

# Declaration of the Queensland Rail network

South West Producers – New Hope Group and Yancoal Australia

Submission to the Queensland Competition Authority in response to the submission provided by Queensland Rail Limited dated 30 May 2018

16 July 2018



**NEW HOPE**  
GROUP



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## 1 Introduction

This submission is made on behalf of New Hope Group and Yancoal Australia (the **South West Producers**) in response to:

- (a) the submission opposing declaration of the use of Queensland Rail's rail transport infrastructure, lodged with the Queensland Competition Authority (the **QCA**) by Queensland Rail Limited (**QR**) on 30 May 2018 (**QR's Initial Submission**); and
- (b) the further submission from QR dated 18 June 2018 (**QR's Further Submission**) and the draft 'Queensland Rail Access Framework' which formed part of that submission (the **Access Framework**).

This submission is entirely consistent with the South West Producers' previous submission to the QCA, dated 30 May 2018 (the **South West Producers' Initial Submission**) and should be read together with it.

The South West Producers have sought to respond to as much as possible of QR's Further Submission in the time available, but may provide a supplementary submission in respect of QR's proposed Access Framework within the extended submission period of 30 July 2018 provided by the QCA.

## 2 Executive Summary

### 2.1 Declaration should be continued

The South West Producers remain of the view that each of the access criteria set out in section 76 of the *Queensland Competition Authority Act* (Qld) (the **QCA Act**) are clearly satisfied in respect of either:

- (a) the declared service, as defined by the QCA Act as:  
*the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager (the Declared Service);* or
- (b) the part of the Declared Service involving the use of rail transportation infrastructure for providing transportation for coal to the Port of Brisbane by rail, consisting of the West Moreton network, future extensions or expansions to it, and relevant parts of the South-East Queensland network including the dedicated dual gauge track from Lytton Junction to Fisherman Islands (collectively referred to in this submission (and the South West Producers' Initial Submission) as the **West Moreton corridor coal rail access service**).

The South West Producers also consider it remains clear that:

- (a) it is open to the QCA to declare the West Moreton corridor coal rail access service (as part of the Declared Service) if it has any doubt about whether the access criteria are satisfied in respect of the broader Declared Service; and
- (b) it is clearly appropriate for the QCA to recommend that the Declared Service or the West Moreton coal rail access service continue to be declared for at least a further 15 year period in accordance with section 87A and 87C of the QCA Act.

### 2.2 Criterion (a) – promotion of competition

QR's arguments in respect of criterion (a) are fundamentally flawed as they rely on:

- (a) an interpretation of what is required for there to be a 'promotion of competition' that is inconsistent with the well settled meaning of that terminology;

- (b) assertions about QR's incentives and the extent of constraints it would face in the absence of declaration that do not stand up to scrutiny; and
- (c) an Access Framework:
  - (i) that is not an appropriate counterfactual for the purposes of criterion (a), given that it is blatantly contrived solely to try to defeat the declaration continuing;
  - (ii) which is so easy for QR to amend that the QCA cannot be satisfied that the initially proposed terms present a likely future state of the market without declaration; and
  - (iii) which completely removes the principal protections provided to the South West Producers by declaration –reference tariffs (and the certainty of transparent and efficient pricing) which will have a substantial detrimental impact on investment and competition in a number of dependent markets.

Even if it was assumed that the Access Framework did provide a counterfactual, it is clear that the uncertainty of access and pricing of access which is produced by the Access Framework will damage or eliminate competition in a number of dependent markets – demonstrating that declaration will promote a material increase in competition in those markets and criterion (a) is satisfied.

### **2.3 Criterion (b) – foreseeable demand at least cost**

While QR may be correct that for some rail access services, road haulage is in the same market, that is demonstrably not true in respect of the West Moreton corridor coal rail access service given the costs of long distance road haulage for a bulk product like coal, the requirement in the coal terminal at the Port of Brisbane that coal only be accepted by rail and the environmental and community issues that would arise from trucking of large coal volumes through Brisbane.

On the basis of the demand and capacity information provided in the South West Producers' Initial Submission and this submission, it is clear that foreseeable demand is met at least cost by the South West coal rail corridor infrastructure and criterion (b) is satisfied.

### **2.4 Criterion (c) – the facility is significant**

By artificially assuming that the facility is 'the West Moreton system' rather than the entirety of the infrastructure used to provide the West Moreton corridor coal rail access service, QR has substantially understated and ultimately come to the wrong conclusion about whether the facility is significant such the criterion (c) is justified.

On the basis of the information provided in the South West Producers' Initial Submission and this submission, it is clear that the South West coal rail corridor infrastructure is significant and criterion (c) is satisfied.

### **2.5 Criterion (d) – promotion of the public interest**

The reasons provided by QR in respect of criterion (d) are a list of unsubstantiated assertions, that do not stand up to scrutiny.

On the basis of the information provided in the South West Producers' Initial Submission and this submission (particularly in relation to the effect of declaration on investment), it is clear that, at least in respect of the West Moreton corridor coal rail access service, declaration promotes the public interest and criterion (d) is satisfied.

### 3 Criterion (a) – Promotion of competition

#### 3.1 What is required for there to be a promotion of competition

QR argues in the QR Initial Submission that the test of 'promoting a materially more competitive environment' (as set out in the QCA Staff Issues Paper, and case law):

*is too low and is contrary to the stated legislative intention of increasing the threshold to ensure that declarations are only sought when increases in competition are not trivial in amending criterion (a).*

QR states [at 24] that the QCA must be affirmatively satisfied that declaration would result in a 'significant and non-trivial increase in competition'.

However, QR's interpretation is completely inconsistent with the legal and regulatory precedent which exists in relation to the interpretation of this wording.

In particular, QR's interpretation is:

- (a) inconsistent with the Australian Competition Tribunal's decision in *Sydney Airport*<sup>1</sup> (as upheld in the Federal Court) that what a promotion of competition requires is that:

***if the [service] is declared there would be a significant, finite probability that an enhanced environment for competition and greater opportunities for competitive behaviour – in a non-trivial sense – would arise in the dependent market***

(noting that the promote competition part of the language in the section has not changed since that decision was handed down);

- (b) inconsistent with the Australian Competition Tribunal's latest consideration of the criteria in *Application by Glencore Coal Pty Ltd*<sup>2</sup>:

***In identifying dependent markets for the purposes of criterion (a), what must be determined is whether any dependent market is distinct from the market for the service, and the effect access will have on the conditions for competition in that dependent market. This includes considering whether access will create or improve the environment in which competition may then flourish: see Sydney Airport FC at [107].***

- (c) inconsistent with the National Competition Council's (NCC) Guide to Declaration of Services – which was updated following the change to the wording of criterion (a) and continues to state the following<sup>3</sup>:

***The promotion of a material increase in competition involved an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.***

The legislature must be assumed to know and understand how that wording had been interpreted, such that where it has seen fit to change other aspects of criterion (a), but not the promotion of competition wording – it is clear that there was no intention to change how the reference to promotion of competition was interpreted. All that has changed is what is required to produce that promotion of competition (previously access, now declaration).

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<sup>1</sup> [2005] ACompT 5

<sup>2</sup> [2016] ACompT 6 at [107].

<sup>3</sup> NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010* (Cth), April 2018 at [3.23].

It is also notable that there was no discussion in the Productivity Commission review of the national access regime report or the Harper Review report about seeking to change what promotion of competition meant under criterion (a) – such that there is absolutely no reason to suggest that the Sydney Airport decisions' interpretation of this wording is no longer valid.

Accordingly, the South West Producers confirm that they consider the QCA is correct in its interpretation of the meaning of promotion of competition in the context of criterion (a) (and would be acting consistently with all judicial and regulatory precedent, and legislative intention, by maintaining that position).

### 3.2 QR's Alleged Incentives

QR claims that it has '*incentives to maximise demand for its below rail services due to significant spare capacity on its systems*' and not being '*vertically integrated in a relevant respect*' (QR's Initial Submission at 4).

However, QR has not conducted itself in a way which demonstrates that it has strong incentives to maintain throughput.

For example, when Peabody Energy was experiencing significant cost pressures which were threatening the economic viability of the Wilkie Creek mine, it appears that no real attempt was made by QR to provide even temporary price relief and consequently the mine shut. Peabody later advised the QRC that:

*'The uncompetitive rail costs, including below rail, in the Western system were a material contributing factor in the high cost pressures which contributed to the decision to place Wilkie Creek into care and maintenance'.<sup>4</sup>*

Similarly, as discussed in the South West Producers' Initial Submission, QR's submissions in respect of the 2016 UT1 review sought pricing that would have made all of the West Moreton coal mines unviable.

In addition, as discussed in the South West Producers Initial Submission, there are in fact clear reasons to consider QR's incentives might actually be to restrict coal access through the Metropolitan region as:

- (a) QR is a passenger train operator in the metropolitan region – and comes under great public and policy pressure to operate passenger trains in a way that limits delays and outages – such that QR's long term commitment to continuing the coal industry throughput is questionable given the interaction with the passenger network; and
- (b) given QR is a statutory authority, and part of the government, it cannot simply be assumed it will maximise throughput when that will presumably not occur if it conflicts with the government of the day's policy position.

Even if QR's incentives were not altered by government policy or the passenger train commitments, it is economically incentivised (and permitted by the Access Framework) to charge coal producers an access price which would leave the producer only covering marginal costs. Where a coal producer is faced with that proposition (and not being able to recover the sunk costs expended previously) it will be heavily incentivised to cease making long term investment decisions in the West Moreton coal industry. In that regard, the South West Producers note they both have investments in other regions which do not appear to have this same risk.

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<sup>4</sup> Queensland Resources Council submission to the Queensland Competition Authority on Queensland Rail's 2015 Draft Access Undertaking, 5 June 2015 [4].

### 3.3 QR's Alleged 'Constraints'

QR claims that it would be 'materially constrained' by a number of other factors, including:

- (a) competition from road operators;
- (b) customer's ability to pay;
- (c) QR's statutory obligations, position as a statutory authority and transport services contract obligations;
- (d) the threat of regulation or declaration under Parts 3 or 5 of the QCA Act; and
- (e) regulation of passenger services.

#### **Most of the 'constraints' don't apply to the West Moreton corridor coal rail access service**

The vast majority of those constraints may impact on QR's behaviour in respect of other services – but will not provide any constraints in respect of the West Moreton corridor coal rail access service.

Competition from road operators is clearly not applicable in respect of the West Moreton corridor coal rail access service because for bulk commodities like coal, road transport is generally not economically viable and is subject to a series of non-price constraints (including the coal terminal at the Port of Brisbane not being permitted to receive coal other than via rail deliveries). QR effectively admits as much in the QR Initial Submission noting that road transportation does not offer an effective substitute for *'some bulk commodities being transported over long distances'*. The lack of substitutability between road and rail transport is discussed in more detail in respect of criterion (b) below.

Similarly, regulation of passenger services, and QR's statutory obligations, position as a statutory authority and transport services contract obligations impose no evident constraints on QR in respect of the West Moreton corridor coal rail access service.

#### **Ability to pay**

It is theoretically true that the South West Producers' ability to pay means there is a limit to the prices which QR can charge for provision of the West Moreton corridor coal rail access service before the West Moreton mines become economically unviable and close.

However, as noted above in section 3.2, the South West Producers experience is that when this constraint has actually arisen in the past, it has been largely ignored by QR, including at the cost of a previous West Moreton producer closing and noting that access pricing was a material factor in that decision..

That either indicates that QR is not actually constrained in its behaviour by this issue, or is simply unable to accurately determine the price point at which this constraint exists.

In a market with numerous customers it is possible that the price point for such a constraint might be able to be found by trial and error with limited damage to competition. However, this issue has already been a material factor in reducing the number of West Moreton producers from 3 to 2, and if QR was to misjudge the constraint level again such that another producer shuts its operations the South West Producers consider that is likely to be the end of the entire West Moreton coal industry.

#### **Threat of regulation or declaration**

The South West Producers consider that in the circumstances in which QR asserts these constraints apply (in the absence of declaration) the 'threat of declaration' under Part 5 of the QCA Act will not be a credible or real threat that in any way constrains QR's behaviour.

That is the case because in those circumstances the Minister has already determined that the Declared Service (or relevant part thereof) does not satisfy the access criteria. It is hard to see why QR would then feel constrained in its behaviour where it had the benefit of such a decision. In fact QR would presumably perceive there to be far less risk than an infrastructure provider who had never previously been regulated – as it would have a clear written decision describing why it would not be declared. As such, the South West Producers do not consider that Part 5 of the QCA Act will (in these circumstances) not provide a meaningful constraint on QR's behaviour.

The South West Producers also consider the 'threat of regulation' under Part 3 of the QCA Act will not be a material constraint on QR's behaviour. While it is possible that QR would be a 'monopoly business activity' which could be regulated under Part 3:

- (a) whether a monopoly business activity is declared under Part 3 of the QCA Act – is a matter of discretion for the government (see sections 19 and 20 QCA Act). Unlike Part 5 of the QCA Act, Part 3 does not provide objective criteria which, if met, must result in regulation; and
- (b) Part 3 does not enable the QCA to directly regulate a business or the terms on which it provides goods or services – it merely allows the QCA to report on pricing practices – whether any recommendations of the QCA are ultimately implemented is then a matter for government.

It seems to the South West Producers that where QR is a statutory authority and presumably aware of the government's wishes, Part 3 of the QCA Act will not provide a meaningful constraint on QR's behaviour.

### **3.4 The Access Framework is not an appropriate counterfactual**

Based on the above analysis, it appears clear that QR's position on criterion (a) effectively relies very heavily on the counterfactual (the likely state of dependent markets without declaration) being assessed on the basis of their proposed Access Framework, and their proposed Access Framework terms being such that it would be concluded that declaration would not promote competition in such dependent markets.

The South West Producers consider that the Access Framework is not an appropriate counterfactual that should be taken into account by the QCA in assessing the likely state of markets in the absence of declaration.

That is the case for a series of reasons.

Principally, the Access Framework is clearly designed with the sole purpose in mind of trying to artificially establish that criterion (a) is not satisfied.

The ACCC notes in its merger guidelines:<sup>5</sup>

*the ACCC will not take into account counterfactuals it considers have been manipulated for the purposes of making clearance more likely. Signs that a counterfactual may have been manipulated include:*

- *a change of policy or intention by the merger parties that occur after the merger is proposed.*

It is hard to understand why criterion (a) should be treated any differently.

It is clear that the Access Framework:

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<sup>5</sup> ACCC Merger Guidelines, November 2008 (as updated in November 2017) at [3.19].



- (a) has been designed to make a determination that the access criterion are not met more likely (being the equivalent of a clearance, i.e. the mergers prohibition in the *Competition and Consumer Act 2010* (Cth) (**CCA**) not being met, in the quote above); and
- (b) represents manipulation, given that the first time it has ever been proposed is after the declaration review has commenced (being the equivalent of a change in policy after a merger is proposed in the quote above).

To accept that the operation of the Access Framework is an appropriate counterfactual is to effectively accept the absurd result that an infrastructure provider when faced with a declaration application can arguably prevent access regulation by proposing an entirely new set of access arrangements that have never been implemented and for which the likely outcomes are entirely speculative given there is no evidence or experience with how they would operate.

This situation is clearly distinct from the position of an infrastructure owner who has for many years operated a voluntary access regime – such that the infrastructure provider's past behaviour under those existing access arrangements might provide a reasonable basis for the QCA being satisfied as to the likely state of competition in dependent markets without declaration.

It cannot be the legislature's intention in respect of the revised criterion (a), that it is now merely a safe harbour for this sort of attempt at permitting unregulated monopoly pricing. The South West Producers cannot see how such an interpretation can be consistent with the object of Part 5 of the QCA Act as it clearly does not:

*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.*

Legitimising access terms which are less efficient will create uncertainty that will damage the prospects of future investment and consequently damage competition in numerous dependent markets.

### **3.5 The Access Framework terms are not likely to stay the same**

The deed poll provides that QR can amend the Access Framework at any time subject only to consent of the State (which seems likely to be forthcoming relatively easily for a government owned and controlled statutory authority) and the amendments being 'not inconsistent' with the Framework Objective.

While QR is required to 'have regard' to a number of factors under the deed poll, having regard to a matter solely requires giving consideration to it. It does not require that such factors are given particular significance or weight, that the amendment is consistent with the factors to be considered or that is appropriate having had regard to such factors – all of which would be a materially higher threshold.

In understanding the potential for amendments, it is important to also recognise that the Framework Objective is a very high level principle of:

*To promote the economically efficient operation of, use of and investment in, the Network, with the effect of promoting effective competition in upstream and downstream markets.*

It is one thing to do as the QCA is generally required to and make a decision about whether an access undertaking is 'appropriate' by weighing a number of relevant factors including such a high level objective.

However a negative 'not inconsistent' test measured solely by reference to such a high level objective provides an extremely low threshold for an amendment to be permitted.

For example, an amendment could be 'not inconsistent' where it did not promote the objective.

Seemingly, the only way that an access holder or seeker could challenge such an amendment would be to commence expensive and likely protracted court proceedings (and given that QR has no liability under clause 8 of the deed poll for breaches of the access framework it is hard to see what stops QR from simply proposing further amendments even if an initial amendment was defeated).

In addition, the deed poll prevents (by clause 10) any such dispute unless it is commenced within 90 days of the amendments being published – creating a substantial risk of amendments (including those that are in fact inconsistent with the Framework Objective) being slipped through without access holders or seekers realising the detriments they will cause. Given the liability position noted above, QR is in fact incentivised to do this.

Given the ease of amending the proposed terms of the Access Framework, it seems absolutely clear to the South West Producers that QR's initial proposed terms cannot be a counterfactual that the QCA would be satisfied of.

### **3.6 The Access Framework terms are highly uncertain and unreasonable**

Even if the QCA determined that the appropriate counterfactual reflects the operation of the Access Framework, the South West Producers still consider that it is clear that declaration will promote competition in dependent markets.

QR asserts that the Access Framework is based on the 2016 Access Undertaking (**AU1**) with *'amendments made primarily to allow for administrative or process changes to improve efficiency for access seekers, access holders and [QR]'* – but this is clearly misleading in circumstances where the Access Framework subsequently put forward includes blatantly material changes which have the effect of providing QR with broad discretion across a range of issues including, most concerningly, pricing.

A detailed summary of the differences between AU1 and the Access Framework is included in Schedule 1.

However, the issues which are perhaps the most damaging (taking into account the terms of the Access Framework and the related deed poll) are:

- (a) the Access Framework replaces QCA determined reference tariffs with a completely uncertain pricing position:
  - (i) with a floor price based on incremental cost and a ceiling price based on standalone cost (the latter of which is so much higher than any economically viable price that it provides no useful guidance at all). This is a known issue with such formulation. For example, it is worth noting the serious concerns raised by Aurizon and SCT Logistics in their successful application to the ACCC for authorisation of collective negotiation with Brookfield Rail due to the 'considerable range' of pricing permitted due to a nearly identical floor and ceiling price formulation;
  - (ii) where clear information asymmetry will exist in any price negotiations; and
  - (iii) the QCA's position as arbitrator being replaced by a private commercial arbitrator will produce a far less certain outcome, and one that is far more likely to result in an economically unviable price given that an arbitrator will lack the QCA's past experience and resources and cannot even be guaranteed to be the same arbitrator when the next pricing decision comes to be made,

which results in a much higher likelihood of differential pricing and a high prospect of favouring some users over others which is not justified on the basis of efficiency, but rather based on commercial negotiations and/or the uncertainty of different arbitral outcomes;

- (b) the Access Framework can be very easily amended by QR (see the discussion above);
- (c) unlike an access undertaking, the Access Framework does not provide an opportunity for an independent review of the appropriateness of its terms prior to it taking effect or at regular periods;
- (d) in accordance with the related deed poll, having a term of only 10 years without any certainty as to the position in relation to provision of access beyond that period, such that a replacement Access Framework need not be provided, or could be provided on any terms of QR's choosing;
- (e) making the limits on price differentiation subject to a very broad discretion to set prices differently (see clause 3.3.2 being expressed as 'subject to clause 3.3.1');
- (f) deleting most of the reporting obligations;
- (g) including new provisions (which are mirrored in the deed poll) which provide for QR to have no liability for breach of the Access Framework (which as discussed differs substantially from the position under the QCA Act for breaches of an approved access undertaking); and
- (h) removing details around the network management principles.

These are significant departures which diminish the certainty the approved access undertaking otherwise provides.

### **3.7 Removal of the QCA Act protections**

In addition to the Access Framework producing uncertainty, inefficient pricing, greater information asymmetry and thereby damaging competition and investment the absence of declaration would also remove the protections under the QCA Act which apply in respect of the Declared Services.

Those protections have no real equivalents in QR's proposed deed poll and Access Framework.

In particular, each of the following material arrangements will be removed if the Declared Service was to cease to be declared:

- (a) QR will cease to be obliged to negotiate an access agreement when requested (section 99 QCA Act);
- (b) QR will cease to be obliged to conduct such negotiations in good faith (section 100 QCA Act);
- (c) QR will cease to be prohibited from unfairly differentiating between access seekers in a way that has a material adverse effect on the ability of an access seeker to compete with other access seekers (section 100 QCA Act);
- (d) QR will cease to be prohibited from engaging in conduct for the purpose of preventing or hindering a user's access under an access agreement (section 104 QCA Act) or access determination (section 125 QCA Act);
- (e) the rights of a user to transfer access rights will be removed (section 106 QCA Act);
- (f) the right of a user to refer access disputes to the QCA for arbitration (Division 5 of Part 5 QCA Act) which critically can require QR to provide access on determined terms including

price and require extensions or expansions of the facility (sections 117 and 118 QCA Act);

- (g) there will cease to be a regulator who has the power to require information about compliance with the access arrangements (section 150AA QCA Act); and
- (h) the QCA and stakeholders will cease to have rights to enforce the undertaking and be awarded compensation for loss or damage caused by QR breaches (section 158A QCA Act).

The loss of these protections are clearly inconsistent with the certainty of access, efficient access pricing and reasonable access terms that are needed in order for businesses to continue to make long term investments in dependent markets (such as new coal mine developments or coal mine expansions).

### **3.8 Illustrative example – future pricing negotiation**

To take the example of pricing, in the absence of declaration (where no reference tariffs exist):

- (a) the negotiation of access terms will occur in an environment of clear information asymmetry:
  - (i) QR will have no obligation to inform an access seeker about how it has calculated the price, how it compares to its costs or the profit margin it is seeking; and
  - (ii) QR will know the prices it has agreed with access holders, but that will not be known to the access seeker,such that access seekers will have extremely limited prospects of being able to determine how reasonable the price is;
- (b) because of that information asymmetry, access seekers are likely to have very limited ability to assess whether an arbitration should be commenced;
- (c) the Access Framework will only provide a completely uncertain pricing position with:
  - (i) a floor price based on incremental cost and a ceiling price based on standalone cost with the ceiling price being so much higher than any economically viable price that it provides no useful protection at all; and
  - (ii) a list of factors to have regard to that are unbalanced and favour QR's commercial interest – without any regard to efficiency, reasonableness, interests of the access seeker or ability to pay (see clause 3.3.1 of the Access Framework);
- (d) the issues that restrain or blunt QR's incentives to engage in monopoly pricing to the greatest extent profitable will have been removed (particularly the potential for a QCA arbitration of pricing and reference tariffs) such that QR's economic incentives will be to maximise profit;
- (e) the only real right that an access seeker will have is to commence an arbitration under the Access Framework, however:
  - (i) it is not even clear in the dispute provisions of the Access Framework that a failure to reach agreement on the terms of an access agreement does enable a dispute to be brought;
  - (ii) any arbitration will be protracted and expensive – QR will have strong economic incentives to ensure it gets the highest possible price and will be expected to incur significant costs to defend any such dispute;

- (iii) any arbitration will have a very high uncertainty of outcome given the very limited direction provided by the Access Framework – in particular:
  - (A) the floor and ceiling prices will be a considerable range apart;
  - (B) the arbitrator will not have the deep economic experience and resources of the QCA and past experience with determining tariffs and terms of access;
  - (C) the principles provided in the Access Framework are extremely high level;
  - (D) there will be no likely consistency in approach or methodology given that there is likely to be different arbitrators for different access disputes and the decisions in previous arbitrations will not be publicly available (so it will not be evidence if the limited differential pricing protections have been breached);
- (iv) if an access seeker was successful in arbitration, it is likely that QR would then change the Access Framework to ensure that no subsequent access seeker could successfully seek arbitration using the same provision of the Access Framework (see section 3.5 regarding QR's broad ability to change the Access Framework)
- (v) any arbitration will be confidential – such that the outcomes will (completely unlike a QCA decision) not be available to other access seekers as a transparent guide to likely outcomes; and
- (f) the issues will be exacerbated when an expansion is required given there is no longer any regulator with the ability to require QR to expand capacity (even where expansion funding is provided by customers) and given the information asymmetry about the costs and need for such an expansion.

The outcomes of this are clear – in the absence of declaration there will be:

- (a) a significant increase in prices to existing users – compared to the efficient and appropriate reference tariffs which apply under declaration;
- (b) a much higher likelihood of differential pricing with a high prospect of favouring some users over others – not justified on the basis of efficiency, but rather based on commercial negotiations and/or the uncertainty of different arbitral outcomes; and
- (c) a dramatic chilling effect on investment in mines. In particular, it is difficult to see why a producer would incur considerable costs in exploration and development (and obtaining regulatory approvals), if the producer:
  - (i) has no real way of predicting the price it will face at the point when access is requested; and
  - (ii) will ultimately be faced with an access negotiation where QR is economically incentivised to charge the producer an access price which would leave the producer only covering marginal costs (and not being able to recover the sunk costs expended to that point).

### **3.9 Impact on dependent markets**

The chilling impact on future investment created by the completely uncertain pricing position which will apply in the absence of declaration will have adverse implications across a number of dependent markets which are reliant on new and continuing investment.

In particular, turning to the individual dependent markets identified in the South West Producers Initial Submission:

#### **Port of Brisbane catchment coal tenements market**

The clearest outcome of the deep uncertainty and monopoly pricing that the Access Framework will produce is deterring future competition in this tenements market.

There is in fact a real prospect that the Access Framework will, in effect, completely eliminate this market (which must evidence that declaration would promote a material increase in competition).

That follows because, as described above, it is impossible to see how producers would incur costs in exploration and development in the face of such limited certainty of costs of the West Moreton coal rail access service and the knowledge that they can be held hostage to monopoly pricing at the time of seeking access.

It is highly likely that the prospect of new entry will be eliminated.

Even if one or both of New Hope or Yancoal were incentivised to continue to participate in the market due to existing take or pay rail haulage or port commitments (and ownership of the QBH coal terminal in the case of New Hope) that will forever entrench a position of there being at most two possible acquirers in the Port of Brisbane catchment coal tenements market. It is highly unlikely that either producer would develop new mines solely to address a take or pay exposure given the long investment horizon of a new mine and the relatively short term of outstanding contractual commitments at any point in time. Therefore, New Hope, as the owner of QBH, would be the only party with an incentive (and not necessarily an adequate incentive) to participate in the market for tenements. Again that would demonstrate that declaration would promote a material increase in competition.

#### **South-west Queensland rail haulage market**

As discussed in the South West Producers Initial Submission, declaration creates the prospects of new entry into this market at the point where Aurizon's existing haulage fleet are reaching the end of their useful life.

If the declaration was to cease and the Access Framework was to come into effect, the South West Producers cannot see how a new entrant could invest in rolling stock with a useful life well beyond the term of the proposed Access Framework on the basis of seeking to do business with coal producers who are likely to be priced out of existence by QR.

For new entry to be possible, a haulage provider would need major users to be willing to commit to long term haulage contracts to sponsor or underwrite that entry (so the haulage provider would have some certainty it could obtain a return on its investment in 20 year+ life rolling stock and a maintenance and provision facility) – see for example the way Pacific National was able to enter the Queensland coal haulage industry through a contract underwritten by volumes from Glencore and Rio Tinto.

However, it is immensely difficult to see where that volume of demand to sponsor new entry comes from in circumstances where the uncertainty of pricing created by the absence of declaration has fundamentally damaged the prospect of new investment occurring.

In other words, without declaration the prospect of new entry to the rail haulage market (and therefore any hope of competition) will be eliminated.

Consequently it is clear that declaration also promotes a material increase in competition in the South-west Queensland rail haulage market.

### **Port of Brisbane coal handling services market**

The damage that the removal of the undertaking (and particularly reference tariffs) will do to investment in the West Moreton coal industry will, over the declaration period, be likely to result in significantly lower (if any) future investment in the industry.

Both New Hope and Yancoal have coal mining projects elsewhere where they are simply not exposed to the level of risk that they would face in the West Moreton coal supply chain as a result of the declaration ceasing.

Without continued investment in coal mining in the West Moreton region the demand for the coal handling services provided at the Port of Brisbane will diminish and eventually be eliminated.

Again this very clearly demonstrates that declaration promotes a material increase in competition in this market.

### **South-west Queensland / Northern New South Wales domestic energy market**

As noted above, the damage that the expiration of declaration and removal of the undertaking (and particularly reference tariffs) will do to investment in the West Moreton coal industry will be likely to result in significantly lower (if any) future investment in the industry.

Both New Hope and Yancoal have coal mining projects elsewhere where they are simply not exposed to the level of risk that they would face in the West Moreton coal supply chain as a result of the declaration ceasing.

Without continued investment in coal mining in the West Moreton region, energy customers in the south-west Queensland / Northern New South Wales domestic energy market will potentially cease in the declaration period to have coal supply available to them as an economically viable energy source.

That will have a significant detrimental impact on competition for energy supply to such businesses, which will be left with only sourcing gas supply in a very tight gas market – see the ACCC's East Coast Gas Inquiry report for the difficulties of an acquirer of gas in that market.

Again this very clearly demonstrates that declaration promotes a material increase in competition in this market.

### **Other relevant markets**

As noted in the South West Producers Initial Submission, the South West Producers also strongly consider that declaration promotes a material increase in competition in regional markets for supply and acquisition of various goods and services in particular around the town of Oakey and the Darling Downs region more broadly (as supply and demand in such markets is greatly facilitated and fostered by the existence, operation and future investment in the West Moreton coal industry and the employment and economic activity that industry generates).

If the QCA was not satisfied that criterion (a) was satisfied on the basis of at least one of the dependent markets noted above, the South West Producers would appreciate the opportunity to provide submissions on the exact definition of various regional markets in which more indirect impacts of the declaration ceasing may be felt.

## **3.10 Existing access agreements do not provide protection over the declaration period**

QR indicates that existing access arrangements will remain in effect after expiry of the declaration.

However, the South West Producers confirm that their access agreements will either expire before the existing declaration expires or well before the end of the declaration period now being proposed (proposed by the South West Producers as 8 September 2035).

Even if existing access agreements were to remain on foot post declaration, because they do not contain any renewal or extension rights – they cannot actually protect current users (or competition in dependent markets) from the adverse impacts which will be caused by the absence of declaration over the declaration period (i.e. after their expiry).

### **3.11 Dependent markets being 'workably competitive' is a result of declaration not proof that declaration will not promote competition**

QR simply asserts that *'key relevant dependent markets are effectively competitive and would be with and without declaration'*. And *'It is well established that if a dependent market is already workably or effectively competitive, improved access is unlikely to promote a material increase in competition and declaration of the service is therefore unlikely to satisfy criterion (a)'*.

What QR fails to recognise – is that the context of this declaration review is an entirely different position to where no declaration currently exists. In that position (which is what would more typically exist when an application for declaration occurs) if a market is already workably or effectively competitive it is necessarily the case that that position has arisen without declaration.

However, here the very reason that certain dependent markets are workably competitive is that the declaration (and as a result the approved access undertaking) exists.

Consequently it is misconceived to take the pro-competitive outcomes of declaration and then seek to use them as evidence that declaration is not required to achieve those outcomes (which is effectively what QR's position boils down to).

### **3.12 Conclusion**

Based on the above analysis, the South West Producers consider it is clear that declaration produces a material increase in competition in multiple dependent markets (including at least the Port of Brisbane catchment coal tenements market, Port of Brisbane coal handling service market, South-west Queensland rail haulage market, and the south-west Queensland / Northern New South Wales domestic energy market) such that criterion (a) is satisfied.



## **4 Criterion (b) – Foreseeable demand at least cost**

### **4.1 Road is not substitutable for rail for West Moreton corridor coal transportation**

The only argument that appears to have been presented by QR in respect of criterion (b) is 'whether the product dimension for the market for the relevant services includes road haulage services'.

That issue was addressed in the South West Producers' Initial Submission, where it was explained that road haulage was clearly not in the same market as the West Moreton coal corridor rail access service because:

- (a) trucking/road haulage is generally uneconomic for coal from the West Moreton system mines, with the economics of road haulage becoming worse the further west the mine is (e.g. for Cameby Downs) and the larger scale the mine is (e.g. for the proposed New Acland development);
- (b) it is a condition of the QBH coal terminal's lease at the Port of Brisbane that it is prohibited from receiving coal by road haulage delivery without the Port of Brisbane's consent (which the South West Producers understand from previous discussions is highly unlikely to be given); and
- (c) there are numerous other non-price constraints on utilising road haulage including government policy, environmental, safety and social licence to operate issues, which would make a large volume of trucking practically impossible.

That is also consistent with a number of regulatory decisions which have each found that trucking is not likely to be viable for bulk products over long distances and/or large volumes, including the commentary of the Australian Competition Tribunal in *Re Fortescue Metals Group Limited* (in respect of iron ore transportation).<sup>6</sup>

For the reasons set out in the South West Producers Initial Submission the South West Producer continue to consider the appropriate market definition is the market for West Moreton corridor coal rail access services.

### **4.2 Foreseeable demand at least cost**

QR has not provided any projection of foreseeable demand or the costs of meeting such demand to support its position in respect of criterion (b).

As discussed in the South West Producers Initial Submission:

- (a) there is material surplus capacity in the West Moreton corridor rail infrastructure, and the potential to undertake incremental expansions to increase the capacity of the West Moreton corridor rail infrastructure up to 20 mtpa; and
- (b) given the extremely high costs of building another rail line to meet some or all of the demand, it is clear that foreseeable demand is met at least cost by the existing facility (the West Moreton rail corridor infrastructure).

Consequently it is clear that foreseeable demand is met at least cost by the West Moreton corridor rail infrastructure and criterion (b) is satisfied.

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<sup>6</sup> [2010] ACompT 2.

## 5 Criterion (c) - Significance

### 5.1 Key issues in respect of criterion (c)

Criterion (c) requires that the facility for the service must be significant, having regard to its size or its importance to the Queensland economy.

As noted earlier in this submission, the West Moreton corridor rail infrastructure comprises of the West Moreton system and parts of the Metropolitan Brisbane network.

In that regard, the South West Producers note QR's acknowledgement that the Metropolitan Brisbane network is significant, having regard to its size or importance to the Queensland economy.

However, in respect of the West Moreton system particularly, QR asserts (at [45]) that the West Moreton system (and other sections of the broader QR network) does not satisfy criterion (c) due to:

- (i) *the low volume/value of freight hauled on each system with regard to contribution to, as appropriate, Queensland's exports, imports, or the domestic freight industry;*
- (ii) *high under-utilisation rates, often related to the impact of modal competition with road; and*
- (iii) *the high degree of dependence on [Transport Service Contract] revenue on [the] facilities indicating lack of commercial viability.*

QR does not provide any information to substantiate those claims.

The key issues in contention in respect of criterion (c) are therefore:

- (a) how the facility should be defined – noting the West Moreton system cannot actually provide a rail service on its own – all traffic utilising it requires access to the Metropolitan system for the rail services they acquire; and
- (b) whether the facility which provides the West Moreton corridor coal rail access service, properly defined, meets the criteria of being significant having regard to its size or its importance to the Queensland economy.

### 5.2 Defining the facility

The relevant facility for the purpose of this declaration review, is the rail transport infrastructure which makes up the QR Network, or at least, the rail transport infrastructure that is utilised to provide the West Moreton coal rail access service.<sup>7</sup>

As discussed in the South West Producers Initial Submission – the QCA Act defines a facility by reference to its use to provide the service.

In that context it simply cannot be right that where a service requires two parts of a rail network – that significance under criterion (c) is artificially considered separately for each part.

The rail infrastructure which is utilised by QR to provide the West Moreton coal rail access service includes the combined West Moreton system and the section of the Metropolitan Brisbane system used to transport coal from the West Moreton regions to the Port of Brisbane, including sections of the Ipswich, Beenleigh and Cleveland lines and the dedicated dual gauge freight and coal lines from Lytton Junction to the port at Fisherman Islands (the **West Moreton corridor rail transport infrastructure** or the **facility**)

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<sup>7</sup> Queensland Competition Authority Act 1997 (Qld) section 70(a).

To define the facility more narrowly than that represents a flawed and misconceived approach to applying criterion (c).

### **5.3 Irrelevance of other infrastructure not being declared / relevance of the existing declaration**

QR seeks to make much of the fact that other significant infrastructure (certain ports and airports) in Queensland have not been declared.

However, that is completely irrelevant to whether the facility in this case is significant and therefore meets criterion (c) and what inferences should be drawn from the Declared Service currently being declared.

Whether the ports and airports referred to by QR in the QR Initial Submission are significant within the meaning of criterion (c) has never fallen to be determined as no one has applied to seek declaration of the services provided by those facilities.

Whereas it is clear that the State has previously formed the view that access to QR's network is important and significant from the previous decisions to declare the Declared Service, followed by seeking certification of the Queensland rail access regime. The South West Producers consider that is highly relevant to the assessment of criterion (c).

### **5.4 Significance - size**

#### **Factors demonstrating significance having regard to size**

QR alleges that the West Moreton system is of 'insufficient size' but does not provide any basis for that assertion.

As discussed in the South West Producers Initial Submission:

- (a) the physical size of a facility provides guidance on whether it may be considered significant, while not being determinative;
- (b) 'size' also takes into account capacity and throughput using the facility;
- (c) the West Moreton rail corridor infrastructure is significant having regard to its size with:
  - (i) the West Moreton system alone running over 314 kilometres;
  - (ii) the West Moreton corridor rail infrastructure (which as noted above is the appropriate definition of the facility for these purposes) is approximately 380 kilometres from Cameby Downs to the Port of Brisbane – which is longer than some of the central Queensland coal network rail systems; and
  - (iii) the West Moreton corridor rail infrastructure transporting approximately 7Mtpa of coal per annum as well as providing access for grain, livestock and passenger services.

Coal exported through the Port of Brisbane from July 2017 to May 2018 (excluding transshipments) totalled 6.21 million tonnes.

The South West Producers also consider it is relevant that the 'Western System' extends beyond the West Moreton system and needs access to the Metropolitan system in order to allow transportation to Brisbane – such that the West Moreton system is part of a clearly significantly sized rail corridor which stretches into south-Western Queensland.

## 5.5 Significance - Economic importance

### Why QR's views on economic importance are misconceived

The flaw in QR's assessment is that it appears principally focused upon the economic significance to QR itself – when the criterion is expressed by reference to the Queensland economy.

The West Moreton corridor rail transport infrastructure currently services five operating mines, with a number of further coal deposits that are yet to be mined which are proximate to the West Moreton coal rail corridor.

### Contribution facilitated from dependent markets

The NCC states that the economic importance of a facility (in the context of the national significance test) *'focuses on the market(s) in which access would materially promote competition'*, and will generally consider that (national) *'significance to be established if the dependent market(s) provide substantial annual sales revenue to participating businesses'*.<sup>8</sup>

As set out at paragraphs 5 and 6 of the South West Producers' Initial Submission, there are a range of dependent markets that the South West Producers consider are clearly benefitted through declaration of the West Moreton corridor rail transport infrastructure, including:

- (a) the Port of Brisbane catchment coal tenements market;
- (b) the south-west Queensland rail haulage market;
- (c) the Port of Brisbane coal handling services market;
- (d) a south-west Queensland / Northern New South Wales domestic energy market; and
- (e) regional markets for supply and acquisition of various goods and services in particular around the town of Oakey and the Darling Downs region more broadly.

The South West Producers continue to consider that access as a result of declaration clearly results in a material promotion of competition in each of these markets (as discussed in relation to criterion (a) earlier in these submissions). Consideration of simple economic theory clearly demonstrates that these markets produce substantial benefits to the Queensland economy.

In particular, an operating coal industry (both in terms of exploration activity, development activity and actual operations), rail haulage provider and coal terminal operator provide significant economic contributions through:

- (a) providing significant employment in the region: reducing unemployment levels and resulting in workers increasing spending through local businesses and to the benefit of the regional economy;
- (b) new regional business investment: as spending in regional businesses increases, businesses expand - making investments in their own businesses (including through employment in their own businesses) and new businesses develop in the region;
- (c) reduced need for government investment: with increased levels of private investment in regional areas, contributions to local communities increase and the reliance upon government investment being reduced.

### The relevance of underutilisation or surplus capacity

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<sup>8</sup> NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010* (Cth), April 2018 at [5.10].

QR appears to allege that because there is surplus capacity in the West Moreton corridor rail infrastructure, it necessarily follows that infrastructure is not significant.

As a matter of logic that is clearly wrong. The most significant infrastructure will typically have some spare capacity as part of the design is to allow some degree of operational flexibility and ability to recover from system outages.

The key is to understand why such surplus capacity exists.

In the case of the West Moreton corridor coal rail access service it is clear that this is not "related to the impact of modal competition with road" as QR suggests might be the case elsewhere.

The South West Producers consider it is clear that any underutilisation of train paths on the West Moreton corridor rail transport infrastructure is principally a result of:

- (a) a material number of paths being preserved for non-coal access (such that there are limits on supply side substitutability) as detailed in the QCA's Final Decision on QR's 2015 Access Undertaking);
- (b) the metropolitan 'blackout' which restricts coal trains from accessing parts of the metropolitan network which make up the West Moreton corridor rail transport infrastructure;
- (c) alternative substitutes for transportation of other products that do not exist for coal (noting there is some trucking of grain, such that demand side substitution dynamics appear to be different);
- (d) the pricing for non-coal services being different due to government subsidies and the lack of reference tariffs; and
- (e) QR's lack of incentive to maintain throughput resulting in it not changing price in response to the likely Wilkie Creek closure.

The government cannot sensibly impose restraints on the utilisation of the rail infrastructure and then have a statutory authority argue that coal not using paths preserved for other traffics must indicate that the infrastructure is not significant.

As discussed in the South West Producers' Initial Submission on criterion (b), coal paths on the West Moreton corridor rail transport infrastructure are limited (to 77 paths west of the range and 87 beyond of its 112 paths, as per the QCA Final Decision on QR's 2015 DAU). Due to that limitation, the South West Producers often 'backfill' coal train capacity on the West Moreton corridor rail transport infrastructure as it becomes available.

In any case, as set out in the EY Report (discussed further below), the approval for expansion of the current New Acland Mine is proposed to increase the production capacity of thermal coal at New Acland from 5.1 mtpa to 7.5 mtpa over a 12 year period, and Yancoal has confirmed that the Cameby Downs mine has significant coal resources which could be used as the basis for an expansion, indicating that the volume and value of coal hauled on the West Moreton corridor rail transport infrastructure has the clear potential to increase.

### **New Acland – an illustration of significance to the Queensland economy**

To provide a more concrete illustration of the significance to the Queensland economy of the West Moreton corridor coal rail access service – it is worth considering the economic importance of a major proposed coal development on which there is significant information publicly available – the New Acland development.

Without the West Moreton coal rail corridor access service this type of development could not occur – such that the very significant contribution such a development could make is highly relevant to the significance of the West Moreton corridor rail infrastructure.

There is an entire report published by EY regarding the benefits of that development (the **EY Report**).<sup>9</sup>

While that report should be reviewed in full, this submission references some key information.

In addition to the matters set out in paragraph 8.4 of the South West Producers' Initial Submission (including classification of the West Moreton corridor rail transport infrastructure as a national key freight route and other economic contributions deriving from employment and tourism), the EY Report further sets out significant economic contributions that will result from the expansion of the existing New Acland mine.

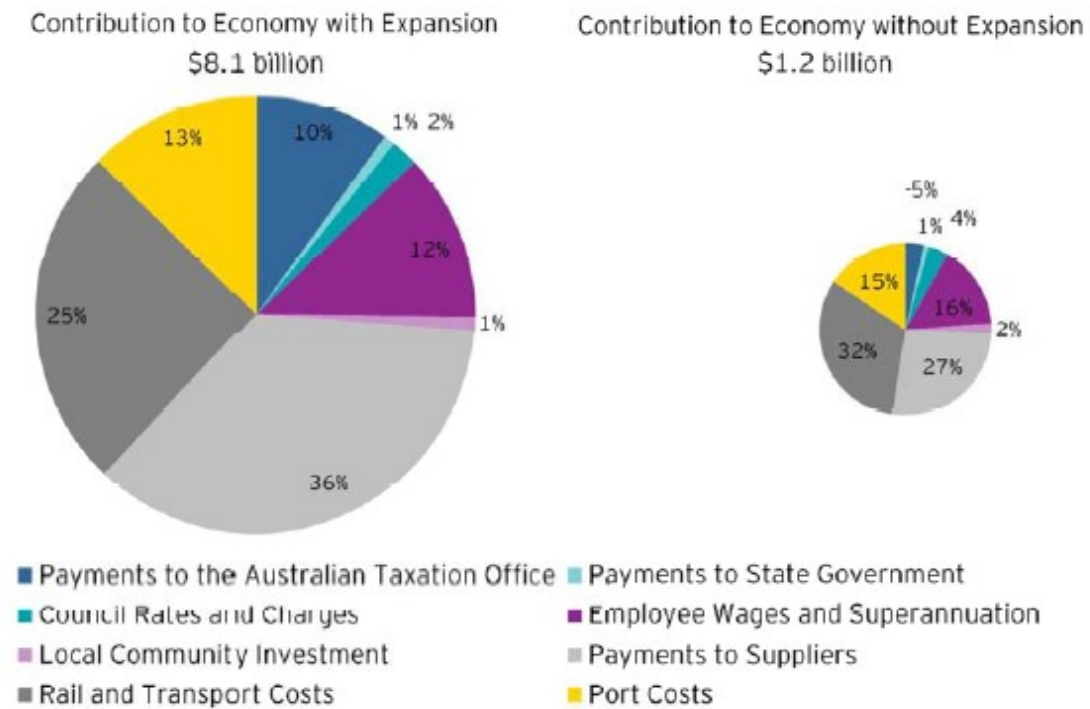
In particular, the EY Report demonstrates that over the 12 year life of the proposed expanded mine, New Acland will contribute more than \$8.1 billion in payments to a variety of stakeholders, benefitting the local and broader Queensland community as demonstrated in Figures 1 and 2 below.

**Figure 1: Summary of payments to stakeholders**

| Table 1: Overview of payments to stakeholder groups currently and in each scenario, presented in 2017 real dollar terms |                            |                            |                               |
|---|----------------------------|----------------------------|-------------------------------|
| Stakeholder group   | Existing operations FY2017 | Scenario 1: with expansion | Scenario 2: without expansion |
| Federal Government  | \$42.2 million             | \$810.9 million            | (\$47.3 million)              |
| State Government  | \$3.5 million              | \$97.1 million             | \$12.6 million                |
| Local Government  | \$11.3 million             | \$163.0 million            | \$50.5 million                |
| Employees   | \$70.9 million             | \$1,003.7 million          | \$212.6 million               |
| Local Community Investment  | \$5.8 million              | \$67.9 million             | \$24.3 million                |
| Suppliers   | \$120.2 million            | \$2,906.8 million          | \$360.5 million               |
| Rail and Transport  | \$138.6 million            | \$2,048.4 million          | \$430.4 million               |
| Port  | \$69.3 million             | \$1,029.4 million          | \$211.4 million               |
| <b>Total payments to stakeholders under each scenario</b>   | <b>\$461.8 million</b>     | <b>\$8,127.1 million</b>   | <b>\$1,255.0 million</b>      |

<sup>9</sup> EY, New Acland Coal Mine Stage 3 Project: Financial Impact Study, 27 September 2017, available at <http://www.aclandproject.com.au/files/files/20170927%20-%20EY%20Report%20-%20New%20Acland%20Stage%203%20Impact%20Study.pdf>

**Figure 2: Comparison of payments to stakeholders over the life of the mine, presented in 2017 real dollar terms**



Current employment levels at New Acland include 535 full time jobs, with a further 405 jobs to be created in construction and ongoing operations with the expansion of the mine.<sup>10</sup>

Even the current pre-expansion economic contribution made by the New Acland mine is clearly still substantial, for example, the expenditure on goods and services required for the efficient operation of the mine (including earthmoving contractors, drilling contractors and cleaning materials etc) at the time the EY report was prepared totalled \$213.6 million.<sup>11</sup>

Of course this is intended to be an illustrative example only. A major expansion of the Cameby Downs mine or development of any new mine which would utilise the West Moreton corridor rail transport infrastructure would also bring significant benefits.

**Commercial viability**

The South West Producers do not consider that QR's view of the commercial viability of the West Moreton corridor rail transport infrastructure is either justified or a determinative consideration in the context of criterion (c).

It is clearly economically viable for QR to provide access to the West Moreton coal users.

Even if it is true that other traffics on the line need to be partly government subsidised, the fact that coal services 'pay their own way' reduces the burden on government and facilitates investment in the other types of businesses that use the rail network.

The relevant economic impact being assessed for the purpose of criterion (c) clearly relates to the Queensland economy (specifically, the impact of revenue in dependent businesses) and not specifically to QR's commercial interests as an infrastructure owner.

<sup>10</sup> New Hope Group, media release, *\$7 billion to hit economy if New Acland Stage 3 not approved*, 9 November 2017.

<sup>11</sup> EY report [3.2.4.4].

Even if the QCA decided that QR's own economic interests were relevant to an assessment of criterion (c), the South West Producers consider it is patently clear that it is beneficial for the West Moreton corridor rail transport infrastructure to be declared because:

- (a) declaration has facilitated investment in the West Moreton region, including investment in coal projects;
- (b) use of the West Moreton corridor rail transport infrastructure by the South West Producers (and previously by other miners) results in the payment of tariffs and socialisation of costs for maintenance of the facility; and
- (c) the continuation of that industry has materially relieved some of the financial pressure that would otherwise sit totally with the state government to fund the maintenance of the West Moreton corridor rail transport infrastructure solely for the purposes of passenger, livestock, grain and other freight services.

## 5.6 Significance - Other factors

Criterion (c) is clearly expressed in two parts – a requirement the facility be significant and a requirement that in assessing that significance regard must be had to the size of the facility and its importance to the Queensland economy.

Consequently it is clear that other factors can also be taken into account in assessing significance.

While it is true that (as QR notes) the objective of Part 5 of the QCA Act is expressed in economic terms – that does not dictate how the more detailed criterion (c) operates.

The South West Producers' views in this regard are entirely consistent with:

- (a) judicial commentary – such as the comments by the High Court in the Pilbara decision that this criterion *'may also [like the public interest criterion] direct attention to matters of broad judgment of a generally political kind'*,<sup>12</sup> and
- (b) regulatory commentary – such as the comments in the NCC Guide to Declaration that *'the assessment of national significance is a matter of judgment that does not lend itself to determination by precise calculation'*.<sup>13</sup>

In other words, QR is wrong to seek to simply discount broader societal significance (as it seeks to do in paragraph [41]), and while it is true that the objects of Part 5 of the QCA Act are economic in nature criterion (C) is worded in a way that is not so confined.

The South West Producers consider that the West Moreton rail corridor infrastructure is clearly significant even without having regard to such issues, but note the rail link is also important to numerous businesses and communities in that part of regional Queensland.

## 5.7 Conclusion – criterion (c) is satisfied

The above reasoning, in addition to that provided in the South West Producers' Initial Submission, clearly indicates that criterion (c) is met, even if measured only against the West Moreton corridor rail transport infrastructure. The facility is clearly significant when having regard to its size or its importance to the Queensland economy, through the effects it produces in dependent markets and relevant businesses.

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<sup>12</sup> *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 [43].

<sup>13</sup> NCC, *Declaration of Services, A guide to declaration under Part IIIA of the Competition and Consumer Act 2010* (Cth), April 2018 at [5.4].



In the context of the state economy, the economic contributions produced by mines in the West Moreton region by virtue of their access to the declared facility, and the revenue produced in dependent markets as a result of that access, clearly demonstrates that the facility is significant when having regard to its contributions towards the Queensland economy.

## **6 Criterion (d) – Public Interest**

### **6.1 QR Submissions on criterion (d)**

Criterion (d) as amended, requires:

*that access (or increased access) to the service, on reasonable terms and conditions as a result of declaration of the service would promote the public interest.*

Section 76(5) QCA Act sets out the matters which the QCA and the Minister must have regard to when considering criterion (d), including (for a service which does not extend outside Queensland):

- (a) the effect declaring the service would have on investment in:
  - (i) facilities; and
  - (ii) markets that depend on access to the service;
- (b) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared; and
- (c) any other matter the QCA or the Minister considers relevant.

QR's submissions in respect of criterion (d) are effectively a list of unsubstantiated assertions.

Specifically, QR has asserted:

- (a) that access under the proposed Access Framework will promote significant public benefits by removing 'unnecessary regulatory burdens' and promoting flexibility and proportionality;
- (b) there are significant direct costs of declaration borne by each of QR, the QCA and users of the QR Network;
- (c) there are several significant indirect costs of declaration; and
- (d) that there are 'policy arguments' as to why declaration does not promote the public interest.

The South West Producers consider those positions are either misconceived or substantially overstate the costs of declaration.

In addition, QR's submissions fail to acknowledge or engage with the benefits of declaration and adverse outcomes which would arise in the absence of declaration (discussed further below). In particular, it is mandatory under section 76(5)(a) QCA for the Minister and QCA to consider the effect declaration would have on investment, which the South West Producers consider is a very clear public benefit that is not considered by QR.

When scrutiny is applied to QR's unsubstantiated claims in respect of criterion (d) and the benefits of declaration and adverse outcomes which would arise in the absence of declaration are properly taken into account South West Producers continue to consider it is absolutely clear that declaration promotes the public interest such that criterion (d) is satisfied.

### **6.2 Interpretation of criterion (d)**

While not addressed in the QR Initial Submission, the South West Producers note that the threshold required under the new criterion (d) is not a particularly high one.

While now expressed as a positive 'promote the public interest' test rather than a 'not contrary' to the public interest test, it has no materiality threshold (see by contrast to the wording of criterion (a) and its reference to 'a material increase').

Consequently, the threshold is probably best described as noted in the explanatory memorandum to the *Competition and Consumer Amendment (Consumer Policy Review) Bill 2017* at [12.37] that criterion (d) means:

*that a decision maker must be satisfied that declaration is likely to generate overall gains to the community.*

This effectively involves an analysis of all public benefits and detriments arising with and without declaration, with the criteria being satisfied if declaration provides any net 'overall gains'.

### 6.3 Access Framework

#### **The Access Framework does not provide reasonable terms and conditions**

QR asserts that the Access Framework provides 'access on reasonable terms and conditions'.

As discussed under criterion (a) above, the proposed Access Framework (and related access agreement and deed poll) is clearly an artificial counterfactual designed by QR to manipulate its preferred regulatory outcome and cannot reasonably be considered to reflect the likely state of the future without declaration.

However, even if it was considered to provide a counterfactual, the South West Producers consider that it is clearly not the case that the Access Framework provides access on reasonable terms and conditions – at least in respect of the West Moreton corridor coal rail access service.

By way of some key examples:

- (a) it provides no certainty of efficient pricing:
    - (i) the removal of the West Moreton system coal reference tariffs creates substantial uncertainty as to the price at which access will be provided to the South West Producers, and whether that cost will be reasonable;
    - (ii) the range between the floor price (at incremental cost of providing access) and the ceiling price (stand alone cost) is so ridiculously large that it is effectively worthless in seeking to guide negotiations or an arbitration of access pricing; and
    - (iii) as discussed in respect of criterion (a) above, the South West Producers experience is that providing QR such a wide discretion will not result in efficient pricing – but will instead result in prohibitively high costs above the level that is economically viable and ultimately the end of the West Moreton coal industry.
  - (b) it is limited to 10 years: with no certainty as to how the terms of access will continue beyond that point;
  - (c) it provides no certainty of terms given the ease of QR amendments:
    - (i) the most critical aspect of the Deed Poll is its amendment provisions, which allow QR to amend the Framework objective (only with prior written consent of the State) and clause 7.2 of the Deed Poll allows QR to 'amend the Access Framework, from time to time, so long as the amendments are not inconsistent with the Framework Objective'; and
    - (ii) 'not inconsistent' is a very low threshold – particularly when combined with a broadly expressed objective of the nature proposed – such that it will be nearly impossible to show any specific detailed amendment is inconsistent with such an objective. In the case of QR, the consent of the State is also not likely to be a barrier given QR's status as a State owned statutory authority,
- such that the Access Framework can effectively be changed at QR's whim; and

- (d) it will be very difficult to enforce: the removal of the declaration would effectively remove the involvement of the QCA in monitoring and potentially taking enforcement action in relation to compliance with the access undertaking.

A more fulsome summary of the differences between the Access Framework and the approved access undertaking is contained in Schedule 1.

### **Alleged regulatory burden**

QR states that efficiencies will be promoted by removing unnecessary regulatory burdens. QR does not elaborate upon what these alleged regulatory burdens are, or what efficiencies may be promoted in their absence – such that it is frankly hard to see how the QCA can give this claim any weight.

The QCA has relatively recently determined that the current access undertaking is appropriate (which is a pre-condition under the QCA Act of providing approval for an access undertaking). Consequently, any alleged 'regulatory burden' has already been assessed to be justified by the benefits produced.

Finally, it is hard to see what burden is created by declaration itself. If QR's concern is with provisions of the undertaking – they have a chance with each undertaking review to propose amendments to remove regulatory burden they consider unjustified (with those claims then being assessed by an independent regulator).

In addition, given that criterion (d) requires an assessment of overall gains, an assessment of regulatory burden needs to actually be a comparison of the burdens created by declaration with burdens created by the Access Framework.

To that end, the South West Producers consider the burden of establishing and administering the proposed Access Framework will (when assessed across the community rather than just from QR's perspective) be far greater than any burden which exists in a declared climate.

That is principally the case because:

- (a) access negotiations are made substantially more efficient with declaration – given a reference tariff (so there are no protracted price negotiations), standard access terms and the power of the QCA to resolve access disputes if negotiations fail;
- (b) the access undertaking provides greater transparency measures to inform access negotiations and investment decisions (including reporting, master planning and the like); and
- (c) having monitoring and enforcement being largely in the hands of an independent and experienced economic regulator rather than arbitrators or courts with less experience, resources and powers – is likely to result in greater prospects of compliance at lesser cost than would occur without declaration.

### **Alleged promotion of flexibility and proportionality**

From the South West Producers perspective, the only party that benefits from the 'flexibility' QR sees in its proposed framework is QR itself. For example:

- (a) the proposed Access Framework easily lends itself to amendment by QR; and
- (b) QR has an extensive discretion in relation to pricing giving the extremely wide range between the proposed floor and ceiling price.

Yet that very flexibility from QR's perspective – is deep uncertainty for all other stakeholders.

Certainty is critical to the businesses of coal producers, and haulage providers, such that the extreme levels of flexibility QR is seeking will damage the commercial viability of stakeholders and have a chilling effect on their investment decisions (as discussed further below).

That is particularly the case in relation to pricing matters, as infrastructure and logistics costs are some of the most significant costs incurred by the South West Producers such that the ability to obtain access to infrastructure and regulated pricing is extremely important.

In terms of 'proportionality' the South West Producers can only guess that QR's concern seems to be that the access undertaking regulates some parts of the Declared Service more than might be required. Even if it was assumed for a moment that that was the case, the solution to that is to have the access undertaking provide greater flexibility for parts of QR's business where access and economic regulation is less relevant – not to remove the protections and benefits of declaration in respect of all of QR's services. To use a colloquialism – that is very much throwing the baby out with the bathwater.

#### **6.4 Alleged significant direct costs of declaration**

QR lists three types of direct costs of declaration: compliance and regulatory costs borne by QR, costs of the QCA performing its regulatory functions and direct administration costs borne by the QCA.

It is hard to see how the QCA can give the costs borne by QR significant weight when they have not been substantiated in any way.

Even if QR had substantiated the costs of regulation, the reality is that the costs incurred by the QCA are funded entirely by customers, including the South West Producers, via the QCA levy. Similarly, customers bear their own costs of the regulatory process and the prudent expenditure by QR on the regulatory process which is taken into account in the prices set by the QCA. Accordingly, if the customers effectively bear all of the costs arising from regulation and are still supportive of declaration continuing, it must be that the reasonable terms and conditions of access arising from declaration promote the public interest.

Moreover, the South West Producers consider that QR's approach to the access undertaking (particularly in the multiple withdrawals and changes of positions), substantially exacerbated the costs of declaration. That sort of self-harm cannot lead to a finding that declaration involves significant direct costs.

By contrast, the consultation which has occurred to date in relation to the next access undertaking sounds significantly more promising and would involve lesser costs being incurred by QR, the QCA and stakeholders if that is ultimately how QR determines to proceed.

For the reasons noted above, the South West Producers are confident that the aggregate costs of regulation through the QR system are significantly less than would be incurred under an Access Framework model where:

- (a) there would be much higher costs of negotiation (particularly due to the difficulties of price); and
- (b) compliance, enforcement and disputes would become much more expensive given the absence of an independent regulator and the reliance on arbitrators and courts.

In addition, the QCA would continue to exist irrespective of the decision on the review of the declaration of the Declared Service – so removing the declaration in relation to QR actually increases the costs of regulation of other services (as much of the QCA's costs would remain at similar levels and costs would be shared among a lesser volume of stakeholders).

## 6.5 Alleged significant indirect costs

QR asserts there are a number of indirect costs of declaration. In each case those costs are completely unsubstantiated.

In relation to those arguments:

- (a) regulatory error: there is no evidence to support that declaration introduces the risk of regulatory error. As discussed above, the QCA is a well-resourced, experienced regulator that is amply qualified to carry out its duties as the state's economic regulator. The South West Producers would be far more concerned about errors being made by commercial arbitrators forced to grapple with disputes in the absence of the resources and deep experience that the QCA has. The lesser prospect of error is a factor that shows that declaration promotes the public interest;
- (b) inconsistent regulation: the fact that other significant infrastructure is not declared is largely as a result of applications to seek declaration not having been made. That is not necessarily because such services would not be declared if such an application was made – in many cases it is because the current operators or owners are providing access on pricing and terms that are not materially worse than what might occur with regulation. To state that declaration is inconsistent with the object of either Part IIIA of the CCA or Part 5 of the QCA is clearly absurd in circumstances where the legislation is the foundation for access regulation in Australia and is obviously vital to that purpose. While it is acknowledged that section 44AA(b) of the CCA Act provides for 'a framework and guiding principles to encourage a consistent approach to access regulation in each industry' this wording does not exist in section 69E of the QCA Act. For the reasons set out elsewhere in this submission, the South West Producers consider it is clearly evidence that declaration facilitates investments and efficient operation and use of QR's network such that it is consistent with the object of Part 5 of the QCA Act;
- (c) public detriment in superfluous regulation: QR has not substantiated any alleged superfluous regulation, such that it is hard to see how the QCA can give this assertion any weight. The QCA has relatively recently approved the existing access undertaking as being appropriate (and therefore clearly not superfluous). If QR holds the view that the access undertaking regulates some parts of the Declared Service more than might be required then, the solution to that is to have the access undertaking provide greater flexibility for parts of QR's business where access and economic regulation is less relevant – not to remove the protections and benefits of declaration in respect of all of QR's services;
- (d) efficiency: QR has not substantiated how declaration reduces efficiency. The South West Producers consider that declaration is critical for promoting efficiency. In particular, setting tariffs at efficient levels using a certain and transparent methodology results in efficient investment decisions – both in terms of QR's rail infrastructure and by haulage providers, coal producers and other rail customers;
- (e) discounting of benefits to foreign owned companies: This is a bizarrely xenophobic submission for a government entity to be making. Declaration benefits haulage providers, coal producers and other rail users with substantial operations in Australia, which provide employment, coal royalties and economic growth. Both the South West Producers have their head office in Australia, are listed on the ASX and employ substantial people across their Australian operations. They are clearly part of the community across which the overall gains from declaration are to be measured. Discounting of clear public benefits based on some element of ultimate foreign ownership is clearly not appropriate; and

- (f) private benefits to QR: It is acknowledged that economic benefits derived from QR are 'public' in a sense. However, QR has not substantiated in any way how declaration is decreasing those benefits. If the allegation is that reference tariffs are preventing them from engaging in monopoly pricing – that is a very clear public benefit. It is a fundamental tenet of economics that while monopoly pricing increases the suppliers profit/utility it causes a deadweight loss to society.

Consequently, the South West Producers considers that the alleged indirect costs are either not relevant to an assessment of criterion (d), not substantiated or actually weigh in favour of declaration promoting the public interest.

## **6.6 Policy arguments**

QR asserts three policy arguments which it alleges show declaration does not promote the public interest.

In relation to those arguments:

- (a) environmental and safety benefits from increased rail modal share: The South West Producers cannot see how it is considered that the Access Framework is said to promote efficiencies. In any case, in relation to the West Moreton corridor coal rail access service, road is not competitive as described earlier in this submission (and in the South West Producers Initial Submission). There is a real likelihood the removal of reference tariffs will result in the West Moreton coal industry being priced out of the market, and QR seeking to increase prices for the remaining rail users such that volume is actually transferred to road haulage;
- (b) Queensland Moving Freight Strategy: The South West Producers have reviewed this strategy and cannot see how QR have formed the view that non-declaration is any more consistent with this strategy than continued declaration. If anything the general policy positions of seeking to move greater volumes of road freight to rail freight and facilitating greater investment in freight are policies that are clearly fostered and facilitated by the certainty produced by the declaration and access undertaking; and
- (c) safety obligations: no evidence is provided to suggest that declaration enables QR to more efficiently adhere to safety obligations. The South West Producers understand that QR will propose some amendments to the next undertaking and standard access agreement to resolve some of its concerns – which demonstrates any issues are not a result of declaration. If changes are justified they will presumably be approved by the QCA.

Consequently, the South West Producers considers that those 'policy arguments' are either not relevant to an assessment of criterion (d), or actually weigh in favour of declaration promoting the public interest.

## **6.7 Benefits of Declaration**

Importantly, QR does not acknowledge or engage with the benefits arising from declaration.

Those benefits are discussed in detail in the South West Producers Initial Submission, but most importantly including:

- (a) facilitating investment by providing certainty of pricing and other terms of access – noting the investment in the coal industry in the West Moreton region has major economic benefits in terms of employment, coal royalties and economic growth;
- (b) facilitating investment in QR's network itself – particularly through socialisation;

- (c) reducing the costs which would otherwise be incurred by QR / the State to subsidise the non-coal tariffs which use the West Moreton corridor rail infrastructure; and
- (d) reducing negotiation and administration costs.

When those benefits are taken into account, the South West Producers consider it is absolutely clear that declaration promotes the public interest and criterion (d) is satisfied.



## Schedule 1 – Summary of Access Framework

The key changes between AU1 and the proposed Access Framework are:

- move to a negotiate-arbitrate model;
- removal of the reference tariff system means that alteration to the pricing principles are particularly material to coal-carrying services on the West Moreton and Metropolitan systems;
- QR has a host of discretions to amend the Access Agreement/Access Framework and alter existing use of various systems; and
- 10 year term, with no certainty of access arrangements beyond that point.

A summary comparison of the differences between QR's current approved access undertaking and the Proposed Access Framework are set out below:

| Affected Clause                           | QR Access Undertaking 1   | QR Access Framework  | Implications of Difference  |
|---|---|--|---|
| <b>Objective</b><br>[*new* cl. 1.2.2]     |   |  | Intends to import objective of Part 5 QCA Act into the Access Framework   |
| <b>Term</b>                               | Indefinite, assuming the service continues to meet the access criteria  | 10 years<br><br>(proposed definition of Terminating Date is the 'earlier of' 10 years from 9 September 2020; and, the date on which use of the Network is taken to be a service declared under Part 5 of the QCA Act). | Future users have no certainty as to the terms of access to the Network beyond the initial 10 year term.<br><br>That will have a chilling effect on activity in some markets (like the tenements market) where investment in exploration occurs many years in advance of determining there is a project to develop. |
| <b>Line Diagrams</b><br>[*new* cl. 1.2.4] | QR was obligated to keep the network line diagrams updated including to amend the diagrams no more frequently than 6 months and notify the QCA of changes | Obligation to publish and maintain diagrams on the QR website  | Ability to update and alter diagrams without notice to interested stakeholders  |
| <b>Consistency and Differentiation</b>    | QR was not able to unfairly differentiate between Access  | General obligation not to differentiate between Access Seekers and Access Holders in a way that  | Incentivises QR to price differentially between users.  |

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| <p><b>[cl. 1.3]</b></p>   | <p>Seekers in the levels of service provided to Access Seekers in relation to the AU1</p>   | <p>has a material adverse effect on their ability to compete with each other.</p> <p>General obligation does not prevent QR from treating Access Seekers differently to the extent the different treatment is reasonably justified because of the different circumstances applicable to QR or any of the Access Seekers or expressly required or permitted by the Framework or arbitration determination under the Framework</p>         | <p>Substantial uncertainty as to the ability to achieve a fair outcome through arbitration.</p> <p>Arbitration is costly which will likely cause issues due to QR's bargaining strength which may incentivise it to drag arbitration out.</p> |
| <p><b>Funding Agreement Register</b><br/><b>[former cl. 1.4.5]</b></p>                                      | <p>Requirement to maintain a register of Funding Agreements and provide copies of registered funding agreements to the QCA.</p>   | <p>Deleted</p>   | <p>No transparency as to whether a relevant Funding Agreement has mandated construction of a network Extension or not.</p>  |
| <p><b>Extension Pre-approval for inclusion in a Regulatory Asset Base</b><br/><b>[former cl. 1.4.6]</b></p> | <p>Ability to seek QCA pre-approval of scope, standard and cost of a proposed Extension for inclusion in the Regulatory Asset Base prior to execution of a Funding Agreement.</p>   | <p>Deleted</p>   |   |
| <p><b>Master planning and extension coordination</b><br/><b>[cl. 1.5]</b></p>                               | <p>Required QR to prepare a Regional Network Master Plan for each Regional Network (West Moreton Network, the Mt Isa Network and the North Coast Network) and undertake consultation and seek funding for a Regional Network Master Plan.</p> | <p>QR will consult with relevant Access Holders and Nominated Rolling Stock Operators regarding QR's master planning for Extension projects for the Mt Isa Line, North Coast Line and West Moreton System.</p> <p>Access Holders and Nominated Rolling Stock Operators may request QR undertake a Concept study, Pre-Feasibility study or Feasibility study on their behalf (and at their cost) to investigate a relevant Extension.</p> | <p>Shift of costs of various studies from QR to Access Holders and Rolling Stock Operators.</p>   |

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| <b>Preliminary Steps</b><br>[cl. 2.1.2]                         | A prospective Access Seeker may give a written request to QR to produce Capacity Information which QR will make available in 10 Business Days   | Deleted   | Uncertain as to whether a prospective Access Seeker could expect to receive this information during the initial meetings with QR (cl. 2.1.2(a)) or if the information will not be available at all.<br><br>If the information will not be made available at all, this will inhibit users from procuring long-term certainty required for investment decisions. |
| <b>Requirement for confidentiality agreement</b><br>[cl. 2.2.2] | QR and Access Seekers could require each other to enter into confidentiality agreements which would not prevent an Access Seeker or Holder from disclosing information to the QCA for the purpose of a dispute. | QCA references deleted and allows QR only to disclose information: <ul style="list-style-type: none"> <li>• as required by law;</li> <li>• to the Minister under the Rail Authority Act;</li> <li>• DTMR;</li> <li>• Rail Safety Regulator; and</li> <li>• Rail Authority (including board members, officers and employees).</li> </ul> | Imbalanced allowance for QR to disclose confidential information.<br><br>No provision to disclose for the purpose of advice from external advisors, arbitration or litigation.   |
| <b>Ring fencing arrangements</b><br>[cl. 2.2.3]                 | QR obligated to submit a DAAU to the QCA regarding ring fencing arrangements in the event it develops interests in upstream or downstream markets   | Obligation to submit DAAU deleted.<br><br>QR required only to 'consider the need for ring fencing arrangements taking into account the Framework Objective and its obligations under the Framework.   | Clearly gives QR the opportunity to become vertically integrated without constraint.   |
| <b>Inclusions in Indicative Access Proposal</b><br>[cl. 2.4.2]  | QR required to provide detail of the methodology for calculating Access Charges.<br><br>Provides for costings if a  | Only required to provide a 'basis for calculation' of Access Charges.<br><br>Provision for costings if a Reference Tariff does not apply have been deleted.   | Lack of transparency around pricing calculations.  |

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|  | Reference Tariff does not apply to the requested Access Rights,  |   |   |
| <b>Access Seeker to Give Notice of Intent to Negotiate or Not</b><br>[cl. 2.5.1] | Access Seekers not formerly required to advise QR if it did not intend to proceed with its Access Application on the basis of the relevant Indicative Access Proposal. | Access Seekers required to give written notice to QR if it does not intend to proceed but only specifies 'as soon as reasonably practicable after receiving the Indicative Access Proposal'.  | Increased obligations on users.<br><br>(Also see consequence of late notification of intent to negotiate cl. 2.5.2 which requires a response within 20 Business Days, otherwise QR is able to choose to either give a revised Indicative Access Proposal or proceed on the existing IAP).   |
| <b>Issues to be Addressed in Negotiations</b><br>[cl. 2.7.2]                     | Reference to requirements under the QCA Act to provide specific information  | Reference to QCA Act removed and specifies requirement for Access Seeker to request information (to the extent it has not already been provided): <ul style="list-style-type: none"> <li>• information about the price of Access, including the way price is calculated (including floor and ceiling);</li> <li>• estimate of available Capacity;</li> <li>• diagram or map of rail transport infrastructure and information about its operation and safety system</li> </ul> | Places obligation on Access Seekers to request information that is highly relevant to negotiations instead of the information automatically being provided.<br><br>This may afford QR the opportunity to withhold material information.   |
| <b>Safety considerations</b><br>[cl. 2.8.2]                                      |  | Addition prevents an Access Seeker from disputing a Negotiation Cessation Notice issued under the clause (2.8.2) and the dispute resolution clause (6.1) does not apply to the issue of a notice under the clause.  | Clearly gives QR the power to arbitrarily prevent users from accessing a Network if it considers (acting reasonably) that use of any Access Rights may adversely affect the safety of any persons using or intending to use a passenger Train Service.<br><br>This clearly creates very significant concerns for coal or mineral services where QR may attempt to rely upon issues of safety to |

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|   |   |   | prevent coal services from travelling on the Network.  |
| <b>Mutually Exclusive Access Applications</b><br><b>[cl. 2.9.2]</b> | <ul style="list-style-type: none"> <li>• Provided for the creation of and administration of an access queue to accommodate nominations of Competing Access Seekers' Applications.</li> <li>• Particular requirements for the categorisation of Access Applications for coal services on the West Moreton Network.</li> <li>• Provision for an Access Seeker to assign its position in the queue.</li> <li>• Provision for dispute resolution</li> </ul> | <ul style="list-style-type: none"> <li>• Provision for an access queue is deleted and QR is provided a discretion to make a determination with respect to mutually exclusive access applications.</li> <li>• QR's discretion is exercised with regard to what is most favourable to QR, which is 'ordinarily' based on (though not limited to) the Access Agreement that represents the highest present value of future returns to QR after considering the Access Agreement.</li> <li>• Remainder of listed provisions are deleted.</li> </ul>   | <p>Provides QR with a significant and unconstrained discretion to determine which Access Applications will be accepted and which will not.</p> <p>In circumstances where Capacity information is not available to a potential Access Seeker, there is no transparency around whether or not the Network can accommodate existing Access Applications to verify whether existing Applications could all be met by existing Capacity.</p>  |
| <b>Renewals</b><br><b>[cl. 2.9.3]</b>                               | <ul style="list-style-type: none"> <li>• QR obliged to notify an Access Holder if an Access Seeker (who is not a Renewal Access Seeker) applies for the Capacity that will arise when the Access Holder's existing Access Agreement expires.</li> <li>• Only applies where the relevant existing Access Agreement concerns coal carrying Train Services or</li> </ul>   | <ul style="list-style-type: none"> <li>• Only required to notify the Access Holder if 'the then current term' of the Access Agreement (whether initial or as renewed) is at least 5 years.</li> <li>• QR will only execute an Access Agreement with a new Access Seeker if the relevant Renewal Access Seekers fails to, or cannot submit a Renewal Application to QR in respect of the relevant Renewal within 20 business days of receiving QR's notice.</li> <li>• Specification relating to coal or bulk mineral carrying services deleted – no differentiation between types of services.</li> </ul> | <ul style="list-style-type: none"> <li>• Uncertain drafting what is 'the then current term'?</li> <li>• Provides QR with a significant and unconstrained discretion to favour alternative Access Seekers including discretion beyond a determination of which Access Agreement presents the highest present value of future returns and allows QR to consider 'all risks associated with the Access Agreement'.</li> <li>• This extra discretion clearly allows QR to arbitrarily dismiss an Agreement that</li> </ul> |

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|  | other bulk mineral carrying Train Services.  | <ul style="list-style-type: none"> <li>A decision to grant access to the Access Seeker or the relevant Renewal Access Seeker will be made by QR on the basis of which of those parties accepts (and executes) an Access Agreement with QR which, in the opinion of QR is most favourable to it (decision also to be ordinarily based on (but not limited to) the Agreement that represents the highest present value of future returns to QR 'after considering all risks associated with the Access Agreement.'</li> </ul> | represents the highest present value of future returns if it is favourable to QR to do so.   |
| <b>Development of Standard Agreements</b><br>[cl. 2.9.4] | Access Seeker can propose variations to the terms of the Standard Access Agreement which the Access Seeker can demonstrate would promote, or are required to accommodate, productivity or efficiency improvements to the Access Seeker's proposed Above Rail Services and QR rejects those proposed variations, QR will provide written reasons for the rejection. | Insertion of 2.9.4(c) that an Access Seeker is not entitled to dispute a rejection by QR and the dispute resolution process under clause 6.1 does not apply to such a rejection.  | Arbitrary and unconstrained power to object to legitimate variation proposals.<br><br>Deprives users of any recourse against QR's decision, even where written reasons may be deficient. |
| <b>Execution of Access Agreements</b><br>[cl. 2.9.5]     | Provided for execution of Access Agreements as soon as was reasonably practicable and in any case within 20 Business Days of the Access Seeker receiving   | Now requires only that an Access Seeker and QR use all reasonable endeavours to execute a Funding Agreement as soon as reasonably practicable if the Funding Agreement is preventing the Access Agreement from becoming   | Removes alternatives such that a Funding Agreement that prevents an Access Agreement from becoming unconditional must be executed.   |

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|  | <p>QR's offer.</p> <p>Provides that QR and the Access Seeker must use reasonable endeavours to execute the Funding Agreement that is preventing an executed Access Agreement from becoming unconditional.</p>   | unconditional.  |   |
| <b>Part 3 – Pricing Rules</b>            |   |   |   |
| <b>Application</b><br>[formerly cl. 3.0] | Described application to Reference Train Services and the Reference Tariff  | Deleted   |   |
| <b>Pricing Objectives</b><br>[cl. 3.1]   | Previous applied to non-coal carrying Train Services  | Reference to non-coal carrying services is deleted  | No differentiation between coal and non-coal services.  |
| <b>Revenue Adequacy</b><br>[cl. 3.1.1]   | <p>Specifies that Access Charges and Transport Service Payments should generate expected revenue that is at least enough to meet the efficient costs of providing Access and should include a return on investment commensurate with commercial risk involved.</p> <p>Where QR is expected to earn excess revenue, QR could seek to reduce Transport Service Payments instead of Access Charges</p> | <p>Now demands return on investment commensurate with 'the risks involved'.</p> <p>Ability to reduce Transport Service Payments instead of Access Charges is deleted.</p> | <p>QR has no obligation to reduce Transport Service Payments or Access Charges such that it can maximise its profits.</p> <p>This clearly incentivises QR to charge monopoly rents.</p> |

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| <b>Network Utilisation</b><br><b>[former cl. 3.1.2]</b>         | Provided QR with an ability to differentially price Train Services based upon varying markets.   | Deleted   |   |
| <b>Floor Revenue Limit</b><br><b>[cl. 3.2.2 and definition]</b> | <p>The level of revenue that will recover the expected Incremental Cost of provided Access to the individual Train Service or combination of Train Services as applicable.</p> <p>Taken into account in setting the methodology, rates and other inputs for calculating Access Charges for an Access Seeker's proposed Train Services,</p>   | Now requires QR to also take into account the level of contribution provided by Transport Service Payments towards the relevant rail transport infrastructure.  | Ability to manipulate the floor price with changes in the TSP.  |
| <b>Ceiling Revenue Limit</b><br><b>[cl. 3.2.3]</b>              | <ul style="list-style-type: none"> <li>Is the value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service(s), assessed in accordance with cl 3.2.3(c) at the commencement of the Evaluation Period</li> <li>the value of assets used in 3.2.3(a) is agreed by the Access Seeker and QR or, failing agreement, as determined by the QCA</li> </ul> | <ul style="list-style-type: none"> <li>The value of assets in clause 3.2.3(a) will be calculated by QR using the Depreciated Optimised Replacement Cost (<b>DORC</b>) methodology.</li> <li>DORC methodology set out at cl 3.2.3(c) and includes: optimisation (determination of the optimal configuration and sizing of network assets); replacement cost (a modern engineering equivalent (<b>MEE</b>) is established for each asset in the optimised assets and a replacement cost established) and depreciation (those MEE assets are depreciated using the standard economic life of each existing asset together with an estimate of the remaining life of each existing asset).</li> </ul> | No regulation around the valuation of assets. DORC methodology lacks transparency. Scope for QR to manipulate valuations to increase ceiling price. |



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|   |   | <ul style="list-style-type: none"> <li>QR will publish annually on its website the estimated asset value for the West Moreton System and Mt Isa Line System, including key assumptions used.</li> </ul>  |   |
| <b>Access Charge Differentiation</b><br><b>[cl 3.3.1]</b> |   | <p>QR to consider a range of factors 'which impact on its business' in determining access charge differentiation, including:</p> <ul style="list-style-type: none"> <li>initial estimate of Access Charges for the requested Access Rights as in the Indicative Access Proposal;</li> <li>characteristics of the relevant Train Service (including axle load, speed, wheel diameter, Train length, origin and destination etc...)</li> <li>the commercial impact on QR's business (including factors such as the potential for growth of the QR business; opportunity costs to QR; credit risk associated with the business; part of the Network relevant to the Access being sought.</li> </ul> | <p>QR is clearly incentivised to cherry pick its customers.</p> <p>QR's prioritisation of the Passenger Priority Obligations suggests the QR Network will be capitalised upon by the government of the day by seeking to stop coal services from travelling along the West Moreton region and the Metropolitan Network.</p> |
| <b>Limits on Access Charge Differentiation [cl 3.3.2]</b> | Only allowed differentiation of Access Charges if     | <ul style="list-style-type: none"> <li>[3.3.2(a)] QR not to 'have regard to the identity of the Access Seeker';</li> <li>[3.3.2(b)] Will not price differentially between Access Seekers if the Train Services are alike and the Access Seekers are operating in the same end market (but will have regard to location/duration and quality of the Train Path/etc to determine if characteristics are alike)</li> </ul>  | <ul style="list-style-type: none"> <li>This is subject to the QR Passenger Priority Obligations, cl 3.3.1 and matters under 3.3.2(b) which will clearly inform QR as to the type of service such that any attempt to disguise identity is largely futile.</li> <li>error at 3.3.2(c)(iii) – incomplete sentence</li> </ul>  |
| <b>Reference Tariffs</b>                                  | Reference Tariffs applied to Reference Train Services | <ul style="list-style-type: none"> <li>All mention of Reference Tariffs is deleted.</li> <li>Now only General provisions relating to all</li> </ul>  |   |

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| <b>[cl 3.5 – including sub-clauses]</b>                                  |  | Train Services  |  |
| <b>Take or Pay Charges</b><br><b>[cl 3.5.2]</b>                          |  | Take or Pay Charges payable under Access Agreements have been implemented   |  |
| <b>Consequences of contravention (of Part 3 – Pricing Contravention)</b> | QCA determined   | Only avenue to dispute a Pricing Contravention is to refer the matter for arbitration in accordance with cl 6.1   | No ability to first raise the issue/s with QR directly – users directed straight to arbitration.<br><br>This means users will be forced to weigh-up the opportunity cost of accepting QR's contravention or engaging in a long and expensive arbitration process.<br><br>QR will have the ability to exploit that. |
| <b>Part 4 – Operating Requirements</b>                                   |  |   |  |
| <b>Network Management Principles [cl 4.1]</b>                            |  | Removed obligation to provide 'Capacity related' information to Access Holders.   | Lack of transparency around Network Capacity means users will not have the necessary long-term certainty required for investment in projects.  |
| <b>Consultation for Through-Running Times</b><br><b>[cl 4.2]</b>         | Required consultation with relevant Railway Managers in relation to proposed amendments to the Operating Requirements Manual | Requirement is deleted  |  |
| <b>Operating Requirements Manual [cl. 4.3]</b>                           | Operating Requirements Manual is set out in Schedule G<br><br>Must make the Manual available to Access Seekers               | Reference to Schedule G deleted (as is Schedule G)<br><br>QR will publish the ORM on its website (instead of providing to Access Seekers directly)<br><br>QR will consult with Access Holders regarding | No description as to how the assessment of whether or not an amendment to the ORM will be considered minor or administrative.<br><br>This, in addition to the specification of absolute discretion at 4.3(c) demonstrates  |

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|  |  | changes to the ORM '(other than those of a minor or administrative nature)'.<br><br>4.3(c) subject to the requirement to consult on amendments to the ORM unless they are minor or administrative, 'QR may amend the ORM from time to time in its absolute discretion'.   | that QR is left with far too broad of a discretion to amend and/or consult or not consult.  |
| <b>Part 5 - Reporting</b>                                    |  |   |   |
| <b>Quarterly network train performance reports [cl. 5.1]</b> | Public release of information regarding QR Train Services for the quarter (including average delay and cancellation information) and written complaints from Access Holders etc.                                   | Obligation to provide a quarterly report (and obligations as to contents) deleted.<br><br>Previous cl 5.3.1 amended and rolled into an obligation to publish an annual financial report. The financial report will not include Financial Statements and will include information in connection with the Below Rail Services, including: <ul style="list-style-type: none"> <li>• revenue and expenses;</li> <li>• return on assets for each of the West Moreton System, North Coal Line System and Mt Isa Line System;</li> <li>• return on assets for other Systems on an aggregated basis.</li> </ul> The report will also be accompanied by an audit certificate prepared by a suitable auditor. | No transparency as to the operation of various parts of the QR Network.<br><br>Inhibits users' ability to assess the viability of projects in other region. |
| <b>Annual report on negotiation phases [cl. 5.2]</b>         | Required annual publication of details including the number of requests for Capacity Information throughout the year (and time taken to provide the information); the number and percentage of Access Applications | Deleted.  | Reduced transparency around the operation and cost of various Networks prevents users from properly assessing the costs.                                    |

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|   | acknowledged in accordance with the Undertaking and within the applicable timeframe; information about Regional Networks to which a Reference Tariff applies; maintenance and operating costs of Regional Networks to which a Reference Tariff does not apply, etc.  |  |  |
| <b>General reporting obligations</b><br>[cl. 5.4]     | <p>Obligations to ensure the accuracy of reports issued under clauses 5.1 and 5.2.</p> <p>Obligations regarding information requested by the QCA or about compliance with the Undertaking.</p> <p>Obligation to audit as required by the QCA, acting reasonably.</p> | Deleted  |  |
| <b>Monthly Operational Reports</b><br>[*new* cl. 5.2] | New clause   | <p>QR will provide each Nominated Rolling Stock Operator and Access Holder with an Operational Report for each relevant System on which it operates or holds Access Rights.</p> <p>QR will consider 'relevant comments' from a Nominated Rolling Stock Operator or Access Holder regarding inaccuracies or omissions.</p> <p>The report(s) will include information including on time train performance; actual and scheduled Train transit times; actual Train Services summary; cancellations and reasons; major operational, safety or environmental incidents and summary of</p> |  |

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|   |   | speed restrictions in place at the end of the month.  |   |
| <b>Rail User Groups</b><br>[*new* cl. 5.3]              | New clause  | <p>Provides that QR and relevant Nominated Rolling Stock Operators and Access Holders may agree to establish a Rail User Group for each of the West Moreton System, North Coast Line System and Mt Isa Line System.</p> <p>Purpose is to provide a forum to review, discuss and improve rail operational issues.</p> <p>Frequency and rules for the conduct of meetings are by agreements or, failing agreement, as determined by QR acting reasonably, but acknowledging that ideally, meetings would be held either monthly or quarterly.</p> | Contrived attempt to emulate a responsible regulated regime which in practice, is unlikely to provide any benefit to users. Particularly in circumstances where QR maintains the ability to amend the Deed Poll / Standard Access Agreement / Access Framework at its discretion. |
| <b>Part 6 – Administrative provisions</b>               |   |   |   |
| <b>Governing law</b><br>[*new* cl. 6.1.1]               |   | The law in the State of Queensland  |   |
| <b>Alternative Dispute Process</b><br>[cl. *new* 6.1.2] | <p>Access Seekers and QR can agree to use a different dispute resolution process or timeframes.</p> <p>If such an agreement is struck, the different dispute resolution process or timeframe is binding and neither can seek to alter the process without agreement of the other; or seek to alter or challenge the outcome except for in the case of manifest error.</p> | <p>Agreement as to different dispute resolution process must be evidenced in writing.</p> <p>Can only change the different dispute resolution process by written agreement with the other party.</p> <p>Reference to ability to alter or challenge the outcome of the different dispute resolution process is deleted.</p>  | <p>Where a different dispute resolution process is agreed, the outcome can now be altered or challenged even where no manifest error exists.</p> <p>Allows QR the opportunity to encumber users with multiple long and expensive dispute resolution processes.</p>                |
| <b>Application of</b>                                   | Any dispute, complaint or   | Divided to provide for disputes under each of the:  | Separates the dispute resolution procedures   |

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| <p><b>dispute and complaint resolution process</b><br/>[*new* cl. 6.1.3]</p>  | <p>question arising in relation to the Undertaking, a request for Access or the negotiation of an Access Agreement to be resolved in accordance with clause 6.1.</p> <p>Provision for disputes arising in relation to Schedule D (Reference Tariffs) or Schedule F (Network Management Principles)</p>                   | <ul style="list-style-type: none"> <li>• Access Framework – resolved in accordance with cl. 6.1;</li> <li>• Access Agreement – resolved in accordance with the provisions of the relevant Agreement; and</li> <li>• Deed Poll – disputes determined in the courts of Queensland.</li> </ul>   | <p>for each document causing increased uncertainty and confusion.</p>   |
| <p><b>Resolution by QCA / Reporting unresolved disputes and complaints to the QCA / QCA Decision-Making</b><br/>[former cl. 6.1.4, 6.1.5, 6.5 ]</p> |  | <p>Deleted</p>  | <p>No regulation or independent moderator</p>   |
| <p><b>Resolution by Senior Management</b><br/>[*new* cl. 6.1.4]</p>   | <p>Former cl. 6.1.3 resolution by escalation allowed escalation of unresolved disputes to representatives of the parties to resolve the dispute after 5 business days.</p> <p>If not resolved, the dispute is escalated to senior management representatives who must resolve the dispute within the specified time.</p> | <p>Removes middle step of previous clause. If after 5 business days (or such longer period as agreed by the parties) after the date on which a Dispute Notice is given, representatives of the parties (comprising their chief executive officers or nominees) must meet and use reasonable endeavours to resolve the Dispute.</p> <p>If the dispute cannot be resolved within 10 business days, either party can refer the dispute to arbitration.</p> | <p>Streamlines process. However, there may be some difficulty around 'agreeing' as to a longer period to resolve a dispute, at the outset, which may result in a dispute about the time to resolve a dispute.</p> |

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|   | <p>If still not resolved, the dispute must be referred to each party's chief executive officer who must resolve the dispute within the specified time.</p> |  |   |
| <p><b>Arbitration</b><br/>[*new* cl. 6.1.5]</p> |  | <p>All disputes referred to arbitration under the Framework to be dealt with under this clause 6.1.5.</p> <p>Specifies single arbitrator agreed upon between the parties or, failing agreement within 10 days after referral to arbitration, by a single arbitrator nominated by the Resolution Institute.</p> <p>Parties may have legal representation without the need for leave.</p> <p>Ability to consolidate any arbitration commenced under the Framework, as determined by the arbitrator appointed for the arbitration proceeding that was commenced first in time, regardless of the parties involved provided the issues for determination concern common questions of fact or law.</p> <p>Provides factors for the arbitrator's consideration in making a determination, including:</p> <ul style="list-style-type: none"> <li>• QR's obligations under law (including by legislation, the contract under which Transport Service Payments are made, service level agreements with DTMR, the Rail Authority/Authorities, etc.);</li> <li>• ministerial directions;</li> <li>• QR constitution;</li> </ul> | <p>Serious issues raised by the prospect of consolidating arbitrations.</p> <p>QR is the only common party across all arbitrations – meaning QR will usually have agreed to the arbitrator appointed.</p> <p>Where parties to an arbitration/s after the arbitration commenced first in time are consolidated, they have no control over the arbitrator and are forced to participate in the consolidated arbitration.</p> <p>Factors to guide the arbitrator's determination concern QR's interests only and do not reflect proper objective considerations.</p> |

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|   |  | <ul style="list-style-type: none"> <li>direct costs to QR of providing Access the subject of the dispute (if relevant) including any costs of extending the network.</li> </ul>   |  |
| <b>Urgent matters</b><br>[*new* cl. 6.1.6]      |  | Nothing in clause 6.1 prevents a party from seeking urgent injunctive relief in the courts of Queensland  |  |
| <b>Limitations</b><br>[*new* cl. 6.2]           |  | <p>Subject to the terms of an Access Agreement, Funding Agreement or any other agreement entered into with QR as contemplated by the Framework:</p> <ul style="list-style-type: none"> <li>damages is not a remedy for any breach of the Framework;</li> <li>only remedy is specific performance;</li> <li>QR is not liable to Access Holders, Access Seekers, Rolling Stock Operators or any other person for any Consequential Loss arising under or in connection with the Framework.</li> </ul> | Overbroad proposed definition of Consequential Loss  |
| <b>Severability</b><br>[*new* cl. 6.5]          |  | <p>Ability to sever a provision of the Framework to the extent that it is illegal or unenforceable in any relevant jurisdiction without affecting the enforceability of the other provisions of the Framework.</p> <p>Does not apply if severing the provision materially alters the scope and nature of the Framework or would be contrary to public policy.</p>   | No indication as to who determines whether a provision materially alters the scope and nature of the Framework or whether it would be contrary to public policy which indicates that QR may seek to exercise a very broad discretion over whether a provision should be severed. |
| <b>Schedules</b>                                |  |   |  |
| <b>Schedule A - Preliminary Information and</b> |  | Minimal changes   | Aligning with altered Access Framework provisions  |



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| <b>Capacity Information</b>                                     |  |   |  |
| <b>Schedule B – Access Application Information requirements</b> |  | Minimal changes   | Aligning with altered Access Framework provisions  |
| <b>Schedule C – Operating Plan Template</b>                     |  | Deleted   |  |
| <b>*New* Schedule C – Network Management Principles</b>         | <p>Previously provided under Schedule F.</p> <p>Provided for Train Planning Principles, Daily Train Plan Principles, Minimising the adverse effects of Possessions, Network Control Principles (including traffic management decision-making matrix)</p> | <p>Master Plan Principles, Daily Train Plan Principles and Minimising adverse effects of Possessions provisions are deleted.</p> <p>Now provides for:</p> <ul style="list-style-type: none"> <li>Repairs, maintenance and upgrading of the Network (including that QR is not obligated to seek Rolling Stock Operators' consent to undertake repairs, maintenance, upgrading, new work or Possession);</li> <li>Network Control Principles, including traffic management decision-making matrix and principles from managing deviations from a DTP</li> </ul> | QR have a wider ability to interrupt train services without consulting with Rolling Stock Operators which will likely result in costly delays and interruptions. |
| <b>Schedule G – Operating Requirements Manual</b>               |  | Deleted   |  |
| <b>*New* Schedule D – Standard</b>                              |  | Placeholder   |  |

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| <b>Access Agreement</b>                                   |  |   |   |
| <b>Schedule I – Extension Principles (now Schedule E)</b> |  | Provision for an Access Funder to refer to QCA for review irrespective of confidentiality requirements deleted. | Intends to bind Access Funders to confidentiality requirements of an Access Funding Agreement |

### **Standard Access Agreement**

The Proposed Standard Access Agreement generally reflects the existing Standard Access Agreement – subject to significant changes as a result of the removal of the reference tariffs (discussed in the undertaking comparison above).

There is added uncertainty about how the Standard Access Agreement would operate where the Access Framework term expired during the term of an access agreement. All that is provided for is the transitional provision in clause 27.21 that provides that if that occurs, the parties must promptly consult regarding consequential changes to the Access Agreement and 'endeavour to negotiate and agree any changes'.

### **Deed Poll**

The most critical aspects of the Deed Poll are:

#### **Amendment**

The amendment provisions allow QR to amend the Framework objective (only with prior written consent of the State) and clause 7.2 of the Deed Poll allows QR to 'amend the Access Framework, from time to time, so long as the amendments are not inconsistent with the Framework Objective'.

'Not inconsistent' is a very low threshold – particularly when combined with a broadly expressed objective of the nature proposed – such that it will be nearly impossible to show any specific detailed amendment is inconsistent with such an objective. In the case of QR, the consent of the State is also not likely to be a barrier given QR's status as a State owned statutory authority. The deed poll also fundamentally limits the ability to challenge amendments further by imposing a bar on proceedings unless commenced within 90 days and providing that QR has no liability even if it has amended or sought to amend the Access Framework in a way that breaches QR's proposed threshold for amendments.

Consequently the Access Framework can effectively be changed at QR's whim and therefore provides no certainty on which the QCA could be satisfied as to dependent markets continuing to be workably competitive.

#### **Liability**

The Deed Poll provides that QR cannot be liable for damages for breach of the deed and the only remedy available is specific performance.

That is the case seemingly no matter how intentional, how egregious, how repeated or how damaging the breach is. It is hard to see how the QCA could ever be satisfied that QR would comply with the Deed Poll when there are basically no consequences for it not doing so.