manner, which may adversely affect competition in related markets.

Aurizon Network's proposal is to remove the CLMPs from the 2014 DAU and include them in the SRCA. The effect is that the PIOs would be primarily responsible for ensuring wagons conform to the CLMPs as a condition of the SRCA. This would likely increase costs for the PIO depending on the terms and conditions of its rail connection agreement with Aurizon Network.

Since Aurizon Network can agree with a PIO to vary or to contract out of these provisions, there is an incentive for Aurizon Network to do so with a PIO that is a related party, ensuring that the latter's costs are minimised. Aurizon Network would not have the same incentives to reach the same agreement with a non-related party.

We recognised that the CLMPs are designed to minimise damage to the CQCN and that it is in the public interest that these provisions are recognised in the 2014 DAU. However, given that Aurizon Network's proposal may create incentives for it to engage in behaviour that unfairly differentiates between parties in a materially adverse manner, we considered Aurizon Network's proposal to be inappropriate in these circumstances.

The CLMPs are also referenced in clause 1.3 of Schedule F to the 2014 DAU (Reference Tariffs). Aurizon Network's proposal may unnecessarily complicate this by removing the CLMPs from the 2014 DAU. Aurizon Network's proposal would create a situation where reference tariffs refer to the SRCA, which is susceptible to variation.

Aurizon Network put forward an argument that its proposed treatment of the CLMPs was to ensure that it is adequately protected. The CLMPs are already accounted for in reference tariffs and their placement within the 2014 DAU does not alter any obligations. We considered it unlikely that a situation could occur where a train service could avoid paying the reference tariffs by utilising Part 9 of the 2014 DAU. Aurizon Network's proposal is likely to create uncertainty, leading to increased costs, and is not in the interest of stakeholders and would not promote the object of Part 5 of the QCA Act.

Section 9.5 outlined how we considered Aurizon Network should amend the 2014 DAU in relation to the treatment of CLMPs.

9.4.3 Arguments raised by Aurizon Network

We gave particular consideration to Aurizon Network's argument that the process it has submitted was done on a voluntary basis and that there was no requirement under the QCA Act to include this process in an undertaking.⁶⁶²

Section 136(4) of the QCA Act imposes a statutory duty on the QCA to consider a draft access undertaking given to us. The QCA Act does not permit us to differentiate between provisions that are specifically required to be present in an access undertaking and any other provisions. Therefore we had to consider the entirety of Aurizon Network's 2014 DAU (including the framework for connecting private infrastructure) within the confines of the QCA Act.

⁶⁶² Aurizon Network, Response to Policy & Pricing Principles Draft Decision, p. 13.

Accordingly, we must consider whether or not it is appropriate for us to approve Aurizon Network's proposed process for connecting private infrastructure, having regard to the factors set out in section 138(2). If we refuse to approve that process, we must provide Aurizon Network with reasons for the refusal (s. 136(5)(a)), and the way in which we consider it is appropriate to amend the process (s. 136(5)(b)). This was the approach we adopted in the initial draft decision, and it was our approach in the consolidated draft decision. This chapter sets out our reasons for the refusal, and the way in which we considered it appropriate to amend the process.

9.4.4 Stakeholders' comments on the consolidated draft decision

Aurizon Network restated its view that the process for connecting private infrastructure was submitted on a voluntary basis and that it would not accept amendments proposed by the QCA where they increase costs and risks to Aurizon Network. Aurizon Network submitted that it has a commercial incentive to facilitate connection of private infrastructure and there is no proof that a failure by Aurizon Network prevented a mine development. Aurizon Network's view is that in seeking to regulate such matters, the QCA is acting beyond power.⁶⁶³

9.4.5 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure as set out in its 2014 DAU.

We have considered the concerns raised by stakeholders in response to our CDD. However, as stakeholders did not provide any new arguments, our analysis, reasoning and decision remains unchanged from that set out in our CDD analysis above. However, we wish to make the following comments for the purpose of clarity.

Voluntary process

As outlined above, Aurizon Network submitted that the process under Part 9 was included in the 2014 DAU voluntarily and that we have acted beyond our statutory power in proposing amendments to Part 9 that increase costs or risks to Aurizon Network. At the same time Aurizon Network submitted that it considered the construction of connecting infrastructure constituted an extension under the QCA Act.⁶⁶⁴

The two positions put forward by Aurizon Network seem incompatible. If it considers connecting infrastructure an extension of the CQCN under the QCA Act then it is something that can be included in to an access undertaking.⁶⁶⁵

More immediately, Section 136(4) of the QCA Act imposes a statutory duty on the QCA to consider a draft access undertaking given to us. The manner we are required to apply the QCA Act is the same, whether an item is included 'voluntarily', as claimed by Aurizon Network, or not. We must consider the section 138(2) factors in our consideration, and as such we consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act, including the object of Part 5 of the QCA Act, for the reasons set out in our analysis above. Indeed, Section 137(2)(g) of the QCA Act states that an access undertaking for a service may include details of terms relating to "extending" the facility.

⁶⁶³ Aurizon Network, 2014 DAU, sub. 125: 120-121.

⁶⁶⁴ Aurizon Network, 2014 DAU, sub. 125: 121.

⁶⁶⁵ See section 137(2) of the QCA Act.

The amendments we consider appropriate to be made to Part 9 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out in the rest of this chapter below.

Final decision 9.1

- (1) After considering Aurizon Network's proposed framework for connecting private infrastructure, our final decision is to refuse to approve Aurizon Network's proposal.**
 - (2) We consider it appropriate that Aurizon Network amend its draft access undertaking in the manner proposed in our final decisions 9.2, 9.3 and 9.4.**
- We consider it appropriate to make these decisions having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.**

9.5 Amending the process for connecting private infrastructure

9.5.1 Aurizon Network's proposal

Part 9 of the 2014 DAU sets out the following process for connecting private infrastructure to the QCN:

- The PIO provides Aurizon Network with a written proposal for the proposed connection for it to review and assess (cl. 9.1(b), (c)).
- Aurizon Network will permit the connection if:
 - it is satisfied that the connection is to be used to allow trains operating on the private infrastructure to enter or exit the network for the purpose of access; meets minimum construction and service standards and will not adversely impact safety; and will not, by virtue of its existence, reduce capacity or supply chain capacity (cl. 9.1(c))
 - it owns, or holds the appropriate lease, over the connecting infrastructure (cl. 9.1(d))
 - it can access the necessary land (cl. 9.1(e))
 - it and the PIO have entered into required relevant agreements—including a rail connection agreement (consistent with the SRCA, unless agreed) and any other agreement necessary relating to design, construction, project management or commissioning of the connecting infrastructure or other works (cl. 9.1(e)).
- Aurizon Network must notify the PIO, providing reasons, if it is not satisfied the connection requirements are met, and it refuses to enter a connection agreement (cl. 9.1(f)).

Part 9 of the 2014 DAU provides for Aurizon Network to be responsible for designing, constructing, project managing and commissioning the connecting infrastructure, unless otherwise agreed (cl. 9.1(g)). It does not include the 2010 AU arrangements that outline the standards required and the PIO's role for connections in this event (2010 AU, cl. 8.3(c)).

Part 9 of the 2014 DAU does not include other 2010 AU arrangements that Aurizon Network said are now dealt with in the SRCA which require Aurizon Network to:

- ensure connecting infrastructure built by third parties is physically connected to the network, facilitate the movement of trains and offer to provide train control and planning services (2010 AU, cl. 8.3(b))

- pay reasonable costs where it has unreasonably delayed the development of the connecting infrastructure (2010 AU, cl. 8.3(d)).⁶⁶⁶

Part 9 of the 2014 DAU does not include a process to refer disputes to dispute resolution. Instead, Aurizon Network has advised disputes in relation to the connection framework are subject to the Part 11 dispute resolution provisions (see Chapter 6).

In initial submissions, stakeholders did not accept Aurizon Network's proposed process for connecting private infrastructure.⁶⁶⁷ The overarching view of stakeholders was that the 2014 DAU provides Aurizon Network with too much discretion which Aurizon Network could use to favour its related party rail operator.⁶⁶⁸

9.5.2 Summary of the initial draft decision

Our initial draft decision was to refuse to accept Aurizon Network's proposed arrangements for connecting private infrastructure. We proposed amendments to Part 9 of the 2014 DAU and the SRCA to balance Aurizon Network's and PIOs' rights and interests, and simplify and speed up the negotiation process.

Our initial draft decision 9.1 refused to approve Part 9 of the 2014 DAU as proposed by Aurizon Network. We proposed amendments to:

- clarify the process for connecting private infrastructure and improve transparency
- address Aurizon Network's ability to unreasonably delay or fail to enter agreements required to connect private infrastructure
- clarify arrangements where Aurizon Network is responsible for designing and building the connecting infrastructure.

Clarifying the process and improving transparency

We considered a clear process for proposing connecting infrastructure, assessing the proposal, and putting it into effect would simplify and speed up negotiations for connections. While we accepted Aurizon Network's approach in principle, we proposed amendments to Part 9 of the 2014 DAU to clarify the process and improve transparency. These included:

- requiring that the PIO's proposal provides reasonably sufficient detail about the proposed connection (cl. 9.1(a) of the IDD amended DAU)—so Aurizon Network can assess the proposal without delay
- testing for whether the connection would reduce capacity following the completion of any planned expansion (cl. 9.1(b)(v) of the IDD amended DAU)—to provide a realistic view of the capacity implications of connection
- requiring 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 need to be made (cl. 9.1 (d), and (f) of the IDD amended DAU)—to make Aurizon Network more accountable for its decision-making, and give the PIO a better understanding of what is required and to assist in determining the facts should the matter go to dispute resolution

⁶⁶⁶ Aurizon Network, 2013 DAU, sub. 2: 345.

⁶⁶⁷ Anglo American, 2014 DAU, sub. 7: 57–60; Asciano, 2014 DAU, sub. 22: 41–42, 125–126; QRC, 2014 DAU, sub. 42: 50.

⁶⁶⁸ Asciano, 2014 DAU, sub. 22: 42.

- providing that the SRCA may be used by parties as an 'anchor' or starting point to guide negotiations (cl. 9.1(e)(i)).

Dealing with delays

We considered that Part 9 of the 2014 DAU did not appropriately deal with Aurizon Network unreasonably delaying or failing to enter agreements required for connection beyond requiring it to review a written proposal in a timely fashion. For this reason, we proposed that the way in which the DAU should be amended was that Aurizon Network pay all reasonable costs arising out of loss suffered by PIOs, access seekers or access holders from Aurizon Network's unreasonable delays in meeting key milestones.

We also proposed that Aurizon Network to notify a timeframe for reaching key connection milestones⁶⁶⁹, providing reasons explaining the length of the timeframe selected (cl. 9.1(d) of the IDD amended DAU)—to provide transparency for the likely timing of progress to connection.

Construction matters

We considered unambiguous terms of the construction agreement are important where Aurizon Network constructs the connecting infrastructure. Uncertainty regarding terms of a construction agreement could lead to disputes and delays, particularly where there is limited competitive pressure on Aurizon Network to provide a timely or cost effective response or where Aurizon Network seeks to use its monopoly position inappropriately to reduce or remove risk and liability for the project being built.

We considered matters relevant to the negotiation of the construction of the connecting infrastructure to be within the scope of the access undertaking, including the SRCA.⁶⁷⁰

We also considered the manner in which the design and construction contract is negotiated, and the timeframes applicable to the negotiation and performance of the contract, fall within the scope of the 2014 DAU. While the performance of the construction contract itself might not be within the scope of the relevant access agreement, the 2014 DAU already covers disputes relating to the negotiation and formation of the construction contract.⁶⁷¹ Including these matters within an access undertaking is also implicitly permitted by the framework of the QCA Act.⁶⁷² Accordingly, we proposed amendments to increase certainty and limit the possibility for delay and cost blow-outs. We also proposed amendments to the SRCA to set out required steps and timeframes to guide the process where Aurizon Network designs and builds the connecting infrastructure (see Section 9.6.2 of this chapter).

⁶⁶⁹ These include entering a rail connection agreement with the PIO; the design and construction of any connecting infrastructure; and commissioning.

⁶⁷⁰ Aurizon Network said disputes on a construction agreement are out of the scope of the 2014 DAU (Aurizon Network, 2014 DAU, sub. 4: 239).

⁶⁷¹ The intent and scope of the access undertaking deals with facilitating the negotiation of access arrangements. Where connecting infrastructure is required, access cannot be negotiated or provided without the existence of a construction contract between the parties—and the formation of an appropriate construction contract for connecting infrastructure is one of the pre-conditions to access.

⁶⁷² For example, the QCA Act provides that an access undertaking must include provisions preventing Aurizon Network from unfairly differentiating between access seekers or users (s. 137(1A)) and may include details of time frames for giving information in the conduct of negotiations (s. 137(2)(c)) and provisions to be included in access agreements (s. 137(2)(j)). The QCA must also have regard to the interests of persons who may seek access to the service in deciding whether to approve a draft undertaking (s. 138(2)(e)).

In proposing the amendments, we noted a standard construction agreement is being developed for SUFA⁶⁷³ and we believed this could be the reference point for a construction agreement for connecting infrastructure.

9.5.3 Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network agreed the process for connecting infrastructure could be improved by the proposed amendments requiring PIOs to provide sufficient details about proposed connections, Aurizon Network provides a realistic view of the capacity implications of a connection and the SRCA is used as an anchor for negotiations.

However, in general, Aurizon Network had serious concerns with other amendments we proposed. Generally, it said our approach attempts to allocate risks, determine performance management arrangements and even impose penalties, which only parties to a contract can properly determine through negotiation.⁶⁷⁴ In addition, Aurizon Network said it included the arrangements for connecting infrastructure in the 2014 DAU on a voluntary basis; there is no requirement to do so under the QCA Act.⁶⁷⁵ As such, it will not accept amendments that allocate costs or risks to Aurizon Network above what it has voluntarily offered.⁶⁷⁶

On this basis, Aurizon Network said it does not support:

- connection milestones—agreeing milestones immediately after receiving the PIO's initial connection proposal is impractical and meaningless as it can take some time before the actual connection is required
- notifications—requiring it to notify us of connection milestones and criteria is unwarranted and intervenes in its day-to-day operations⁶⁷⁷
- requiring it be subject to traditional market based remedies for delays (i.e. damages), while only permitting reasonable, direct costs be recovered (excluding profit, margin and overheads) which allocates risks to Aurizon Network it is not willing to assume.⁶⁷⁸

Other stakeholders

While QRC supported aspects of our proposal, it remained concerned with:

- the lack of a construction agreement—QRC reiterated its concerns that requiring parties to agree the terms of the construction agreement will result in unacceptable delays and disputes and will undermine the benefit of having a SRCA⁶⁷⁹
- Aurizon Network's discretion—if Aurizon Network is responsible for design and construction of the connecting infrastructure, it should not be able to determine timeframes and potentially delay the process to its advantage.⁶⁸⁰ Also, there should be deemed approval of a

⁶⁷³ For more detail on the SUFA construction agreement, or the SUFA assessment process more broadly, see the SUFA project page on our website.

⁶⁷⁴ Aurizon Network, 2014 DAU, sub. 82: 117.

⁶⁷⁵ Aurizon Network, 2014 DAU, sub. 82: 30, 117.

⁶⁷⁶ Aurizon Network, 2014 DAU, sub. 82: 117.

⁶⁷⁷ Aurizon Network, 2014 DAU, sub. 82: 119.

⁶⁷⁸ Aurizon Network, 2014 DAU, sub. 82: 120.

⁶⁷⁹ QRC, 2014 DAU, sub. 84: 79.

⁶⁸⁰ QRC, 2014 DAU, sub. 84: 85.

connection proposal if Aurizon Network fails to notify a PIO otherwise within the prescribed timeframe.⁶⁸¹

9.5.4 Amending the 2014 DAU

Our consolidated draft decision was to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure. The reasons for our refusal had regard to the section 138(2) factors and are set out in Section 9.4 of this chapter. This section sets out the amendments we considered appropriate. We were of the view to largely adopt our initial draft decision 9.1 and the analysis set out in section 9.3 of our initial draft decision except with regards to matters outlined below.

As noted in Section 9.4.1, we recognised that each project to connect private infrastructure is likely to be unique, and will likely require tailored planning, design and construction. A 'one-size-fits-all' approach is likely to be too inflexible.

It would be appropriate for Aurizon Network to amend the 2014 DAU so that upon the receipt of a written proposal from a PIO, Aurizon Network is required to reach an agreement with the PIO regarding appropriate connection milestones. Without limiting the matters that Aurizon Network and a PIO can agree to, the milestones should include provisions for the parties to enter into a Rail Connection Agreement, the design and construction of any connection infrastructure, and the commissioning of connection infrastructure (cl. 9.1(e) of the CDD amended DAU).

The negotiations should be conducted in good faith and Aurizon Network should not behave in a manner that would unfairly differentiate between access seekers in a materially adverse way. We considered the parties should reach agreement within a period of no longer than two months from the date Aurizon Network notifies the PIO it has decided the PIO's proposal meets the required criteria. Under our proposal, the parties may agree to delay committing to set timeframes until an access agreement which requires the proposed connection to the rail infrastructure to be completed has been entered into between Aurizon Network and the PIO (cl. 9.1(f) of the CDD amended DAU).

We considered it appropriate that the negotiation of a relevant access agreement was a clear trigger for the agreement on connection milestones to occur.

This approach would appropriately balance the interests of the parties. Aurizon Network would still have an obligation to provide some certainty to PIOs, while also providing a process that can be flexible where it needs to be.

In recognition of the need for a flexible process, we encouraged Aurizon Network and PIOs to engage prior to the submission of a written proposal. This is a practical recommendation for the purposes of fostering a collaborative approach. However, we did not include explicit drafting for this within the CDD amended DAU as it is simply our recommendation. We did not consider it appropriate to include a strict obligation on either party in this regard.

We considered the proposal outlined above to be appropriate as it allows Aurizon Network and PIOs an opportunity to work collaboratively to reach mutually agreeable timeframes. Where the parties are unable to reach agreement on milestones, the parties may seek to resolve the dispute in accordance with Part 11 of the 2014 DAU.

⁶⁸¹ Aurizon Network, 2014 DAU, sub. 82: 82.

In our initial draft decision, we proposed a clause requiring Aurizon Network to pay all reasonable costs to a PIO arising out of Aurizon Network's unreasonable delay. In light of the matters outlined above, we considered this clause to be appropriate. Aurizon Network and the PIO may agree to extend the timeframe for entering into connection milestones in appropriate circumstances. In those cases the clause requiring Aurizon Network to pay all reasonable costs arising out of its delay (clause 9.1(l) of the CDD amended DAU) would not be applicable until the timeframes for connection milestones are agreed to.

While this approach may result in more disputes arising from parties being unable to agree on milestones, we believed that the parties will have incentives to negotiate terms rather than seek to enter a dispute.

We also considered that the process we proposed addresses the QRC's concern that a construction agreement will be subject to limited oversight. The process will allow the parties to negotiate terms and conditions, including timeframes that are appropriate and tailored to each project, and there may be cost implications for unreasonable delay by Aurizon Network. This includes a milestone for agreeing terms on which design and construction will occur. Requiring every agreement to be regulated will be too inflexible and is likely to increase regulatory and transactional costs.

Other drafting revisions we made to the IDD amended DAU, as reflected in the CDD amended DAU, were:

- Clause 9.1(b)—we proposed amending this clause to permit the parties to agree to a different period to the prescribed two months for Aurizon Network to assess a proposal received from a PIO. This change was made to provide flexibility to both parties in response to stakeholder submissions. We considered that this amendment would promote the interests of both parties.
- Clause 9.1(e)(iv)—we proposed adding an option for the parties to be able to agree connection milestones for any other matters the parties consider necessary. This was made in response to a submission from QRC which raised the possibility that there may be other matters in relation to which it is appropriate to have connection milestones. We considered this would give the parties greater flexibility and an enhanced ability to "tailor" the process to suit their requirements, thereby promote the interests of both parties. (This change is also reflected in the consequential change to clause 9.1(l)(iv).)
- Clause 9.1(l)—Aurizon Network submitted that its obligation to reimburse the PIO, Access Seeker or Access Holder for costs arising out of Aurizon Network's unreasonable delay should relate to efficient costs rather than reasonable costs which is what we had proposed in the IDD amended DAU. Aurizon Network submitted that changing the requirement to reference efficient costs would better accord with the object of Part 5 of the QCA Act (as set out in section 69E, and which is to promote the economically efficient operation of, use of and investment in, significant infrastructure) as well as the pricing principle set out in section 168A(a). Our view was that 'reasonable costs' is appropriate in these circumstances because the terms of the agreement between Aurizon Network and a PIO are likely to be negotiated on commercial terms. The economic incentives for Aurizon Network and PIOs are likely to be different because unlike Aurizon Network, PIOs are not monopoly service providers.
- Clause 9.1(n)(i)—we proposed an amendment to ensure that any party may seek to resolve a dispute in relation to the connection milestones under Part 11.

9.5.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network submitted that the CDD maintained the QCA's position that Aurizon Network may only recover direct reasonable costs, with no profit, margin or overhead, relating to design, construction, project management and commissioning of connecting infrastructure. Aurizon Network said this means it is not being compensated for associated risks.

Aurizon Network submitted that the inclusion of clause 9.1(k)(iii), which does not allow recovery of costs if a connection does not proceed is against the section 168 pricing principles.

Aurizon Network remained opposed to the introduction of mandatory connection milestones while acknowledging that the CDD approach enables Aurizon Network and the PIO to delay setting milestones until an access agreement has been entered into. Aurizon Network said that setting rigid timelines at an early stage does not make sense given that the majority of projects will not proceed or will experience delays.⁶⁸²

In response to the CDD, Aurizon Network restated its concerns that:

- (a) Agreeing on connection milestones upon receipt of a written proposal is premature as a high degree of uncertainty remains. It does not make sense to agree milestones at an early stage of the development process (clause 9.1(b))
- (b) The proposed timeframe of 2 months for concluding milestones is otherwise too tight (clause 9.1(e))
- (c) It does not volunteer to include matters relating to design and construction of connecting infrastructure
- (d) By extending Aurizon Network's liability for delays beyond a PIO to include access seekers and access holders, QCA seeks to extend the application of a new liability framework to additional counterparties for delays relating to the entering into or performance of obligations under connecting infrastructure arrangements with a PIO, which is beyond the QCA's power
- (e) It is not compelled to assume risks of costs incurred due to delay, for which it receives no return (clause 9.1(l))

Aurizon Network submitted that if clause 9.1(l) is deleted it is prepared to accept a firm obligation to enter into a SRCA and construction agreement within two months of an access agreement being entered into, and that any failure by it to meet this timing would properly be the subject of a dispute.⁶⁸³

The QRC restated that:⁶⁸⁴

- (a) The lack of a standard construction agreement could cause delays and disputes. Implementing such an agreement is key to improving commercial workability and giving stakeholders confidence to invest in the industry.
- (b) The capability of the PIO to design and construct the connecting infrastructure (as against Aurizon Network) needs to be more consistently provided for in clause 9.1.
- (c) A deemed approval of connection proposals should be provided for if Aurizon Network fails to notify the PIO of the outcome of its assessment of the connection proposal within

⁶⁸² Aurizon Network, 2014 DAU, sub. 125: 119, 121.

⁶⁸³ Aurizon Network, 2014 DAU, sub. 125: 123.

⁶⁸⁴ QRC, 2014 DAU, sub. 124: 36-38.

the timeframes. QRC said that a deemed approval concept would overcome the commercial imbalance around the assessment response process in clause 9.1(b).

The QRC submitted that the CDD amended DAU does not specify a process for determining which entity will undertake the design, construction and commissioning of connecting infrastructure. The QRC considered that it is commercially important and appropriate for the PIO to be able to elect to undertake the design, construction and commissioning of the project, rather than having to agree this with Aurizon Network. The QRC suggested the matters the subject of clause 6 of the SRCA should rather be reflected in clause 9.1 of the Undertaking.⁶⁸⁵

Further new issues raised by QRC included that:

- (a) The intent of clause 9.1(c) needs to be clarified in respect of who owns the infrastructure - and this needs to be clarified in the SRCA. QRC added that it is unclear how Aurizon Network proposes to treat connecting infrastructure when developing reference tariffs. QRC said the CDD did not address this issue and the scenario should be avoided where Aurizon Network gains an unintended benefit.
- (b) Clause 9.1(g) should provide that if Aurizon Network notifies the QCA of a decision to delay setting connection milestones, Aurizon Network should be obliged to notify the QCA of connection milestones within 5 days of these being determined.
- (c) The PIO should be able to dispute a decision by Aurizon Network under clause 9.1(e) not to permit a connection or that the clause 9.1(b) criteria are not met. There is some uncertainty as to whether these matters are captured under Part 11 clause 11.1.1.
- (d) The definition of consequential loss at clause 9.1(l) needs to be clarified as a party should not have the benefit of exclusion of liability if it has committed fraud, gross negligence or wilful default.

9.5.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed process for connecting private infrastructure as set out in its 2014 DAU.

Aurizon Network and QRC generally re-iterated concerns they have previously raised and no new information or arguments have been provided on these issues in response to our CDD. We therefore consider that our analysis, reasoning and decision on these matters for the most part remain unchanged from that set out in our CDD analysis above, however we make the following comments.

Commercial risk

A key theme of Aurizon Network's submission relates to its commercial risk in the process leading up to the connection of private infrastructure (e.g. planning and building). It has reiterated that our CDD amended 2014 DAU does not allow it to recover at least its efficient costs plus a return on its investment commensurate with its commercial and regulatory risks.

Our approach is to address the potential for Aurizon Network to extract monopoly rents from the construction of private infrastructure and also receive a regulated return upon completion of the project. This over-recovery would be inappropriate and inconsistent with the object of Part 5 of the QCA Act. Aurizon Network's discretion may also allow it to unfairly differentiate between users in a materially adverse way, affecting competition in related markets.

⁶⁸⁵ QRC, 2014 DAU, sub. 124: 36.

Our position is that Aurizon Network should be able to recover costs where those costs are "reasonable" and they are not already recovered by Aurizon Network elsewhere. Our drafting of clause 9.1(k)(iii) in our CDD amended 2014 DAU attempted to convey that position. We consider it appropriate to update our drafting to better reflect our position to allow Aurizon Network recover "efficient costs" where those costs are not recovered elsewhere to further clarify our policy position.

The pricing principles under section 168A of the QCA Act relate to the price of access to a service, which are recognised in the regulated returns that Aurizon Network earns from providing below rail services. We have considered these in the context of setting reference tariffs.

With respect to allocation of risk, we have not included a standard construction agreement in our final decision amended 2014 DAU in recognition that the parties themselves are best placed to negotiate the allocation of risk involved in such projects. As we have emphasised in our CDD, there is no one-size-fits-all solution.

However, this does not mean that Aurizon Network should be allowed to use its monopoly power in bargaining with stakeholders. We consider this is appropriately addressed by the framework we have proposed under our final decision amended 2014 DAU. The safety net for stakeholders is that Aurizon Network is required to commit to connection milestones, and that stakeholders are able to invoke appropriate dispute resolution processes where negotiations fail.

For the reasons outlined above, we consider it appropriate that Aurizon Network is entitled to recover its efficient costs for the design, construction, project management and commissioning of the connecting infrastructure so long as those costs are not already recovered elsewhere, including as part of the regulated asset base.

For clarity, we have amended clause 9.1(k)(iii), which previously read: "[Aurizon Network] is entitled to payment for that design, construction, project management and commissioning consisting only of reimbursement of its reasonable direct costs and excluding any and all profit, margin or overhead relating to the Connecting Infrastructure" by changing it to read "[Aurizon Network] is entitled to payment for that design, construction, project management and commissioning consisting only of reimbursement of its efficient costs which directly relate to the Connecting Infrastructure, but to the extent only that such costs have not, or will not be, included in the Regulatory Asset Base or recovered by Aurizon Network through other means under this Undertaking ". The parties may negotiate and agree to what this cost is, however failing an agreed outcome, the parties may seek to dispute the efficient cost under Part 11.

We consider the drafting of our final decision amended 2014 DAU allows Aurizon Network to recover its efficient costs even if the project does not proceed, however the specific terms will be subject to negotiations between the parties.

Lastly, Aurizon Network submitted that the process outlined in our CDD amended 2014 DAU is more prescriptive compared to the ARTC's Hunter Valley Coal Chain Access Undertaking. We note that while the ARTC is not a vertically integrated business, Aurizon Network is, which may create incentives for Aurizon Network to engage in unfair differentiation.

[Clause 9.1\(l\) - reimbursement of costs for delay](#)

Clause 9.1(l) makes clear that Aurizon Network will be liable for reasonable costs incurred by a private infrastructure owner for any unreasonable delay caused by Aurizon Network in entering into or executing milestones. Aurizon Network submitted that this is unnecessary and notes

that it is obligated by the QCA Act to not hinder access. Aurizon Network also submitted that it will accept obligations to enter into milestones (including entering into a SRCA and a construction agreement) as long as the clause 9.1(l) is deleted from the 2014 DAU.

We consider it appropriate to provide certainty that Aurizon Network would be liable to reimburse PIOs for costs arising directly out of its unreasonable delay. This is likely to increase stakeholders' confidence in the process of dealing with Aurizon Network. We note that clause 9.1(l) in and of itself does not guarantee a party will be successful in a claim for reimbursement of reasonable costs.

The purpose of the clause is to address the potential for Aurizon Network to leverage its bargaining power to extract significant concessions from PIOs before it is willing to enter into connection milestones. This may allow Aurizon Network to unfairly differentiate between users in a material way that affects competition in related markets.

We are of the view that clause 9.1(l) is necessary to achieve our policy aim that the process for connecting private infrastructure should promote flexibility, certainty and a consultative approach between the relevant parties. Stakeholders' support suggests that this clause does provide credibility to Part 9, which may incentivise parties to take a genuine consultative and collaborative approach to negotiations.

However, we are of the view that clause 9.1(l) should be updated to:

- reflect that the reimbursement obligation only applies to reasonable costs incurred by the PIO arising directly out of Aurizon Network's unreasonable delay
- delete the reference to access seekers and access holders on the basis that recovery of delay costs by an access holder or access seeker should sit within a commercial arrangement with the PIO. We note this change has also been made to clause 9.1(n) for the same reason.

Clarifying drafting

We also considered the following clarification matters in response to QRC's submission:

- Consistent with our position in the CDD, our final decision position is that Aurizon Network should ultimately own or lease the connecting infrastructure. This will make the connecting infrastructure form part of the CQCN that is used to provide the declared below rail services. We consider that the process of transferring ownership or lease (if necessary) should be considered on a case by case basis by the parties. If the parties cannot reach agreement, they can use the dispute resolution process to try to resolve any issues.
- How connecting infrastructure is addressed for the purpose of developing reference tariffs should be considered on a case by case basis. We consider that there are two likely scenarios, either the parties will agree that Aurizon Network will recoup its costs directly from the PIO, or the connecting infrastructure is treated in a manner consistent with Schedule E of the 2014 DAU.
- We consider that Aurizon Network should construct the connecting infrastructure unless the parties agree that it will not. This position recognises that Aurizon Network will be usually best placed to undertake the relevant work. This is appropriate given our position that Aurizon Network may only recover efficient costs. We would reconsider our position if Aurizon Network seeks to recover a "commercial" rate in which case it may be appropriate for stakeholders to elect whether or not Aurizon Network is responsible for design, construction and commissioning of the connecting infrastructure.

- We do not consider it appropriate to include a "deeming" provision that has the effect of deeming Aurizon Network to have accepted a PIO's written proposal after a particular period. We consider that the process we have proposed in our amended 2014 DAU, coupled with a PIO's ability to seek resolution of a dispute, is appropriate in light of the matters we have outlined in this section above.
- We do not consider it necessary to insert a reporting obligation on Aurizon Network to report to the QCA when it and another party has decided to delay in setting milestones. We consider such agreements to be a decision between Aurizon Network and the stakeholder, and it is inappropriate for us to intervene in this process if parties can reach agreement.
- We consider clause 9.1(n) already appropriately covers the matters raised in QRC's submission regarding the uncertainty of whether stakeholders can dispute an Aurizon Network decision to reject a private infrastructure proposal.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 9 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 9.2

- (1) **After considering Aurizon Network's proposed framework for connecting private infrastructure, our final is to refuse to approve Aurizon Network's process for connecting private infrastructure.**
- (2) **We consider it appropriate that Aurizon Network amend its draft access undertaking in the manner proposed in Part 9 of the final amended DAU, that is:**
 - (a) **upon the receipt of a written proposal from a PIO, Aurizon Network is required to negotiate with the PIO and to agree on the milestones**
 - (b) **the connection milestones negotiation process should conclude within a period no longer than two months from the date Aurizon Network notifies the PIO it has decided the PIO's proposal meets the required criteria**
 - (c) **arrangements should be clarified for where Aurizon Network is responsible for designing and building the connecting infrastructure**
 - (d) **Aurizon Network is to pay reasonable costs incurred by a PIO arising directly out of Aurizon Network's unreasonable delay.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

9.6 Amending the Standard Rail Connection Agreement

The SRCA guides negotiations between Aurizon Network and PIOs seeking to connect private infrastructure to the network. While a negotiated connection agreement may differ from the SRCA, the conditions in the SRCA will be relied upon in resolving a dispute if negotiations fail.

9.6.1 Aurizon Network's proposal

Aurizon Network said its proposed SRCA for the 2014 DAU largely reflects the approved SRCA arrangements from the 2010 AU.⁶⁸⁶ The key difference is the proposed SRCA now includes CLMPs as a schedule to the SRCA (see below). The proposed SRCA also includes a number of new provisions that clarify interpretation of the SRCA or otherwise reflect consequential amendments.⁶⁸⁷

Aurizon Network proposed that the SRCA cover the connection of private rail infrastructure to the network for the purpose of entering loaded coal trains into the relevant individual coal system. In particular, Aurizon Network said:

- the SRCA is not intended to apply to the connection of major new expansions, as these may require varied terms and conditions
- connection to the rail network for services other than coal services would also not be covered by the SRCA, but by other agreements negotiated between Aurizon Network and the other party.⁶⁸⁸

Stakeholders generally supported continuing to use the recently approved SRCA.

9.6.2 Summary of the initial draft decision

Our initial draft decision accepted the SRCA included in the 2014 DAU where it was consistent with the recently approved SRCA in the 2010 AU. The SRCA in the 2010 AU had been reviewed and approved following a lengthy and comprehensive assessment, including extensive consultation with stakeholders. We did not consider stakeholders had raised any new or material concerns.

On this basis, we proposed the SRCA be amended to:

- provide a process by which Aurizon Network may design, construct and commission the connecting infrastructure—to provide greater clarity and certainty and reduce delay:
 - setting out timelines for Aurizon Network to prepare a proposed construction contract and design for the connecting infrastructure and for the PIO to respond to Aurizon Network's proposal (SRCA, cl. 7(b)(ii), (iii), (v), (vi))⁶⁸⁹
 - providing for the PIO to request modifications to each document in particular circumstances⁶⁹⁰ and for Aurizon Network to consider the PIO's proposal and modify and resubmit or dispute (SRCA, cl. 7(b)(ii), (iii)(C), (iv), (v), (vi)(A))
 - providing a process to modify any agreed construction contract or design to reflect a material change in circumstances (SRCA, cl. 7(b)(vii))
 - requiring that, unless otherwise agreed, the construction agreement must contain terms and conditions identified in the SRCA (SRCA, cl. 7(b)(viii))

⁶⁸⁶ Aurizon Network, 2013 DAU, sub. 2: 332.

⁶⁸⁷ Aurizon Network, 2014 DAU, sub. 3:242–243.

⁶⁸⁸ Aurizon Network, 2013 DAU, sub. 2: 330–331.

⁶⁸⁹ In doing so, we sought stakeholders' comments on what timeframes would be appropriate.

⁶⁹⁰ Being limited to the technical specifications required, the standard appropriate to the nature of traffic and current service standards, safety and capacity; and project management or timing issues that will result in non-prudent or unreasonable costs or delays.

- require Aurizon Network to consult with (not just notify) the PIO on proposed changes to system operating parameters as soon as practicable (SRCA, cl. 8(i))— to reflect proposed amendments to the process for changing system operating parameters to put greater emphasis on third-party involvement and consultation (see Chapter 13 of this consolidated draft decision)
- define consequential loss with greater particularity (SRCA, cl. 1)—to improve clarity and certainty.

We considered our amendments would simplify and speed up negotiations for connections whilst taking proper account of Aurizon Network's, PIOs' and users' rights and interests. We considered including an SRCA in the access undertaking with transparent terms and conditions, is preferable to individually negotiated arrangements for each connection.

We did not accept Aurizon Network's proposal to exclude particular connections from using the SRCA. We considered it is inappropriate for the SRCA to apply to some connections but not others.

Where a party requires a connection to access the network the SRCA should be applied, but we accepted flexibility might sometimes be required to finalise terms and conditions. In these circumstances, we considered the SRCA provided a baseline template.

9.6.3 Stakeholders' comments on the initial draft decision

Aurizon Network did not agree the SRCA needed further amendment. It said the SRCA was negotiated with stakeholders and did not need to be renegotiated.

Aurizon Network did not agree that where the PIO is responsible for design and construction of the connecting infrastructure, it should also be responsible for planning the works. This was on the basis that Aurizon Network is obliged to maintain responsibility for the mainline network and works could be required to be undertaken on the mainline, including closures of sections of track.⁶⁹¹

The QRC considered the SRCA required further refinement and, to this end, provided a marked-up SRCA as part of its submission. In particular, the QRC proposed amendments to:

- clarify meanings and definitions—for example, force majeure and security, and processes and obligations such as post commissioning procedures, exchange of safety and interface information, the interface risk management and emergency response plan
- align the SRCA with the undertaking
- ensure that provisions similar to remedy provisions in Part 9 of the undertaking are also incorporated in the SRCA.

Stakeholders queried how the cost of private infrastructure would be taken into account when setting reference tariffs. The potential exists for double counting if the PIO pays for the cost of the infrastructure and it gets included in the RAB and reference tariff calculations.

9.6.4 Amending the 2014 DAU

Our consolidated draft decision was to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure. The reasons for our refusal had regard to the section 138(2) factors and are set out in Section 9.4 of this chapter. This section sets out the

⁶⁹¹ Aurizon Network, 2014 DAU, sub. 82: 121.

amendments we considered appropriate. We decided to adopt the proposed amendments in our initial draft decision with respect to the SRCA (including the reasons set out at sections 9.3.3 and 9.4.3 of our initial draft decision), with changes to:

- the SRCA, where relevant, so that it was consistent with our consolidated draft decision 9.2
- a number of drafting revisions to clarify meaning and definitions, as noted in submissions.

We were of the view that the changes proposed in the CDD amended DAU, predominantly the insertion of a new clause 7, were appropriate as they would provide a framework for the parties to negotiate a construction agreement in circumstances where Aurizon Network is undertaking the construction of the private infrastructure project.

This was appropriate in light of our consolidated draft decision 9.2. As outlined in Section 9.4 above, it was appropriate for parties to negotiate timeframes for milestones to allow for greater flexibility in the framework. However, once parties agree to enter into a Rail Connection Agreement, the terms of that agreement should largely be mechanical as it deals with interconnection to the CQCN.

The terms of the SRCA should also provide a sufficiently clear framework for the negotiation of a construction agreement. This would improve certainty for the parties involved and promote confidence in the process. However, the SRCA should not unnecessarily dictate the terms of the construction agreement as each construction project is likely to be unique.

As discussed in section 9.3.3 of our initial draft decision, transparency and certainty of process, coupled with a basis for agreement negotiations was likely to promote efficient outcomes and efficient investment in the CQCN. We considered that the amendments we proposed would promote the object of Part 5 of the QCA Act, balance the interests of the parties and promote the public interest.

In Section 9.7 below, we assess issues relating to the placement of the CLMPs.

9.6.5 Stakeholders' comments on the consolidated draft decision

Aurizon Network restated that the SRCA is flexible, widely understood by coal miners and can be amended as agreed between the parties. It did not suggest any further amendments.⁶⁹²

QRC⁶⁹³ reiterated concerns that the QCA did not accept its previous proposals in regard to:

- (a) definition of consequential loss - QRC said the definition lacks certainty and is too broad
- (b) definition of a force majeure event - QRC sought an exhaustive legal definition
- (c) exchange of safety and interface information (clause 12 of the SRCA)
- (d) insurance (clause 18 of SRCA) - QRC remained of the view that Aurizon Network should not be entitled to require adjustments to the value of insurances effected under the SRCA.

The QRC also raised new concerns in regard to:

- (a) Auditor's scope and expert appointment - QRC suggested that the procedure set out in the TOD has not been consistently applied in the SRCA. QRC would like to see a statement as to whether the decision of the auditor is final and binding, and the qualifications of the auditor, at clause 3(e) of the SRCA.

⁶⁹² Aurizon Network, 2014 DAU, sub. 125: 122-123.

⁶⁹³ QRC, 2014 DAU, sub. 124: 39-41.

- (b) Scope of PIO's obligations in respect of accreditation. It is impractical to require a PIO to comply with the Rail Infrastructure Manager's accreditation conditions where these conditions are not notified to the PIO.

9.6.6 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed process for connecting private infrastructure as set out in its 2014 DAU.

Aurizon Network and QRC both re-iterated concerns they have previously raised and no new information or arguments have been provided on these issues in response to our CDD. As such, our analysis, reasoning and decision on these matters remains unchanged from that set out in our CDD analysis above.

QRC raised a number of issues regarding the draft of the SRCA. We consider that these are largely matters that should be negotiated between the parties. We consider that the interests of the parties are aligned in the context of connecting private infrastructure and therefore an expansive prescriptive approach is unnecessary. We wish to emphasise that the parties are encouraged to collaborate, and failing that, the parties can refer disputes to the QCA or otherwise.

We have however clarified that the auditor's scope and expert appointment is to make clear that the auditor's report is binding.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 9 of the 2014 DAU in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 9.3

- (1) After considering Aurizon Network's proposed framework for connecting private infrastructure, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) We consider it appropriate that Aurizon Network amend the 2014 DAU in the manner proposed in the SRCA contained in the final amended DAU; that is, to provide greater clarity (without changing the intent), and to:**
 - (a) provide a process by which Aurizon Network may design, construct and commission the connecting infrastructure**
 - (b) require Aurizon Network to consult with (not just notify) the PIO in respect of proposed changes to system operating parameters as soon as practicable.**

We consider it appropriate to make these decisions having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

9.7 Coal loss mitigation provisions in the SRCA

9.7.1 Aurizon Network's proposal

Aurizon Network included proposed CLMPs as a schedule to the SRCA (SRCA, Schedule 7). Under these arrangements, the PIO has primary responsibility for ensuring wagons are loaded, profiled and veneered in a manner that prevents coal loss (i.e. by taking measures to satisfy relevant standards, targets and levels when handling and loading coal) (cl. 1.1(c), 1.3 of Schedule 7 of the proposed SRCA). This includes:

- a general requirement for the PIO to comply with applicable laws, instructions, guidelines and standards (now or in the future) (cl. 1.4 of Schedule 7 of the proposed SRCA)
- detailed requirements relating to the PIO's operations and practices (cls. 1.5, 2.3, 2.4, 2.5 of Schedule 7 of the proposed SRCA)
- reporting requirements relating to material non-compliance with the CLMPs (cl. 1.8 of Schedule 7 of the proposed SRCA).

Stakeholders' comments

In initial submissions, stakeholders reiterated concerns about Aurizon Network's proposed approach to deal with CLMPs in the SRCA.⁶⁹⁴ The two key issues raised were:

- whether the SRCA is an appropriate mechanism to deal with coal loss mitigation
- the nature and content of the proposed CLMPs.

Asciano said CLMPs should not be included in the SRCA, which should focus on connections, not coal management. It said the infrastructure owner is not in the best position to manage the handling and loading of coal at all load-out sites served by the infrastructure. Asciano considered it would be more appropriate to address CLMPs issues through a separate process or agreement (similar to the access interface deed in the 2010 AU).⁶⁹⁵

9.7.2 Summary of the QCA initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposal to include CLMPs as a schedule to the SRCA. While we consider it is appropriate to address coal loss mitigation through the SRCA, we proposed the CLMPs be:

- included as a schedule to the 2014 DAU (with the SRCA referring to CLMPs as specified in the access undertaking)
- amended to align 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.

Inclusion of CLMPs in the access undertaking

We considered the CLMPs are best dealt with in the body of the access undertaking (see the new Schedule J of the CDD amended DAU) and not as a schedule to the SRCA. Coal loss mitigation is a matter of broader interest to PIOs, access seekers and access holders and in which there is a public benefit in having a consistent approach applied and enforced by us.

We considered having the CLMPs as a part of the access undertaking:

- ensures ongoing connection between the SRCA and Aurizon Network's broader coal loss mitigation obligations
- provides more structure about how changes to the CLMPs should be implemented and can ensure equity of treatment
- continues to allow sufficient stakeholder consultation and regulatory oversight on the exact terms of the CLMPs (and future changes to those provisions).

⁶⁹⁴ See QCA 2013(a) and 2012(b) for a summary of matters raised in that process.

⁶⁹⁵ Asciano, 2013 DAU, sub. 43: 78, 117.

Content of the CLMPs

We proposed amendments to the nature and content of the proposed CLMPs to ensure they do not impose obligations which are higher, different or in addition to the obligations agreed under the CDMP (we attached drafting for the new Schedule J in Volume V of the initial draft decision). We took account of recent developments in best practice for coal loss management (in particular where methods outlined may not be applicable to all supply chain participants due to location and operation characteristics). Our proposed amendments:

- focused on meeting standards, targets and levels that reflect applicable laws (now and in the future) and not those otherwise specified by Aurizon Network (cl. 1.3 of Schedule J to the IDD amended DAU)
- provided a general obligation for the PIO to use reasonable endeavours to prevent coal loss (cl. 1.4 of Schedule J to the IDD amended DAU) as well as new requirements for the PIO's particular operations and practices (cls. 1.5, 2.1, 2.3, 2.5 of Schedule J to the IDD amended DAU); and provided clarity over the factors that might affect the proposed approach⁶⁹⁶
- provided a general process for continuous improvement for parties to identify where performance gaps exist/improvements can be made with a focus on using their reasonable endeavours to achieve 'best practice' (cl. 1.9 of Schedule J to the IDD amended DAU)
- clarified the proposed reporting requirements and monitoring (cls. 1.6, 1.8 of Schedule J to the IDD amended DAU)—including, in the event of noncompliance, requiring parties to agree on a reasonable program setting out the activities, and a timetable to undertake those activities, to prevent its reoccurrence.

9.7.3 Stakeholders' comments on the initial draft decision

Aurizon Network did not agree the CLMPs should be removed from the SRCA and included as a schedule in the undertaking.⁶⁹⁷ It said requiring it to be ultimately responsible for implementing coal loss strategies:

- disadvantages existing network users that have obligations
- is inconsistent with the requirement for all persons to comply with all laws
- transfers the risk of coal loss mitigation to Aurizon Network, despite it having little ability to manage it.⁶⁹⁸

On the last point, Aurizon Network said if a PIO does not implement coal loss strategies due to 'prevailing business conditions', it would be left to rectify the degradation with no compensation or ability to prevent the risk arising.⁶⁹⁹

With regard to the content of the CLMPs, Aurizon Network said:

- obligations on PIOs to limit coal loss should be absolute, and not subject to any limiting factors—this is unfair to existing users who have such obligations and means Aurizon

⁶⁹⁶ By taking into account limiting factors including the: prevailing business conditions; effectiveness of the particular mitigation approach given technology and cost constraints; timeframes required to implement mitigation strategies; specific characteristics underlying the relevant PIO's contribution to dust; and the impact on other supply chain participants.

⁶⁹⁷ Aurizon Network, 2014 DAU, sub. 82: 116.

⁶⁹⁸ Aurizon Network, 2014 DAU, sub. 82: 121.

⁶⁹⁹ Aurizon Network, 2014 DAU, sub. 82: 121.

Network bears the risk of strategies not being implemented when it has little capacity to manage that risk⁷⁰⁰

- the obligation on the PIO to comply with requirements not to overload coal and prevent spillage should not be removed—it does not have the ability to control loading and there is potential for increased safety risks and wear and tear, as well as increased coal fouling and asset degradation.⁷⁰¹

The QRC agreed with our proposal to include the CLMPs in Schedule J of the access undertaking. It said the undertaking is the more appropriate mechanism to deal with coal loss mitigation provisions.⁷⁰² The QRC considered the content of Schedule J could be improved by:

- ensuring Aurizon Network is obliged to act reasonably when exercising its rights and obligations under Schedule J
- narrowing the obligation for the PIO to prevent coal loss, as it is currently too broad
- reducing the oversight and monitoring capability of Aurizon Network in respect of coal loss prevention
- making the meeting requirements less onerous (i.e. we proposed quarterly meetings).⁷⁰³

The QRC also raised a number of drafting related issues. Asciano said there are additional factors to consider when it comes to coal loss mitigation, including additional contractual obligations that may be required if coal handling and load out is managed by a third party (not the private infrastructure owner). Also, increased administrative requirements on the PIO can be costly (e.g. additional reporting, monitoring and testing).⁷⁰⁴

Amending the 2014 DAU

Our consolidated draft decision was to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure. The reasons for our refusal had regard to the section 138(2) factors and are set out in Section 9.4 of this chapter. We decided to adopt our initial draft decision and the analysis set out at section 9.5.3 of our initial draft decision with respect to the treatment of CLMPs.

As outlined in Section 9.4.2, our proposed amendments did not alter any obligations imposed by the CLMPs on PIOs. Further, the CLMPs were also referred to in clause 1.3 of Schedule F to the 2014 DAU (Reference Tariffs) and provided for Aurizon Network to be appropriately compensated.

We noted that the requirements for loading and profiling of wagons set out in clause 2.3 of Schedule J were already consistent with retaining an obligation on the PIO to comply with requirements not to overload coal and to prevent spillage. It is also in the PIO's interests to minimise coal loss. In response to the QRC's comments, we remain of the view that the CLMPs need to be broad and effective in order that individual operators do not have an incentive to avoid meeting their obligations and passing the resulting costs to other users. We also considered quarterly meetings are appropriate. However, we made minor amendments to clauses 1.6 and 1.7 in response to the QRC.

⁷⁰⁰ Aurizon Network, 2014 DAU, sub. 82: 121.

⁷⁰¹ Aurizon Network, 2014 DAU, sub. 82: 121.

⁷⁰² QRC, 2014 DAU, sub. 84: 74.

⁷⁰³ QRC, 2014 DAU, sub. 84: 102–104.

⁷⁰⁴ Asciano, 2014 DAU, sub. 76: 25.

We also considered this approach promotes clarity and certainty regarding the operation of the CLMPs. It limited Aurizon Network's discretion with respects to the contents of the CLMPs, as well as Aurizon Network's ability to unfairly differentiate between PIOs in a materially adverse way. The CLMPs should be included as part of the 2014 DAU as they are applicable to multiple parts of the 2014 DAU, not just in relation to Part 9.

In making this consolidated draft decision, we took into account Aurizon Network's legitimate business interests and the interests of other stakeholders. We considered this would promote the object of Part 5 of the QCA Act, and the public interest.

9.7.4 Stakeholders' comments on the consolidated draft decision

Aurizon Network agreed with the removal of CLMPs from the SRCA and including them as Schedule J to the undertaking. However, Aurizon Network restated its reasoning for not agreeing with the position of introducing limiting factors into the implementation of coal loss prevention measures.

Aurizon Network suggested minor drafting amendments to Schedule J to remove clause references to 'limiting factors', and to replace 'reasonable endeavours' with 'must'.

9.7.5 QCA analysis and final decision

Our final decision is to refuse to approve Aurizon Network's proposed approach to coal loss mitigation provisions.

Aurizon Network re-iterated concerns that it previously raised and no new information or arguments have been provided on this issue in response to our CDD. As such, our analysis, reasoning and decision on these matters remains unchanged from that set out in our CDD analysis above.

We consider it appropriate to make this final decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

The amendments we consider appropriate to be made to Part 9 of the 2014 DAU and inclusion of Schedule J in order for it to be approved are set out in the final amended DAU. This includes the changes set out above.

Final decision 9.4

- (1) After considering Aurizon Network's proposed approach to coal loss mitigation provisions, our final decision is to refuse to approve Aurizon Network's proposal.**
- (2) We consider it appropriate that Aurizon Network amend its draft access undertaking in the manner proposed in the final amended DAU, by:**
 - (a) including CLMPs as a schedule to the access undertaking (Schedule J)— with the SRCA referring to CLMPs as specified in the access undertaking**
 - (b) better aligning the CLMPs with the 2010 CDMP, while also providing an adequate framework for coal producers to implement 'best practice' strategies if it is practicable for them to do so.**

We consider it appropriate to make this decision having regard to each of the matters set out in section 138(2) of the QCA Act for the reasons set out in our analysis above.

APPENDIX A: PROPOSED NEW STRUCTURE OF PART 10

The following table shows the proposed movement of the clauses in Part 10 between our IDD amended DAU and final amended DAU (as discussed in Chapter 5, section 5.3).

Table 35 Change in Part 10 clauses from IDD amended DAU to final amended DAU

<i>IDD amended DAU</i>		<i>CDD amended DAU</i>	
<i>Clause</i>	<i>Title</i>	<i>Clause</i>	<i>Change in title</i>
N/A	N/A	10.1	Overview (new clause)
N/A	N/A	10.2	General principles (new clause)
10.1.1	Annual financial report	3.7 10.4.1	Accounting separation Annual financial report
10.1.2	Annual compliance report	10.5.2	Annual compliance report
10.1.3	Annual maintenance plan	10.3.1	No change
N/A	N/A	10.3.2	Quarterly maintenance cost report (new clause)
10.1.4	Annual maintenance cost report	10.3.3	No change
10.1.5	Monthly network performance report	10.3.4	Quarterly network performance report
10.1.6	Annual regulatory asset base roll-forward Report	10.4.2	Public annual regulatory asset base roll-forward report
10.1.7	Errors in reports	10.7.2	No change
10.2	Breach reports to the QCA	10.5.3	No change
10.3.1	Disclosure of access agreements	10.7.1	Information provision
10.3.2	QCA requested information	10.7.1	Information provision
10.4	Conditions based assessment	10.4.3	No change
10.5	Compliance	10.5.1	Compliance officer
10.6	Certifications required from Aurizon Network's Executive Officer	10.7.3	No change
10.7	Report auditing	10.6.1	No change
10.8	Compliance audit requested by the QCA	10.6.3	No change
10.9	Conflicts audit	10.6.2	Ring-fencing audit
10.10	Audit process	10.6.4	No change