Queensland Rail's 2015 Draft Access Undertaking:

Volume 1

Submissions on QCA's Request for Comments Paper

14 March 2016

1 Introduction

On 5 May 2015, Queensland Rail (***QR***) submitted a draft access undertaking in relation to Queensland Rail's rail network (the ***2015 DAU***).

On 8 October 2015, the Queensland Competition Authority (***QCA***) released its Draft Decision in respect of the 2015 DAU (***Draft Decision***), containing a draft determination that the 2015 DAU was not appropriate to approve, having had regard to each of the matters in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***).

Following the Draft Decision:

(a) stakeholders have made further submissions to the QCA;

(b) the QCA has published a Request for Comments paper (19 January 2016) and an addendum to the paper (15 February 2016); and

(c) the QCA has invited further submissions on both the issues raised in that paper and other issues raised in stakeholder submissions.

New Hope Corporation Limited (***NHC***) has made submissions on the 2015 DAU prior to and after the Draft Decision, and continues to largely support the principles in the Draft Decision and the detailed changes which the QCA has proposed to ensure that the new access undertaking is appropriate.

These further submissions set out NHC's views on:

(a) each of the issues raised in the QCA's Request for Comments paper; and

(b) a number of additional issues raised in other stakeholders' submissions in response to the Draft Decision.

NHC in particular, has included responses which address the many unjustified comments made by QR in its latest submission, particularly in respect of the QCA's approach to pricing matters in the Draft Decision.

2 Structure of NHC Submission

This submission is provided in two volumes, as follows:

(a) **Volume 1**: (this document), comprising of:

  (i) an introduction and overview of NHC's submissions; and

  (ii) submissions in response to the issues raised in the QCA's Request for Comments Paper; and

(b) **Volume 2**: submissions on a selection of the most material issues raised in other stakeholders' submissions in response to the Draft Decision not otherwise addressed in Volume 1.

3 Timing and cost concerns

NHC is becoming increasingly concerned with the length of time (and resulting cost to NHC) taken to determine the terms of the appropriate access undertaking to apply to QR.

NHC acknowledges that QR has substantially complicated the process by multiple draft access undertaking submissions and withdrawals, a reversal of its position on transitional tariffs, and continuing to use each submission and delay to raise an ever-wider scope of issues.

However, it is now important (for the whole West Moreton Network) for certainty to be restored as soon as possible.

NHC (and presumably other stakeholders) have had to commit significant management time and incur significant costs of advisers to fully participate in the regulatory process. That cost burden is exacerbated by the current approach to the QCA Levy (which forms part of the reference tariffs) whereby QR is effectively allowed to pass on to users the costs of QCA's oversight and regulation of QR. In other words, users are being punished with high tariffs as a result of QR's conduct. That is in addition to QR's costs (which are taken into account in setting reference tariffs) already including an allowance for QR's own costs of participation in the regulatory process.

NHC notes that the QCA Act does not require the QCA to approve a QCA Levy which reflects a pass through from QR of the QCA's charges. Rather the QCA is to determine the appropriate QCA Levy as part of setting the appropriate tariff. Given the additional cost and delays caused by QR's approach to the undertaking process, NHC suggests that the QCA should give serious consideration to whether it is appropriate for QR to assume itself some of the QCA costs caused by QR's approach to the regulatory process.

4 Overview of NHC Submissions

Subject to the comments below, NHC largely supports the Draft Decision and continues to consider that it would be appropriate for the QCA to largely adopt the same positions in the Final Decision.

NHC is principally concerned about the following aspects of the Draft Decision:

(a) allocation of fixed costs to coal services;

(b) the adjustment amount not reflecting services east of Rosewood;

(c) the 100% take or pay (***ToP***) (without any adjustment for variable costs not incurred where the service is not operated); and

(d) the approach to determining appropriateness of the reference tariffs (including the weight given to affordability and competitiveness).

NHC also has concerns with a number of issues raised by QR in its submissions in response to the Draft Decision. In particular, NHC strongly rejects, for the reasons set out in these (and previous) submissions, QR's assertions that the tariffs or adjustment amount are not within the QCA's power and that elements of the investment framework are not within power. QR's arguments do not stand up to any detailed legal or economic analysis, and the QCA should not change its approach to pricing or extension matters on the basis of those assertions.

It is also clear from NHC's submission that NHC's and QR's views regarding the appropriate content of the Standard Access Agreement (***SAA***) and the 2015 DAU diverge greatly. This demonstrates the importance of the approved 2015 DAU and SAA being prescriptive enough to provide real certainty on all key issues and minimise areas of future dispute, such that the various stakeholders are able to efficiently progress access negotiations. If that approach is not taken, NHC unfortunately anticipates that negotiations will quickly descend into a stalemate requiring QCA arbitration, due to the extent of the disparity between the positions of QR and access seekers.

The detailed reasons for NHC's submissions are set out in the remainder of this submission (in Volumes 1 and 2).

5 Allocation of common costs

5.1 Train path constraints through the Metropolitan Network

In its latest submissions, QR is now asserting (in direct contradiction to statements in earlier submissions) that there is no cap on the number of train paths for coal services which travel

through the Metropolitan Network. It appears to NHC that this position is not legally correct. Even if it was, it does not reflect the reality of QR's practice to date which in part forms the basis on which coal companies have made contracting and investment decisions.

Consequently, the QCA should not alter its approach to allocation of costs on the basis of QR's new assertions regarding the extent of pathing constraints. Rather allocation of common costs should be based on the higher of contract or forecast paths as a proportion of total available paths.

For completeness, NHC notes that in describing the paths allocated to coal there are references to both 77 and 87 paths. NHC understands that the way QR has applied the path constraint is 77 coal paths from west of the Toowoomba range and 10 additional paths from the east of the Toowoomba range (the latter of which can only be used by Ebenezer).

(a) Whether the constraint is legally binding

The advice provide by Corrs Chambers Westgarth (Appendix 8 of QR's December submission) does not indicate that the 87 path constraint is not legally binding (as QR's submissions appear to claim). Rather it merely indicates that certain items of correspondence from the Department of Transport and Main Roads (***DTMR***) provided by QR to Corrs Chambers Westgarth are not Ministerial directions.

That is obviously not conclusive as to whether pathing constraints exist for coal services, as there are, of course, ways other than a Ministerial direction by which a legally binding constraint on QR could have arisen. A likely source of such a constraint is section 266A of the *Transport Infrastructure Act 1994* (Qld) (***TIA***) which prohibits a railway manager (such as QR) from allocating a train path allocated for:

(i) a regulatory scheduled passenger service; or

(ii) a service involving the transportation of a type of freight other than coal,

for the provision of a different type of service (without approval of the chief executive, being the Director-General of DTMR, or prior written notice from the chief executive indicating that the train path is no longer subject to the requirements of that section).

If QR was to allocate a train path preserved for non-coal usage to a coal service without reasonable excuse, in contravention of that section, QR would be liable for a civil penalty (section 266B TIA).

Section 266A was introduced in 2010 (prior to the privatisation of Aurizon Network and its separation from QR) and preserved the paths allocated to non-coal uses on its commencement.

NHC has reason to believe that the legal constraints imposed by section 266A TIA continue to exist for the following reasons:

(i) [confidential];

(ii) the preservation of paths for agricultural and livestock industries was considered by a Parliamentary Committee in June 2014.[1] Section 7.2 of the Committee's paper is instructive, making it clear that such a legislative preservation was expressly intended to 'protect QR' from the obligations to provide access in a non-discriminatory manner under its access undertaking. The paper goes on to refer to submissions from the Port of Brisbane indicating the then current allocation on the West Moreton Network of the 10 paths preserved for grain, 17

[1] Available at http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2014/5414T5368.pdf.

for other freight and 2 for passenger services – leaving 77 for coal and 10 'spare' used for coal;

(iii) in December 2014, DTMR published a Moving Freight Progress Report which indicates DTMR has identified and preserved paths for non-coal services. That was based on achieving the priority 1 action for the next 10 years referred to in the December 2013 DTMR Moving Freight strategy to 'Preserve train paths on regional rail lines for non-coal rail services in response to agricultural and broader community freight demands' (page 36 and 38); and

(iv) [confidential].

As a result, based on all the evidence available to NHC, it appears that the maximum number of coal services that can be operated on the West Moreton Network remains constrained by the preserved allocations at 87 paths. Given the clear evidence of QR both applying, and clearly expressing an understanding that there is, an '87 path constraint' on coal services, in order to demonstrate that is not the case QR should be required to produce absolutely clear evidence of a subsequent approval from DTMR for a permanent release of the preservation for non-coal services.

(b) 87 paths has been enforced as a practical constraint

It is clear that QR has consistently acted on the basis of a cap of 87 paths being available for coal services, irrespective of whether such a cap was technically legally binding.

During the period before the Wilkie Creek mine was put on care and maintenance, when a full 87 coal services were contracted, NHC understands that a queue of coal access applications continued to exist, irrespective of there being available capacity due to the decline in non-coal volumes. NHC understands that a queue exists at the time of this submission, again despite non-coal volumes being minimal. It is difficult to reconcile the previous and current queues with there being no constraints on the number of paths available for coal services.

Similarly, NHC understands that there have been past events of coal access seekers not being granted the full extent of the access rights sought on the basis of the 87 path constraint.

It is also clear from QR's initial submissions in respect of its draft access undertaking and [confidential] that QR has previously expressly recognised a path cap.

QR has consistently claimed the existence of, and acted consistently with, an 87 path cap until very recently. The only interpretation which seems to be reasonably open is that QR has only sought to change its position on the cap when faced with the QCA's Draft Decision regarding the allocation of fixed costs to coal services.

5.2 Allocation of fixed/common costs

(a) Allocation by paths 'available for coal' inappropriate in any case

In any case, whether the 87 path constraint is legally binding or not is not determinative of the appropriate method for allocation of costs.

As NHC had already noted in its previous submissions, recovery by QR of the fixed costs of the paths formerly contracted by coal (effectively requiring remaining coal producers to underwrite the fixed costs of capacity formerly contracted for the Wilkie Creek mine) from remaining coal producers is inappropriate.

In particular, such an approach ignores the fact that:

(i) coal producers did not collectively request investment in, nor promise to underwrite, these paths (with many of the assets to which the relevant fixed costs

relate not developed for coal and pre-dating the use of this capacity by any coal producer); and

(ii) the 87 paths constraint has never been applied as a reservation of capacity for coal, as these paths are equally available for non-coal services.

QR now proposes to exacerbate this inappropriate allocation by extending the underwriting to additional paths that are asserted by QR to be 'available for coal' but which:

(i) in fact, have never been contracted for coal services;

(ii) were not available to be contracted for coal until QR's recent change of position, due to QR applying the 87 as a firm cap on coal services; and

(iii) are equally available to non-coal customers but, unlike the availability for coal services, have always been available to be contracted by non-coal customers.

QR's proposal that practically all paths on the network are available for coal and should be allocated to coal for costing purposes has even less justification than the position which was reflected (inappropriately, in our view) in the Draft Decision. It very clearly exposes coal producers to a risk (serious deterioration in non-coal traffics) that coal producers are not able to manage, and which coal producers could not reasonably have expected to be exposed to at the time they made contracting and investment decisions.

NHC continues to consider that allocating all of the costs of spare capacity to one group of customers in a mixed-use system is clearly inequitable, will distort competition in markets and is not appropriate. Rather allocation of common costs should be based on the higher of contract or forecast paths as a proportion of total available paths.

The impact on rail users is particularly relevant in relation to the West Moreton Network due to the relatively small number of customers. Where the remaining coal access holders are required to bear an increasing share of the costs of the system as coal and non-coal usage declines, the costs passed through due to other users ceasing to use the service can create a domino effect or 'death spiral' whereby the remaining users are forced to exit as they cannot bear the escalation of costs on this scale.

For coal mine users of the West Moreton Network, the transfer of the costs of capacity formerly set aside for non-coal users to the remaining coal users would have significant impacts. The exit of either of the existing users would have a catastrophic impact on the ability of the remaining miner (which would be responsible for bearing the cost of all 87 coal paths, or potentially 112 if the QR submission is accepted, even if it were only using a small number of them).

(b) If an allocation by 'available' paths is to occur it should occur on the basis of paths which have *actually* been made available

As noted in section 5.1(b) of this Volume of the NHC submission, irrespective of whether it was technically legally binding, it is clear that QR has consistently applied a cap of 87 paths being available for coal services and continued to believe that this constraint existed as recently as December 2015.

QR seeking to now increase the paths used to allocate costs to coal above the 87 paths is entirely inappropriate because:

(i) if it is assumed that QR is right about the legal position, QR is effectively on one hand asserting it has been in blatant breach of its obligations under the undertaking and the QCA Act to negotiate in good faith where it has received access applications for such 'available' capacity (by refusing to do so on the basis

of the allegedly non-binding pathing constraint), and on the other asking to be rewarded for that by now recovering a higher proportion of fixed costs;

(ii) QR has made additional revenue in the interim from ad-hoc services that were used principally because of each producer's inability to contract greater capacity;

(iii) the existing network assets which QR is seeking to recover practically all fixed costs in relation to were invested in at a time when QR clearly believed that only 87 paths could ever be available for coal (and it is unreasonable to subsequently ask coal producers to underwrite investments not intended for usage by coal and for which access to capacity created by such investments has consistently been denied);

(iv) the cap of 87 paths has been a factor that coal project proponents on the West Moreton Network have had to take into account in their rail contracting and mine investment decisions over many years. Opportunities may have existed, under the favourable coal market conditions which have now ceased to exist, for coal project proponents to make investment decisions which may have made use of such capacity (had it been available). NHC was, for example, seeking an additional 1 mtpa of capacity in 2012 which was not available because of the cap on coal paths being applied by QR. Those investment opportunities cannot now suddenly be recreated or reshaped such that the additional paths can be used from the date on which QR's position changed (and NHC notes that QR's proposal would allocate additional paths to coal, for cost allocation purposes, even prior to the date on which QR's position changed and the theoretical opportunity to contract these paths arose); and

(v) even if the 87 path constraint was not technically a legally binding cap, it was clearly government policy and it can be reasonably assumed that if QR sought Ministerial approval (as it does for all coal access agreements) for paths above the cap, that approval would not have been provided.

(c) There is no guarantee QR will maintain their current position

NHC does not believe that QR's asserted position (that all train paths are available for coal services) can be assumed to be a long term position on which a cost allocation methodology can be based.

In theory, QR's asserted position has the potential to result in a substantial increase in coal paths through the Metropolitan Network, which previous governments (of both major political parties) have considered unpalatable, and is directly contrary to the Queensland government's previous freight strategy documents. QR's assertions have also not been supported by any material from the Queensland government indicating that it has changed its policy position (or has any intention to do so).

NHC therefore considers it would be a fundamental error to seek to allocate costs on the basis of QR's assertions about availability without any clear basis that the 87 path constraint has been removed. The signing of Access Agreements for coal services in excess of 87 paths in the future would provide evidence that the change in position claimed by QR is real, and may be an appropriate trigger for review of cost allocations.

6 Adjustment amount

6.1 Regulatory risk and investment impacts

The QCA has requested further comments on the question of the adjustment amount, and in particular on comments made regarding regulatory risk and investment impacts. NHC considers

that the approval of the 2015 DAU without an adjustment amount would undermine confidence in the regulatory regime and have negative impacts on investment.

Even if that cannot be proved now to be the case (as the anticipated negative impacts on investment will of course only eventuate if the undertaking is ultimately approved without an adjustment amount), consideration of the approval criteria must lead to a conclusion that it is not appropriate to approve the 2015 DAU without an adjustment amount.

(a) Adjustment amount: Regulatory risk and investment impacts

The Draft Decision contained a comprehensive analysis of the question of the adjustment amount, which NHC fully supports. That analysis included discussion of how the approval of the 2015 DAU without an adjustment amount could damage confidence in the regulatory regime and impact on investment.

QR has stated that 'stakeholders would have been aware that a voluntary draft access undertaking can be withdrawn at any time'.[2] This is true. However, stakeholders were not aware that:

(i) QR would be willing to renege on commitments given to customers and confirmed repeatedly in letters to the QCA, on which stakeholders relied; and

(ii) QR would seek to retain revenue to which the QCA has determined QR was not entitled (that is, revenue which exceeded appropriate limits).

NHC also expected, and continues to expect, that:

(i) relevant precedents from the West Moreton Network and the Central Queensland Coal Region network, all of which involve some form of true-up arrangement, would (and will) be followed; and

(ii) the QCA would (and will) be willing and able to prevent misuses of regulatory processes to extract monopoly rents.

It is irrelevant whether the expectation created is legally enforceable (which QR raises as an issue), although NHC notes for completeness that misleading statements can give rise to a number of potential legal actions. Rather the issue is simply whether an adjustment amount forms part of the appropriate undertaking, having regard to the matters in section 138(2) of the QCA Act.

Leaving aside arguments about the adjustment amount being beyond the QCA's power (which are also each clearly incorrect, as discussed next in this submission), QR's argument about whether the adjustment amount is appropriate seems to principally rest on the fact that it was only willing to provide an adjustment amount based on either being part of a package which formed a component of its previous proposals or on an assumption about how the QCA would approach the valuation of its regulatory asset base. In other words, QR is opposed to an adjustment amount because it is seeking to 'offset' what it considers a worsening of its position in other areas. That itself should be enough to demonstrate the inappropriateness of QR's position.

The QCA's decision on the asset base valuation and other terms of the undertaking are themselves appropriate, and while the factors mentioned in QR's submission may well truthfully explain QR's own thinking process for why it reneged on its previous position, they do not go to whether an adjustment amount is appropriate. It is not clear from an economic policy perspective as to why it would ever be appropriate for the position on an

[2] QR December 2015 submission at p 14.

adjustment amount to be used to 'offset' other positions that do not suit QR. They are not in fact connected in any logical manner which would make a rational decision maker in the QCA's position alter the result in respect of one of those matters based on the outcome of the other matters.

QR's reversal of position in respect of the adjustment amount has damaged the level of trust which NHC had in QR. This loss of trust has been reinforced by QR's recent change in position regarding the '87 path constraint', which represents a complete reversal of QR's previous position which would also, if given the effect proposed by QR, result in coal producers paying an inappropriate share of the costs of the West Moreton Network. Restoring the trust in QR that may justify a more light-handed approach of the type sought by QR will require a change in approach demonstrated consistently over many years. In the meantime, QR's customers remain reliant on an effective and more certain regulatory regime.

In the event that the QCA was unwilling or unable to address the issue of an adjustment amount (which NHC does not expect to be the case), any future mining investment in the West Moreton Network would need to be considered in the context that the future of the relevant project is reliant on a monopoly service provider which is willing and able to extract monopoly rents by overcharging for services. The extent of the potential overcharging cannot be quantified by potential investors, and the concerns which arise from an ineffective regulatory regime would not be confined to the issue of an adjustment amount.

If gaming of the type QR is attempting to achieve is ultimately permitted, NHC will have been so directly adversely impacted that concerns about the robustness and outcomes produced by the QR regulatory framework will have a clear impact in NHC's consideration of future investment decisions. Given an option, any rational investor would prefer to invest elsewhere. In NHC's case, the need to optimise sunk investments may nevertheless require that further investment continue in this system. Potential investors in new mines, and existing users with lower sunk investments, do not face this consideration.

As NHC noted in its December 2015 submission:

> Evidence that this disincentive can have real, rather than theoretical impacts on investment will exist only after investment decisions have been taken and investment has been lost. However, we submit that the disincentive effect is self-evident, while the counterfactual (that NHC will be no less willing to invest in a mine which depends on a monopoly service provider which has misused the regulatory regime to extract material excess charges and proven the regime to be ineffective) is clearly implausible.

(b) Adjustment amount: the approval criteria

Impacts on regulatory certainty and potential impacts on investment are not the only considerations relevant to the section 138(2) matters which lead to the conclusion that (under the current circumstances) it would not be appropriate to approve a DAU which does not include an adjustment amount. In contrast, none of the section 138(2) matters provide support for approving the 2015 DAU without an adjustment amount:

(i) section 138(2)(a) (efficient use of and investment in infrastructure): To the extent that it is accepted that undermining confidence in the regulatory regime and demonstrating that QR can capture monopoly rents may reduce investment and use of QR's network, this factor points to the need for an adjustment amount;

(ii) section 138(2)(b) (legitimate business interests of the owner): It is not in QR's 'legitimate' business interests to retain revenue in excess of the appropriate

amounts (which reflect a reasonable rate of return commensurate with the risks involved). A DAU which includes an adjustment amount remains appropriate having regard to QR's legitimate business interests;

(iii) section 138(2)(c): (not applicable);

(iv) section 138(2)(d) (the public interest): It is not in the public interest:

(A) that investment be adversely impacted by a loss of confidence in the regulatory regime;

(B) to demonstrate to potential investors in this and other industries in Queensland that a monopoly infrastructure owner is willing and able to manipulate regulatory process to capture monopoly rents;

(C) to demonstrate to potential investors in this and other industries in Queensland that the QCA is unwilling or unable to prevent such an outcome; and

(D) that the competitiveness of existing and potential mines be adversely affected by access charges over the coming regulatory period being higher than they need to be (that is, higher than the level which would be consistent with QR's legitimate business interests);

(c) section 138(2)(e) (interest of persons who may seek access): Clearly it is in the interest of persons who may seek access that future charges are lower due to the adjustment amount. This is so regardless of whether the relevant party was a customer at the time during which the over-recovery arose;

(d) section 138(2)(f): (not applicable);

(e) section 138(2)(g) (pricing principles): QR will receive an amount of revenue which is consistent with the pricing principles. Having received certain revenue which exceeded the appropriate amounts during the extended period of the previous undertaking, the pricing principles do not require that those revenues be ignored or that the test of receiving revenue (which is at least enough to recover efficient costs and receive a return on investment commensurate with the risks involved) be satisfied within a single regulatory period;

(f) section 138(2)(h): (any other issues the authority considers relevant). NHC considers that the following issues, among others, should be considered relevant:

(i) QR's previous stated intention to include an adjustment amount;

(ii) the expectations of stakeholders, formed in reliance on QR's statements;

(iii) the potential effects on the future behaviour of QR and other regulated entities of rewarding the manipulation of the regulatory regime by a regulated entity;

(iv) the beneficial effects which lower access charges (which can be provided without offending the pricing principles, due to the prior recovery of excess revenue) may have on coal production and competition in markets during the period for which the adjustment amount would apply – particularly through facilitating new entry; and

(v) the equity, fairness and reasonableness of the alternative approaches, which are:

(A) windfall gains retained by a monopoly service provider, which have been exacerbated by its own conduct in relation to regulatory processes; or

(B) an adjustment which was anticipated by all stakeholders and which does no more than true-up amounts charged on an interim basis over a transition period.

Accordingly, based on a proper application of those considerations, NHC continues to consider it is appropriate to amend the 2015 DAU to include an adjustment amount.

6.2 Methodology for calculation

NHC agrees with the Draft Decision that:

(a) the methodology for calculation of the adjustment amount should involve a comparison of total actual revenue for FY2014 and FY2015 with the revenue which would have been approved for those periods if the principles of the QCA's decision were applied to determine the Maximum Allowable Revenue for those periods;

(b) total actual revenue should include fixed and variable charges, ToP and relinquishment fees;

(c) amounts should be escalated at the approved WACC to the calculation date;

(d) the amounts should ultimately be recalculated, using the same methodology, to reflect any further over/under recovery through to the date on which new references tariffs (inclusive of the adjustment amount) start to apply; and

(e) reference tariffs (inclusive of the adjustment amounts) will need to be recalculated based on the final effective date such that the adjustment amount is recovered over the remainder of the regulatory period.

NHC generally needs to rely on the QCA to ensure that the detailed calculations and modelling are correct and reflect the above principles. NHC has reviewed the methodology and model at a high level and has not identified any errors.

However, NHC asks that the QCA consider whether tax has been treated consistently throughout the calculations. It is clear that tax payments have been deducted from actual revenues, but not clear to us whether tax has also been deducted from the maximum allowable revenue (***MAR***), or whether the fact that the adjustment amount will reduce QR's tax payments in future periods has been considered.

6.3 East of Rosewood

NHC's December 2015 submission (page 22) explained why NHC considers that an adjustment amount should apply east of Rosewood. The short summary is that NHC is not aware of any argument which could support a different conclusion for east of Rosewood to that which is reached for west of Rosewood. All of the considerations which support the adjustment amount west of Rosewood are equally applicable to the east, and we will not repeat them in this section.

QR may seek to argue that the derivation of the MAR for east of Rosewood has a less sound basis, being partly determined by reference to the proxy (west of Rosewood), and that this somehow makes a calculation of an adjustment amount for east of Rosewood less accurate. We do not agree. Regardless of the challenges of determining a MAR for east of Rosewood, a final MAR will ultimately be determined and applied. Having determined the MAR for future periods, calculating the MAR which ought to have applied for FY2014 and FY2015 is no more challenging for east of Rosewood than it is for west of Rosewood.

Any 'compromise' approach in which the adjustment amount is applied west of Rosewood, while QR retains the benefit of excess charges for east of Rosewood, would:

(a) have no valid basis;

(b) reward QR for the delays in finalising the undertaking and for reversing its position on adjustment amounts; and

(c) undermine confidence in the regulatory regime.

7 West Moreton Network capacity and volumes

7.1 Available train paths

QR has raised a number of issues with the approach adopted by B&H Strategic Services Pty Ltd (***B&H***), presumably with the aim of increasing the percentage of paths and costs allocated to coal. However, QR's arguments are both selective and flawed.

Firstly, QR is confusing corridor capacity with whole of journey run time variability. Secondly the impact of the Metropolitan Network does not as such limit the capacity of the West Moreton Network west of Rosewood, but it does restrict the railing of coal from mines to the Port of Brisbane.

Capacity of a corridor (and in particular, of the West Moreton Network) is limited by the critical section of track having the longest transit time or section run time. Figures 1 and 2 (on pages 5 and 6 respectively of 8) in Annexure 9 of QR's December 2015 submission do not correspond with the headings. The Kalgoorlie (in Western Australia) to Denman (New South Wales) section is on the East – West corridor and Telegraph Point (in New South Wales) to Greenbank (in Queensland) section is on the North-South Corridor.

QR has identified an ARTC network train identifier of 2MB7, being an intermodal train of 1500 metres maximum length. That train service is scheduled to operate on Mondays from Melbourne to Acacia Ridge. Intermodal trains do have significantly more variation in trailing load per train than coal, grain and passenger trains. For intermodal services part of the variation in 'cumulative differences between schedule time and listed running time' would be associated with train load differences. Other sources of difference include different locomotive specifications/horsepower leading to slower or faster running time, the degree of conservatism in the ARTC schedule or timetable, local weather conditions and human performance. Bulk trains such as coal have less variation because train length, load and locomotive type are virtually identical from one train to another. That is most clearly the case on a system like the West Moreton Network where there is only a single rail haulage operator.

The graphs in Figure 1 and Figure 2 demonstrate that nine sections between Kalgoorlie and Denman and eight sections between Telegraph Point and Greenbank are completed in the nominal section run time. While the figures are interesting for the ARTC network, it does not directly relate to capacity impacts on the West Moreton Network.

QR appears to be building contingency on contingency in order to reduce the assessed capacity of the West Moreton Network. By way of example, QR's capacity estimate is based on:

(a) adding two minutes to the critical section running time;

(b) adding an allowance for reserve paths; and

(c) adding an unspecified impact of maintenance in the suburban system.

QR emphatically concludes that there is a maximum of 112 return paths for the West Moreton Network.

Having considered the information available, NHC considers that a fairer assessment of capacity is produced by:

(a) assuming 26 minutes section running time; and

(b) adjusting for all factors except suburban impact with 30% reduction in capacity (this is an accepted rule of thumb to estimate reliable capacity on single line sections).

This yields a maximum of 133 to 135 return paths excluding suburban system impacts (which is a capacity estimate close to that arrived at by B&H). Suburban impacts further reduce capacity by approximately 22.4% down to 103 return paths. Of these 103 paths, the long distance passenger trains consume six paths per return journey, reducing paths available for freight (coal and non-coal) services to 97.

Given coal paths have been restricted to 87 being contracted (77 paths west of Rosewood plus an additional 10 paths to the east of Rosewood), the absolute maximum proportion of fixed costs that should be allocated to coal services is 57.04% west of Rosewood (77 divided by 135).

7.2 Demand forecasts

NHC has previously submitted that QR's forecasts for both coal and non-coal services are likely to underestimate volumes.[3] NHC has no new information which would alter that view, and we refer the QCA to our previous submission.

QR stated in its December submission (page 54) that 'given the QCA's proposed approach, a forecast based on contracted tonnes would be appropriate'. QR appears to be referring to the QCA's proposed approach to cost allocation and aspects of the form of regulation. QR provided no explanation or justification for its new claim that 'a forecast based on contracted tonnes would be appropriate'.

The appropriateness of basing tariffs on forecast volumes, rather than contracted volumes, must be considered in the context of the full package of pricing and risk allocation decisions. The key aspects of the proposed package under the Draft Decision include:

(a) a modified price cap form of regulation;

(b) fixed costs allocated to coal based on paths available for contracting by coal;

(c) variable costs allocated to coal based on a share of coal/non-coal forecast volumes;

(d) tariffs calculated such that the MAR is recovered at forecast volumes;

(e) an Endorsed Variation Event if contracted coal volumes exceed forecast volumes;

(f) revenue upside and downside for QR if volumes vary from forecast, with upside capped by a Endorsed Variation Event trigger (but only if the additional volumes are contracted) and downside mitigated by ToP; and

(g) stronger ToP than under the previous undertaking (but with ToP capping ensuring that ToP provides downside protection, rather than creating upside benefits for QR).

NHC's views of the package are provided in Section 8 below. In summary, NHC considers that the overall balance of upside and downside risks which would arise under the Draft Decision is reasonable.

We strongly disagree that the Draft Decision provides any grounds for changing the basis for calculating tariffs from forecast volumes to contracted volumes. Under the Draft Decision:

(a) coal services would be allocated a share of fixed costs which is based on all paths available for contracting by coal; that is, 77 paths west of Rosewood;

(b) that share of paths exceeds QR's forecast use of the system by coal services, being 62.8 paths; and

[3] NHC December 2015 submission, Volume 2, p 9.

(c) if the forecast is exceeded, then coal services will be paying for the additional capacity between 62.8 paths and 77 paths twice. The cost of this capacity is built into the tariffs and is fully recovered by QR if the forecast of 62.8 paths is achieved. The cost is recovered a second time if 77 paths are used (subject to the Endorsed Variation Event if the paths become contracted).

While NHC disagrees with the extent of upside for QR which is offered by this potential double-recovery, we understand that a similar downside risk exists, because the forecast of 62.8 paths exceeds the contracted paths (53). The arrangement therefore has a degree of reciprocity.

In contrast, adopting contracted paths for pricing purposes would have the following effects:

(a) QR would receive a double-recovery of all fixed costs relating to path usages above 53 paths, up to 77 paths;

(b) a windfall for QR is not a mere possibility, but would be clearly expected in a 'base case' or most likely scenario. That is, according to QR's own forecasts (62.8 paths), QR would be expected to be paid twice for the fixed costs of 9.8 paths (62.8 - 53), which would over-recover the relevant MAR elements by more than 18%; and

(c) there would be no matching downside risk for QR, as the volume used for pricing (53 paths) would be entirely supported by ToP.

Such a change, which provides an expected windfall gain for QR, would not be in the public interest, or in the interests of customers and access seekers.

8 Take or pay

The QCA's Request for Comment paper raises issues relating to ToP. However, given that QR has raised issues regarding ToP under section 9.4 of its December 2015 submission, which deals with 'Form of regulation and ToP', this section provides comments on both the form of regulation and ToP.

8.1 Context for commentary on form of regulation

Although it is common to characterise regulated entities as operating under a particular form of regulation, in practice a range of adjustments and ancillary mechanisms apply which alter the risk allocation from that which would apply under a pure version of price cap or revenue cap regulation.

For example, it is not unusual for an entity operating under a price cap form of regulation to be subject to review triggers which apply if volumes exceed or fall short of forecasts by a defined amount, and to be partially protected from downside risk by ToP arrangements. The model proposed by QR, and the revised version discussed by the QCA under the Draft Decision, are both modified price cap models in which QR:

(a) bears some volume risks;

(b) has an opportunity to retain additional revenue if forecasts are exceeded; and

(c) is partially protected from downside risks by ToP.

NHC's understanding of the differences between QR's proposal and the approach set out in the Draft Decision are as follows:

Issue	QR proposal	QCA Draft Decision
Upside if volumes exceed forecast	Fully retained by QR	Retained by QR but an Endorsed Variation Event applies if contracted

Issue	QR proposal	QCA Draft Decision
		volumes exceed the forecast used to develop tariffs* (therefore in those circumstances, QR does not retain upside).
ToP - percentage	80% of Access Charge relating to unused contracted paths	100% of Access Charge relating to unused contracted paths
ToP - capping	No capping	Capped such that ToP collections will not result in QR receiving total revenue in excess of the Approved Ceiling Revenue Limit.
ToP – Force Majeure	ToP payable regardless of impact of force majeure events	ToP not payable where services are not provided due to QR force majeure event.

* We note that the Draft Decision states (page 198) that this Endorsed Variation Event 'would be applied on an origin-destination basis, so that the tariff would be reviewed if contracted volumes from any single loading point exceed the forecast used to assess the reference tariff'. As noted in NHC's December 2015 submissions, NHC supports this approach, however, the drafting within the revised DAU does not reflect the origin-destination approach.

QR retains upside and risk as follows under the Draft Decision:

Upside	Risks
Additional revenue earned when volumes exceed forecast but contracted volumes do not (ie, through ad-hoc volumes).	Loss of revenue when volumes fall short of forecast (with risk limited to the level at which ToP applies).
Collection of ToP revenue based on 100% of Access Charges while not incurring variable costs associated with the relevant services	Loss of ToP revenue due to QR Cause including QR force majeure.

8.2 NHC comments

NHC considers that the form of regulation and the ancillary arrangements proposed in the Draft Decision provide a reasonable balance and a fair allocation of risks. Our comments on specific elements of the Draft Decision are as follows:

(a) **Endorsed Variation Event:** The proposed Endorsed Variation Event, applied where contracted volumes exceed the forecast used to derive tariffs, is a reasonable requirement as it ensures a balanced and reciprocal allocation of volume risk:

(i) for uncontracted (ad hoc) services, QR will retain both the upside (volumes exceed forecast) and downside (volumes less than forecast); and

(ii) for contracted services, QR will be largely protected from downside risk, and therefore should not retain the upside when contracted tonnages increase.

The Endorsed Variation Event applies only when the contracted tonnages of a mine exceed the forecast used to derive tariffs. As the revised reference tariffs will reflect the increased volumes and any change in QR's costs, QR's overall financial outcomes will be the same as the outcomes which were expected based on the original forecasts.

Therefore QR is no worse off following the change in circumstances. However, a greater proportion of QR's revenue will now be underwritten by ToP contracts, such that QR will receive the same returns while facing less risk.

It is also important to note that under both QR's proposal, and the QCA's Draft Decision, the remaining coal tonnage on the Western System would be required to bear the cost of certain unutilised capacity. Under the Draft Decision, coal services are forecast to consume 63 return paths per week, but are required to pay the fixed costs of a share of the network which is based on the 77 paths which are available for contracting by coal (and other) services. In the event that volumes increase beyond 63 paths to up to 77 paths, then QR (in the absence of the Endorsed Variation Event) will be paid twice for the same fixed costs. NHC can understand this proposal to the extent that the additional services are ad-hoc, as QR faces reciprocal upside and downside risk, but considers that the double recovery of these costs is not appropriate where QR is protected from downside risk by ToP.

On this basis, NHC supports the QCA's proposal regarding the Endorsed Variation Event, subject to this applying on an origin-destination basis as stated in the Draft Decision (but not reflected in the marked up DAU).

(b) **100% ToP:** NHC accepts in principle the QCA's proposal to increase ToP from 80% of the Access Charge applicable to unused contracted paths. However, NHC considers that the maximum proportion to be collected by QR should be less than 100%, to reflect variable costs not incurred by QR where a service does not operate. The purpose of ToP is to protect QR from demand risk. Collection of ToP beyond the point at which QR's loss is fully compensated represents a penalty and we see no justification for an arrangement in which lower volumes provide upside for QR. That would create absolutely the wrong economic incentives for QR in relation to efficient operation and use of the infrastructure.

We note that, 100% of the Access Charge being subject to ToP is out of step with comparable regulatory regimes, which contain a recognition of the variable costs not incurred when a service does not operate. In the case of Aurizon Network's tariffs, AT_1 and EC (which reflect variable costs) are excluded from both the ToP and revenue cap recovery mechanisms, while ARTC's pricing arrangements include a variable charge which is not subject to ToP to address this issue.

(c) **Take or pay capping:** The primary purpose of ToP is to enhance QR's revenue certainty by protecting QR from demand risk. A secondary purpose is to encourage Access Seekers to enter into Access Agreements only where they have a strong expectation of using the contracted paths. Capping ToP in circumstances where further collections of ToP would result in QR receiving more than its expected revenue is not detrimental to achieving either of these purposes, because:

(i) QR will still receive its expected revenue in full; and

(ii) Access Seekers will not rely on capping when deciding to enter into long term ToP contracts, as they will have no basis on which to assume that capping will apply in any particular future period.

For capping to apply in a particular year, the revenue earned from one or more access holders must exceed forecast by more than the shortfall (compared to contract) of other access holders. Allowing QR to collect all ToP in this case will over-compensate QR for its loss of revenue, and effectively involves users (in aggregate) paying for the same path twice, once through ToP, and again when the path is used by another party. It is reasonable for an access holder that is exposed to ToP (often for reasons beyond its

control) to expect its exposure to be mitigated where the relevant capacity is used by another party, such that QR has not suffered a loss of revenue.

We note that the QCA's capping mechanism achieves a similar outcome to that which would occur if the DAU included a flexible short term transfer mechanism (which NHC would welcome in the future), as an access holder which expects to incur ToP could transfer its excess paths to the access holder which expects to exceed forecasts and therefore mitigate its ToP exposure.

NHC does not agree with QR's claim that the capping of ToP creates an inappropriate 'hybrid' price cap/revenue cap approach. QR's revenue under the Draft Decision is uncapped; only ToP collections are capped in certain circumstances. In any case, the existence of ToP, which provides an effective floor on QR's revenue, means that QR itself is proposing a hybrid approach.

As was discussed in Section 8.1 of this Volume of the NHC submissions, adjustments to the 'pure' form of price caps or revenue caps are common. We do not consider that the package of arrangements which make up the form of regulation and ancillary mechanisms as proposed in the Draft Decision is unbalanced or inappropriate, subject to the amendment to the ToP regime noted in paragraph (b) above.

(d) **Take or pay during QR Force Majeure:** NHC acknowledges that many regulated entities are protected from revenue losses arising from force majeure (***FM***) events. In Aurizon Network's case, ToP relief is provided to customers who are unable to access contracted paths due to an Aurizon Network Cause (which includes FM events), however, Aurizon Network ultimately recovers this lost revenue through the revenue cap arrangements. NHC considers that it is reasonable to provide access holders with relief from ToP when paths are not available due to a QR FM event. In these circumstances, customers may be suffering severe financial hardship including lost sales, demurrage costs, and the fixed cost of operations. Whether QR should be entitled to recover the revenue lost in these circumstances via an adjustment to its future revenue entitlements (as applies in the case of Aurizon Network) requires a consideration of the package of risks and benefits which QR receives under the proposed undertaking. We consider that the package as proposed under the Draft Decision is reasonable.

9 Metropolitan Network

9.1 Coal trains beyond 2032

Like the QCA, NHC noted QR's statement in its initial submissions that coal trains would not continue utilising the Metropolitan Network beyond 2032, and B&H's analysis that QR's capital and maintenance program did not reflect that embargo.

NHC notes B&H's analysis that QR's capital program could be reduced by 12% if QR's prudent capital expenditure was assessed on the basis that coal transport will cease in 2032. While this would provide immediate savings for users of the West Moreton Network, it would also presumably result in an approach to the capital program which will be sub-optimal in the event that coal services are ultimately able to continue beyond 2032. [Confidential].

At this stage, NHC considers that it is prudent for QR to plan on the basis that operations may continue beyond 2032. NHC therefore supports the QCA's preliminary view that QR's capital program should be assessed on this basis for the purposes of the 2015 DAU.

However, NHC suggests that this issue should be carefully reviewed during the development and QCA consideration of the next (2020+) undertaking and each subsequent undertaking applicable to QR. In the event that the 2032 limit remains in place, then planning on the basis of long term

continuation of coal services will cease to be prudent at some point in time. That point in time will be influenced by assessments of the likelihood of the limit being extended, and by the value of future costs which could be avoided if the planning horizon was limited to 2032.

9.2 Metropolitan tariff

NHC agrees with QR's statements regarding the complexity and subjectivity which would be involved in assessing the cost of coal carrying train services in the Metropolitan Network. The use of a proxy cost, derived initially from the costs assessed west of Rosewood, is a practical solution.

However, NHC does not agree that this proxy costing needs to be applied in regard to capital costs incurred in recent years. Recent projects have a known cost and purpose. They do not suffer from the same challenges, in terms of complexity and the need for subjective judgements, that led to the use of a proxy in regard to the earlier assets.

Our understanding of the QCA's proposed approach, and of QR's revised approach, is set out below. Our understanding is based on interpretation of a range of documents which, in some cases, we find unclear (including due to redactions). We would encourage the QCA to explain the mechanism proposed in the final decision as clearly and in as much detail as possible.

(a) **QCA:** Tariff is based on an asset value derived from the west of Rosewood asset base, excluding capex since 2002, plus an allocation of Metropolitan capex since 2002, plus forecast operating and maintenance costs based on west of Rosewood costs. Values derived from west of Rosewood proxies (asset values, operating and maintenance costs) are adjusted to an equivalent value per track km.

(b) **QR revised:** As above, but west of Rosewood capex since 2002 is included, and Metropolitan capex since 2002 is excluded.

Our comments on the alternatives are as follow.

(a) both the approaches appear internally consistent and may avoid the double-counting issue which NHC raised in regard to the approach proposed by QR in the 2015 DAU. However, if it is QR's intention to cease paying rebates on user-funded capex in the Metropolitan Network on the basis that it has removed this capex from the derivation of tariffs, then the double-counting issue would remain under QR's proposal. That is, when capex is incurred west of Rosewood, QR would, under its method, receive additional revenue east of Rosewood. If, in addition to paying a tariff which provides this additional revenue, users have also funded projects and do not receive a rebate, then the double count remains.

(b) QCA's approach adopts a proxy to address the challenges of costing Metropolitan services, but uses actual capital costs of the Metropolitan Network for the more recent periods, where the costs and purpose of the projects are less difficult to assess. NHC agrees that the proxy should only be used to the extent necessary, and the QCA's approach does this. In contrast, QR's approach appears to rely entirely on the proxy, and as a result provides no return to QR on capital expenditure within the Metropolitan Network, while effectively deeming capex west of Rosewood to be incurred east of Rosewood at an equivalent value per km. This will create winners and losers in particular circumstances, which is inappropriate even if NHC accepts QR's claim (of which NHC is sceptical) that this situation would not influence investment decisions.

(c) QR claims that the infrastructure west of Rosewood was 'under-specified' for coal traffic in 2002, and that the asset quality has since been improved through asset renewal. To the extent that this is true, then using a proxy which does not reflect the costs of the

improvements, but which reflects lower maintenance costs resulting from the improvements, may be inappropriate. However, NHC is not sure that this is the case as:

(i) NHC has seen no evidence of substantial reductions in QR's future maintenance costs arising from the claimed improvement in asset condition. This is in part driven by a lack of coherent asset strategy; and

(ii) QR claims (on page 46 of QR's December 2015 submission) that the proxy is based on 'the maintenance and operating costs associated with this same aged and underspecified asset' (that is, the asset in its 2002 condition). If this is the case, then the proxy cost reflects the high maintenance cost of the asset in its 2002 condition and excludes the costs of upgrading the asset since 2002, and is therefore consistent.

In addition, the track east of Rosewood is maintained to a high standard for the dominant passenger operations. Freight services (including coal) are incremental users. It could be reasonably argued that the maintenance costs that should be allocated to coal in the suburban systems would be much lower per kilometre than those costs west of Rosewood.

To the extent that the QCA agrees with QR's comments on this point (that is, if the proxy reflects lower maintenance costs arising from renewals while excluding the cost of renewals), then NHC considers that the appropriate solution is the inclusion of an appropriate portion of the renewals cost within the proxy, while maintaining the QCA's overall approach which provides a more transparent basis for deriving the Metropolitan tariff in the future, and which avoids the issues that arise in terms of double-counting, rebates and incentives which exist under an approach based purely on the proxy.

10 Pricing Principles – renewal rights

This part of the QCA's Request for Comment paper related to both:

(a) pricing on renewal of non-reference services; and

(b) the circumstances in which an access holder should have a right of renewal.

As a user of solely reference services, NHC does not have a direct interest in the first of those issues.

On the second of those issues, NHC continues to be critically concerned that the proposed scope of the renewal rights is unduly narrow, and notes that concern is shared by nearly every other user of QR's network.

NHC reiterates the concerns it expressed in its December 2015 submission (page 10, Volume 3) that:

(a) the proposed clause 2.7.2(e), which requires that a renewal be negotiated in accordance with clause 2.7.2, should be clarified so that QR cannot advise that insufficient capacity exists (as it cannot in a renewal scenario where the capacity is already contracted). That is, clauses 2.7.2(a)(vii), 2.7.2(b) and 2.4.2(b) should not apply. This is consistent with the proposed clause 7.3(j) of the marked-up undertaking in the QCA's draft decision on the Aurizon Network 2015 DAU;

(b) the right to renew access rights should include a right to renew a portion of the existing access rights. This is critically important as a requirement that the full access rights be renewed could force a mine which does not require exactly the existing level of access to over-contract, or to forfeit the renewal right and join a queue (and, if it is unable to gain access through the queue, potentially result in closure of the mine). NHC's proposal is consistent with the proposed clause 7.3(c)(i) of the marked-up undertaking in the QCA's

draft decision on the Aurizon Network 2015 DAU which provides that 'a Renewing Access Seeker may elect to renew only part of its existing Access Rights'; and

(c) a process under which QR notifies the access holder of the need to renew would be beneficial and would not represent a significant administrative burden to QR.

NHC also supports the need for a reasonable degree of flexibility in relation to changes in train service description (as submitted by Aurizon Network) and changes in origin (as submitted by Glencore), where that does not cause material additional capacity to be consumed by the varied service.

11 Standard Access Agreement (Appendix 2 of Request for Comments Paper)

11.1 Changes to 2.9.4 of the DAU to provide that Queensland Rail should substantiate reasons why an access Seeker's request for access cannot be achieved through altering the terms and conditions of the SAA

The SAA should be the starting point for negotiations. By its very nature as a 'standard' it cannot necessarily reflect all of the possible variations that may be appropriate in the context of a particular contract between QR and an access seeker. Consequently, NHC agrees with Aurizon Network's proposal that QR should be required to substantiate the reasons for any refusal to amend terms from those set out in the SAA.

NHC considers that such a provision would facilitate good faith negotiation and would not be unduly onerous to QR. In addition, it would provide a clear basis for an access seeker to determine the justification for the refusal (and thereby make an informed assessment about whether it should raise an access dispute regarding the refusal) and incentivise QR to only refuse variations where that is appropriate. In light of previous experience with QR, NHC views this as a critical point for the negotiate-arbitrate model to be workable.

11.2 Changes to the SAA to include an obligation on Queensland Rail, during the term of an access agreement, to negotiate productivity variations (or variations to train service descriptions) in good faith subject to no financial disadvantage to Queensland Rail

As noted on page 6 of Volume 4 of NHC's December 2015 submission, QR, NHC and Aurizon Network are currently in discussions with regard to business improvements and efficiencies which could result in additional capacity in the West Moreton Network becoming available for contracting. NHC has sought in its proposed amendments to the SAA to permit the subsequent introduction of an alternative reference train, which would enable these improvements and efficiencies to be realised (see page 6 of Volume 4, and the amendments proposed to clause 4.2 of the SAA in Volume 4 of NHC's December 2015 submission).

NHC is mindful that QR should not be financially disadvantaged by the haulage operator or end users seeking efficiency improvements, and consequently should be entitled to receive the ToP amount (including as revised by the QCA), as anticipated at the commencement of the access agreement. However, it is critical that QR is not entitled to retain windfall gains (as that will act as a barrier to investment in achieving efficiencies and business improvements).

NHC is concerned that unless the SAA provides the right to modify the train service description to reflect a different Reference Train Service the SAA will create a disincentive for the investment of the capital required to produce a new Reference Train, resulting in the additional system capacity that would have been generated by the different Reference Train carrying a higher payload failing to be generated (which appears inconsistent with the object of Part 5 of the QCA Act).

In light of previous experience with QR, NHC views this as a critical point.

NHC would be supportive of a good faith obligation for negotiation of productivity variations.

11.3 Removing the interim take-or-pay notices provisions or making these provisions subject to an annual true up

NHC reaffirms its position from the December 2015 submission. The inclusion of interim ToP notices as presently drafted is problematic in light of the Approved Ceiling Revenue threshold test, which can only be properly considered at the end of the ToP period.

In the event that the QCA is minded to include an interim ToP notice requirement it is essential that, at the conclusion of each ToP period, an adjustment is undertaken to ensure that ToP reflects the threshold test and not just what was contained in the interim notice. NHC recognises that there can be benefits associated with timely discussion as to causes for failure to run trains but this issue can be determined without reference to ToP, and then used when calculating what constitutes a Queensland Rail Cause.

11.4 Clarifying which party is responsible for ToP if more than one operator is nominated. This could include, for example, making the access holder liable for all access charges and leaving the payment obligations as between an operator and access holder to the relevant haulage agreement

NHC agrees with the QR position that it is essential that there is clarity around the party responsible for ToP obligations. NHC agrees that it would be appropriate for access holders to be liable in the first instance for all access charges, leaving the payment obligations as between an operator and access holder to the relevant haulage agreement.

11.5 Including an obligation on Queensland Rail to consult with operators in relation to changes to the Interface Standards

NHC welcomes the amendments that the QCA made to the SAA requiring QR to perform maintenance consistent with the Rollingstock Interface Standards. However, if such standards are capable of being amended by QR without the approval of the operator and the access holder, such protection is insufficient. It is essential that QR cannot unilaterally amend the Interface Standards (such that a mere consultation obligation is not sufficient).

NHC also agrees with the submissions made by Aurizon Network, but would add that the access holder's approval should also be required where access rights are held by an end user rather than the operator.

11.6 Queensland Rail submits that it is not feasible for an operator to retain the intellectual property collected by Queensland Rail's train control systems

It is unclear as to why QR is entitled to claim intellectual property rights over data that is generated from actions of an operator performing services for an access holder. If QR's concern is that an operator may use an intellectual property claim to prevent QR from using data, NHC agrees that this would be unworkable. NHC suggested alternative drafting in its previous submission (8.8 of NHC's SAA) to resolve this issue. NHC considers that it is critical that QR is not able to, using an intellectual property claim, withhold data, which would be advantageous to promoting system efficiency.

11.7 Changes to provide that operators only bear the direct cost of noise mitigation where the most efficient mitigation method is on the train, or where an unusual feature of a particular operator's train triggers the need for mitigation. Otherwise, for mitigation methods which require investment by Queensland Rail (eg. trackside sound barriers or lubricators), Queensland Rail to bear the direct cost and recover the cost over time from the relevant train services only

NHC does not agree that the SAA should provide that the cost of noise mitigation should, in all cases, be paid by the operator. If the most efficient method of mitigation involves investment by QR (such as trackside sound barriers or lubricators), then it is appropriate that QR fund the mitigation and recover the cost over time from the operators of all relevant train services (which may be limited to specific train types which triggered the need for mitigation). Operators should bear the cost directly only where the most efficient mitigation method is on the locomotives or other rolling stock, or where an unusual feature of a particular operator's train triggers the need for mitigation on the network (see clause 10.7 of NHC's mark-up of the SAA).

11.8 Amendments to clause 12.1 (a), (b) & (c) to limit the scope of liabilities to the same scope as the benefits which each party receives under the agreement

NHC is concerned that the phrase 'in connection with' is unnecessarily tenuous. Liability should be capable of being established through a link to a negligent act or omission, because benefits of the agreement flow from the rights and obligations and the liability should not be more expansive than the benefit.

11.9 Queensland Rail submits that if the indemnity for carriage of dangerous goods is deleted, Queensland Rail will be obligated to factor the increased risk into the access charges

NHC does not propose to carry dangerous goods, and as coal will not be a dangerous good there should be no changes to the West Moreton Network tariffs for coal services on this basis. NHC notes that the indemnity previously sought by QR was unreasonably broad; in particular QR was not responsible, even to the extent of their contribution.

11.10 Removing the 10% threshold in respect of liability for non-provision of access

NHC reaffirms its position in the December 2015 submission. QR should have liability for non-provision of access, and that liability should not be excused simply because the failure has not met a specified threshold of 10%.

QR is already well protected by the restrictions on claims in clause 13.6 and NHC agrees with Glencore that it is not appropriate to pass the risk of QR non-performance to the party least able to control that risk (the access holder). The inclusion of a 10% threshold has the potential to promote over contracting as the access holder seeks to ensure that there is sufficient capacity to meet sales commitments. There is also no equivalent 'grace' given to access holders (ie, where no ToP is payable provided 90% of contracted services are utilised).

11.11 Aurizon Network has submitted a proposed revision to the Insurance provisions

NHC has reviewed the proposed amendments to the insurance clause, and it appears that many of the amendments are likely to be borne out of Aurizon Network's previous experience, which NHC is not privy to. It is worth noting that Aurizon Network is presently the only operator on the system and as such its proposed amendments and concerns should be considered carefully, in light of its unique position. NHC would welcome the inclusion of an explicit statement that the provision of a certificate of currency is sufficient evidence of insurance and it is not necessary to provide the entire policy.

11.12 Changes to provide that the material change clauses should only apply to non-reference tariff train services (or otherwise be subject to QCA approval)

This is the current position and QR has not provided any compelling reason for the proposed amendment. NHC considers that Material Change under the SAA should not apply where Reference Tariffs exist. Clause 5 of Schedule D of the DAU provides for the variation of Reference Tariffs where a Review Event has occurred. A Review Event includes a material change in circumstances. It is not appropriate that QR should give itself a contractual right to vary charges under an Access Agreement to which Reference Tariffs apply, which by-passes the process under the Access Undertaking.

If it is considered necessary to acknowledge, in the SAA, the possibility of a variation due to a Material Charge where Reference Tariffs apply, then the variation should be subject to QCA approval. Given the QCA's knowledge of the costs which have been allowed for within Reference Tariffs (which access holders do not have full access to) and the impact which a variation should have on QR's Access Charges, the QCA is best placed to consider and approve the variation.

11.13 Changes to the material change clause so that it only permits a review of access charges for a change in government funding where the access charge is below the revenue floor limit. Also, Queensland Rail to provide an access holder of the term of relevant TSC funding and an access holder should be able to terminate the access agreement where changes to access charges due to a material change make the agreement uneconomic

NHC shares Aurizon Network's concerns that access holders are not the party best placed to manage risk given they are not a party to negotiations with government in relation to either funding or the standard of infrastructure that funding is intended to provide. NHC agrees that any material change clause should be limited to instances where the access charge is below the revenue floor limit (of incremental cost) in recognition that QR is otherwise already receiving a level of revenue deemed appropriate by the QCA.

NHC considers that it is critical that an access holder have a right to terminate the agreement where the impact of a Material Change is so severe as to make it uneconomic to continue to operate. This right is critical because if a Material Change occurs, it will be during the term of the agreement, well after the access holder has completed its risk benefit analysis ahead of entering into the access agreement. The provision of information (including the term relating to TSC funding) will assist the access holder in making an assessment of the risk of this clause being invoked.

11.14 New Hope has proposed amendments to clause 21 which it considers better reflect the way that the Western System operates (including ABCD scheduling)

The amendments proposed by NHC reflect the framework used in the QCA's working draft which amended the SAA submitted by QR as part of the June DAU 2013 process. The ABCD timetabling approach adopted for the West Moreton Network results in 'lumpy' transportation of coal because different weeks have a different number of train paths available. NHC considers a percentage based approach is more appropriate to allow smoothing in a system where the number of train paths varies from week to week. The drafting proposed by QR also has the effect of potentially promoting behaviour where an access holder may cancel more trains than necessary in one week to ensure that it can use all the paths in the subsequent week, rather than risking triggering the clause by having two weeks where there is not full utilisation, potentially resulting in overall less utilisation of the system.

11.15 Changes to provide that, where an operator is seeking to implement certain operational efficiencies, relinquishment fees associated with a variance to train service entitlements and rolling stock configurations should be capped to the variation to access revenue arising from that change

It is NHC's view that in order to promote the most efficient use of the system, it is essential that there is sufficient flexibility built into both the SAA and the undertaking to allow efficiencies to be realised. NHC acknowledges that this requires balancing to ensure that both QR obtains the level of revenue that the QCA has designated it is entitled to, and the operator/end user also obtains a benefit from the innovation.

NHC has sought to accommodate the situation where the proposed operational efficiency requires an amended train service description (see discussion at 11.2 above). Where an operator and/or end user cannot see a financial benefit in undertaking an innovation (including where such benefit is appropriated by QR), the innovation will not occur.

11.16 Queensland Rail has submitted that reference to a BBB- S&P rating in the definition of 'Acceptable Credit Rating' is not a suitable minimum

NHC notes that QR states that such a rating does not meet QR's Board approved policies, but fails to disclose what its Board's policy is or the rationale for the particular policy. In any case, it is clearly inappropriate for a regulated entity to unilaterally determine terms of a SAA based purely on its Board policy. NHC also notes that in the draft SAA submitted by QR in May 2015, Queensland listed a credit rating of A as acceptable, see clause 17.1(b).

NHC welcomes the additional clarity provided by a specific credit rating being listed, as this removes a further potential area for dispute and is willing to accept (as previously proposed by QR) a credit rating of A.

11.17 Queensland Rail has proposed to insert a new clause into the Standard Access agreement headed 'Ad Hoc Train Services'

NHC is highly concerned by QR's proposed treatment of ad-hoc services and considers all of the proposed clause 7.3 SAA should be deleted.

NHC considers that, once scheduled, an ad hoc service should be treated exactly like any other train service.

Ad hoc services should definitely be taken into account when determining whether an access holder has met the ToP threshold. It is imperative that the current position is maintained, namely that an access holder not be placed in a position where it could be presented with a ToP bill despite such shortfall being covered by an amount paid by the access holder for the use of ad hoc services during the year. If that was to occur QR would clearly be double-dipping by being paid twice (once as ToP and once on operation of the ad-hoc service) for a single service outcome when no additional costs would have been incurred by QR.

NHC notes that the inclusion of ad-hoc paths in calculating the number of non-operated services on which ToP is payable is a feature of both the Aurizon Network regime (where there is an annual ToP calculation and ad-hoc paths are taken into account in the services operated) and the ARTC Hunter Valley regime (where there is an end of year true up which, in effect, refunds payments for ad-hoc paths during the year except to the extent annual contracted paths were exceeded). As with many other aspects of the SAA, NHC considers the QCA is correct to have regard to the Aurizon Network standard access agreement as a useful reference point for what is a balanced and reasonable position (and notes there is no evident differences between QR's network and Aurizon Network's network in respect of ad-hoc services which would justify different treatment).

NHC considers that the drafting in clause 7.3(c) is unnecessary, because ad hoc services are to be treated in the same manner as regular services. NHC is particularly concerned that QR is attempting to disclaim responsibility for any of its contribution (including its own negligence) to loss.

12 Conclusions

NHC largely supports the Draft Decision and continues to consider that it would be appropriate for the QCA to largely adopt the same positions in the Final Decision.

The Request for Comments paper captures many of the issues which directly concern NHC.

NHC has a material number of other concerns that are responded to in Volume 2.

NHC also has concerns with a number of issues raised by QR in its submissions in response to the Draft Decision. In particular, NHC strongly rejects, for the reasons set out in its submissions, QR's assertions that the tariffs or adjustment amount are not appropriate or are not within the QCA's power. Those arguments do not stand up to any detailed legal or economic analysis, and the QCA should not change its approach to pricing matters on the basis of those assertions.

The detailed reasons for those positions are set out in the remainder of this submission (in Volumes 1 and 2).

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If the QCA has any queries in relation to this submission, please do not hesitate to contact Sam Fisher, General Manager Marketing and Logistics on (07) 3108 3668.

Schedule 1

[confidential]

Schedule 2

[confidential]