
**Draft Decision on
QR's Draft Undertaking**

Volume 1 – Executive Summary & Draft Decision

December 2000

ABOUT THE DRAFT DECISION

To the extent possible, the Authority has organised this Draft Decision in the same order as adopted in the Draft Undertaking provided to it by QR. There has though been some divergence. Matters raised in the Draft Undertaking that have been accepted by the QCA or have no operational effect are not referred to in the Draft Decision.

To assist readers of the Draft Decision, each chapter has at the beginning of it a Key Aspects section which seeks to identify the major matters which are dealt with in the chapter.

Set out below is the structure of the Draft Decision. To the right of each chapter heading is identified the corresponding part of QR's Draft Undertaking.

The Draft Decision does not deal at all with Part 1 of the Draft Undertaking submitted by QR. That Part did not contain any matters relevant to operations. It did though refer to an Explanatory Guide, which accompanied the lodgment of the Draft Undertaking with the QCA. It was stated that to the extent of any inconsistency between the Draft Undertaking and the Explanatory Guide the position in the Undertaking would prevail. The QCA has interpreted the Explanatory Guide as if it formed part of the Draft Undertaking.

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SUBMISSIONS

The Queensland Competition Authority (the Authority) considers public involvement to be an important element of its decision-making processes. It therefore invites submissions from interested parties concerning the Draft Decision on QR's Draft Undertaking.

To facilitate the publication of submissions on the QCA's website, it is preferred if submissions could be made electronically by disk or by e-mail. However, if this is not possible, submissions can be made in writing. Submissions, comments or inquiries regarding this paper should be directed to:

Queensland Competition Authority
GPO Box 2257
Brisbane QLD 4001

Attention Euan Morton

Telephone: (07) 3222 0506
Fax: (07) 3222 0599
E-mail: rail.submissions@qca.org.au

The **closing date** for submissions is 31 March, 2001.

Confidentiality

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available.

To facilitate disclosure of the non-confidential portion of submissions, it would be appreciated if a copy of the submission with the confidential information excised could be provided in addition to the full submission. Again, it is preferred if the relevant submissions could be made electronically by disk or by e-mail. However, if this is not possible, the submissions can be made in writing. Where it is unclear why a submission has been marked "confidential", the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt documents (within the meaning of the *Freedom of Information (FOI) Act 1989*), it cannot guarantee that submissions will not ultimately be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997*, the Authority must take all reasonable steps to ensure the information is not disclosed without the person's consent, provided the Authority is satisfied that the person's belief is justified and that the disclosure of the information would not be in the public interest.

Public access to submissions

Subject to the above, submissions will normally be made available for public inspection at the Brisbane office of the Authority (see below), or on its website at www.qca.org.au. Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on this website.

CONFLICT OF INTEREST

The Authority wishes to advise all interested parties that the Chairman of the Authority, Mr R M Wylie, has disclosed a conflict of interest in respect of the QR Undertaking and in particular, as to reference tariffs affecting the rail freight costs for the North Goonyella Mine. The conflict arises from the fact that Mr Wylie is currently the non-executive Chairman of Thiess Pty Ltd and Deputy Chairman of its holding company, Leighton Holdings Limited. Thiess Pty Ltd and another company have recently purchased the North Goonyella Coal Mine, with Thiess Pty Ltd having an initial minority interest of 40% in the mine.

In addition to Mr Wylie's directorships, he holds shares in Leighton Holdings Limited. However, these shares do not constitute a material proportion of his investment portfolio, nor is it likely that, given the relatively minor influence the acquisition of the new coal mine will have on Leighton's overall profitability, that any decisions made with respect to QR's Draft Undertaking will materially influence the value of these shares.

In accordance with s219(3) of the QCA Act, Mr Wylie disclosed the conflict of interest to the Authority on 13 September 2000. Further, in accordance with s219(4), the Authority gave written notice of the disclosure to the Ministers on 13 September 2000. As required under s219(7), this disclosure was recorded in the Authority's minutes.

The Authority believed that to exclude Mr Wylie at this late stage would have substantially delayed the issuing of a Draft Decision with respect to the Draft Undertaking. Therefore, on 13 September 2000 the Authority requested that the Ministers allow him to continue his involvement in the Authority's consideration of QR's Draft Undertaking, as envisaged in s219(5) of the Act. Following consultation with the Integrity Commissioner, the Ministers' consent was given on 9 November 2000.

In addition, the Authority advised Queensland Rail of the existence of the conflict and QR has indicated that it has no objection to Mr Wylie's continued involvement in the matter.

The Authority has managed and proposes to manage this conflict of interest in the following ways:

- Mr Wylie has not and will not participate in any discussion or decision that directly affects North Goonyella coal freight reference tariffs;
- Mr Wylie has not and will not use the casting vote allowed to the Chairman of the Authority under s217(1) of the QCA Act; and
- this notification will serve as public notice of the conflict of interest and all stakeholders will have a proper opportunity to raise any objections that they may have to Mr Wylie continuing to be involved with the Draft Undertaking.

If an interested party wishes to raise any objections or make any submissions on this matter, they should provide their submission in writing to Dr McDonough, Deputy Chair, Queensland Competition Authority, GPO Box 2257, Brisbane QLD 4001 by 31 March 2001 for consideration by members of the Authority, excluding Mr Wylie.

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1. FOREWORD

This Draft Decision by the Queensland Competition Authority (QCA or Authority) concerns QR's Draft Undertaking on third-party access to its rail-transport infrastructure, which was submitted to the Authority on 23 January 1999.

The QCA has assessed the Draft Undertaking in accordance with the provisions of the *Queensland Competition Authority Act 1997*. This assessment balanced the interests of QR and access seekers, as well as the public interest. The Authority also considered submissions from QR and interested parties on the pricing and non-pricing matters raised by the Draft Undertaking.

As a result of its assessment, the Authority has decided not to approve the Draft Undertaking in its current form, with substantive amendment to the Draft Undertaking being required before approval could be given.

To this end, the Authority has outlined in detail the amendments needed. The thrust of the amendments to the non-price terms and conditions has been to provide a better balance between access seekers' interests and those of QR, with a view to providing third-party providers of above-rail services with the confidence necessary for them to undertake the substantial investment necessary to enter the market.

Key amendments include those relating to the ring-fencing arrangements and the negotiation framework. The Authority is aware of the importance of credible ring-fencing arrangements in the eyes of access seekers such that they have confidence that QR's ability to gain an unfair competitive advantage through its organisational structure is constrained. In addition, the Authority has sought to ensure that appropriate arrangements are in place within QR so that access seekers do not need to negotiate with QR's above-rail business groups for access to declared services.

The key objective of the Authority's proposed amendments regarding QR's capacity management procedures is to improve their transparency and to more clearly establish the roles and obligations of QR, access seekers and third-party operators running train services. The thrust of the Authority's amendments regarding QR's interface considerations is to clearly establish the roles of QR and third-party operators, while recognising the role of regulatory bodies in safety and environmental matters.

With respect to the Draft Undertaking's pricing terms and conditions, the QCA accepts that revenue adequacy is a legitimate objective, provided that distortions to commercial activity in the above-rail market are minimised. Accordingly, the QCA proposes amendments to tighten the definition of revenue adequacy and to emphasise the importance of non-discriminatory pricing. The QCA also proposes a series of amendments to improve the transparency of the cost allocation arrangements and to enhance the proposed audit process. The Authority proposes the reporting of service-performance indicators to enable users and access seekers to evaluate the cost effectiveness of the service being delivered by QR and increase QR's accountability in terms of that service delivery.

QR's access revenues from the coal network are expected to average approximately \$240 million per annum (excluding electric traction charges) over the initial 3-year regulatory review period from 1 July 2001 to 30 June 2004. QR is expected also to earn approximately \$40 million per annum for the use of its electric overhead system.

The QCA is proposing that this revenue be collected via a multi-part reference tariff which incorporates the following components:

- an incremental maintenance charge (\$/'000 gtk)
- an incremental capacity charge (\$/train path)
- an allocated component (a combination of \$/'000 ntk and \$/net tonne).

For above-rail operators who utilise the electric traction system, a further charge will be levied based on the use of the overhead system and the cost of energy supplied. These charges will be levied on a \$/'000 gtk basis.

The QCA is releasing this Draft Decision in order to provide QR and interested parties with the opportunity to comment on the preliminary position the Authority has reached. The Draft Decision includes the reasons for the Authority's refusal and proposes amendments to the Draft Undertaking that the Authority would favourably consider.

The Authority will review its Draft Decision in light of comments received by QR and interested parties. The consultation period will conclude on 31 March 2001. The Authority anticipates releasing a Final Decision by June 2001. Under the QCA Act, the Authority's decisions concerning access undertakings are final.

2. EXECUTIVE SUMMARY

This Executive Summary of the QCA's assessment of QR's Draft Undertaking on third-party access to its rail-transport infrastructure is an overview only. It does not address every issue considered by the QCA nor does it provide detailed information on those items outlined. A list of the QCA's proposed amendments to QR's Draft Undertaking follows this overview.

2.1 Introduction

On 23 January 1999, QR submitted a Draft Undertaking to the QCA on third-party access to its rail-transportation infrastructure (below-rail). An Explanatory Guide clarifying the intent of selected provisions accompanied it.

The QCA's approach is based on the belief that markets drive commercial players to create solutions that better satisfy customers' requirements. A regulatory system merely provides the environment in which this can occur.

Central to this environment is:

- protecting the competitive process, rather than individual competitors
- assigning risk to the party best able to manage it, and where necessary, providing incentives to improve performance
- structuring arrangements so as to encourage minimal resource cost
- empowering end users, and
- minimising transaction costs.

To protect the competitive process, the integrity of the train services (above-rail) market should not be compromised through, amongst other things, QR's vertical integration. Third-party railway operators seeking access to the above-rail market must be confident that QR will not discriminate against them. Without confidence in the integrity of the process, market participants will not invest nor will customers take the risk to contract with them.

To efficiently assign risk and reward, Network Access, the below-rail business group of QR, should be given incentives to better serve all parties. Market participants also must accept that they impose costs on the rail system and that financial disciplines are necessary to enable the market to operate effectively.

For third-party access to QR's network to succeed, an environment conducive to negotiation must be established. This is an extremely complex task when QR controls access to the network. Access seekers must gain entry to that network in order to compete with QR's train services in the above-rail market. Critical aspects to the creation of this environment include:

- ensuring that appropriate arrangements are in place within QR so that access seekers (including third-party operators) do not need to negotiate with QR's above-rail business groups (for example, Coal and Mainline Freight, Metropolitan and Regional Services) for access to declared services; that is, those services declared to be available for access by third parties under the QCA Act
- providing that the structure for the allocation of, and management of, QR's below-rail capacity is clear

- avoiding inappropriate barriers to entry for access seekers
- encouraging arrangements that minimise the transaction costs associated with gaining access to the network.

Nevertheless, the QCA recognises that the assessment of QR's Draft Undertaking is just a first step. In making this first step, the QCA is aware of the importance of engendering confidence in the integrity of the above-rail market. Without this, third-party access can not succeed.

Finally, the QCA is aware that over-zealous regulation can do more harm than good by hindering, rather than enhancing, the evolution of the above-rail market and the dynamism and innovation that comes with it. The QCA has exercised its judgement carefully, and provided QR with the benefit of a reasonable doubt where appropriate, particularly in the process of assessing reference tariffs.

2.2 Scope and Administration of Undertaking

The QCA endorses the proposed three-year term of the Undertaking and QR's proposal for a non-binding review of the Undertaking after it has been in operation for one year.

The QCA accepts that the Undertaking applies only to the negotiation of new access agreements and does not affect existing rail-haulage agreements. The Authority also accepts the Undertaking does not apply to the standard-gauge track or QR's above-rail services.

2.3 Ring-fencing Arrangements

As a vertically integrated enterprise, QR could use its monopoly in the below-rail market to gain an unfair competitive advantage in the above-rail market. The QCA is concerned that even this perception by access seekers could seriously undermine confidence in the evolution of a fair market.

Consequently, the QCA proposes amendments to QR's ring-fencing arrangements to provide greater protection to access seekers' interests.

These amendments focus on:

- the scheduling and train-control function
- the protection of confidential information
- the enforcement of ring-fencing obligations
- accounting arrangements (the Undertaking's pricing framework addresses QR's accounting arrangements.)
- the development of internal access agreements

Responsibility for the scheduling and train-control activities must be properly assigned for the ring-fencing arrangements to be credible. QR proposes that its above-rail business groups develop and execute short-term schedules through the train control function. This creates an unsustainable conflict of interest. The QCA considers that scheduling and train control is a monopoly function within QR's network and therefore must be a core function of Network Access.

The potential exists for QR's monopoly arm to pass on confidential information about third-party operators' proposed or current operations to its competitive arm. QR's above-rail business groups would then have a competitive advantage.

Consequently, the QCA considers that the following limitations on information flow are necessary:

- QR staff, including Network Access staff, who deal with information provided by access seekers must sign a confidentiality deed. Information can then be made available within Network Access without any further restriction
- if employees of Network Access are transferred elsewhere in QR, they should be debriefed to emphasise the confidentiality of the information they possess. Also, they must sign a declaration acknowledging this
- nominated persons or sections within QR who are involved in the assessment of an access application; for example those persons or sections responsible for safety or environmental aspects; can obtain information without the prior approval of an access seeker, provided that appropriate acknowledgment registers are signed
- legal advisers to Network Access who transfer elsewhere in QR must not act for twelve months on any matter involving an access seeker, without the approval of that access seeker. The access seeker may withhold consent for any reason
- Network Access must not disclose any information on a particular access negotiation to an external adviser of an above-rail business group. In other circumstances, information can be made available to other QR staff or external advisers provided that:
 - the access seeker approves. This approval is not to be unreasonably withheld. The access seeker may require a separate confidentiality deed with the external adviser
 - a confidentiality deed between Network Access and other QR staff or outside consultants is signed, and
 - acknowledgment registers are signed as appropriate.

If QR is found to have disclosed any commercially sensitive information to an above-rail business group, a third-party operator can seek liquidated damages of \$10,000. However, where a breach of the ring-fencing provisions is shown to have caused damages in excess of \$100,000, third-party operators can seek remedies available at law or equity. In addition, they can seek injunctive relief.

The QCA proposes that QR's Ring-fencing Guidelines should be audited annually and the results published by the QCA at its discretion. The QCA should decide whether an internal or external party conducts this compliance audit.

2.4 Negotiation Framework

Commercial negotiation is particularly important in the context of third-party access to rail infrastructure because of the varying nature of the service required by the access seeker. Therefore a framework for commercial negotiation must be established that balances the legitimate business interests of QR and the interests of access seekers.

The QCA is concerned mainly with the following aspects of QR's negotiation framework:

- assignment of management responsibility for marshalling yards, stations and platforms
- the ‘unbundling’ of access agreements; that is, their separation into access and haulage components
- the process where access is sought to currently utilised capacity.

The Draft Undertaking provides that where an above-rail business group manages both a marshalling yard and a facility within it, and the sole purpose of a third-party operator seeking access to the yard is to use that facility, then negotiation will be between those two parties. QR subsequently revised its position such that a common user test would be applied to each yard, identifying the areas that provide declared services and those that do not. This resulted in areas within yards being reserved exclusively for the above-rail group currently using them. The QCA believes that marshalling yards potentially provide declared and undeclared services so that under QR’s revised position, a third-party operator may have to negotiate with an above-rail business group to access declared services within a yard, outside the scope of the Undertaking.

Given these concerns, the QCA developed principles to be included in the Undertaking that prevent access seekers being forced to negotiate with QR’s above-rail business groups for access to declared services. The QCA believes that these principles provide for a more equitable assignment process than the common user test. These principles have been applied to QR’s line diagrams for its infrastructure from Gladstone northwards.

The QCA proposes that, subject to stakeholder comment, the amended line diagrams be attached as a schedule to the Undertaking. The QCA anticipates a set of line diagrams for QR’s infrastructure south of Gladstone will be finalised in time to be incorporated as a schedule to an approved Undertaking.

The declaration of rail-transport services covers stations and platforms. However, QR argues that as stations and platforms provide predominantly above-rail services, its above-rail business groups should manage these facilities. Network Access, acting as an agent for that above-rail business group, would negotiate access to the below-rail services of the stations and platforms. The QCA proposes that management responsibility for track adjacent to all platforms and stations be assigned to Network Access. Network Access will also be responsible for access negotiations, within the terms and conditions of the Undertaking, for declared services within stations and platforms. Above-rail business groups will be responsible for operational management at stations.

The QCA believes end users (the purchasers of train services provided by railway operators) should have the option of direct control over transportation of their products, so long as QR’s legitimate business interests are protected. However, the Draft Undertaking provides that only an accredited railway operator may enter into an access agreement with QR. The QCA proposes that the Undertaking should also allow non-accredited organisations to enter access agreements with QR, so long as an accredited railway operator performs the train services.

Under the Draft Undertaking, QR can refuse to negotiate with a third-party operator if there has been a material failure to comply with obligations and processes and an inability to meet with specified prudential requirements. Also, QR need not negotiate beyond an indicative access proposal when a third-party operator seeks access to currently utilised capacity and/or to capacity already required for the carriage of bulk-commodity traffic under an existing agreement. However, QR has an obligation to negotiate under s99 of the QCA Act. The QCA therefore proposes that QR must negotiate in order to establish whether the circumstances for a refusal are met. QR must justify such a refusal by demonstrating that the access seeker is not able to meet the terms and conditions specified in its proposed access agreement in a material way.

In the case of bulk-commodity traffic, the QCA considers a refusal to negotiate could stifle competition by entrenching the position of an incumbent operator in the above-rail market. Clearly this is contrary to the interests of access seekers and end users. Consequently, the QCA proposes that access negotiations, and any associated rights, be undertaken if approved by the end user. In addition, as a condition of preparing an indicative access proposal and negotiating in good faith, QR can recover its costs if subsequently an access proposal is demonstrated to be frivolous or vexatious.

The QCA proposes amendments to the negotiation framework of the Draft Undertaking so that QR's obligations are more clearly established and access seekers protected during access negotiations. Under these amendments, Schedule D preliminary information must incorporate price and costing information consistent with the QCA Act for rail corridors where no reference tariffs apply. Also, access seekers are given more time to act with respect to notifying QR of an intention to progress an access application following receipt of an indicative access proposal. Moreover, the QCA considers that access seekers should be free to seek dispute resolution during an access negotiation.

Finally, the QCA accepts QR's proposed procedures for acknowledging receipt of an access application and preparing an indicative access proposal.

2.5 Pricing Principles

In any market, prices play a central role in coordinating commercial activity. The pricing principles adopted for the below-rail market are critical in protecting the legitimate business interests of QR, above-rail operators and end users. Competition in the above-rail market will be distorted if QR is allowed to earn an excessive return from its below-rail commercial activities, or discriminate, on other than cost grounds, between QR's above-rail operators and third-party operators. The evolution of the above-rail market and the efficient utilisation and expansion of the above-rail network may be compromised.

The Draft Undertaking establishes three pricing objectives to underpin the development of access charges. QR's overriding objective is to achieve revenue adequacy, by maximising the commercially viable utilisation of the rail infrastructure, whilst observing constraints on price differentiation.

The QCA accepts that revenue adequacy is a legitimate pricing objective, provided that distortions to commercial activity in the above-rail market are minimised. Accordingly, the QCA proposes amendments to tighten the definition of revenue adequacy and to emphasise the importance of non-discriminatory pricing. In particular, the QCA considers that QR's capacity to differentiate prices must be subject to a market test in which all third-party operators within defined markets face price discrimination based on cost and risk differences only, with QR bearing the onus of justifying price differences.

QR proposes to develop upper (ceiling) and lower (floor) limits for access charges to ensure that there is no cross-subsidy between individual train services and combinations of train services. The price ceiling is to be set so that QR does not earn excessive returns, and the price floor prevents railway operators paying less than their incremental costs. The QCA accepts these pricing limits but proposes amendments to ensure that the definitions for stand-alone and incremental costs reflect those costs efficiently incurred.

To address the large range between the price floor and the price ceiling, QR submitted reference tariffs for the use of its network for coal transportation. The QCA accepts QR's proposal to develop reference tariffs for certain types of train service in a manner consistent with the Undertaking's pricing principles. The QCA accepts reference tariffs will be developed as an

access charge for a reference train service and that access charges for a train service may be higher or lower than the applicable reference tariff depending on specific access-related matters.

The QCA recognises the important role of reference tariffs in maintaining the integrity of the above-rail market and believes that reference tariffs need to be established for the services most likely to attract interest from third-party operators. Consequently, the QCA proposes amendments to broaden the scope of reference tariffs in the future.

QR's Costing Manual plays an important role in providing confidence to end users and above-rail operators that QR is not gaining an inappropriate commercial advantage over competitors through its vertical integration. Also, customers are reassured that they are not paying excessive access charges and, in doing so, cross-subsidising other traffics.

So that the release of the Draft and Final Decisions is not delayed, the QCA proposes to defer finalising the Costing Manual review until it has concluded its assessment of the Draft Undertaking. However, the Draft Decision contains a detailed analysis of the major issues that the QCA considers relevant to finalising the assessment of the Manual so stakeholders can comment on these proposals. The QCA proposes a series of amendments to improve the transparency of the cost allocation arrangements and to enhance the proposed audit process.

The Draft Undertaking does not cover service-quality disclosure but the QCA considers that reporting on QR's performance is an essential part of the regulatory regime. While measuring performance against contractual obligations will be a feature of access agreements, service quality has wider implications because of the effect of performance on the level of system usage. Railway operators and potential access seekers can use service-performance indicators to evaluate the cost effectiveness of the service being delivered and increase the accountability of QR in terms of that service delivery. Accordingly, the QCA proposes that a service-quality report, setting out key performance-indicators, which may be refined over time, be publicly disclosed.

2.6 Capacity Management

QR's capacity management involves scheduling train services, including establishing priorities in train movements, and coordinating traffic while it is using the rail infrastructure. It includes the ability of railway operators to trade-in capacity and QR's right to resume under-utilised capacity in certain circumstances.

With third-party access to QR's rail services, QR must allocate train paths both for its own traffic and that of competing third-party operators. This can distort competition in the above-rail market; either through third-party operators seeing the risks of entry as too great, or after having entered the market, finding that QR is making capacity decisions that favour its own train services.

Consequently, the QCA proposes amendments to improve the transparency of capacity-management procedures and to more clearly establish the roles and obligations of QR and third-party operators.

These amendments focus on:

- QR's scheduling and train-control framework
- providing sufficient information to permit independent capacity assessments
- developing a forward-looking test for resuming access rights

- transferring access rights to either Network Access or to railway operators through a secondary market.

The scheduling and train-control framework is critical in establishing a consistent basis upon which to manage traffic and will have a significant influence on the daily performance of railway operators. The QCA supports QR's proposal to release sufficient information, including the master train plan and train control diagrams, to allow access seekers and third-party operators to carry out an independent capacity assessment. However, the QCA is concerned with other aspects of the scheduling and train-control framework.

The QCA proposes that QR's scheduling and train-control protocols should be replaced by broad Network Management Principles (NMP) for each phase of the scheduling and train-control process, which would be incorporated as a schedule to the Undertaking. The NMP outline a framework that clarifies the responsibilities of Network Access and third-party operators. Further, they establish transparent processes for the development of the train schedules and the performance of the traffic coordination task.

The QCA accepts that QR will maintain a register of parties who have an interest in existing access rights.

QR proposes that access rights will be allocated to the first railway operator with whom it can negotiate and execute an acceptable access agreement. If two or more railway operators are seeking access with respect to mutually exclusive access rights, QR will finalise an agreement with the operator it considers is most favourable to the commercial performance of its below-rail services. The QCA proposes that where more than one access seeker is competing concurrently for the same capacity, the Undertaking should provide for negotiations with any unsuccessful access seeker(s) to continue on the basis of a revised proposal by Network Access, taking into account the reduction in available capacity. Where more than one access seeker is competing for the traffic of a particular end-user, the Undertaking should provide for QR to execute contingent access agreements prior to executing an unconditional agreement with the operator that wins the end-user's traffic.

The QCA considers that QR must retain a capacity resumption right to prevent the abuse of market power by an access seeker hoarding capacity. Amongst other things, the QCA proposes a forward-looking test for resumption based on path usage. This would provide an objective basis for when QR acts to resume capacity.

A secondary market in access rights is important because it both introduces competition into the resale market for access rights and promotes the transfer of those rights to the parties who can best use them. Further, a third-party operator can more easily enter the above-rail market because the potential for future liability is reduced.

The QCA considers that the limitations QR is placing on the reassignment of capacity in the Draft Undertaking are too restrictive. Consequently, the QCA proposes that the transfer of unwanted access rights, including partial transfer, be permitted by bilateral negotiation. This would be subject to establishing adequate notification procedures between QR and the holders of access rights and satisfying QR's legitimate requirements regarding safety, environment, capacity availability, the same traffic type (for example, coal traffic) and price variation (that is, no incremental cost variations, such as different axle loads).

The right to surrender access rights to Network Access will complement the establishment of a secondary market in access rights. The QCA proposes amendments to provide access seekers greater protection, particularly with respect to payment for access rights surrendered to, and reassigned by, Network Access.

2.7 Interface Considerations

The rail infrastructure and the delivery of above-rail services are strongly interdependent. Consequently, QR, as network manager, must interact closely with third-party operators. By managing this interface closely and consistently, QR can maintain the integrity of the rail structure, or use it to hinder access to QR's below-rail services by third-party operators. For example, QR could impose unnecessarily restrictive interface conditions on third-party operators or take on technical regulatory functions.

The QCA considers that the Undertaking should clearly establish the roles of QR and third-party operators, while recognising the role of regulatory bodies in safety and environmental matters. However, the Draft Undertaking imposes safety and environmental requirements exceeding those of Queensland's existing regulatory framework. While QR has since revised its position on some matters, it has imposed requirements on third-party operators that appear unnecessarily onerous or inconsistent with legislative requirements. The QCA proposes amendments to:

- the joint safety-risk assessment, to be conducted by QR with each third-party operator prior to the latter commencing its train services;
- rollingstock interface standards
- authorisation of the rollingstock of third-party operators
- QR's auditing powers
- the requirement for ISO 14,000 accreditation of third-party operators' environmental management systems.

Under the Australian co-regulatory rail-safety framework, the safety role of the track manager is confined to addressing interface issues. Therefore, QR's role in the safety-risk assessment of a third-party operator should not extend beyond preparation of the joint safety-risk assessment. This joint assessment attempts to identify and manage all reasonably foreseeable hazards relating to the interface between the third-party operator, QR and other railway operators.

Nevertheless, the QCA recognises that, in practice, it may be difficult to clearly define the scope of this interface. The joint safety-risk assessment may become a source of disagreement between QR and third-party operators. Therefore the QCA proposes that the Undertaking include an informal dispute-resolution process for safety-interface matters that involves the Rail Safety Accreditation Unit (RSAU) of Queensland Transport. This Unit can provide non-binding advice to the parties and if this does not help to resolve the dispute, the QCA will arbitrate.

The QCA also proposes that the joint safety-risk assessment address the training requirements for the staff of third-party operators. In certain respects, QR should assist a third-party operator to meet any such requirements.

The QCA will not endorse QR's rollingstock interface standards as part of the Undertaking. These standards will now be addressed in the joint safety-risk assessment. The QCA also proposes that QR's right to authorise the rollingstock of a third-party operator be replaced by a right to seek certification documentation that the rollingstock is as agreed by the two parties in the joint safety-risk assessment.

The QCA recognises that QR has the right to suspend, on safety grounds, the rollingstock and/or the staff of a third-party operator. However, to prevent QR using this right in an anti-

competitive manner, the QCA proposes that QR be restricted from exercising its suspension right in any way contrary to s104 and s125 of the QCA Act.

The RSAU has clear legislative responsibilities to approve, and ensure compliance with, the safety-management systems of all accredited railway operators. Therefore, the QCA proposes that QR should not have the right to conduct annual or 'spot' safety audits. Further, QR should not have an open-ended audit right to check whether or not a third-party operator has complied with the rollingstock standards agreed during the joint safety-risk assessment. Rather, the access agreement should specify what aspects of that third-party operator's compliance QR can audit. Before exercising its right, QR must provide evidence to demonstrate the need for such a review. Such evidence would be readily forthcoming if QR has reported all relevant incidents to the affected operator.

The QCA accepts that to analyse the impacts and requirements of a third-party operator's operations, QR can require the operator to submit an operating plan during the negotiation process.

To meet Queensland's legislative requirements, third-party operators of train services must develop processes that identify the associated environmental risks and appropriate control measures to manage those risks. The Draft Undertaking provides that environmental-management systems of third-party operators must be accredited under the ISO 14,000 standard prior to operating their train services. The QCA proposes that this requirement be removed as it exceeds legal requirements and cannot be justified in the public interest. QR itself is not currently accredited under this standard.

QR stipulates that third-party operators must procure independent environmental audits annually to ensure compliance with QR's environmental-management systems. It reserves the right to undertake 'spot' audits where it suspects a third-party has not complied. The QCA is concerned that QR's auditing rights are invasive. It considers that a better approach is to place the onus of responsibility on the third-party operator to inform QR that it has complied with its environmental obligations. The third-party operator can be required to provide QR with an annual statement of compliance and to advise QR of any breaches of environmental obligations as they occur. Consequently, the QCA proposes that third-party operators not be required to obtain an independent environmental audit annually and that QR should have no right to require a 'spot' environmental audit.

In the context of discussions between the QCA, QR and its stakeholders over the content of Schedule E (summary of standard access agreement), QR argued that it must be able to terminate an access agreement if it considers that it will be placed at an unacceptable risk of liability from possible environmental harm or breach of environmental laws. The Authority proposes a balanced process that could culminate in an environmental-termination right in an access agreement, including recognising the relevant provisions of the EPA Act and the role of the EPA under that Act.

Finally, the QCA proposes that QR's interest in adjoining infrastructure should be confined to the interface. In fact, the interface will vary with the type of infrastructure. Access seekers should have a right to design and supervise construction of adjoining infrastructure subject to meeting QR's engineering and safe-working standards for the interface. QR could reserve to itself the right to approve the clearance point.

2.8 Schedule E - Summary of Standard Access Agreement

Schedule E of the Draft Undertaking incorporates a summary of a standard access agreement. In the discussions held on the content of Schedule E, QR argued that the summary outlined all the major issues likely to be addressed in an access agreement. The Draft Undertaking provides

that unless otherwise agreed between QR and a third-party operator, an access agreement must be consistent with these principles. QR's view was that the Schedule E principles protected QR's legitimate business interests and did not impose unreasonable restrictions upon third-party operators.

The QCA shared stakeholders' concerns that the Schedule E principles were not commercially balanced.

The QCA initiated discussions between QR and its stakeholders to develop an agreed form of Schedule E upon which parties could rely if QCA were called upon to arbitrate in a dispute. Consequently, Schedule E now reflects the agreement of QR and its stakeholders on many issues.

However, the QCA must exercise its judgement on the remaining issues. The most significant ones are as follows:

- if a dispute arises during an access negotiation and is referred to the QCA, the Authority may appoint an external mediator so as not to jeopardise possible future arbitration
- any security deposit or prudential contribution required by QR to manage the risk of payment default should reflect the revenue risk that it has taken on. An access seeker should be credited interest on the security at a market-based rate
- Network Access should coordinate the clearance of network blockages, including retaining a right to direct any railway operator to assist in the clearance of a blockage. Railway operators should be responsible for establishing arrangements to effect recovery of their rollingstock from breakdown sidings within a reasonable time
- material change events specified in access agreements are triggers only and should be assessed on a case-by-case basis with associated cost changes not automatically flowed on, and
- an access seeker should be able to bind QR contractually to comply with the confidentiality arrangements established in the Undertaking.

2.9 Development of Reference Tariffs

On the basis of the reference tariff approach proposed by the Authority, QR's access revenues from the coal network are expected to average approximately \$240 million per annum (excluding electric traction charges) over the initial 3-year regulatory review period from 1 July 2001 to 30 June 2004. QR is expected also to earn approximately \$40 million per annum for the use of its electric overhead system.

The QCA is proposing that this revenue be collected via a multi-part reference tariff that incorporates the following components:

- an incremental maintenance charge (\$/'000 gtk)
- an incremental capacity charge (\$/train path)
- an allocated component (a combination of \$/'000 ntk and \$/net tonne).

This allocated component is calculated by dividing the revenue that cannot be casually attributed to capacity or maintenance evenly into two components. The first component (\$/'000

ntk) is then calculated by dividing the amount by the forecast ntk for that cluster over the regulatory period. A similar approach is adopted for the \$/net tonne component.

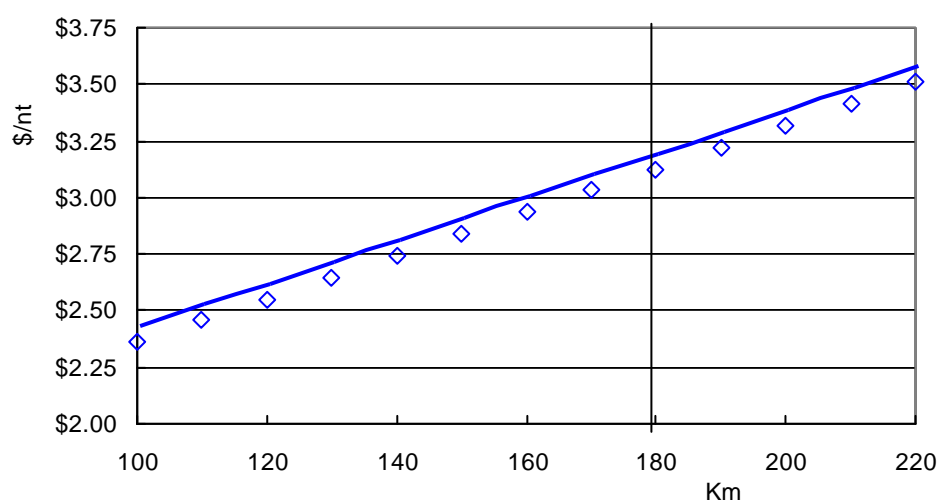
For above-rail operators who utilise the electric traction system, a further charge will be levied based on the use of the overhead system and the cost of energy supplied. These charges will be levied on a \$/'000 gtk basis.

The QCA accepts QR's proposed assignment of mines in the Central Queensland coal systems into the following clusters:

- Moura
- Newlands
- Central Blackwater
- Stanwell
- Gregory
- North Goonyella
- South Goonyella, and
- West Goonyella

Figures 1 to 6 depict the reference tariff - net tonne relationship for each cluster and show how the access charge varies with haulage distance.¹ The vertical lines rising from the distance axis indicate the approximate average haul for that corridor. Care must be taken with the interpretation of these diagrams as they assume the operation of the reference train service.

Figure 1: Moura reference tariff



¹ The North, South and West Goonyella clusters are presented in a single figure for Goonyella. Reference tariffs for North and West Goonyella are almost identical. South Goonyella's reference tariff is slightly higher reflecting a higher capacity charge.

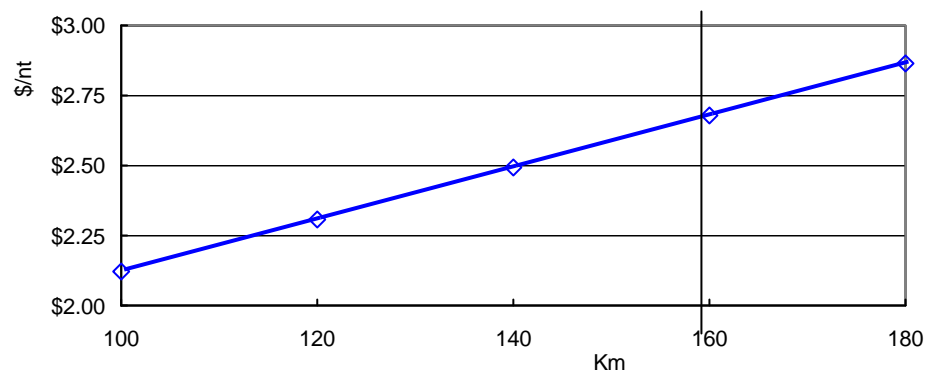
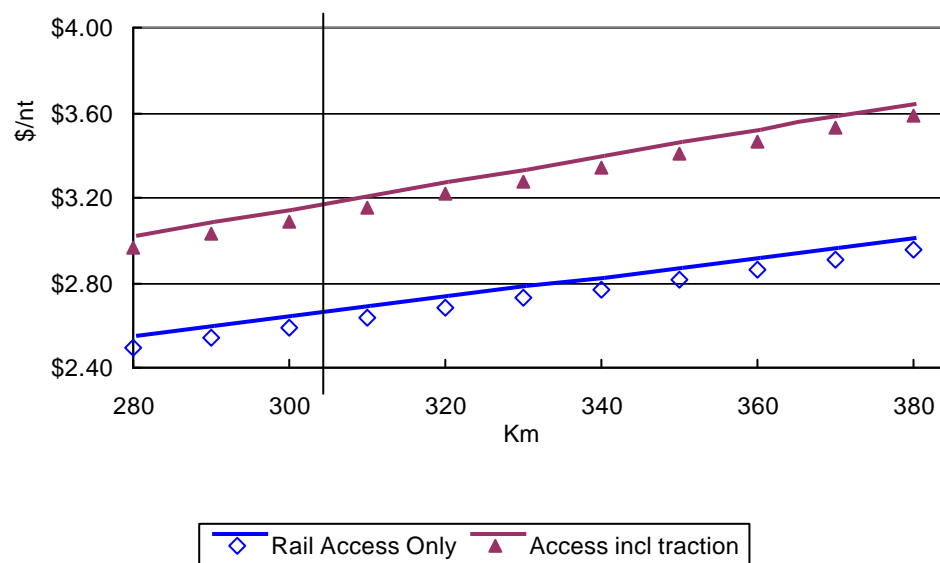
Figure 2: Newlands reference tariff**Figure 3: Central Blackwater reference tariff**

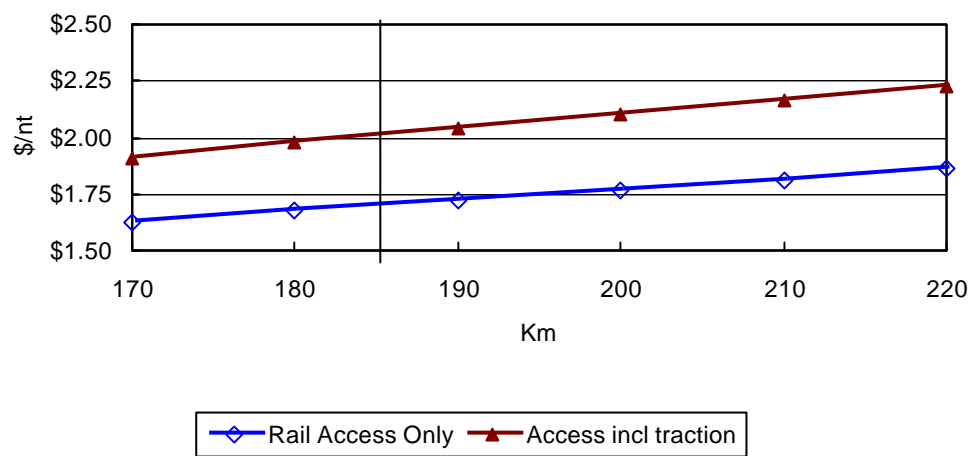
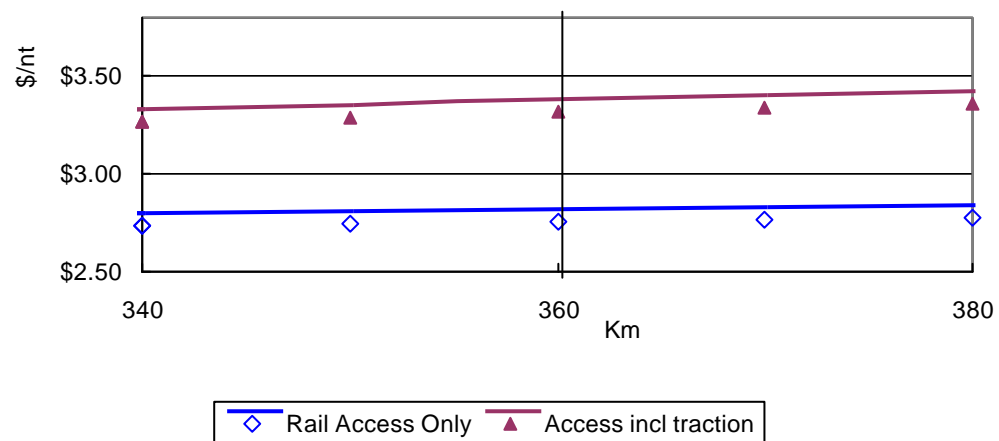
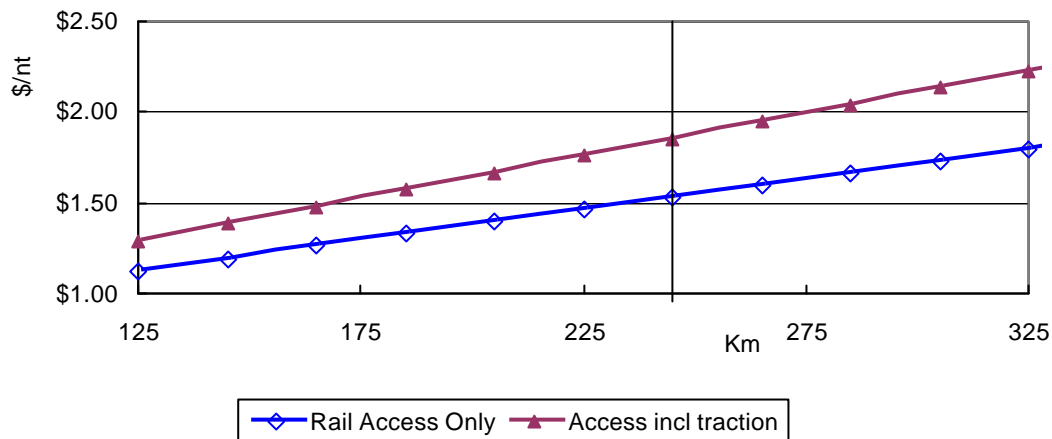
Figure 4: Stanwell reference tariff**Figure 5: Gregory reference tariff**

Figure 6: Goonyella reference tariff

Key aspects underpinning the assessment of reference tariffs are as follows:

- assets were valued in accordance with the depreciated optimised replacement cost approach (opening value \$2.04 billion)
- depreciation was effected on a straight line basis (based on various physical asset lives, the most significant of which is a 40 year track life)
- operating and maintenance costs were estimated on a stand-alone basis for the coal network
- contributed assets were not taken into account in the assessment because any adjustments will be made on a case-by-case basis upon demonstration, by way of documentary evidence, that recognition beyond an existing haulage agreement is justified
- a post-tax nominal weighted-average cost of capital of 8.63% was derived as follows:
 - risk-free rate being based on the 10 year Commonwealth Government bond rate on the day of the decision
 - a market risk premium of 6%
 - an asset beta of 0.45, from which an equity beta of 0.76 and a debt beta of 0.2 were derived
 - tax being based on QR's forecast tax liabilities at the prevailing tax rate and imputation credits valued at 50%
- reference tariffs will be escalated by CPI less an X factor adjustment of 1.5% per annum.

3. DRAFT DECISION

3.1 Introduction

In accordance with ss136(4) of the QCA Act, the QCA refuses to approve the Draft Undertaking given to it by QR. In refusing to approve a draft undertaking, paragraph 136(5)(b) of the QCA Act requires the QCA to state the way in which it considers it is appropriate to amend the draft undertaking. The reasons for the proposed amendments to QR's Draft Undertaking are discussed in Volumes 2 and 3 of this Draft Decision. A summary of the QCA's proposed amendments is provided below.

3.2 Amendments to Part 2 – Scope and Administration

Amendment 1 – Rail infrastructure on privately-owned land: Chapter 2; section 2.2

Para 2.1(d) should be amended to commit QR to provide an access seeker seeking access to rail infrastructure on land to which QR is not authorised to grant access, with:

- the name, address and contact details of the relevant landowner;
- advice to the access seeker concerning the nature and extent of the rights, if any, which QR holds in relation to the infrastructure; and
- a letter indicating that the access seeker is negotiating with QR with respect to the use of QR's rail infrastructure and whether or not QR has an objection to the access seeker negotiating access to the land and in that event full details of the objections;

within 14 days of the lodgement of the access seeker's access application.

Amendment 2 – Public reporting of QR's compliance with the Undertaking: Chapter 2; section 2.6

A new clause should be inserted in the Undertaking that commits QR to report to the QCA within the first half of each financial year, in respect of its previous financial year:

- the number, and percentage, of requests for preliminary information responded to within the nominated time frame;
- the number, and percentage, of access applications acknowledged within the nominated time frame;
- the number, and percentage, of access applications in which an extension of time for provision of an indicative access proposal is sought by QR;
- the number, and percentage, of indicative access proposals provided within the nominated time frame;
- the average number of days taken to acknowledge an access application, in those circumstances where QR has taken in excess of 7 days to respond to access seekers;
- the average number of days taken to provide the indicative access proposals, in those instances where QR has taken in excess of 30 days to provide the document to access seekers;

- the number, and percentage, of instances in which an access seeker has notified QR that it believes that the indicative access proposal has not been prepared in accordance with the Undertaking;
- the number of non-ring-fencing related disputes, regarding an alleged procedural breach of the Undertaking, that are referred to the dispute-resolution process;
- the number of non-ring-fencing related disputes, regarding an alleged substantive breach of the Undertaking, that are referred to the dispute-resolution process;
- the number of disputes where QR was found to have committed a procedural breach of the Undertaking;
- the number of disputes where QR was found to have committed a substantive breach of the Undertaking;
- the number of complaints received regarding an alleged breach of QR's ring-fencing obligations;
- the number of complaints where QR was found to have breached its ring-fencing obligations;
- the number of agreements concluded; and
- the number of variations to existing agreements concluded.

3.3 Amendments to Part 3 – Ring-fencing Arrangements

Amendment 3 – Organisational structure: Chapter 3; section 3.2

Scheduling and train control

QR should assign management and operational responsibility for the performance of the scheduling and train control function to Network Access with the exception of the Brisbane Mayne (Citytrain) centre. Paras 3.2(c) & (d) should be amended accordingly.

Transitional arrangements have been proposed for the reassignment of responsibility for the short-term scheduling and train control functions at the following train-control centres:

- Mackay and Rockhampton to be moved within Network Access' responsibilities within six months of the Undertaking being approved; and
- Townsville and Brisbane Central (freight) to be moved within Network Access' responsibilities within nine months of an Undertaking being approved.

Organisational restructuring

A new provision should be inserted such that, if at any time during the life of the Undertaking, QR proposes to make any of the following changes to its organisational structure, it must submit a draft amending undertaking to the QCA for approval:

- Network Access is abolished;
- any of Network Access' current functions, including the scheduling and train-control functions, are reassigned to any other QR business group;

- any construction, maintenance or associated functions performed by Infrastructure Services Group are assigned to the above-rail business groups;
- any functions performed by Technical Services Group associated with the processing of access applications are assigned to the above-rail business groups; and
- the Safety Executive is subsumed within an above-rail business group.

Amendment 4 – Protection of confidential information: Chapter 3; section 3.4

QR should amend the definition of confidential information in Part 8 to:

- provide that it is information which ‘is not publicly available and the disclosure of which might reasonably be expected to affect materially the commercial affairs of a person’ and insert the word ‘lawful’ before the word ‘possession’ in para (iii); and
- include ‘derived information’ ie any notes, calculations, conclusions, summaries or other material derived or produced partly or wholly from any confidential information.

Scope of confidentiality provisions²

Para 4.2(a) should be amended to refer not only to confidential information exchanged as part of the negotiation process but also exchanged throughout the duration of an access agreement.

A new provision should be inserted recognising that information reasonably necessary to be disclosed by a third-party operator to customers or potential customers in the course of and for the purpose of furthering its business is not confidential information.

A new provision should be inserted to provide that an access seeker’s confidential information must only be used for a permitted purpose, that is, to respond to an access application, develop an indicative access proposal or execute and administer an access agreement.

Confidential information flows

To protect access seekers’ confidential information that is passed to Network Access, new provisions should be inserted to:

- reserve the QCA a right to develop a confidentiality deed which either QR or a third-party operator could enter into at their discretion;
- require all QR staff likely to be disclosed a third-party operator’s confidential information to sign an internal personal confidentiality deed;
- establish an obligation on QR to establish an acknowledgment of receipt form and acknowledgment register for each third-party operator and its associated access negotiation process to provide an ongoing record of those persons who are disclosed a third-party operator’s confidential information.
- specify the following persons and/or segments within QR as segments of ‘confidential information convergence’ ie. approval from a third-party operator is not required prior to disclosure of its confidential information:

² The Draft Undertaking’s confidentiality provisions are in Part 4 rather than Part 3. However, given the importance of confidentiality to QR’s ring-fencing arrangements, it has been discussed in Chapter 3 of the Draft Decision.

- Chief Executive Officer and Board;
 - Group General Manager Technical Services Group;
 - Rollingstock Engineering Unit within Technical Services Group;
 - Environmental Unit within Technical Services Group;
 - Group General Manager Infrastructure Services Group; and
 - Corporate Counsel.
- provide that an access seeker's approval for the release of its confidential information cannot be unreasonably withheld where:
 - if Network Access intends passing the confidential information to an internal adviser to process an access application, it obtains the prior consent of the access seeker and agrees to execute a confidentiality deed in an agreed form – or, failing agreement, in a form approved by the QCA from time to time - with the access seeker; or
 - the internal adviser being disclosed the confidential information has no direct or indirect involvement in advising an above-rail business group on that or related matters.

Legal advisers and consultants

New provisions should be inserted in the Undertaking to:

- require Network Access to appoint its own in-house legal team and preclude a member of that legal team, if he/she subsequently moved on to work for a QR above-rail business group, being able to work for 12 months on a matter for that business group if it was directly or indirectly related to a matter involving an access seeker that person dealt with whilst advising Network Access;
- require that QR employ different external solicitors/consultants/advisers for its above and below-rail business groups where there is a potential for a conflict of interest to occur eg where a third-party operator and an above-rail business group are competing for business and an external adviser is acting for that QR business group;
- insert a requirement to the effect that QR's contracts with external advisers to Network Access will provide that Network Access will inform the access seeker before disclosing any information – confidential or otherwise - to the adviser and the adviser will not disclose confidential information in respect of access seekers or users to other QR business groups; and
- explicitly committed that only Network Access has access to the confidential information of a third-party operator in the FMS (information management) system.

Amendment 5 – Breaches of Ring-fencing Guidelines: Chapter 3; section 3.5***Ring-fencing obligations***

New provisions should be inserted in the Undertaking to:

- provide for QR to report immediately to the QCA any actual or alleged breach of the Ring-fencing Guidelines and any response by QR;
- establish an initial internal-review process for alleged ring-fencing breaches such that:
 - the internal review is completed and the access seeker notified in writing of the findings of the review within 28 days of the alleged breach being brought to QR's attention in writing;
 - an access seeker and the QCA could refer a dispute over the findings of the internal review to the QCA at the end of the 28 day period; and
 - the results of the QCA review provide a basis for compensation;

Implications of breaches

New provisions should be inserted to:

- include a liquidated damages clause of \$10,000 where confidential information is disclosed to an above-rail business group in breach of the Ring-fencing Guidelines;
- allow an access seeker to seek recourse through the courts if it can demonstrate that an alleged breach of the ring-fencing provisions of the Undertaking had caused damage in excess of \$100,000. In addition to any remedies available at law or in equity, the access seeker should also be able to seek injunctive relief against QR; and
- in the event of confidential information falling into the hands of a person within QR who did not reasonably require access to it, place the onus of proof on QR to demonstrate that this did not occur as a result of a breach of the Undertaking's confidentiality obligations.

Amendment 6 – Audits of Ring-fencing Guidelines: Chapter 3; section 3.6

Para 3.5(b) should be amended to:

- provide for annual compliance audits of the Ring-fencing Guidelines;
- reserve the QCA's right to decide whether an internal or external compliance audit of the Ring-fencing Guidelines should be conducted and in the case of an external audit, to choose the identity of the auditor;
- commit QR, in the event of an external audit, to provide all information requested by the auditor within specified time frames determined at the time of the auditor's appointment and to pay for the audit;
- commit QR to provide compliance audit reports to the QCA; and
- allow the QCA to publish, as appropriate, QR's compliance audit reports.

Amendment 7 – Proposed framework for establishing internal access agreements for existing QR train services: Chapter 3; sub-section 3.7.1

Sub-para 3.4.1(b) should be replaced by a provision reflecting that in developing internal access agreements for existing train services:

- the term of internal access agreements be the same as the term of the relevant external agreement between QR and its private and government customers;
- for general freight and freight forwarding services, a maximum transitional term of two years for internal access agreements be applied unless there is a longer external agreement in place; and
- for new tonnages of bulk commodities not covered by an existing contract, the internal access agreement be linked to the term of the new contract.

The two-year transitional period would start from the date of release of the QCA's Final Decision on QR's Draft Undertaking.

Amendment 8 – Proposed framework for establishing internal access agreements for new or renewed services: Chapter 3; sub-section 3.7.3

Sub-cl 3.4.2 should be removed. New provisions regarding the development of internal access agreements for new or renewed train services should be inserted such that:

- internal access agreements for new or renewed train services developed in accordance with a standard access agreement for coal haulage services (once completed) and approved reference tariffs will not be subject to s104 of the QCA Act;
- the disclosure of all below-rail aspects of new rail access agreements in the coal mining sector is allowed; and
- QR commits to provide its internal access agreements for non-coal train services to the QCA for review.

3.4 Amendments to Part 4 – Negotiation Framework**Amendment 9 – Management responsibility for QR's infrastructure: Chapter 4; section 4.2**

Subject to stakeholder comment, QR should assign management responsibility for its infrastructure in accordance with line diagrams attached to Chapter 4.

QR should incorporate the following principles for the assignment of management responsibility for QR's rail infrastructure as a schedule to the Undertaking:

- the overall objective of the assignment process is to ensure that third-party operators are not forced to negotiate with QR's above-rail business groups for access to declared rail-transportation services. This objective requires the following outcomes from the assignment process:
 - (a) Network Access should operate as a stand-alone provider of declared rail-transportation services. The onus of proof in justifying a departure from this principle rests with QR.

-
- (b) Existing market shares of QR's above-rail business groups should not be a factor in the assignment of management responsibility for declared services.
- (c) Network Access should provide access - using its own infrastructure - to any private siding.
- (d) Network Access should provide access to: any end user's facility not owned or leased by a rail operator; a facility where there is joint use by end users.
- (e) Network Access should provide access to declared rail-transportation services that assist normal mainline operations. These operations include the following rail transport functions:
- mainline running, including the use of passing loops;
 - loading and unloading at facilities other than freight centres and depots, undertaken as part of the normal operational cycle;
 - train queuing and staging for the following activities so long as they are undertaken as part of the normal operational cycle:
 - loading and unloading;
 - transit;
 - 'on track' maintenance, provisioning and crewing activities;
 - train marshalling and shunting:
 - in preparation for transit;
 - in preparation before or after train loading or unloading;
 - in preparation before or after maintenance and provisioning.
 - short term train storage:
 - in a breakdown situation;
 - for short periods where product flow has been disrupted;
 - for short periods where the timetable does not allow use.
- (f) Disputes between an access seeker and QR with respect to a request for a reassignment of management responsibility for a part of QR's rail infrastructure from an above-rail business group to Network Access should be referred to the QCA for resolution. The QCA would adopt the following four step dispute resolution process:
- the access seeker would write to QR seeking a reassignment of management responsibility;
 - QR would be required to respond in writing within 30 days, providing an explanation of its decision;

- if the access seeker did not accept QR's decision, the matter would be referred to the respective Chief Executive Officers of the two parties within 7 days for resolution. The Chief Executive Officers would have a further 14 days to resolve the dispute; and
- if there were no resolution after 14 days, the access seeker or QR would give notice to the QCA about the dispute and the QCA would then resolve the matter.

Amendment 10 – Assignment of management responsibility for stations and platforms: Chapter 4; section 4.3

Sub-paras 4.1.1(a) & (b) should be amended to:

- assign management responsibility, including access negotiations, for track adjacent to all platforms/stations to Network Access; and
- assign responsibility for access negotiations regarding declared services within stations and platforms to Network Access. Such negotiations should occur within the framework of the Undertaking.

Amendment 11 – Access seekers' right to sign access agreements with QR: Chapter 4; section 4.4

Sub-para 4.1.1(c) should be amended to provide that both accredited and non-accredited organisations can execute access agreements with QR, provided that an appropriately accredited railway operator performs the train services.

Amendment 12 – Discretion to refuse to negotiate - prudential requirements: Chapter 4; section 4.5

Paras 4.1.2(b) & (c) should be amended to:

- require QR to enter into negotiations with an access seeker in order that it could establish whether the circumstances for a refusal to enter into an access agreement are met;
- place the onus on QR to justify its refusal to enter into an access agreement by demonstrating that the access seeker was not capable of meeting the terms and conditions specified in its proposed access agreement in a material way;
- require where QR established the circumstances for a refusal to enter into an access agreement to provide written reasons for its refusal to the access seeker within 14 days; and
- adopt the following definition of solvency;

“Solvent” means none of the following events have happened in relation to the third-party operator:

- (a) the third-party operator is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the Corporations Law;

- (b) a meeting is convened to pass a resolution to place it in voluntary liquidation or to appoint an administrator, unless the resolution is withdrawn within 14 days or the resolution fails to pass;
- (c) an application is made to a court for it to be wound up and the application is not dismissed within one month;
- (d) the appointment of a controller (as defined in the Corporations Law) of any of its assets, if that appointment is not revoked within 14 days after it is made; or
- (e) the third-party operator resolves to enter into, or enters into, any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement”.

Para 4.1.2(d) should be removed and replaced with the following principle for negotiating in respect of committed capacity:

- if QR can establish that an application is frivolous or vexatious, it is entitled to recover its costs. QR may seek acknowledgment of an access seeker’s liability for costs in such a negotiation.

Amendment 13 – Information required by QR: Chapter 4; sub-section 4.6.1

New provisions should be inserted in the Undertaking to:

- allow access seekers the opportunity to revisit the Schedule C information that they provide as the negotiation process proceeds; and
- impose an obligation on QR to provide Schedule D preliminary information before it requires Schedule C information, provided the costs of provision are met.

Amendment 14 – Information provided by QR: Chapter 4; sub-section 4.6.2

Schedule D should be amended to specify that for rail corridors where no reference tariffs apply, the preliminary information incorporates price and costing information consistent with ss101(2) and ss101(3) of the QCA Act.

Amendment 15 – Appropriateness and basis of fees for information provision by QR: Chapter 4; sub-section 4.6.4

Para 4.3(f) should be amended to provide that fees for information provision reflect the costs of provision and guiding principles regarding the setting of fees are established.

Amendment 16 – Time frames for action: Chapter 4; sub-section 4.6.5

The time frame in para 4.6(b) should be extended to 60 days.

Para 4.6(c) should be amended to:

- reflect that QR will respond to concerns including, where appropriate, the making of revisions to the indicative access proposal, within a period of 30 days, under normal circumstances. If the required response is more complex, QR will advise the access seeker within 7 days of receipt of its written concerns regarding the time required to respond (consistent with the indicative access proposal process in para 4.4(c);

- state that, if an access seeker is satisfied with the response received from QR, including any revisions to the indicative access proposal, it must notify QR of its intent to proceed with negotiations within 60 days of receiving QR's response; and
- remove the 30 day time frame for the triggering of dispute resolution in para 4.6(c).

Amendment 17 – Dispute resolution: Chapter 4; section 4.7

Sub-cl 4.9.2 should be amended such that where QR utilises a 'nominee' in the Chief Executive resolution process, that nominee be the General Manager of Network Access.

3.5 Amendments to Part 5 - Pricing Principles**Amendment 18 – Appropriateness of revenue adequacy objective: Chapter 5; sub-section 5.2.1**

Sub-cl 5.1.1 should be amended such that:

- revenue adequacy is considered in the context of efficient operations and the efficient level of assets actually required to provide the service; and
- in the event there is a conflict between QR pursuing revenue adequacy and non-discriminatory pricing in a particular market, provides for the latter to prevail unless QR can justify the price difference to the QCA.

Amendment 19 – Limits on price differentiation: Chapter 5; sub-section 5.2.2

Sub-cl 5.1.2 should be amended such that:

- price differentiation is subject to a market test in which all third-party operators within defined markets would be subject to price differentiation on cost and risk differences only (whether or not they are competing head-to-head) with QR bearing the onus of justifying price differences; and
- third-party operators have the option of rate-review provisions in access agreements if an operator is able to demonstrate that QR has sold a like-train path to another operator for a lower price than applies to that operator.

Amendment 20 – Rail infrastructure utilisation: Chapter 5; sub-section 5.2.3

Sub-cl 5.1.3 should be amended such that QR's assessment of the commercial justification for expansions of its network should focus on the net additional revenue it expects to earn.

Amendment 21 – Pricing limits: Chapter 5; section 5.3

The stand-alone cost definition in Part 8 should be amended to replace 'those costs that QR would incur' with 'those costs that would be incurred by an efficient network provider'.

Sub-para 5.2.2(a) should be amended to oblige QR to observe the limits on price differentiation irrespective of whether the resulting access charges cover the incremental cost of the individual train service.

The incremental cost definition in Part 8 should be amended to replace 'those costs of providing access' with 'those costs of an efficient network provider providing access'.

Amendment 22 – Reference tariffs for trains services not identified in Schedule G: Chapter 5; section 5.4

Sub-para 5.3.1(f) should be amended to oblige QR to submit reference tariffs for other services within three months of being required to do so by the QCA and comply with any request from the QCA for information to enable the QCA to assess those reference tariffs.

Amendment 23 – Cost allocation: Chapter 5; section 5.5***Costing Manual***

The QCA does not consider it appropriate to attempt to complete its assessment of QR's Costing Manual in conjunction with its assessment of QR's Draft Undertaking. However, the QCA proposes that the Manual should include:

- default allocators for corporate overheads;
- the creation of additional account codes to more accurately reflect the split of costs and assets relating to declared and undeclared services;
- telecommunications costs to be assigned to QR's business groups, other than the below-rail groups, on the basis of the market price of the services consumed by those groups;
- QR's four Central Queensland coal systems to be treated as geographic regions in their own right;
- the more structured use of work orders;
- the netting off of 'like for like' cost recovery-type revenue items against the relevant cost items; and
- the assignment of corporate service costs to levels appropriate to where the costs are incurred rather than the Group General Manager level.

Accounting arrangements³

Para 3.3(b) should be amended to:

- commit QR to report to the QCA within the first half of each financial year, in respect of its previous financial year:
 - a statement of assets, a statement of earnings before interest and tax and a cash-flow statement, excluding interest, tax and dividends, aggregated for the declared services, prepared using generally accepted accounting principles and in accordance with QR's normal external reporting format; and
 - a statement of assets, a statement of earnings before interest and tax and a cash-flow statement, excluding interest, tax and dividends, aggregated for operations on the Blackwater, Goonyella, Newlands and Moura coal systems, prepared using generally accepted accounting principles and in accordance with QR's normal external reporting format; and

³ The Draft Undertaking's provisions concerning QR's accounting arrangements are in Part 3 rather than Part 5. However, given their importance to cost allocation matters, the subject has been discussed in Chapter 5 of the Draft Decision.

- undertakes to publish asset values and depreciation for those services for which access charges are based on the ceiling of stand-alone cost, in the instances where relevant asset values for pricing purposes depart from those published in financial statements.

Audits of Costing Manual

A new provision should be incorporated in the Undertaking that provides for the following audit framework for the Costing Manual in that it:

- defines the scope of the audit such that the auditor examines whether:
 - the processes contained in the Manual have been followed; and
 - the financial statements represent a reasonable allocation of costs and are consistent with the Manual;
- requires financial statements to be prepared in accordance with the Manual within 6 months of the end of the financial year;
- provides that these accounts would be certified by the Chair and the Chief Executive or the Chair and a Director;
- provides for the QCA to select the auditor to audit QR's compliance with its Manual;
- confirms the auditor would be provided full access to QR's information systems, with the degree of access forming part of the auditor's report to the QCA;
- obliges QR to provide any information the auditor requires within any reasonable time frame nominated by the auditor;
- acknowledges that QR must comply with the QCA's requirements in response to a qualified audit report in accordance with the QCA's time frames; and
- acknowledges that an audit may be conducted at any time.

Amendment 24 – Performance regime: Chapter 5; Section 5.6

A new provision should be inserted to provide for the following key performance-indicators to be disclosed publicly on a monthly basis:

- the number, and percentage, of trains that enter the network healthy, but depart unhealthy;
- the number, and percentage, of unhealthy trains that do not deteriorate further whilst on the network;
- the number, and percentage, of healthy trains that leave the network early;
- the number, and percentage, of unhealthy trains that leave the network early;
- the average deterioration time of unhealthy trains;
- the number, and average duration, of delays by source such as track repairs, track construction, terminals, equipment failure, network scheduling, above-rail operator, weather and accidents;

- the number of complaints relating to system reliability and delays;
- the number of kilometres under temporary speed restrictions, expressed as a percentage of total track kilometres;
- the number, and percentage, of instances in which trains have not achieved their allocated timetable or path, or a path is allocated outside the tolerance of the capacity entitlement, due to the unavailability of the allocated path;
- the number of instances of track possession time overruns, and the percentage of total track possessions in which such possessions have been of a greater duration than foreshadowed in the daily train plan;
- the number of instances in which an operator has failed to be contacted about a departure from its capacity entitlements;
- track quality, measured by a quality index with component measures such as rail surface level, alignment, twist/cross level and gauge variation;
- the number of reportable incidents, specific to each operator; and
- the number of complaints regarding billing accuracy.

3.6 Amendments to Part 6 - Capacity Management

Amendment 25 – Scheduling and train control framework: Chapter 6; section 6.2

References to the scheduling and train control protocols in the Draft Undertaking should be removed.

A new provision should be inserted requiring QR to provide third-party operators with any document train controllers are supplied with to assist in the performance of their duties.

Amendment 26 – Train scheduling practice: Chapter 6; section 6.3

Cl 6.1 should be amended to commit QR to perform the scheduling function in accordance with the Scheduling Principles.

The following Scheduling Principles should replace the scheduling and train-control protocols and be incorporated as a schedule to the Undertaking:

Capacity Entitlement Principles

- (a) All railway operators' capacity entitlements will use consistent terminology incorporated in a single glossary.
- (b) Capacity entitlements will be expressed in terms that can be interpreted for the development of a master train plan and a daily train plan.
- (c) Where objectives of either party cannot be met, the parties could, in accepting the capacity entitlement, document the areas where the objectives are not being met with a view to modifying the capacity entitlement at another opportunity.

Master Train Plan Principles

- (a) The master train plan will need to define all of the railway operators' capacity entitlements and Network Access' requirements in a form that indicates the time/distance (location) relationship of the train services.
- (b) The master train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service (eg. explanations of underlying capacity entitlements).
- (c) The master train plan may be modified:
 - (i) from time to time according to new capacity entitlements, changes to existing capacity entitlements, or their underlying objectives, and any actual train data. In any event, stakeholders will review the master train plan at least every 3 months;
 - (ii) at any time following a request by an railway operator to make such a change on terms established by their capacity entitlement;
 - (iii) where actual train running indicates a consistent variation of greater than 10%; and
 - (iv) following a review by railway operators at least every 3 months.
- (d) Network Access will invite all railway operators to contribute to the modification of the master train plan. Each operator will be provided with a copy of any proposed changes 48 hours prior to a meeting between all parties. An operator will have the power of veto over changes to the master train plan if its capacity entitlement can no longer be satisfied.
- (e) The master train plan will be in a form that is readily convertible to a daily train plan, which is the principal reference document to be used by the train controllers in carrying out their duties.

Daily Train Plan Principles

- (a) The daily train plan will express the relevant railway operator's capacity entitlement and Network Access' requirements in a form that indicates the time/distance (location) relationship of the train services. It will reflect the information contained in the master train plan.
- (b) The daily train plan will consist of a graphical representation as well as any explanatory notes to indicate any relevant conditions of service.
- (c) Network Access will invite all railway operators to contribute to the formulation of the daily train plan. This will normally occur each week, for the coming week or fortnight. Unless otherwise agreed by all parties, Network Access will make available a draft of its understanding of operators' requirements 24 hours before a weekly meeting of all parties to finalise the plan.
- (d) The daily train plan may be modified:
 - (i) periodically during the course of its currency, in accordance with the railway operators' capacity entitlements or Network Access' needs;
 - (ii) at any time following a request by a railway operator to make such a change on terms established by its capacity entitlement; and

- (iii) where actual train running indicates a consistent variation to that established in the access agreement and formulated in the daily train plan.
- (e) Network Access will invite all railway operators to contribute to the modification of the daily train plan. Each operator will be provided with a copy of any proposed changes.
- (f) The daily train plan will be the principal reference document from which train controllers will carry out their normal duties of train routing and dispatch, as well as incident management where trains run differently from their expected paths.
- (g) The daily train plan will express the expected train operation performance-target over its period and will be used as the base information for performance monitoring in reference to the underlying capacity entitlement.
- (h) Modifications to the daily train plan may occur during the course of its duration in the event of out-of-course running. Those modifications will occur according to the train-control principles.

Amendment 27 – Train priority: Chapter 6; section 6.4

Cl 6.1 should be amended to commit QR to perform the train-control function in accordance with the Train-Control Principles.

The following Train-Control Principles should replace the scheduling and train-control protocols and be incorporated as a schedule to the Undertaking:

- (a) The fundamental objective of train control will be to facilitate the running of train services and the commencement and closures of track possessions as scheduled in the daily train plan.
- (b) The following general principles apply to train operations and train control:
 - (i) all parties will ensure that operational safety is maintained through compliance with safe-working rules, safety management systems, applicable safety-risk management and rollingstock interface requirements and environmental-management systems;
 - (ii) railway operators will ensure operating integrity, including train crewing, locomotives, wagons and loading so that the daily train plan can be met;
 - (iii) QR will manage the network on behalf of railway operators based on agreed entry/exit times as specified in the daily train plan with the objectives of managing trains according to their schedule for on time exit, not contributing to late running and, if a train is running late, making up time and holding the gain where reasonably possible; and
 - (iv) the primary objective is to keep healthy trains healthy.
- (c) Out-of-course running is dependent on the particular circumstances of a rail corridor, including the traffic type using the corridor. In the event of out-of-course running:
 - (i) except as provided in a railway operator's access agreement, train control will adhere to the contracted capacity entitlement of each railway operator, expressed in terms of the daily train plan. The capacity entitlement will reflect a level of priority on the network;

- (ii) where train control fails to adhere to a railway operator's contracted capacity entitlement, the terms of that operator's access agreement will govern the consequences;
 - (iii) the identity of a railway operator will, of itself, play no part in a decision by train control to alter that operator's scheduled train service; and
 - (iv) train control will resolve conflicts in accordance with the primary goal of keeping trains healthy.
- (d) The Matrix, approved by the QCA, will be provided to assist train controllers in the resolution of disputes in accordance with the above principles.
- (e) For the purposes of the Matrix, a 'healthy' train is defined as one that has experienced no deviation - in excess of an agreed tolerance - from the path in the daily train plan that is attributable to QR as the rail manager. Out-of-course running refers to the circumstances in which the actual running of a train service differs, by more than an agreed tolerance, from the path provided in the daily train plan.
- (f) QR will provide railway operators with the current version of the Matrix, real-time train-control information and copies of train-control diagrams to assist operators understand how train-control decisions are made.

Amendment 28 – Public availability of capacity information: Chapter 6; section 6.5

A new provision should be inserted in the Undertaking to provide for the release of sufficient information to allow access seekers to conduct their own capacity analysis.

Such information would include:

- master train plan;
- relevant daily train plans;
- train control diagrams;
- maintenance requirements; and
- historical delay and system disruption data.

Access seekers would be required to pay QR's reasonable costs in providing such information.

Amendment 29 – Capacity-allocation process: Chapter 6; section 6.6

Sub-para 4.7.1(c)(iii) should be removed.⁴

Sub-para 6.3.2(b) should be amended such that:

- access rights are contingent on the winning of a contract with an end user by a specified date. Reference to 'the most favourable commercial outcome for the below-rail service provider' should be removed;

⁴ This provision is in Part 4 of the Draft Undertaking. Given its importance to QR's capacity-allocation process, the Authority has discussed it in Chapter 6 of the Draft Decision.

A new provision should be inserted in the Undertaking to provide for the following procedures in the event that capacity auctions are conducted:

- lodgement of bids made before a specified date;
- closed bids, with rivals unaware of competitors' offers;
- winning bid made transparent and communicated to all participants; and
- process overseen by an independent person.

Amendment 30 – Resumption of access rights: Chapter 6; section 6.7

Resumption test

Para 6.4(a) should be amended to:

- establish a threshold trigger for resumption of access rights where a railway operator, for any reason other than the occurrence of a force majeure event or the failure of QR to make the railway operator's access rights available, does not operate:
 - (i) a train service on a scheduled train path seven (7) or more (not necessarily consecutive) times out of any twelve (12) consecutive occasions on which that particular scheduled train path exists; or
 - (ii) all of its nominated weekly train services for seven (7) or more (not necessarily consecutive) weeks out of any twelve (12) consecutive weeks;
- allow QR to issue a notice in writing which reduces the railway operator's access rights, either by:
 - (i) deleting the relevant scheduled train-path from the railway operator's access agreement; or
 - (ii) reducing the railway operator's relevant nominated weekly train-services, provided that the number of remaining nominated weekly train-services is no less than the railway operator's average weekly usage during the relevant twelve (12) week period;

once the threshold trigger has been satisfied and provided:

- (iii) the railway operator is not able to demonstrate, to QR's reasonable satisfaction, a sustained requirement for the access rights; and
 - (iv) QR is satisfied that it can demonstrate that it has a reasonable expectation of alternative demand to justify a resumption of capacity;
- provide that where QR reduces a railway operator's access rights, the access charge payable by the railway operator will be varied in accordance with the terms of its access agreement;
- provide that where QR makes a decision to reduce a railway operator's access rights in accordance with the stated procedure, and the railway operator believes that QR's decision is not justified in the circumstances, the railway operator may challenge the decision through the dispute-resolution procedure for capacity-resumption disputes;

- provide that QR will not implement the reduction, unless and until the dispute resolution procedure has been exhausted in favour of its decision, provided it is not otherwise required to do so by law.

Disputes over resumption

A new provision should be inserted in the Draft Undertaking to incorporate the following procedure to apply with respect to capacity resumption disputes:

- a party (either QR, a railway operator or an access seeker) instigates the process by giving notice to the QCA and the other relevant parties indicating the capacity sought and detailing the circumstances which have led to the satisfaction of the trigger. The QCA would then substantiate the information and appoint an expert to hear the matter. Once an expert has been appointed, parties would be allowed 10 business days to make submissions with:
 - the incumbent railway operator bearing the onus of demonstrating that it satisfies the test for a sustained requirement for the access right; and
 - QR, as network manager, bearing the onus of demonstrating that the test of a reasonable expectation of alternative demand is met.

The expert would be allowed 10 business days in which to deliver a decision, which would become effective at the expert's discretion.

Miscellaneous resumption matters

New provisions should be inserted in the Draft Undertaking to:

- establish the life of a particular transgression of the capacity resumption trigger as one month;
- permit an end user to change its railway operator subject to the satisfaction of capacity-transfer conditions;
- provide that all of the above resumption matters also be included in access agreements; and
- establish a right for access seekers to apply for a resumption of an incumbent's capacity.

Amendment 31 – Capacity transfer procedures: Chapter 6; section 6.8

Relinquishment of access rights

Para 6.4(c) should be amended to:

- allow an access seeker carrying non-coal freight and passenger traffics to surrender its access rights subject to the access seeker continuing to pay the difference between its contracted access charge and the maintenance costs saved for the relevant line/corridor for the remainder of the contract term, or until QR resells the capacity;
- oblige QR to assign surrendered access rights to the next access seeker that seeks rights consistent with those that have been surrendered; and

- recognise that if QR could not have supplied a train path to the next access seeker without using some part of the surrendered capacity, then the access rights should be considered consistent and the surrendered party's obligation to QR would then be terminated.

Secondary market in access rights

Para 6.4(f) should be amended to:

- allow the transfer of unwanted capacity rights between participants, including partial transfer, by bilateral negotiation, subject to the establishment of adequate notification procedures between QR and capacity holders;
- allow access agreements to make appropriate adjustments to access rights so that transferability could be accommodated; and
- subject to a commerciality test, not allow QR to unreasonably withhold consent for the transfer of capacity.

3.7 Amendments to Part 7 – Interface Considerations

Amendment 32 – Establishment of rollingstock interface standards: Chapter 7; section 7.2

Sub-cl 7.1.1 should be amended to remove the reference to the development of rollingstock interface standards (RIS) for the rail infrastructure and the requirement that only rollingstock and rollingstock configurations complying with the RIS may operate on that infrastructure.

A schedule to the Undertaking should be inserted that provides the following non-exhaustive list of minimum interface requirements to guide negotiations regarding minimum rollingstock interface standards during the joint safety-risk assessment so that any vehicle a third-party operator proposes to run on QR's network should be able to:

- remain on the track up to the permissible speed-limit;
- negotiate the varied track elements and configuration without interference or fouling;
- clear track-side structures and infrastructure;
- activate the signalling system
- stop from track speed within the required distances;
- retain its loading; and
- comply with environmental requirements.

Amendment 33 – Appropriateness of QR's role in authorising rollingstock: Chapter 7; section 7.3

Sub-paras 7.1.2(a) & (b) should be amended to:

- provide that QR and a third-party operator should agree on a party competent to provide certification for the operator's rollingstock; and
- reserve QR's right to seek documentation – eg. certificates of compliance - from a third-party operator in order to confirm that the rollingstock/rollingstock configurations for its

proposed train services are as agreed by the two parties in the safety-risk management plan.

Amendment 34 – Preparation of joint safety-risk assessment by QR and a third-party operator: Chapter 7; section 7.5

Sub-cl 7.3.1 should be amended to:

- recognise that QR's role in the preparation of a third-party operator's safety-risk assessments should not extend beyond preparation of the joint safety-risk assessment;
- provide for the following dispute resolution process for safety-related interface matters:
 - following receipt of written notice from either party notifying the other party of a safety-related interface matter, the Chief Executive Officers (CEOs) of the two organisations would meet to try and resolve the matter;
 - if the CEOs could not reach a resolution after 14 days of receipt of the written notice, the matter would be referred to the RSAU which would provide non-binding advice to the two parties; and
 - if the RSAU's advice did not facilitate resolution of the dispute, the matter would be referred to the QCA for arbitration under the QCA Act;
- provide that QR and a third-party operator would agree any additional training requirements for the third-party operator's staff during the safety-risk assessment process.

Amendment 35 – Appropriateness of QR providing assistance to prospective third-party operators to fulfil the Draft Undertaking's rollingstock and safety requirements: Chapter 7; section 7.6

Sub-cl 4.7.2 should be amended to insert a provision committing QR to provide:

- to a third-party operator, on a timely basis, all information relevant to the joint safety-risk assessment during the negotiation period; and
- a 'reasonable endeavours' commitment to assist a third-party operator meet any additional training requirements for its staff identified during the safety-risk assessment process.

Amendment 36 – Annual audits of third-party operators' compliance with the RIS and safety-management systems: Chapter 7; section 7.7

Paras 7.5(a) & (b) should be amended to remove QR's right to require an annual or 'spot' audit of a third-party operator's safety-risk management plan.

QR's right to an open-ended audit power concerning a third-party operator's compliance with the agreed rollingstock standards should be removed and replaced with an entitlement to audit within the following framework:

- QR must be obliged to provide all relevant information on above-rail rollingstock incidents - eg. incidences of dragging equipment and 'hot box' detection, over-loading and inaccurate train manifests - to a third-party operator concerning its train services;

- it should be specified in the access agreement with a third-party operator what aspects of that operator's compliance with the agreed rollingstock standards QR can audit;
- QR must provide reasonable grounds, as established in the access agreement, for the need for an audit prior to exercising its audit right; and
- a third-party operator must pay for audits of its rollingstock required by QR if the reasonable grounds for audit established in the access agreement are satisfied.

Amendment 37 – Reasonableness of QR's environmental requirements: Chapter 7; section 7.9

Environmental investigation

Sub-cl 7.4.1 should be amended to provide an option for a third-party operator to present its existing environmental-management system to QR for its consideration and as a basis for negotiation, as an alternative to the procurement of an environmental investigation and risk management report.

Environmental-management systems

Sub-para 7.4.2(b) should be amended to:

- remove the requirement that a third-party operator's environmental-management system be consistent with the ISO 14,000 environmental standard; and
- impose requirements in respect of QR's environmental authorities/licences on third-party operators to the extent that these licence requirements are relevant to the third-party operator's train services.

QR should also not reserve itself a right to terminate access agreements on the grounds of unacceptable environmental risks. A better process would be one where QR must provide a statement of reasons why it does not accept the environmental investigation and risk management report or the third-party operator's environmental management system. The third-party operator would have a right of reply, and if the two parties still cannot reach agreement on the contentious environmental matters, each should have the right to trigger dispute resolution procedures.

Environmental audits

Paras 7.5(a) &(b) should be amended to:

- link QR's auditing requirement to the risks posed by a third-party operator's train services and what is established in that operator's environmental-management system. Auditing requirements should be specifically addressed in the environmental-risk investigation and management report, if prepared, or during the exchange of information associated with the upgrading of the two parties respective environmental management systems;
- require each party to provide the other with copies of the relevant parts of its internal audit reports; and
- require that a third-party operator comply with its obligations under the EPA Act, including any notices or directions it receives from the EPA. Failure to comply with such

an obligation and for that failure to cause or threaten serious environmental harm would establish grounds for a material event of default.

Amendment 38 – QR’s assistance to prospective third-party operators concerning the Draft Undertaking’s environmental requirements: Chapter 7; section 7.10

The preliminary information provided to access seekers in accordance with Schedule D (Information Packs) should include noise-planning levels, including ‘interim’ planning levels, and an indication as to whether the planning levels are binding.

A new provision should be inserted in the Undertaking that commits QR to provide on a timely basis:

- all environmental reports, relevant licence conditions, base-line noise data, particulars of noise complaints, any enforcement action and a copy of the Queensland Rail Code of Practice for Railway Noise Management, to a third-party operator during the negotiation period.

Amendment 39 – Treatment of issues relating to adjoining infrastructure: Chapter 7; section 7.11

Paras 7.7(a) & (b) should be amended to:

- limit QR’s interest in the development of any adjoining infrastructure to the following interface elements:
 - the connection point or turn-out;
 - the safe-working system, including signalling; and
 - the electrical overhead system, where relevant;
- reserve QR’s right to approve the design of adjoining infrastructure and check its construction (after completion) against the design for the above interface elements and recover its reasonable costs thereof;
- require that the connection point (or turn-out) between the existing infrastructure should be designed and constructed to QR’s existing or committed engineering standards, whichever is relevant;
- recognise that safe-working arrangements for the adjoining infrastructure would be tailored to the level of risks generated by the particular physical characteristics of the adjoining infrastructure and the mainline, as well as the train services using the mainline and the adjoining infrastructure; and
- recognise the electrical power supply systems of QR and a third-party operator would need to be completely in accord with QR’s current design (or committed design in appropriate circumstances), as would the physical link between the electrical infrastructure on the mainline and adjoining track.

3.8 Amendments to Schedule E – Summary of Standard Access Agreement

Amendment 40 – Schedule E - Summary of standard access agreement

The Undertaking should incorporate the following principles regarding the development of a standard access agreement in lieu of the Draft Undertaking's Schedule E:

1. Access Rights

- The agreement will provide for non-exclusive train -service entitlements for the operation of train services in terms of agreed service levels over the nominated network. Train service entitlements can be varied only in accordance with agreed scheduling procedures specified in the agreement or as otherwise agreed between the parties.
- It is the responsibility of the third-party entering into an access agreement with QR to ensure that the operator of train services utilising the access rights is accredited.
- Access agreements will be for a specified term and include a good faith negotiation process for renewal.

2. Access Charges

- Access charges are to be agreed between the parties and payable in accordance with reasonable payment terms set out in the agreement. Late payments or credits by either party will bear interest at an agreed default rate.
- The Agreement will provide for a fair and reasonable mechanism for dealing with bona-fide disputed invoices. The mechanism will not discourage the raising of genuine disputes.
- The agreement may provide for periodic review of access charges.
- Unless otherwise stated, all amounts payable under the agreement are exclusive of GST.
- In appropriate cases, QR may require lodgement of a security to secure performance by the third-party of its obligations under the agreement having regard to QR's reasonable assessment of the creditworthiness of the third-party. An established rail entity's ability to demonstrate a track record of timely payment of similar obligations in other rail jurisdictions should be a relevant factor in assessing creditworthiness. Any required security should reflect the revenue-risk that QR has taken on.
- Where there are no security arrangements in place and a user defaults on its payments, QR is entitled to require some form of security equivalent to its financial exposure, where the default was not attributable to a legitimate dispute.
- A third-party paying a security deposit should be credited with interest on the security at a market-based rate for as long as it is held by QR.

3. Train Service Entitlements

- The third-party shall not be entitled to commence train services unless and until all provisions of the agreement required to be completed or complied with prior to the commencement of train services have been completed or complied with by the due date specified in the agreement. QR will use all reasonable endeavours to cooperate with the

third-party to facilitate the third-party's completion or compliance with such requirements.

- The third-party must only operate trains of the nominated specification for the transport of the nominated product-type over the nominated network.
- Train-service entitlements can be reduced by QR upon reasonable notice to prevent the hoarding of capacity and appropriate adjustments will be made to the access charges payable.

4. Day to Day Train Movements

- QR is to have responsibility for train control and shall exercise train control having regard to the safe conduct of rail operations on the nominated network.
- QR shall ensure that the operation of train services is in accordance with the daily train plans, which may be varied in the circumstances specified in the agreement (which normally include safety considerations, force majeure, incidents or emergencies, track possessions in accordance with the agreement or as otherwise agreed between the parties, such agreement not to be unreasonably withheld).
- The third-party is required to comply with all QR train control directions and ensure all trains and rollingstock are equipped with appropriate communication systems to comply with the agreed rollingstock interface standards.

5. Train Operations

- The agreement will specify all reasonable operational, communication and procedural requirements for train services.
- The third-party is to comply with all laws, safe-working procedures and safety standards and all other train operations requirements in the agreement. QR will comply with its safe-working procedures and safety standards and may, acting reasonably, vary the safe-working procedures and safety standards at any time following consultation with, and reasonable notice to, the third-party. Subject to such variations being on safety grounds, each party is responsible for its costs - including the costs of additional or modified equipment - in complying with the safe-working procedures and safety standards. Safe-working procedures and safety standards will as far as practicable be consistent for all railway operators on the nominated network.
- The parties should agree specific performance-levels and measurement criteria as a basis for creating effective performance-management and incentives. This may involve financially based incentives and sanctions. The performance levels may also be reviewed periodically.
- The agreement will specify relevant rollingstock interface standards. The third-party must obtain certification from an appropriately qualified person - both certification and person to be subject to the reasonable satisfaction of QR - that its rollingstock and rollingstock configurations comply with such rollingstock interface standards. Rollingstock and rollingstock configurations that are so certified will be included in the rollingstock specification as being authorised to operate on the nominated network subject to continuing compliance with the rollingstock interface standards and rollingstock specification.

- The third-party is responsible for the safe operation of its rollingstock on the nominated network and must ensure that at all times its rollingstock and rollingstock configurations comply with all applicable laws, the rollingstock specification and the rollingstock interface standards specified in the agreement. QR may suspend the operation of rollingstock and trains for demonstrated non-compliance that has safety implications until such non-compliance is rectified. If the source of non-compliance does not have safety implications, the third-party should be required to rectify the non-compliance within a reasonable period of time, but not be suspended. If the non-compliance is not rectified within a reasonable period, QR may suspend the operation of the affected rollingstock and trains.
- The third-party must ensure all loadings of rollingstock are secure.
- QR may, acting reasonably, vary the agreed rollingstock interface standards at any time on safety grounds, after consultation with the third-party. Otherwise, QR may, acting reasonably, negotiate any other changes with the third-party. Where any changes in the standards necessitate modification of the third-party's rollingstock, the costs of such modifications are to be borne in the manner agreed by the parties or, failing agreement, as determined by an expert.
- QR will not exercise its suspension power in relation to a third-party's rollingstock and trains in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act."
- "If the suspension of a third-party operator's rollingstock becomes a source of disputation, in the absence of an alternative dispute resolution process agreed between the parties, the Undertaking's dispute resolution procedures could be triggered."
- "A third-party operator could reserve the right that if its rollingstock is suspended without reasonable justification, then QR would be liable for the loss thereby caused."

6. Infrastructure Management

- QR is responsible for the management and control of the nominated network.
- QR will carry out maintenance work on the nominated network such that, subject to any agreed criteria, the infrastructure is consistent with the agreed rollingstock interface standards and the third-party can operate train services in accordance with its train service entitlements.
- QR may impose operational constraints - such as speed or load restrictions - for the protection of persons or property or to facilitate maintenance work or enhancements and has reasonable entitlements to take possession of the track for the purpose of maintenance work, emergency repairs and enhancements. In carrying out such work, QR will use its reasonable endeavours to minimise disruption to train services so that the third-party can operate train services in accordance with its train-service entitlements.
- The agreement will contain principles for consultation with the third-party regarding maintenance that will impact on the third-party's schedule.
- The agreement will contain provisions requiring the parties to provide advice to each other in relation to factors that could affect the third-party's operation of train services or the integrity of the nominated network.

- The third-party may inspect the nominated network for the purposes of assessing the operational, environmental and safety risks with respect to the infrastructure, as well as the standard of the infrastructure comprising the nominated network including, but not limited to, fencing and at-grade crossing protection. QR will not be liable for claims in relation to, or arising out of, the standard of the infrastructure except where QR fails to maintain the infrastructure such that, subject to any agreed criteria, it is consistent with the agreed rollingstock interface standards and the third-party can operate train services in accordance with its train service entitlements.
- The agreement will specify the reasonable terms and conditions on which the third-party will have access to the nominated network for the purpose of inspecting the standard of the infrastructure comprising the nominated network.

7. Incident Management

- Prior to the commencement of train services the third-party is required to develop an emergency response plan containing procedures for dealing with incidents which must not be inconsistent with QR's emergency procedures.
- In the event of an incident, QR is responsible for the overall coordination and management of incident responses and may, subject to using reasonable efforts to consult with the third-party, take any action it considers reasonably necessary to recommence services as soon as possible. The third-party is to cooperate and assist with the restoration of train movements in accordance with directions from train controllers seeking to coordinate the clearance of network blockages. Any third-party so directed should be adequately compensated for doing so and is entitled to expect that all rail operators are subject to the same obligation.
- Once a third-party's train has been moved off the main line and is no longer causing a blockage, it is responsible for implementing its recovery plan for the broken-down rollingstock, including effecting the recovery within a reasonable period.
- Investigations into incidents are to be commenced as soon as practicable after an incident and carried out in accordance with the process specified in the agreement. The parties must cooperate in any investigation and consult in good faith in relation to the implementation of any recommendations.

8. Environmental Protection and Other Issues

- All environmental laws, regulations and relevant guidelines must be complied with.
- Environmental management must be approached on a risk-identification and management basis with respect to operations on the nominated network. Auditing requirements should be linked to the environmental risks posed by a third-party's train services and be established in that third-party's environmental-management system.
- The third-party is required to inform QR of non-compliance with its environmental management system and provide details of how it intends to address the non-compliance. The third-party is required to rectify the breach as soon as practicable having regard to the nature of the breach and any action required by the EPA.

9. Accreditation

- QR must have and maintain accreditation as a railway manager under the *Transport Infrastructure Act 1994* to the extent required to perform its obligations under the Agreement.
- An operator accredited as a railway operator under the *Transport Infrastructure Act 1994* must operate train services and the operator must maintain such accreditation to the extent required to perform its obligations under the Agreement.

10. Third-party's Staff

- The third-party is responsible for demonstrating to the Rail Safety Accreditation Unit through the joint safety-risk assessment process, the competence of its staff performing safety-related work. QR may suspend the right of the third-party's staff to operate on the nominated network in the event of breach, or likely breach, of any laws, QR train control directions, safe-working procedures or safety standards, until such non-compliance is rectified.
- QR will not exercise its suspension power in relation to a third-party's staff in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.
- If the suspension of a third-party operator's staff becomes a source of disputation, in the absence of an alternative dispute-resolution process agreed between the parties, the Undertaking's dispute-resolution procedures could be triggered.

A third-party operator could reserve the right that if its staff are suspended without reasonable justification, then QR would be liable for the loss thereby caused.

11. Safety Risk Management

- Safety-risk management must be addressed by risk identification through a joint safety-risk assessment process and the formulation of a safety-risk management plan. The parties will be required to comply with the safety-risk management plan.

12. Inspection and Audit Rights

- Rights of inspection and audit in relation to the third-party's compliance with the agreement and inspection of trains and rollingstock shall be included in the agreement. The agreement will specify the terms and conditions on which QR can carry out such inspections and audits. Except in emergencies, QR will, in carrying out any inspection or audit, give the third-party reasonable notice and use reasonable endeavours to minimise disruption to the third-party's train services.

13. Insurance

- The agreement will provide for insurances to be effected by the parties to appropriately provide for the relevant insurance risks.

14. Indemnities and Liabilities

- Each party is liable for, and is required to release and indemnify each other for, all claims in respect of personal injury, death or property damage caused or contributed to - to the

extent of the contribution - by the wilful default or negligent act or omission of that party or its staff.

- The third-party is solely liable for, and is required to release and indemnify QR for, any damage to property or personal injury or death of any person being transported on train services, except to the extent that an act or omission by QR, its servants or agents, caused or contributed to the damage or harm.

15. Limitation of Liability

- The liabilities of the parties for default shall be limited as agreed in the agreement.
- Neither party has any liability for consequential loss or damage or loss of profits in any circumstances.
- Claims by either party must be lodged within twelve months of the occurrence of the event or circumstance giving rise to the claim.

16. Material Change

- Access charges will be adjusted to reflect the net impact of any material change where such material change results in a variation to the net cost to QR of performing its obligations under the agreement.
- A material change shall be limited to changes in taxes, laws or funding from QR's government infrastructure payments. The effect of material changes should be assessed on a case-by-case basis and in consultation with the third-party. There should be no assumption of automatic flow-on effects of material changes.
- Any dispute regarding the impact on access charges as a result of a material change will be determined by an independent expert.

17. Disputes

- Any dispute between the parties is to be firstly referred in writing to the respective chief executives for resolution. If the dispute is not resolved, then the parties may agree to refer the dispute for resolution by an expert or arbitration. If there is no agreement to resolve the dispute in this manner then the dispute is to be determined by a court.

18. Default, Suspension and Termination

- The agreement will specify reasonable events of default and mutual rights of suspension and termination having regard to the commercial interests of both parties.

19. Force Majeure Event

- The obligations of either party - other than an obligation to pay monies due - will be suspended where by reason of a force majeure event, that party is delayed in, or prevented from, carrying out its obligations under the agreement. The agreement will provide for relief in respect of the payment of access charges to the extent that QR is unable to provide access rights because of a force majeure event affecting QR.
- In the event that infrastructure on specified lightly trafficked corridors of the nominated network is damaged by a force majeure event and in QR's reasonable opinion the cost of

repairing the damage is not economic, QR may elect not to proceed with repairs or replacement unless the parties agree as to the funding of the cost of that work.

- The access agreement will provide for a process that might result in termination of the agreement in the event that circumstances of prolonged force majeure prevent the performance by a party of its obligations.

20. Assignment

- The third-party may assign the whole of its rights and obligations under the Agreement to a related body corporate, provided that the assignor remains liable for the performance of obligations under the agreement or to a non-related body corporate, with the prior written consent of QR, such consent not to be unreasonably withheld.
- A change in control of a third-party not a publicly listed corporation will be deemed to be an assignment of the agreement.

21. QR's Undertaking

- QR will comply with all applicable laws and the terms of QR's Access Undertaking.
- The agreement will contain provisions which require information provided to Network Access by third-party operators to only be used for the purposes of the Agreement and to be kept confidential, in that it not be provided to any other person (including other employees or agents of QR) without the consent of the third-party operator. Consent need not be sought where the transfer of a third-party's confidential information is for the purpose of processing an access application and QCA-approved procedures governing the flow of that information are in place.
- The obligation to keep such information confidential will continue to bind the parties for a reasonable period of time following the expiry of the agreement.

3.9 Amendments to Schedule G – Reference Tariffs

Amendment 41 – Basis for choosing the reference train service: Section 10.2; Chapter 10

The predominant service operating on the corridor should not be the reference train service.

Instead, those elements of QR's reference train that are necessary will be adopted, having regard to the cost reflective tariff structure and the efficient utilisation of the infrastructure. In future reviews, the reference train service will be judged on the basis of providing the most efficient outcome for end users.

Amendment 42 – Structure of reference tariffs: Section 10.3; Chapter 10

The reference tariff should be structured as follows:

- a usage based charge which reflects the incremental operating and maintenance cost expressed on a per GTK basis;
- a capacity charge that covers the incremental cost to the network owner of the provision of capacity expressed per train path;
- a charge for the use of the electrical overhead network only if an above-rail operator uses it;

- an allocative charge for the remainder of QR's revenue which is based, for each cluster, on equal amounts being collected on:
 - a per tonne basis; and
 - a per net tonne kilometre basis;
- take or pay arrangements are only triggered for a mine where:
 - the cluster in which the mine belongs fails to rail 90% of the monthly average requirement for that cluster (adjusted for the number of days in the month);
 - the mine fails to rail 90% of its monthly average requirement (adjusted for the number of days in the month); and
 - over the preceding 3 months, the operator and the mine fail to rail 90% of its average requirement over that period.

Amendment 43 – Specification of the reference train service: Section 10.4; Chapter 10

QR's proposed arrangements are acceptable, subject to:

- the reference train not specifying gross train tonnages;
- capacity consumption being determined by reference to the standard train path for the corridor rather than the dominant train; and
- allowance being made for acceptable variations as itemised in the QCA's consideration.

Amendment 44 – The geographic scope of reference train service: Section 10.5; Chapter 10

QR's proposed clusters are acceptable except that the take or pay component of the reference tariff should operate on the basis of system-wide activity levels.

Amendment 45 – Assigning new mines to clusters and deleting mines from existing clusters: Section 10.6; Chapter 10

Access charges for new mines (other than those on the Gregory branch):

- should be subject to a test that a mine further away (from its destination) than existing mines on a system cannot be arranged in a cluster such that, in absolute terms, it pays less per tonne than those other mines, based on the reference train service; and
- should not cause new mines to pay a higher net tonne kilometre component of the reference tariff than mines closer to their destination, so long as this meets the first test and does not increase existing users' access charges.

Amendment 46 – Forecast traffic volumes: Section 11.2; Chapter 11

QR's initial traffic task forecasts, QR1, are suitable to adopt for the purposes of assessing forecast costs and unit rates of the reference tariffs. The remaining parameters are to be calculated by assuming average haul lengths for each corridor and the operation of the reference train service.

Amendment 47 – Estimation of stand-alone costs: Section 12.2; Chapter 12

The QCA has:

- assigned to non-coal traffics the incremental capacity costs associated with the paths those trains consume;
- assessed stand-alone maintenance costs on the basis of the costs that would be incurred by the railway assuming it only carried coal traffic;
- assessed the current level of inefficiency in the maintenance of QR's coal corridors at approximately 15%; and
- estimated the system-wide and regional cost components of stand-alone cost on the basis of an allocation of QR's costs (as set out in table 12.5).

Amendment 48 – Asset valuation approach: Section 13.2; Chapter 13

The QCA has valued all assets in the coal network, including land, on a DORC basis.

Amendment 49 – Determination of the replacement cost of assets: Section 13.3; Chapter 13

The current replacement cost of the network should be:

- adjusted to allow for costs associated with financing construction; and
- undertaken on a brownfields basis so as to recognise costs of altering infrastructure from the original track construction.

Amendment 50 – Unit rates & quantities: Section 13.4; Chapter 13

The unit rates developed by GHD are appropriate to use for asset valuation purposes.

Amendment 51 – Depreciation methods for below-rail infrastructure: Section 13.5; Chapter 13

Asset consumption should be recognised through depreciation charges and a straight-line pattern of depreciation should be adopted. In those instances where an asset's condition is inconsistent with its age, the asset valuation should be adjusted accordingly.

Amendment 52 – Determination of asset lives for below-rail infrastructure: Section 13.6; Chapter 13

Asset lives should be measured in terms of physical lives.

Amendment 53 – Optimisation of below-rail infrastructure: Section 13.7; Chapter 13

A limited brownfields optimisation is appropriate in the current circumstances. This has resulted in \$33.6 million of track comprising 50 km between Rocklands and Callemondah being excised from QR's asset valuation.

Amendment 54 – Recognition of Contributed Assets: Section 14.2; Chapter 14

In developing QR's reference tariffs:

- elements of past capital contributions will not influence the process that establishes reference tariffs;
- QR may have contractual obligations to honour past user-funded capital contributions, and these will be dealt with through the respective rail haulage agreements; and
- past contributions should only be recognised where a claimant can demonstrate that recognition beyond the existing haulage contract is justified by way of documentary evidence presented, in which case specific adjustments would be made to access charges.

Amendment 55 – Quantifying the extent of recognition of past contributions: Section 14.3; Chapter 14

Where further recognition of past contribution is warranted:

- the approach applied in quantifying the extent of this recognition should be dependent upon the nature of the commitment that the mine is able to produce;
- the inclusion of recognition through adjustments to reference tariffs is the most effective means of ensuring equity between users;
- there should be no minimum threshold on the value of contributed assets to be included in the recognition;
- credits should be independent of the identity of the contributor;
- taxation effects should not be considered unless they are specifically identified in supporting documentary evidence; and
- all of the recognition should be deemed to relate to below-rail assets.

Amendment 56 – The method to estimate the allowed rate of return: Section 15.2; Chapter 15

The capital asset pricing model (CAPM) will be used to estimate QR's rate of return, which will be presented as the weighted average cost of capital (WACC).

Amendment 57 – Segment specific or QR-wide rate of return: Section 15.3; Chapter 15

The rate of return will be estimated on a segment-specific basis, that is, on the undiversifiable risks faced by Network Access in the provision of access for coal traffics.

Amendment 58 – Key parameters in the WACC/CAPM derivation: Section 15.4; Chapter 15

The risk-free rate will be based upon the prevailing 10 year Commonwealth bond rate, unless there is evidence of market perturbation, in which case, the QCA proposes to apply an average over the preceding 5 trading days.

Amendment 59 – Market risk premium: Section 15.4; Chapter 15

The market risk premium is 6%.

Amendment 60 – Capital structure: Section 15.4; Chapter 15

The gearing level is 55%.

Amendment 61 – Cost of debt: Section 15.4; Chapter 15

The cost of debt should equal the risk-free rate plus a premium of 120 basis points.

Amendment 62 – Asset and equity betas: Section 15.4; Chapter 15

The asset beta is 0.45, which translates into an equity beta of 0.76.

Amendment 63 – Value of imputation credits: Section 15.4; Chapter 15

Gamma (reflecting the value of imputation credits) is 0.5.

Amendment 64 – Treatment of corporate tax and inflation: Section 15.10; Chapter 15

A post-tax nominal framework will apply, with tax liabilities on forecast taxable income assessed at the prevailing statutory tax rate.

Amendment 65 – Type of regulatory framework to be applied to QR's reference tariffs: Section 16.2; Chapter 16

The QCA has adopted:

- a price cap approach; and
- a 3-year regulatory period commencing 1 July 2001.

Amendment 66 – Price inflator for reference tariffs: Section 16.3; Chapter 16

The QCA has adopted the Consumer Price Index, Brisbane, published by the Australian Bureau of Statistics, as the inflator, adjusted by available information to account for any CPI-spikes.

Amendment 67 – Derivation and calculation of the X-factor: Section 16.4; Chapter 16

The escalation factor should be derived using a CPI-X framework, with an X-factor of 1.5% to be applied for each year of the regulatory period.

Amendment 68 – Sharing of efficiency gains: Section 16.5; Chapter 16

QR may retain any gains from out-performance for the term of the regulatory period and a glide path will be applied in the next review period following an assessment of the source of out-performance.

Amendment 69 – Triggers for the review of reference tariffs: Section 16.6; Chapter 16

Material change events are limited to a change in taxes or a departure in actual traffic volumes of greater than 10% from the forecasts adopted in the QCA's analysis of QR's reference tariffs.

Any review would have to take account of the totality of departures from forecasts that underpinned the QCA's original assessment of reference tariffs.