

Draft Decision

Queensland Rail's 2015 Draft Access Undertaking

October 2015

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SUBMISSIONS

Closing date for submissions: 24 December 2015

This report is a draft only and is subject to revision. Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (QCA). Therefore submissions are invited from interested parties concerning its assessment of Queensland Rail's 2015 draft access undertaking, submitted on 5 May 2015 under section 133 of the *Queensland Competition Authority Act 1997* (QCA Act). The QCA will take account of all submissions received.

Submissions, comments or inquiries regarding this paper should be directed to:

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EXECUTIVE SUMMARY

Queensland Rail's business operations include passenger rail activities as well as providing below-rail services for its extensive track network. The below-rail service is declared by regulation, making it subject to the third-party access provisions of the Queensland Competition Authority Act 1997 (the QCA Act).

Our Draft Decision is to refuse to approve Queensland Rail's 2015 draft access undertaking (DAU) for providing access to its below-rail services.

Introduction

An approved undertaking for access to Queensland Rail's below-rail services is necessary to provide certainty about the detailed terms and conditions of access. An access regime should balance the legitimate business interests¹ of Queensland Rail and the interests of access seekers and holders.

On 4 February 2015, we issued an initial undertaking notice under s.133 of the QCA Act requiring Queensland Rail to submit a DAU within 90 days. Queensland Rail's 2015 DAU was received on 5 May 2015 in compliance with the s.133 notice.

2015 DAU

We have reviewed Queensland Rail's 2015 DAU afresh in accordance with our obligations under s.138(2) of the QCA Act.

On balance, our view is that Queensland Rail's 2015 DAU does not appropriately balance the rights and obligations of itself against those of access seekers/holders and end customers. Queensland Rail's approach is not consistent with the approval criteria in the QCA Act, both across pricing and non-pricing matters.

We have proposed changes to Queensland Rail's 2015 DAU to address these matters.

Pricing

Pricing for commercial freight services on the West Moreton network is perhaps the most contentious aspect of Queensland Rail's proposal.

The 2015 DAU includes a West Moreton reference tariff for coal-carrying train services, equivalent to \$19.41/'000 gtk. Queensland Rail said this was below its proposed ceiling price of \$34.92/'000 gtk — based on a brownfields depreciated optimised replacement cost (DORC) valuation, which values the existing assets in their existing (brownfields) configuration.

Asset valuation methodology

The West Moreton network was constructed in the 19th century for regional traffic. It does not reflect the service potential of a modern engineering equivalent asset as it was not originally designed for coal transport.

Queensland Rail has spent increasing amounts on maintenance and capital expenditure to cope with coal traffics as volumes have grown since coal services began in 1996. We have largely accepted these costs as necessary to operate a network with the idiosyncratic characteristics of the West Moreton network.

¹ Section 10.3.2 of this Draft Decision outlines our interpretation of the term 'legitimate business interests'.

The high costs that Queensland Rail incurs to provide services on the West Moreton network highlight the need to examine the age of assets and appropriateness of revaluing them for inclusion in the initial asset value.

Some of Queensland Rail's maintenance costs have extended the lives of assets (e.g. wooden sleepers and fences). Other assets like tunnels, cuttings and embankments require only incidental further work and once they have been built are essentially perpetual in nature. Indeed, without tracks going through them and trains carrying goods or passengers on those tracks, the tunnels of and by themselves do not add any additional value to the West Moreton network (beyond the value of the other assets in the network itself).

The QCA has made adjustments to the regulatory asset base (RAB) for these factors.

Drop in volumes

Queensland Rail's business environment has changed substantially since it submitted its previous 2013 DAU—with both coal and non-coal volumes dropping significantly.

The question is then—how should the spare capacity on the West Moreton network be treated? The QCA's view is that coal traffics should not fund the costs associated with spare non-coal train paths. Coal traffics should only pay for the paths they can contract to use.

The QCA therefore proposes capping coal traffics' share of fixed costs (return on assets as well as fixed maintenance and operating costs) to take into account contracting restrictions on coal services.

On this basis, the QCA proposes an indicative draft ceiling price equivalent to \$18.88/'000 gtk from 1 July 2015. This price has been calculated as if it were to apply from 1 July 2015. The QCA proposes to re-calculate and adjust this indicative ceiling price to the date the new undertaking will commence.

Adjustment amount

In its 2013 DAU (withdrawn on 12 December 2014), Queensland Rail had proposed an adjustment to reflect any over- or under-recovery of revenues from 1 July 2013 (the date the tariffs in the 2008 access undertaking were scheduled to expire) to the date when the new tariff would commence. The 2015 DAU does not propose such an adjustment.

Our view is that approving Queensland Rail's proposal would create regulatory uncertainty, which would, among other things, adversely impact on investment. Having regard to the relevant factors in section 138(2) of the QCA Act, our Draft Decision is that the 2015 DAU should be amended to include an adjustment amount payable by Queensland Rail for its over-recovery of revenues from 1 July 2013.

While the QCA's proposed indicative ceiling price of \$18.88/'000 gtk is not materially different from Queensland Rail's proposed reference tariff of \$19.41/'000 gtk, these tariffs are not comparable during the adjustment period as they are based on significantly different volume assumptions. Having regard for this difference, we have estimated the adjustment amount payable by Queensland Rail from 1 July 2013 to 30 June 2015 to be \$26.3 million as at 1 July 2015. Reflected in forward looking prices over the regulatory period, this means an indicative reference tariff equivalent to \$15.88/'000 gtk as at 1 July 2015.

This adjustment is only indicative and will differ from the final adjustment that would reflect the period between 1 July 2013 and the day before the commencement date of the new undertaking.

Non-pricing matters

Queensland Rail's 2015 DAU covers a broad range of non-pricing matters, including negotiation processes, reporting obligations and contracting and investment frameworks. The QCA considers that, in many respects, Queensland Rail's proposals skew rights and obligations in its favour and against those of access holders and seekers.

We have proposed changes to address this imbalance, including:

- streamlining and rebalancing the scope, capacity, negotiation and administrative sections of the 2015 DAU to clarify the dispute resolution process and remove any inappropriate discretionary powers in Queensland Rail's favour
- providing greater transparency in the planning, scheduling and day of operations processes
- ensuring the operating requirements for train services on Queensland's Rail's infrastructure are consistently applied to all relevant parties
- providing transparency in Queensland Rail's reporting and compliance processes
- enabling a better balance in risk allocations across parties in the standard access agreement
- embedding the right of a customer to fund a network extension and the obligation of Queensland Rail to facilitate a network extension regardless of funding source.

Submissions invited

In reviewing Queensland Rail's 2015 DAU and stakeholder submissions and preparing this Draft Decision, the QCA had regard to its obligations under s. 138(2) of the QCA Act.

However, it is important to be clear that this document is not a draft version of a final decision, and it has no force of itself. There should be no expectation that it presents views and recommendations as to how to amend the 2015 DAU which will prevail to the end of the decision making process unless the QCA is persuaded otherwise. This document represents the QCA's preliminary view and is intended to give stakeholders an insight into that view to encourage further contributions. The QCA's application of s. 138(2) and its thinking may change towards its final decision, which will be informed by submissions made in response to this document.

The QCA encourages stakeholders to comment on this Draft Decision. Submissions are invited by 5 pm, 24 December 2015.

INTRODUCTION

Background

Queensland Rail owns and operates an 8,000-kilometre rail network, including the commuter lines in south east Queensland, the West Moreton network, and the Mount Isa and North Coast lines (see **Figure 1.1**). It also operates the state's suburban and long-distance passenger services.²

Declaration for third party access

The services provided by Queensland Rail's intrastate rail network were declared by regulation in 1997, making the services subject to the third-party access provisions of the QCA Act. As a result of that declaration, Queensland Rail, access seekers and access holders gained rights and obligations relating to the negotiation of the terms and conditions of access to Queensland Rail's rail transport infrastructure.

The below-rail (track) network is subject to the access regime established by Part 5 of the QCA Act. It follows a negotiate–arbitrate model, in which the primary responsibility is on the access provider and access seeker to negotiate on price and non-price terms. Part 5 provides for the development of an access undertaking to guide how the access regime should operate.

History of this Draft Decision

Following its creation in 2010, Queensland Rail commenced a process to transition from the 2008 undertaking to one that better reflected its assets and business structure:

- March 2012—Queensland Rail submitted the 2012 DAU which sought to replace its 2008 undertaking with a set of requirements more suited to a network operator which is not vertically integrated with an above-rail freight business.
- April 2012—QCA released an Issues Paper on the 2012 DAU.
- February 2013—Queensland Rail withdrew its 2012 DAU and submitted the February 2013 DAU (the 2013 DAU). In doing so, Queensland Rail indicated that it had revised the 2012 DAU to reflect concerns raised by its stakeholders.
- April and May 2013—the QCA hosted a series of workshops on issues in the February 2013 DAU, including above-rail operational issues, West Moreton network pricing, standard access agreements (SAAs), Mount Isa pricing and investment framework matters.
- June 2013—Queensland Rail resubmitted its 2013 DAU and included, for the first time, its proposed voluntary reference tariffs for the West Moreton network.
- June 2014—the QCA released its consultation paper on western system coal tariffs in the 2013 DAU along with a report on the West Moreton network prepared by its rail consultant, B&H Strategic Services (B&H).
- June 2014—the QCA conducted a workshop with stakeholders on West Moreton network coal tariffs.
- October 2014—the QCA released its 2014 Draft Decision.

² Queensland Rail was created in 2010 when the Queensland Government split the former QR Ltd. Queensland Rail owns most of the former QR Ltd rail network in Queensland, apart from the tracks in central Queensland owned by Aurizon Network Pty Ltd (formerly QR Network Pty Ltd).

Figure 1.1: Queensland Rail's network

Source: Queensland Rail

- December 2014—Queensland Rail withdrew its June 2013 DAU.
- February 2015—the QCA issued an initial undertaking notice under s. 133 of the QCA Act, requiring Queensland Rail to submit a draft access undertaking (DAU) to the QCA within 90 days after receiving the notice.
- May 2015—Queensland Rail submitted a DAU to the QCA, within the time specified in the s.133 notice.

Submissions on Queensland Rail's 2015 DAU

The QCA received submissions from Aurizon, Glencore, Queensland Rail, Asciano, New Hope, Port of Brisbane, Queensland Resources Council, Sekitan Resources and Yancoal.

Stakeholders expressed concern about Queensland Rail's proposed 2015 DAU. For instance, stakeholders had concerns regarding the proposals for:

- application and scope—including that the 2015 DAU does not apply to all of Queensland Rail's declared services
- negotiation process—including that Queensland Rail has provided itself with too much discretion over the nature of information exchanged, the time frames and the circumstances when it could cease negotiations
- pricing principles—namely, that Queensland Rail's principles for how it will set and negotiate prices for access gave it too much discretion in setting access charges.
- principles and requirements for operating the network—including that Queensland Rail had provided itself with excessive discretion on how the network was to be managed and that there was a lack of information on how changes to the relevant requirements should occur
- reporting—including the type and quality of information proposed to be reported by Queensland Rail on its compliance with the undertaking
- administrative provisions—including that the tariff-related reports should be provided for the entire period covered by interim tariffs to date
- Standard Access Agreements (SAAs)—namely, that as part of streamlining the SAA provisions, Queensland Rail has inappropriately tilted the balance of obligations and responsibilities away from itself and towards access holders
- investment framework—including, that Queensland Rail has given itself inappropriate discretion in deciding whether or not an access seeker's network extension will be allowed.

In addition to these broad issues, stakeholders raised concerns about Queensland Rail's proposed West Moreton tariff and the absence of an adjustment charge.

Queensland Rail has proposed a ceiling price of \$34.92 per thousand gross tonne kilometres ('000 gtk) for the West Moreton network, based on a DORC valuation of existing assets, but has indicated that it will accept a reference tariff of \$19.41/'000 gtk which it said had regard to, among other things:

- Queensland Rail receiving at least its efficient costs of providing the service
- the current market conditions
- a desire to maximise traffics on the western system.

Some stakeholders considered this tariff was excessive. In particular, they said the tariff did not reflect the age and condition of the network and the level of service it is capable of providing.

Queensland Rail also proposed that this tariff commence from the date the undertaking was approved.

Some stakeholders also sought an adjustment in the new undertaking to reflect what they considered was an over-recovery of tariff revenues by Queensland Rail prior to the date the new undertaking would commence.

The QCA's considerations

The QCA has considered Queensland Rail's 2015 DAU and stakeholder submissions in accordance with the assessment criteria in s. 138(2) of the QCA Act (see **Box 1**).

Box 1: The legal framework

The QCA may approve the 2015 DAU only if the QCA considers it appropriate to do so having regard to each of the matters set out in the QCA Act:

The Authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following (s. 138(2)) —

- (a) *the object of this part; which is:*
 - ...to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets (s. 69E).*
- (b) *the legitimate business interests of the owner or operator of the service;*
- (c) *if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;*
- (d) *the public interest, including the public interest in having competition in markets (whether or not in Australia);*
- (e) *the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;*
- (f) *the effect of excluding existing assets for pricing purposes;*
- (g) *the pricing principles mentioned in section 168A; which in relation to the price of access to a service are that the price should:*
 - (i) *generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved (s. 168A(a))*
 - (ii) *allow for multi-part pricing and price discrimination where it aids efficiency(s. 168A(b))*
 - (iii) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher (s. 168A(c))*
 - (iv) *provide incentives to reduce costs or otherwise improve productivity(s. 168A(d))*
- (h) *any other issues the authority considers relevant.*

It is not open to the QCA to approve an access undertaking that does not include the matters required by s. 137. These are:

- (1) *an expiry date (s. 137(1))*
- (2) *provisions for identifying, preventing and remedying conduct by an access provider that provides, or proposes to provide, access to itself or a related body corporate that unfairly differentiates in a material way between access seekers (in negotiations (s. 137(1A)(a)(i)) and access holders (in providing the service (s. 137(1A)(a)(ii)))*
- (3) *provisions preventing an access provider that provides, or proposes to provide, access to itself or a related body corporate recovering, through the price of access, costs that are not reasonably attributable to the provision of the service (s. 137(1A)(b)).*

Sections 137(2) and 138A set out matters that may be included in an access undertaking.

Our Decision

Our Draft Decision proposes to refuse to approve Queensland Rail's 2015 DAU.

In this Draft Decision we have explained our views and have set out those amendments that we consider necessary before we can approve Queensland Rail's proposed 2015 DAU.

Structure

This Draft Decision follows the structure of the 2015 DAU, including:

- Chapter 1: Application and scope—the extent to which the 2015 DAU applies to the entirety of Queensland Rail's declared service as well as ring-fencing and non-discriminatory treatment obligations.
- Chapter 2: Negotiation and capacity management—Queensland Rail's process for negotiating with access seekers and its discretion to allocate capacity between competing access seekers.
- Chapter 3: Pricing principles—the principles for setting access charges.
- Chapter 4: Operating requirements—the appropriateness of the rules for how Queensland Rail will demonstrate capacity, coordinate maintenance and schedule and operate trains.
- Chapter 5: Reporting—Queensland Rail's proposed approach to reporting and audit of costs, performance and compliance with the undertaking.
- Chapter 6: Administrative provisions—Queensland Rail's structural changes to administrative provisions, including dispute resolution and tariff reporting.
- Chapter 7: SAAs—the appropriateness of Queensland Rail's 2015 standard access agreement (2015 SAA).
- Chapter 8: West Moreton tariffs—an appropriate approach to the reference tariffs for the West Moreton network. The chapter also addresses the issue of an adjustment amount to reflect the previous over-recovery of tariff revenues by Queensland Rail.
- Chapter 9: Investment framework, planning and coordination—the appropriateness of Queensland Rail's treatment of its obligation to permit, but not fund, an extension to the network to facilitate the execution of an access agreement.
- Chapter 10: Legislative framework—how we have applied our legislated obligations in making our 2015 Draft Decision.

Consultation on the Draft Decision

The QCA invites submissions on this Draft Decision, to be received no later than 5 pm on Thursday 24 December 2015.

The QCA will weigh the comments and submissions from Queensland Rail and other stakeholders, as well as the QCA's own analysis.

The QCA will be assisted in its deliberations if submissions are made in the context of the assessment criteria in s. 138(2) of the QCA Act, including the relative importance of matters where the application of the assessment criteria leads to conflicting or inconsistent conclusions.

1 APPLICATION AND SCOPE (PART 1)

Part 1 of Queensland Rail's 2015 DAU contains provisions on the scope of access, non-discriminatory treatment of above-rail operations, and the term of the undertaking.

This chapter accepts many aspects of Queensland Rail's proposals, but proposes changes to Part 1, including to:

- *clarify the extent to which the undertaking will apply to Queensland Rail's activities*
- *provide that descriptions of the infrastructure to which the undertaking will apply are up to date*
- *enhance ring-fencing obligations.*

Introduction

Scope and administrative matters are addressed in an approved access undertaking to provide certainty to access seekers negotiating access to a declared service while protecting the legitimate business interests of the service provider. These include the scope of access covered by the undertaking as well as provisions to provide for non-discriminatory treatment.

In respect of the application and scope of the Queensland Rail DAU, the key issues are summarised below in **Table 1.1**. Matters that require a more detailed explanation are discussed in Sections 1.1 to 1.5.

Table 1.1: Summary of key positions—application and scope

<i>Summary of 2015 DAU proposal³</i>	<i>Consistency with QCA 2014 Draft Decision⁴</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Scope of access in the undertaking			
The 2015 DAU applies where Queensland Rail is a railway manager except where it is manager for a third party owner. ⁵	Inconsistent with the 2014 Draft Decision. The 2015 DAU should apply wherever Queensland Rail is the railway manager as defined in the <i>Transport (Rail Safety) Act 2010 (Qld)</i> (TRSA).	Aurizon and New Hope considered the scope of access should extend to all managed rail transport infrastructure while Glencore supported Queensland Rail's proposal. ⁶	See Section 1.1 below.
Queensland Rail to use 'reasonable endeavours' to ensure accuracy of its line diagrams. Line diagrams to be amended	Broadly consistent with the 2014 Draft Decision.	Stakeholders re-emphasised consultation and dispute requirements in QCA 2014 Draft Decision. ⁸	See Section 1.2 below.

³ Queensland Rail Draft Access Undertaking May 2015.

⁴ QCA, 2014 Draft Decision; Chapter 1.

⁵ Queensland Rail, 2015 DAU, cl. 1.2.1(b)(i)(C).

⁶ Aurizon, sub. no. 10: 10–11; Glencore (sub. no. 7: 17) and New Hope (sub. no. 10: 4) supported the proposal.

Summary of 2015 DAU proposal³	Consistency with QCA 2014 Draft Decision⁴	Stakeholders' comments	QCA 2015 Draft Decision
upon reasonable requests. ⁷			
Non-discriminatory treatment			
Queensland Rail acknowledges its obligations under ss.100, 104, 125 and 168A(c) of the QCA Act. ⁹	Inconsistent with the 2014 Draft Decision which requires specific provisions to prevent non-discrimination.	Stakeholders said the 2015 DAU should include specific provisions to prevent non-discrimination. ¹⁰	See Section 1.3 below.
Ring- fencing arrangements			
Queensland Rail would voluntarily submit a draft amended access undertaking (DAAU) to implement ring-fencing arrangements if it enters a market in competition with third parties. ¹¹	Broadly consistent with the 2014 Draft Decision.	Stakeholders said the QCA should be able to require the undertaking be amended to implement ring-fencing provisions. ¹²	See Section 1.4 below.
Term of the 2015 DAU			
Queensland Rail sought a term from the date of approval to 30 June 2020. ¹³	Inconsistent with the 2014 Draft Decision. The term in 2014 Draft Decision expires on 30 June 2017.	Stakeholders supported the longer term provided the QCA could require amendments to the undertaking to rectify unforeseen and significant inequity. ¹⁴	See Section 1.5 below.

1.1 Scope of the access undertaking

Under the QCA Act, the declared services include:

the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager (s.250 (1)(b)).

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that its 2015 DAU apply to Queensland Rail (or a related body of Queensland Rail) where it is a railway manager, except in the circumstance where it is providing

⁸ Glencore, sub. no. 7: 16; New Hope, sub. no. 10: 4, 23–24.

⁷ Queensland Rail, 2015 DAU, cl. 1.2.3.

⁹ Queensland Rail, 2015 DAU, cl. 1.3.

¹⁰ New Hope, sub. no. 10: 4, 25; Glencore, sub. no. 7: 17.

¹¹ Queensland Rail, 2015 DAU, cl. 2.2.3.

¹² Asciano, sub. no. 5 att. 1: 8–9; Glencore, sub. no. 7: 18; New Hope, sub. no. 10: 7

¹³ Queensland Rail, 2015 DAU, cl. 1.1 and definition of 'Term'.

¹⁴ Aurizon, sub. no. 6: 10; Asciano, sub. no. 5, att. 1: 12; New Hope, sub. no. 10: 3, Glencore, sub. no. 7: 16; Yancoal, sub. no. 16: 4.

railway manager services to the owner of the infrastructure and the terms of the contract with the owner do not allow Queensland Rail to comply with aspects of the 2015 DAU.¹⁵

Stakeholders' comments

Glencore and New Hope said they accepted the position proposed by Queensland Rail.¹⁶

Aurizon said the scope of access should extend to all rail transport infrastructure for which Queensland Rail was the operating rail manager, not just the infrastructure it owned.

QCA analysis and Draft Decision

Having reconsidered relevant matters, including stakeholder submissions, we consider the access undertaking should cover all of the declared service. That is, Queensland Rail should apply the access undertaking to rail infrastructure for which it is the railway manager, regardless of whether it owns the infrastructure.

The QCA notes that where an approved undertaking does not explicitly provide access to a declared service, an access seeker may still seek access to the declared services through the QCA Act. However, one of the key purposes of an approved undertaking is to provide clarity on the terms for access to these declared services. Therefore, it is important to ensure that appropriate access to all the declared service is granted, consistent with the QCA Act.

The 2015 DAU does not cover certain aspects of the declared services as listed under section 250 (1)(b) of the Act, namely where:

- Queensland Rail does not own the rail infrastructure, but is the railway manager
- a subsidiary of Queensland Rail is the railway manager.

Should Queensland Rail want to change the scope of services that the QCA Act declares, Aurizon said it ought to seek partial revocation on the infrastructure it did not own from the declared service rather than excluding it from the access undertaking.¹⁷

Given the Act defines the declared service by reference to rail transport infrastructure for which Queensland Rail or a related party is the railway manager, we consider that the access undertaking should also apply to all rail transport infrastructure for which Queensland Rail (or its related party) is the railway manager. To do otherwise reduces clarity for both access holders and access seekers and represents a potential 'hold-up' opportunity whereby a third party operator may be unnecessarily prevented from accessing a declared service. This is not consistent with section 138(2)(e) and (h) of the QCA Act.

The test for the undertaking's application should be based on the concept of the railway manager, as that is the person who has effective management and control of the infrastructure. Indeed, this is consistent with the *Transport (Rail Safety) Act 2010*, which defines this concept as:

Rail infrastructure manager means a person who has effective management and control of rail infrastructure or proposed rail infrastructure, whether or not the person—

- (a) Owns or will own the rail infrastructure
- (b) Has or will have a statutory or contractual right to use the rail infrastructure or to control, or provide, access to it.

¹⁵ Queensland Rail, 2015 DAU, clause 1.2.1.

¹⁶ Glencore, sub. no. 7: 17; New Hope, sub. no. 10: 4.

¹⁷ Aurizon, sub. no. 3: 10–11.

Therefore, to balance the interests of the access holders and access seekers (s.138(2)(e) and (h)) and the legitimate business interests of Queensland Rail (s.138 (2)(b)), we believe it is appropriate that the scope of access should be amended to include all the rail transport infrastructure for which Queensland Rail (or Queensland Rail's successor, assign or subsidiary) is the railway manager. This will provide access holders and access seekers with clarity that the undertaking applies to all Queensland Rail's declared services. Moreover, aligning the definition of railway manager in the undertaking with that of existing legislation to which Queensland Rail is subject will help avoid inconsistencies between regulatory requirements for Queensland Rail, reducing administration costs.

Draft Decision

- 1.1 After considering Queensland Rail's proposed scope of the 2015 DAU, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 1.2 The QCA requires that Queensland Rail amend its proposal so that the 2015 DAU applies to all rail transport infrastructure for which Queensland Rail (or Queensland Rail's successor, assign or subsidiary) is the railway manager, consistent with the declared service in s.250 (1)(b) of the QCA Act. The required amendments are set out in Clause 1.2.1 and the definition of 'Network' in Appendix C.**
- 1.3 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

1.2 Line diagrams

Queensland Rail regularly publishes line diagrams, illustrating the network for which Queensland Rail is the railway manager and the existing private infrastructure connection points, on its website.

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed to:

- use 'reasonable endeavours' to ensure accuracy of its line diagrams in all material respects¹⁸
- notify the QCA at intervals of no more than six months of amendments to the line diagrams¹⁹
- review the line diagrams if requested by the QCA or by an access holder or seeker, subject to these requests being reasonable.²⁰

Stakeholders' comments

New Hope and Glencore said the proposal should include a right for access holders to dispute the accuracy of the line diagrams.²¹

¹⁸ Queensland Rail, 2015 DAU, cl. 1.2.3 (b)

¹⁹ Queensland Rail, 2015 DAU, cl. 1.2.3 (d)

²⁰ Queensland Rail, 2015 DAU, cl. 1.2.3 (c)

²¹ Glencore, sub. no. 7: 16; New Hope, sub. no. 10: 4, 23–24.

QCA analysis and Draft Decision

We accept the part of Queensland Rail's proposal on line diagrams that provides it will use 'reasonable endeavours' to publish line diagrams that are accurate in all material respects. To require further steps would impose unjustified administrative costs on Queensland Rail.

However, we require amendments to the proposal so that Queensland Rail will notify access holders and access seekers of any proposed amendment to line diagrams, and allow for disputes about the accuracy of the line diagrams.

Line diagrams should be sufficiently accurate to allow access seekers and access holders to rely on the information which the diagrams provide. The accuracy of line diagrams is important for promoting competition in above-rail markets.

The 2015 DAU does not provide for a dispute resolution process for access seekers and holders if they question the accuracy of the diagrams, nor does it provide that Queensland Rail would notify stakeholders prior to any amendment to the diagrams.²²

The proposed undertaking's requirement to use 'reasonable endeavours' rather than providing for accuracy potentially diverts stakeholders' disputes away from whether the diagrams are accurate, to whether Queensland Rail used reasonable endeavours to make them accurate. We consider this does not provide stakeholders with sufficient certainty that the line diagrams are accurate.

We note that the 2015 DAU does not require Queensland Rail to notify stakeholders of amendments to line diagrams. In the absence of such a requirement, we consider that stakeholders may not receive adequate opportunity to review the accuracy of the diagrams, nor understand the reasons for doing so. We consider this does not adequately balance the interests of access holders and seekers (s.138(2)(e) and (h)) to have clarity on the scope of the declared infrastructure, with the interests of Queensland Rail, to minimise administration costs (s.138(2)(b)).

Therefore, we consider that Queensland Rail should notify access seekers and access holders before amending the line diagrams and provide the reasons Queensland Rail proposes for making such amendments (s.138 (2)(e) and (h)).

To balance the interests of access seekers and holders (s.138(2)(e) and (h)) with those of Queensland Rail (s.138(2)(b)), we require Queensland Rail to further amend its proposal to include provisions on a notification process and on a dispute process regarding the accuracy of line diagrams.

Draft Decision

- 1.4 After considering Queensland Rail's proposed line diagrams provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 1.5 The QCA requires Queensland Rail to amend its proposal so that Queensland Rail will notify stakeholders before making material amendments to the line diagrams, and provide a dispute process if stakeholders question the accuracy of the line diagrams. The required amendments are set out in Clause 1.2.3 in Appendix C.**
- 1.6 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

²² Queensland Rail, 2015 DAU, cl. 1.2.3

1.3 Non-discriminatory treatment

The QCA Act provides that an access provider must not unfairly differentiate between access seekers in negotiating access agreements, and between access holders in providing access (see the non-discriminatory treatment principles, ss.100(2) and 168A(c)). These provisions were introduced in 2010 when Aurizon's vertically integrated above- and below-rail coal business was privatised. The 2008 undertaking applicable to Queensland Rail does not contain clauses reflecting these non-discriminatory treatment principles.

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed in the 2015 DAU to acknowledge its obligations under ss.100, 104, 125 and 168A(c) of the QCA Act.²³ The 2015 DAU does not contain further provisions or obligations in this respect.

Stakeholders' comments

A number of stakeholders said that the 2015 DAU should clearly set out how Queensland Rail will apply the non-discriminatory treatment principles.²⁴

Asciano said 'the above rail services operated by Queensland Rail do still impact on the operations of third party users such as Asciano.' They said these impacts are operational in nature, 'relating to issues such as pathing priority and track occupations or cost allocation impacts relating to the allocation of Queensland rail costs between above-rail and below-rail services.'²⁵

QCA analysis and Draft Decision

Although Queensland Rail acknowledges its obligations under the QCA Act, its proposal is not clear on how it will comply with its obligations. The 2015 DAU should therefore include specific provisions stating how it would implement the non-discriminatory treatment principles consistent with the requirements of the QCA Act (ss.100, 104, 125, 137(1A) and 168A(c)).

We note that Queensland Rail provides below-rail access to third party freight train operators, but does not operate above-rail freight train services. Given it is not vertically integrated for freight services, it is unlikely Queensland Rail will have strong financial incentives to discriminate between freight train operators.

However, Queensland Rail's above-rail passenger services are vertically integrated with its below-rail infrastructure. Therefore Queensland Rail has the potential and power to favour its own passenger service in scheduling trains beyond the priority requirements in the *Transport Infrastructure Act 1994* (the TI Act) (ss.266 and 266A), for operational convenience.²⁶

Given this, we do not consider it appropriate to accept Queensland Rail's proposal in respect of non-discriminatory treatment as it is inconsistent with the interests of access seekers and holders, who may face discrimination due to favourable treatment of Queensland Rail's passenger services which use the same network (s.138(2)(e) and (h)).

We accept that Queensland Rail has a legitimate business interest in managing its passenger business efficiently and complying with its obligations under the TI Act. Specifically, the TI Act

²³ Queensland Rail, 2015 DAU, cl. 1.3

²⁴ Asciano, sub. no. 5, att. 1: 8–9; New Hope, sub. no. 10: 4, 25; Glencore, sub. no. 7: 17;

²⁵ Asciano, sub. no. 5, att. 1: 8–9.

²⁶ Asciano, sub. no. 5, att. 1: 8–9.

(ss.266 and 266A) requires Queensland Rail to preserve train paths for regularly scheduled passenger train services and obliges Queensland Rail to give priority to those services in allocating available train paths.

However, the TI Act's requirements should not excuse Queensland Rail from all its obligations under the QCA Act not to discriminate against third party access seekers and holders (ss.138(2)(b), 100, 104, 125, 137(1A) and 168A(c)).

To address stakeholder concerns that Queensland Rail could favour its above-rail passenger operations, we consider clause 1.3 of the 2015 DAU should be amended to clearly state that, consistent with sections 100 and 168A(c), Queensland Rail will:

- not engage in conduct for the purposes of preventing or hindering an access seeker's or access holder's access
- not provide access to related operators (of Queensland Rail) on more favourable terms than the terms on which it provides access to competitors of related operators
- give all access seekers, whether they are a Queensland Rail party or a third party, a consistent level of service and an equal opportunity to obtain access rights.

Setting out how Queensland Rail will prevent itself from unfairly differentiating between access seekers and users (in particular, between freight and passenger train services) will provide access seekers and access holders with the confidence that they will receive equivalent terms and conditions in matters such as train operations and scheduling, unless otherwise provided for in the undertaking and subject to the constraints of the TI Act (s.138(2)(e) and (h)). This is also an explicit requirement of the QCA Act (s.137(1A)).

Should Queensland Rail become vertically integrated in freight train operations in the future, additional prohibitions on unfair differentiation may be required in the undertaking.

Draft Decision

- 1.7 After considering Queensland Rail's proposed non-discriminatory treatment provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 1.8 The QCA requires Queensland Rail to amend its proposal so that it clearly sets out how it will be prevented from unfairly differentiating between access seekers and between access holders, consistent with ss.100, 104, 125, 137(1A) and 168A(c) of the QCA Act. The required amendments are set out in Clause 1.3 in Appendix C.**
- 1.9 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

1.4 Ring-fencing arrangements

A vertically integrated enterprise could potentially use its monopoly power in the below-rail market to gain an unfair competitive advantage in the above-rail market. For that reason, ring-fencing of activities and information is required when a vertically integrated entity combines monopoly services with related operations that compete with third parties in an upstream or downstream market.

A range of issues related to ring-fencing are dealt with separately in the 2015 DAU such as the confidentiality of information (see Chapter 2) and the separation of financial information (see Chapter 5).

Queensland Rail's 2015 DAU proposal

The 2015 DAU provides that if Queensland Rail gains interests in markets upstream or downstream from the below-rail services that are in competition with third parties in those markets, then Queensland Rail will inform the QCA and prepare and submit to the QCA a DAAU setting out its ring-fencing obligations.

Stakeholders' comments

Glencore and New Hope partially accepted the position proposed by Queensland Rail, subject to amending the 2015 DAU to allow the QCA to require the undertaking be amended to implement ring-fencing provisions.²⁷ Asciano said that a broader ring-fencing regime should be reinstated.²⁸

QCA analysis and Draft Decision

We consider that, with Queensland Rail's existing operational structure, ring-fencing issues are unlikely to affect competition as Queensland Rail's passenger operations do not compete with other above-rail operators. Furthermore, we note that Queensland Rail's constitution prevents it from establishing above-rail freight operations.

However, there is nothing preventing Queensland Rail's constitution from being changed to allow it to operate freight trains.

Therefore, the QCA considers that Queensland Rail's undertaking should provide for ring-fencing arrangements to be submitted by Queensland Rail before it enters an above-rail market—or any other market—in competition with third party operators.

We consider that the 2015 DAU's proposed ring-fencing arrangements do not adequately outline the obligations of Queensland Rail regarding the preparation of a DAAU. Specifically, the 2015 DAU does not provide a timeframe for when Queensland Rail must inform the QCA of its newly acquired interests. Furthermore, the undertaking does not provide adequate certainty that the QCA could require Queensland Rail to amend the undertaking should the QCA reject a DAAU submitted by Queensland Rail.

Given these ambiguities, Queensland Rail's proposal would not provide certainty to access holders and access seekers on the timeframe or the process for implementing ring-fencing arrangements should the QCA require amendments to Queensland Rail's ring-fencing proposal (s.138(2)(e) and (h)).

Setting out a clear trigger for including ring-fencing arrangements and outlining how Queensland Rail will implement those arrangements will provide certainty to access seekers and holders and is consistent with ensuring the broader integrity of the regulatory regime (s.138(2)(e) and (h)). It is in Queensland Rail's legitimate business interests that the preparation of ring-fencing arrangements do not impose an unreasonable burden (s.138(2)(b)). But, given Queensland Rail will only be required to implement such arrangements if it gains relevant interests in upstream or downstream markets, these requirements are unlikely to impose an unreasonable burden on Queensland Rail. In any event, we consider that the burden, if any, would be outweighed by such consideration of the interests of access seekers, access holders, the public interest, and by ensuring the objects of the QCA Act are achieved.

²⁷ Glencore, sub. no. 7: 18; New Hope, sub. no. 10: 7.

²⁸ Asciano, sub. no. 5: 3, 12.

Draft Decision

- 1.10** After considering Queensland Rail's proposed ring-fencing arrangements, our Draft Decision is to refuse to approve Queensland Rail's proposal.
- 1.11** The QCA requires Queensland Rail to amend its proposal so that the undertaking provides that the QCA may require Queensland Rail to submit a DAAU which implements arrangements for ring-fencing information from any related party above-rail operator, if Queensland Rail enters a market in competition with third parties. The required amendments are set out in Clause 6.5 in Appendix C.
- 1.12** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

1.5 Term of the 2015 DAU

The period during which an access undertaking starts and expires (i.e. the term) is a vital element of an undertaking.

Queensland Rail's 2015 DAU proposal

Queensland Rail's 2015 DAU proposed that the term of the new access undertaking starts from the date of the approval (commencement date) and ends on 30 June 2020 (termination date).

Stakeholders' comments

Most stakeholders supported the June 2020 expiry date as it provided longer-term regulatory certainty.²⁹ Glencore, Yancoal and New Hope did not object to the longer term itself, although they considered that if a longer term were to be adopted, the undertaking should include a provision to allow the QCA to require amendments to rectify unforeseen and significant inequity.³⁰

QCA analysis and Draft Decision

We consider the term of the proposed access undertaking is appropriate. The term of an access undertaking should achieve a balance between the regulatory certainty of the undertaking and the timeliness of the regulatory decisions.

The QCA considers that regulatory certainty is an important outcome of a well-functioning undertaking. Assuming the new undertaking is approved with appropriate terms and conditions in 2016 as expected, Queensland Rail, access seekers/holders and other stakeholders will be assured of these rules until the proposed expiry date in 2020 (s.138(2)(e) and (h)). A four-year term for this access undertaking is also consistent with our recent undertaking decisions for other access providers.³¹

²⁹ Aurizon, sub. no. 6: 10; Asciano, sub. no. 5, att. 1: 12; New Hope, sub. no. 10: 3; Glencore, sub. no. 7: 16; Yancoal, sub. no. 16: 4.

³⁰ New Hope, sub. no. 10: 3; Glencore, sub. no. 7: 16; Yancoal, sub. no. 16: 4.

³¹ Aurizon Network's successive undertakings, including the 2008 undertaking that now applies to Queensland Rail, have had initial terms of about four years (excluding any subsequent extensions). The first undertaking of Dalrymple Bay Coal Terminal (DBCT) was for 4.5 years.

Draft Decision

- 1.13** After considering Queensland Rail's proposed term of the new access undertaking to start from the date of the approval (commencement date) and end on 30 June 2020 (termination date), our Draft Decision is to approve Queensland Rail's proposal.
- 1.14** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

2 NEGOTIATION PROCESS (PART 2)

The third-party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation, which establishes the central role of commercial negotiation for parties wishing to secure access rights.

This means a key component of a rail access undertaking is an effective negotiation framework that can promote successful negotiation and hence facilitate access. An effective negotiation framework enables appropriate information exchange between parties, enables parties to negotiate in a timely manner and on reasonable terms, provides a transparent and predictable process for allocating limited available capacity, and protects an access provider from negotiating with parties that have no genuine interest in gaining access.

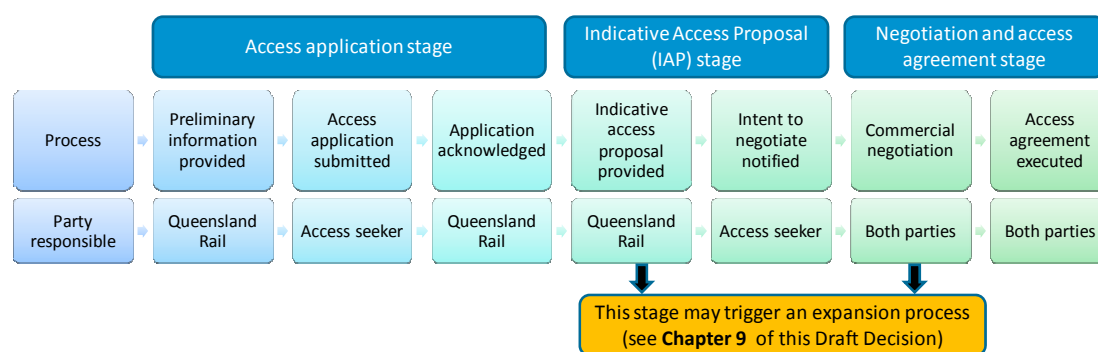
An effective negotiation framework seeks to balance the interests of access seekers and access holders, and the legitimate business interests of an access provider. It also promotes efficient operation of, use of and investment in the relevant declared infrastructure and the public interest.

On this basis, we have proposed amendments to the negotiation process which we require before approving the 2015 DAU.

Introduction

Part 2 of Queensland Rail's 2015 DAU proposes the framework for parties to negotiate with Queensland Rail to reach agreed terms and conditions in the form of an access agreement.³² It also includes the process and the rules for allocating limited available capacity and outlines the responsibilities of Queensland Rail and access seekers during different stages of the negotiation process (see **Figure 2.1**).

Figure 2.1 Overview of the proposed negotiation framework



The key issues are summarised below in **Table 2.1** (which is based on the format used by Queensland Rail in its explanatory submission to the 2015 DAU³³). Matters that require detailed explanation are discussed in Sections 2.1 to 2.5.

³² The access agreement has been typically executed by Queensland Rail and a rail operator. However, the 2015 DAU proposes that an access agreement can also be executed in a tripartite form by Queensland Rail, a rail operator and, if required, a rail operator's end customer (see Chapter 7 of this Draft Decision).

³³ Queensland Rail, sub. no. 1: 13-47.

Table 2.1 Negotiation process

<i>Summary of 2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision³⁴</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Information exchange			
Information required by Queensland Rail from an access seeker is included in Schedules to the 2015 DAU.	Not applicable as Queensland Rail proposes to include the information requirements in the 2015 DAU rather than on its website.	Information requirements make it difficult for an end customer to apply for access rights independently of a rail operator.	See Section 2.1.
2015 DAU lists technical information Queensland Rail will provide. Other information (e.g. cost, price, etc) is provided subject to confidentiality obligation.	Partially inconsistent as the provision of cost and pricing information is made subject to Queensland Rail's confidentiality obligation.	The 2015 DAU should expressly provide for disclosure of cost and pricing information to allow balanced negotiations with Queensland Rail.	See Section 2.1.
Timeframes			
Proposes fixed timeframes; at the indicative access proposal (IAP) stage allows Queensland Rail to unilaterally extend the timeframes while access seeker faces adverse consequences for a delay.	Inconsistent as the extension process is not balanced between Queensland Rail and an access seeker.	Proposed departure from timeframe is not balanced; prefer the QCA's 2014 Draft Decision.	See Section 2.2.
Refusal to provide access			
Queensland Rail can refuse access if an access seeker is not genuine, non-compliant, has concurrent requests or may adversely affect passenger safety.	Partially inconsistent. Although the 2015 DAU no longer proposes refusing access based on passenger operational issues, Queensland Rail's approach to assessing the impact of an access seeker on passenger safety is discretionary.	Refusal on passenger safety grounds highlights potential conflict of interest for Queensland Rail; greater clarity required on 'non-compliance' factors.	See Section 2.3.
Queensland Rail can recover costs where an access application does not result in an access agreement; Queensland Rail can refuse to deal with that access seeker until those costs are paid.	Not applicable as 2015 DAU includes new circumstances for cost recovery and a new provision on consequences if access seeker fails to pay those costs.	Cost recovery proposal not transparent; cost recovery should be limited to incremental costs and prevent 'double-dipping'.	See Section 2.3.

³⁴ QCA, 2014 Draft Decision; Chapter 2.

<i>Summary of 2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision³⁴</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Competing access requests			
Where access seekers compete for the same haulage task, Queensland Rail will negotiate solely with the customer access seeker or an access seeker (compulsorily) nominated by the customer.	Inconsistent as compulsory nomination of access seeker by customer undermines above-rail competition.	Did not comment on this aspect of the 2015 DAU.	See Section 2.4.
Where access seekers compete for limited available capacity, Queensland Rail will form a queue and re-order it based on, among other factors, which is more favourable to its legitimate business interests.	Partially inconsistent as the queuing mechanism proposed gives Queensland Rail considerable discretion in allocating limited available capacity to competing access applications.	Proposal allows Queensland Rail to make discriminatory and non-transparent decisions in giving priority to competing access applications.	See Section 2.4.
Access renewal rights			
Coal-carrying or other bulk-mineral-carrying train services may get priority if they satisfy conditions relating to contract period and meet timeframes for renewal applications and negotiations.	Partially inconsistent as uncertainty about whether existing access holder will get priority and what contract terms will be offered; ambiguity about the renewal process when there is no competing access seeker.	Priority in renewing access rights should be extended to other bulk and intermodal freight services; timeframes should be flexible and non-price terms should be the same as existing access agreement.	See Section 2.5.

2.1 Information exchange

The 2015 DAU sets out two forms of information exchange during the negotiation process:

- information required by Queensland Rail from an access seeker
- information provided by Queensland Rail to an access seeker.

2.1.1 Information required by Queensland Rail

Queensland Rail's 2015 DAU proposal

The 2015 DAU requires an access seeker to seek access rights by submitting an access application, and specifies information an access seeker is required to provide Queensland Rail at different stages of the negotiation process, in order to describe its planned operations (Table 2.2).

Table 2.2 Information required by Queensland Rail

<i>Stage</i>	<i>Information requirements</i>
Access application stage	<p>Schedule B to the 2015 DAU sets out the information requirements in an access application, such as:³⁵</p> <ul style="list-style-type: none"> evidence to assess an access seeker's ability to use the access rights sought, including where access rights are sought to serve a customer: <ul style="list-style-type: none"> evidence that the access seeker is reasonably likely to have such a customer and information regarding the effect on the access seeker's ability to attract a customer in the future, if access rights were granted to it information required to assess the planned operations such as: <ul style="list-style-type: none"> description of the proposed train service (e.g. route of operation, duration of agreement, frequency of service, and other information depending on whether a coal, freight or passenger train service is proposed) description of the proposed train (e.g. number, type and weight of locomotives and wagons/carriages) infrastructure requirements for the proposed train service (e.g. any extensions or private infrastructure) separate information requirements in cases where an access application is for the renewal of existing access rights or for the transfer of existing access rights. <p>Queensland Rail proposed publishing access application forms on its website which might identify different requirements for different types of train services.³⁶</p> <p>The 2015 DAU enables Queensland Rail, acting reasonably, to require additional information from an access seeker for the purpose of preparing an indicative access proposal (IAP).^{37,38}</p>
Negotiation stage	<p>The 2015 DAU requires an access seeker to submit a draft operating plan consistent with the template in Schedule C to the 2015 DAU.³⁹</p> <p>It sets out the full details of an access seeker's proposed train operations and is a basis for finalising the terms and conditions of an access agreement such as train service entitlements, access charge and capacity analysis.</p>

Stakeholders' comments

Stakeholders accepted Queensland Rail's proposed approach of detailing the information requirements for an access application and operating plan in schedules to the access undertaking.⁴⁰

³⁵ Queensland Rail, 2015 DAU, cl. 2.1.1 and Schedule B; sub. no. 1: 16

³⁶ Queensland Rail, 2015 DAU, cl. 2.1.1(b)

³⁷ An IAP is a non-binding document prepared by Queensland Rail which describes the relevant rolling stock and operating characteristics and outlines Queensland Rail's preliminary analysis of capacity availability and indicative methodology for calculating access charges (Queensland Rail, 2015 DAU, cl. 2.4.2).

³⁸ Queensland Rail, 2015 DAU, cl. 2.3.1; sub. no. 1: 16

³⁹ Queensland Rail, 2015 DAU, cl. 2.7.2(a)(iii)(A) and Schedule C

⁴⁰ Glencore, sub. no. 7: 19; New Hope, sub. no. 10: 26

However, Glencore and New Hope said the 2015 DAU should make it clear that an end customer (e.g. a mining company) can apply for access rights independently of a rail operator and that the information requirements should be reduced to reflect that circumstance (**Table 2.3**).⁴¹

Table 2.3 Stakeholders' comments on information requirements

<i>Stage</i>	<i>Stakeholders' comments</i> ⁴²
Access application stage	<p>Schedule B should make it clear that an end customer can apply for access rights (not only rail operators).</p> <p>An end customer should not be required to describe the proposed train (e.g. number, type and weight of locomotives and wagons). If required, Queensland Rail could assume a standard reference train service until a rail operator is appointed to provide that information.</p>
Negotiation stage	<p>Information requirements set out in the operating plan template in Schedule C can only be completed by a rail operator and should be delayed until the end customer has contracted a rail operator.</p>

QCA analysis and Draft Decision

We accept Queensland Rail's proposal to include the information requirements from an access seeker as schedules to the undertaking. However, we require amendments so the 2015 DAU clearly identifies the information required if a customer applies for access rights independently of a rail operator. We also require amendments to prevent Queensland Rail from requiring information beyond what is included in the undertaking.

Information requirements—process

The 2015 DAU proposes to specify the information requirements in Schedule B to the undertaking. This is different from Queensland Rail's 2013 DAU proposal of specifying them on its website, which raised concerns about discretionary changes to those requirements by Queensland Rail.⁴³

We consider Queensland Rail's 2015 DAU proposal is an improvement over its earlier proposal. For example, detailing the information requirements in the undertaking will avoid any discretionary changes by Queensland Rail, as any change will be subject to the amendment process in the QCA Act. It creates certainty about the information requirements in the negotiation process and is in the interests of all parties, having regard to s.138(2) of the QCA Act, in particular paragraphs (b) and (e).

The 2015 DAU also allows Queensland Rail to require additional information from an access seeker for the purpose of preparing an Indicative Access Proposal (IAP), provided that Queensland Rail acts reasonably when requiring that additional information. However, stakeholders said that the reasonableness requirement should be clarified to relate to the information that was necessary for preparing an IAP.⁴⁴

We consider Queensland Rail's proposal obliges it to act reasonably, so the additional information it requires will need to be relevant and pertinent for the purpose of preparing an

⁴¹ Glencore, sub. no. 7: 9; New Hope, sub. no. 10: 17

⁴² Glencore, sub. no. 7: 19-20; New Hope, sub. no. 10: 17

⁴³ QCA, 2014 Draft Decision: 14-15

⁴⁴ Glencore, sub. no. 7: 19-20; New Hope, sub. no. 10: 28

IAP. Therefore, we consider this aspect of Queensland Rail's proposal adequately addresses stakeholders' concerns. The proposed approach will enable Queensland Rail to assess its ability to meet the requested access requirements and is in its legitimate business interest, having regard to s.138(2)(b) of the QCA Act.

That said, we have reviewed the 'access application' definition in the 2015 DAU and Queensland Rail's proposal of publishing on its website the access application forms which may identify different requirements for different types of train services.

We consider the 2015 DAU drafting could allow Queensland Rail to require information beyond what is included in the undertaking – in Schedule B and in the provision that enables Queensland Rail, acting reasonably, to request additional information. For example, it is unclear if the different requirements identified in the website forms for access applications will be as per the information requirements in the undertaking. We have proposed amendments so that the information requirements (e.g. in the website forms) are in accordance with the undertaking. We consider our proposed amendments will protect the interests of all parties – they will oblige Queensland Rail to seek information within the bounds of the approved undertaking, prevent Queensland Rail from acting in a discretionary manner and enable Queensland Rail to prepare a better IAP based on the information access seekers provide, having regard to s.138(2)(b) and (e) of the QCA Act.

Information requirements—content

We have reviewed the content of the information requirements and agree with stakeholders that they allow a rail operator, not an end customer, to apply for access rights; thus an end customer cannot apply for access rights directly.

In this context, we consider the 2015 DAU does not provide a genuine contracting option for an end customer to be an access holder (see Chapter 7 of this Draft Decision). Given this, having regard to s.138(2)(e) of the QCA Act, we do not consider it appropriate to approve Queensland Rail's information requirements proposal.

We have proposed amendments to allow a rail operator or an end customer to be the access holder and principal contractor under an agreement (see Chapter 7). Therefore, we consider the information Queensland Rail requires from an access seeker need to be amended to reflect our Draft Decision in Chapter 7.

In particular, we consider if a customer is unable to provide information about planned operations, Queensland Rail can make reasonable assumptions about train operational matters, and both Queensland Rail and the customer access seeker can agree an assumed operating plan for the purpose of negotiating an access agreement. We have proposed relevant amendments in Schedule B and Part 2 of the 2015 DAU.⁴⁵

We consider our proposal will enable an end customer to apply for and execute an access agreement before selecting a rail operator(s) to utilise the access rights. This will facilitate above-rail competition and promote efficient use of the network and is in the interests of access seekers, having regard to s.138(2) of the QCA Act, including balancing paragraphs (a), (b), (d) and (e).

⁴⁵ The amendments we have proposed are consistent with those made to Aurizon Network's 2010 access undertaking to reflect our 2013 decision on an alternative form of standard access agreement that enabled an end customer to hold access rights

The 2015 DAU requires an access seeker to provide evidence about its ability to use the access rights sought. This includes requiring a train operator access seeker to provide evidence that it is likely to attract a customer including information about the effect that a grant of access rights will have on its ability to attract a customer in the future.

We accept that it is in Queensland Rail's legitimate business interests to reduce administrative costs associated with negotiating access applications which have no prospect of leading to an access agreement. But at the same time, this has to be balanced against requiring a reasonable level of information in order for access seekers to demonstrate that they genuinely seek access.

We consider it is reasonable to require a train operator access seeker to provide evidence that it (the access seeker) is likely to have a customer at the commencement date of the access agreement. However, Queensland Rail has not explained why additional evidence is required about an access seeker's ability to attract a customer in the future – which seems irrelevant for assessing an access seeker's ability to use the requested access rights.

Therefore, we consider this aspect of the information requirement should be limited to whether an access seeker is likely to have a customer at the commencement date of the access agreement, and not require additional information about whether the access seeker is likely to attract a customer in future. We have proposed amendments in Schedule B to reflect this position. These amendments will remove unnecessary information requirements imposed on access seekers, having regard to the interests of access seekers in s.138(2)(e) of the QCA Act.

As part of information requirements, the 2015 DAU requires an access seeker to nominate the form of access agreement being sought – that is, either a SAA or a different form of access agreement. Stakeholders said this requirement should be removed given there is only one SAA.⁴⁶ We consider Queensland Rail's proposal allows access seekers flexibility in choosing a form of access agreement and it does not prevent them from selecting the SAA. Therefore, we are minded to accept this aspect of Queensland Rail's proposal.

⁴⁶ Glencore, sub. no. 7: 19; New Hope, sub. no. 10: 17

Draft Decision

- 2.1 After considering Queensland Rail's proposed information requirements from an access seeker during the negotiation process, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 2.2 The QCA requires Queensland Rail to amend its 2015 DAU to:**
- (a) make appropriate amendments to the information requirements and the negotiation process to enable an end customer to apply for access rights and to execute an access agreement independently of a rail operator. The required amendments are set out in Part 2 and Schedule B in Appendix C.**
 - (b) provide that the information requirements for access application are in accordance with the undertaking. The required amendments are set out in Cls. 2.1.1 and 7.1 in Appendix C.**
 - (c) limit the information required by Queensland Rail regarding an access seeker's ability to use the access rights sought. The required amendments are set out in Schedule B in Appendix C.**
- 2.3 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.**

2.1.2 Information provided by Queensland Rail

The QCA Act lists the information Queensland Rail must give an access seeker, including information about the access price (and the pricing methodology), costs (including capital, operating and maintenance) and asset values (and the asset valuation methodology). Such information could alternatively be given in the form of a reference tariff.⁴⁷

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed providing technical, operating and commercial information to an access seeker at different stages of the negotiation process (**Table 2.4**).

Table 2.4 Information to be provided by Queensland Rail

<i>Stage</i>	<i>Information provided</i>
Access application stage	<p>Schedule A to the 2015 DAU lists the preliminary information Queensland Rail will provide such as:⁴⁸</p> <ul style="list-style-type: none"> a description of the railway track (including corridor maps and line diagrams), signalling and communication systems and safe working requirements train operational constraints such as maximum train speeds, nominated sectional running times and maximum train length any applicable reference tariff and standard access agreement. <p>Queensland Rail proposed making the preliminary information available on its website and keeping it current and accurate.⁴⁹</p>

⁴⁷ QCA Act, ss.101(1), and 101(2) and 101(4). A reference tariff is the QCA approved price for a declared service that forms the benchmark price for negotiation of an access price between Queensland Rail and an access seeker. In terms of Queensland Rail's network, reference tariffs are approved for only the coal-carrying train services on the West Moreton system.

⁴⁸ Queensland Rail, 2015 DAU, cl.2.1.2(c) and Schedule A (cl.1).

<i>Stage</i>	<i>Information provided</i>
	<p>Queensland Rail also proposed making available, on request, capacity information to a prospective access seeker in the form of a daily train plan (DTP).</p> <p>Queensland Rail said the DTP would provide the scheduled times for all train services for a particular day on a specified part of the network. But the DTP will not show the whole network and as such may not show all train services that would potentially affect the existing capacity. However, Queensland Rail said it will note the other parts of the network where interaction with other train services would affect the existing capacity.⁵⁰</p>
IAP stage	<p>Queensland Rail proposed providing in the IAP information such as:⁵¹</p> <ul style="list-style-type: none"> • the indicative train operating characteristics • an indicative capacity analysis i.e. an assessment of whether there is sufficient available capacity to accommodate the requested access rights and any additional capacity required to grant the requested access rights • a preliminary methodology for calculating access charges.
Negotiation stage	<p>To facilitate the negotiation process, Queensland Rail proposed providing information such as:⁵²</p> <ul style="list-style-type: none"> • additional information in accordance with its obligations under the QCA Act, provided it did not breach its confidentiality obligations (in particular, the 2015 DAU proposes that Queensland Rail is not obliged to disclose confidential information unless a confidentiality agreement on terms satisfactory to it, acting reasonably, has been executed)⁵³ • if requested, capacity information relevant to an access seeker's access application • a methodology for calculating access charges, a capacity analysis and other terms of an access agreement.

Stakeholders' comments

Stakeholders said an effective negotiate–arbitrate model required access seekers to have enough information to competitively negotiate with Queensland Rail. They wanted greater disclosure of information on matters including:

- *costs*: capital, operating and maintenance costs (on standalone and incremental basis)
- *assets*: asset value (and the valuation methodology) including the written-down book values for rail transport infrastructure relevant to the access rights being sought
- *prices*: access price (and the pricing methodology) including where Queensland Rail said that a price was 'market based' how Queensland Rail determined that 'market based price'
- *capacity*: spare capacity estimate (including the way it was calculated) and master train plans.⁵⁴

⁴⁹ Queensland Rail, 2015 DAU, cl.2.1.2(c).

⁵⁰ Queensland Rail, 2015 DAU, Schedule A (cl.2)

⁵¹ Queensland Rail, 2015 DAU, cl.2.4.2

⁵² Queensland Rail, 2015 DAU, cls.2.7.2(a)(i), (ii), (vi), (vii) and (x)

⁵³ Queensland Rail, 2015 DAU, cl.2.2.2(b)

⁵⁴ Asciano, sub. no. 5: 10, 16; Glencore, sub. no. 7: 20-22; Aurizon, sub. no. 6: 20-21.

Stakeholders suggested that this information should be provided in the IAP or within a specific minimum time period after the IAP.⁵⁵

Stakeholders supported Queensland Rail's proposal to make the preliminary information available on its website.⁵⁶ However, Aurizon noted the information packs available on Queensland Rail's website were almost nine years old and suggested that Queensland Rail should be obliged to review and amend them.

QCA analysis and Draft Decision

We accept Queensland Rail's proposal to specify in the undertaking the technical and operating information it will provide to an access seeker. However, we consider Queensland Rail's proposal creates significant uncertainty about the provision of cost, pricing and capacity information and is inconsistent with its obligations under s.101 of the QCA Act. We have proposed amendments requiring Queensland Rail to provide such information to enable access seekers to have relevant information and facilitate balanced negotiations.

Cost and pricing information

The rail network in Queensland has been declared since 1997. Since that time the operator of the network has had obligations under s.101 of the QCA Act to provide certain basic information to access seekers. This information provision requires Queensland Rail to provide an access seeker information on matters such as:

- price of a service
- cost of a service (and elements of those costs)
- asset value
- spare capacity, which requires an understanding of the extent of the network's capacity and of the capacity being consumed by existing traffic
- safety systems.

This is reasonably basic information and the obligation to provide it is unlikely to be onerous to Queensland Rail as the obligation has existed for over 17 years.

The 2015 DAU specifies the technical, operating and commercial information Queensland Rail will provide to access seekers, which is consistent with our 2014 Draft Decision.⁵⁷

However, the 2015 DAU does not specify the cost and pricing information that Queensland Rail will provide to access seekers. Instead, the 2015 DAU proposes that Queensland Rail will provide that information only when an access seeker executes a confidentiality agreement on terms which are satisfactory to Queensland Rail (acting reasonably). The 2015 DAU does not include those terms.⁵⁸

Under the QCA Act, we may allow Queensland Rail to excise the provision of specific information if there is a reference tariff in place or if its disclosure can damage the operator's or

⁵⁵ Aurizon, sub. no. 6: 20; Glencore, sub. no. 7: 20; New Hope, sub. no. 10: 8.

⁵⁶ Glencore, sub. no. 7: 22; New Hope, sub. no. 10: 16; Aurizon, sub. no. 6: 19-20.

⁵⁷ QCA, 2014 Draft Decision, 18–19

⁵⁸ We note that rail access undertakings that have applied to Aurizon Network and Queensland Rail (e.g. 2008 and 2010 access undertakings) include the QCA-approved confidentiality deed that identifies how parties will handle and manage each other's confidential information. However, those confidentiality obligations govern handling of confidential information consistent with s. 101(6) of the QCA Act and do not prevent a party from disclosing its confidential information to the other party.

a third party's commercial activities. Thus, an assessment under s. 101(2) of whether information is confidential and in what form it should be disclosed, is determined by us, not Queensland Rail.

Therefore, Queensland Rail's proposal effectively enables it to withhold confidential information, including the cost and pricing information it is obliged to disclose under the QCA Act (unless we authorise Queensland Rail to not provide the information).

This creates significant uncertainty about some basic information that access seekers need to effectively negotiate with Queensland Rail. Lack of that basic information could adversely affect the interests of access seekers, particularly those seeking access rights for traffics and systems with no approved reference tariff and may discourage access to Queensland Rail's network thereby adversely affecting the efficient use of the declared service. For this reason, we do not consider it appropriate to approve Queensland Rail's proposal, having regard to s. 138(2) of the QCA Act, in particular paragraphs (a), (b), (d) and (e).

We consider Queensland Rail's information disclosure obligations should be consistent with the QCA Act – that is, the undertaking should specify the cost and pricing information that Queensland Rail should provide to an access seeker for systems and traffics where no reference tariffs apply. We also agree with stakeholders that Queensland Rail should be obliged to provide that information in the IAP. Our position will enable access seekers to have access to relevant cost and pricing information and facilitate balanced negotiations between parties, which would be in the interests of access seekers and promote the efficient use of Queensland Rail's network, having regard to s. 138(2), particularly paragraphs (a), (b), (d) and (e).

Capacity and preliminary information

We have also reviewed the capacity information Queensland Rail proposes to provide at the access application and negotiation stages—that is, a daily train plan (DTP) for a part of the network. Queensland Rail said that DTP may not show all the train services that may affect the existing capacity but that it will 'note' the other parts of the network where interaction with other train services would impact on existing capacity.

We consider simply 'noting' the other parts of the network is not enough to provide relevant capacity information, which is critical to the efficient operation of the network and to access seeker requests for capacity. Rather, Queensland Rail should provide sufficient information about other train services that could affect existing capacity. Accordingly, we do not consider it appropriate to approve Queensland Rail's proposal, having regard to s. 138(2), in particular paragraphs (a) and (e).

We have proposed amendments to oblige Queensland Rail to provide in the DTP sufficient information about other train services that may potentially impact on the existing capacity.

That said, we consider the DTP itself is not enough to provide reliable information about the available capacity (see Chapter 4 of this Draft Decision). A master train plan (MTP) provides additional information, for example, about regular maintenance activities over a period of a month or more, that is also relevant in determining the existing available capacity. Therefore, we have proposed amendments requiring Queensland Rail to also provide a MTP to an access seeker. Our position would make sufficient information available to an access seeker to reasonably assess the capacity that is available for contracting and is in the interests of access seekers, having regard in particular to s. 138(2)(e) of the QCA Act. It would also allow an access seeker and Queensland Rail to assess the requirements for an expansion and would promote efficient investments in the network, having regard to s. 138(2)(a) and (b) of the QCA Act.

We accept Queensland Rail's proposal of making the preliminary information available on its website. We also note the 2015 DAU obliges Queensland Rail to keep that preliminary information current and accurate, which should address Aurizon's particular concern about the information being outdated.

Draft Decision

2.4 After considering Queensland Rail's proposal about the information it will provide during the negotiation process, our Draft Decision is to refuse to approve Queensland Rail's proposal.

2.5 The QCA requires Queensland Rail to amend its 2015 DAU to:

- (a) **specify, for systems where no reference tariffs apply, cost and pricing information that Queensland Rail will provide in an Indicative Access Proposal, consistent with its obligations under s. 101(2) of the QCA Act. The required amendments are set out in cls.2.4.2 and 2.7.2 in Appendix C.**
- (b) **provide that confidentiality obligations do not apply where parties are required to disclose information under the QCA Act. The required amendments are set out in cls.2.2.2 and 2.7.2 in Appendix C.**
- (c) **provide appropriate capacity information to an access seeker. This includes providing a DTP which contains sufficient information about possibly relevant train services and also an MTP. The required amendments are set out in Schedule A in Appendix C.**

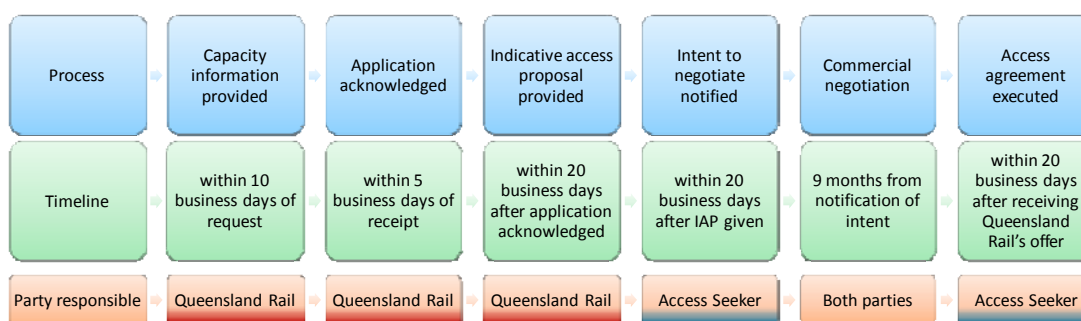
2.6 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

2.2 Timeframes

Queensland Rail's 2015 DAU proposal

The 2015 DAU proposes timeframes for different stages of the negotiation process (**Figure 2.2**).

Figure 2.2 Proposed negotiation process timeframes⁵⁹



The 2015 DAU also proposes departure from those timeframes in certain circumstances:

- Queensland Rail can extend the time for providing an IAP if it considers an application raises complex issues. In doing so, Queensland Rail 'may' provide the reasons for extending the

⁵⁹ Queensland Rail, 2015 DAU, cls.2.1.2(b), 2.3.2(a), 2.4.1(a), 2.5.1, 2.7.1(b)(ii)(C) and 2.9.5(a)(iv)

time. An access seeker can raise a dispute with the QCA if it considers the extended time is excessive.⁶⁰

- Parties can agree to extend the negotiation period and the timeframe for an access seeker to execute the access agreement offered by Queensland Rail.⁶¹

The 2015 DAU also proposes that if an access seeker:

- delays notifying its intent to negotiate (i.e. after 20 business days (**see Figure 2.2**) but before three months), Queensland Rail could revise the IAP, thereby bringing the application back to the IAP stage.⁶²
- does not notify its intent to negotiate within three months, that application will be treated as withdrawn.⁶³
- does not execute the offered access agreement within 20 business days or the agreed timeframe, Queensland Rail's offer will lapse.⁶⁴

Stakeholders' comments

On the timeframe for providing an IAP, stakeholders were concerned that Queensland Rail's proposal allowed it to delay the timeframe subject only to an access seeker raising an access dispute, which was 'likely to be highly counterproductive to successfully negotiating access'.⁶⁵ They supported the QCA's 2014 Draft Decision — that the timeframe should be extended where the party seeking extension can reasonably justify the extension and the other party (acting reasonably) agrees to the extended time.⁶⁶

On the negotiation period, New Hope suggested that Queensland Rail should not unreasonably withhold agreeing to an extension if there are special circumstances which would reasonably justify the extension (e.g. where negotiations were well advanced and close to completion).⁶⁷

On the timeframe for executing an access agreement, Asciano suggested a longer timeframe. Glencore said that an extension should be allowed if an access seeker can reasonably justify the extension; New Hope added that Queensland Rail should not unreasonably withhold agreeing to an extension.⁶⁸

Glencore and New Hope supported Queensland Rail's proposal of letting the access agreement offer lapse if an access seeker did not execute it within the specified timeframe.⁶⁹

QCA analysis and Draft Decision

We accept Queensland Rail's proposed timeframes for the different stages of the negotiation process. We also accept that it is in Queensland Rail's legitimate business interest to have certain controls to prevent access seekers unnecessarily delaying the negotiation process, which imposes costs and uncertainty on Queensland Rail.

⁶⁰ Queensland Rail, 2015 DAU, 2.3.2(b)-(d)

⁶¹ Queensland Rail, 2015 DAU, cls.2.7.1(b)(ii)(C) and 2.9.5(a)(iv)

⁶² Queensland Rail, 2015 DAU, cls.2.5.2(a)-(b)

⁶³ Queensland Rail, 2015 DAU, cl.2.5.2(c)

⁶⁴ Queensland Rail, 2015 DAU, cl.2.9.5(b)

⁶⁵ Glencore, sub. no. 7: 22-23; New Hope, sub. no. 10: 8; Asciano, sub. no. 5: 7

⁶⁶ Glencore, sub. no. 7: 22; New Hope, sub. no. 10: 8

⁶⁷ New Hope, sub. no. 10: 8

⁶⁸ Asciano, sub. no. 5: 25; Glencore, sub. no. 7: 23; New Hope, sub. no. 10: 31.

⁶⁹ Glencore, sub. no. 7: 23; New Hope, sub. no. 10: 31

However, we consider Queensland Rail's proposal of allowing an extension to some of those timeframes is not balanced between Queensland Rail and access seekers. We have proposed amendments in Part 2 of the 2015 DAU to adequately balance the interests of all parties.

Negotiation timeframes are necessary to facilitate timely access and the undertaking should specify the timeframes that parties can reasonably be expected to meet. However, timeframes are not an end in themselves and the undertaking should allow parties the opportunity to depart from those timeframes to deal with exceptional circumstances that can be reasonably justified.

IAP and intent to negotiate

The 2015 DAU proposes the same timeframe of 20 business days for Queensland Rail to provide an IAP and for an access seeker to notify its intent to negotiate on the basis of that IAP.

On providing an IAP, the 2015 DAU allows Queensland Rail to extend the time and that it 'may' provide reasons for the delay. An access seeker can dispute that extension with the QCA if it considers the delay is excessive. We consider this proposal creates uncertainty about the timing of an IAP as Queensland Rail is not obliged to provide reasons for the delay. The absence of a justification can also prevent an access seeker from raising a dispute.

That said, we agree with stakeholders that raising a dispute under the QCA Act on a 'timeframe' matter can be counterproductive to conducting negotiations in a timely manner. We expect parties negotiating for an access agreement to be able to negotiate and agree on an alternative timeframe if delays can be justified. This would be consistent with the QCA Act requirement that the access provider and access seeker must negotiate in good faith for reaching an access agreement.⁷⁰

On providing the intent to negotiate, an access seeker faces adverse consequences for notifying late—including a delayed negotiation or a rejection at Queensland Rail's discretion, regardless of the complexity of its application that could justify that delay. Such consequences could have the effect of impeding the effective utilisation of Queensland Rail's infrastructure.

Given this, we consider the IAP and the intent to negotiate extension process are not balanced between Queensland Rail and access seekers. Accordingly, we do not consider it appropriate to approve Queensland Rail's proposal having regard to s. 138(2), in particular paragraphs (a), (b) and (e).

As stated in our 2014 Draft Decision, we consider that the undertaking should allow Queensland Rail to extend the time for providing an IAP beyond 20 days and an access seeker to extend the time for notifying its intent to negotiate, if each party can reasonably justify its decision and the other party (acting reasonably) agrees to the extended time. We consider our proposal adequately balances the interests of all parties as it allows a party to seek an extension if it can be reasonably justified and protects a party from unnecessary delay, having regard to s. 138(2)(a), (b) and (e) of the QCA Act.

We also consider that reporting the time Queensland Rail took in providing the IAPs and access seekers took in notifying their intent to negotiate would place greater accountability on them to meet their respective obligations regarding timeliness. Therefore, Queensland Rail should report those timeframes in ranges. This reporting requirement is also considered in Chapter 5 of this Draft Decision.

⁷⁰ QCA Act, s. 100(1)

Other matters

The 2015 DAU enables parties to agree to extend the negotiation period and the timeframe for an access seeker to execute an access agreement. We agree with Glencore that an extension at these stages of the negotiation process should be reasonably justified so that it does not adversely affect other access seekers, in particular where a queue is formed to allocate limited available capacity.⁷¹ We also agree with New Hope that a party should not unreasonably withhold agreeing to an extension. For example, a negotiation period may extend beyond the stipulated nine month period when there is insufficient available capacity to meet an access seeker's requirements and the rail infrastructure is to be extended.⁷²

For these reasons, we do not consider it appropriate to approve these aspects of Queensland Rail's proposal.

Effectively, we consider Queensland Rail's proposal should be amended to allow parties to act reasonably when seeking and agreeing on an extension. This will be in the interests of all parties, having regard in particular to s. 138(2)(b) and (e) of the QCA Act.

Draft Decision

- 2.7 After considering Queensland Rail's proposed timeframes for different stages of the negotiation process, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 2.8 The QCA requires Queensland Rail to amend its 2015 DAU so that the party seeking an extension to a timeframe (relating to providing an Indicative Access Proposal and an intent to negotiate, a negotiation period and an execution of access agreement) can reasonably justify the extension and the other party cannot unreasonably withhold its consent to the extension request. The required amendments are set out in Part 2 in Appendix C.**
- 2.9 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

2.3 Refusal to provide access and cost recovery

Queensland Rail's 2015 DAU proposal

The 2015 DAU enables Queensland Rail to:

- cease negotiations in certain circumstances
- recover its costs where an access application does not result in an access agreement.

Circumstances for refusing to provide access

The 2015 DAU entitles Queensland Rail to refuse to deal with an access seeker, if it considers the access seeker:⁷³

- has no genuine intention of obtaining/using access rights (e.g. whether the access seeker has a right to unload at its destination)
- is non-compliant—that is, the access seeker

⁷¹ Glencore, sub. no. 7: 23

⁷² New Hope, sub. no. 10: 31

⁷³ Queensland Rail, 2015 DAU, cls.2.8.1(a)(i)-(v), 2.8.2, 2.8.3, 2.1.1(c), 2.5.2(c)

- does not comply with the dispute resolution process and its outcome
- does not agree to comply, or fails to comply materially, with the undertaking's obligations and processes
- is unlikely to comply materially with an access agreement (e.g. does not satisfy prudential requirements, which require that an access seeker must not be insolvent or be in material default of any agreement with Queensland Rail, including that the access seeker must demonstrate within 10 business days of Queensland Rail's request that it satisfies the prudential requirements)
- may adversely affect passenger safety—that is, if an access seeker's train service may adversely affect the safety of passengers using a passenger train service and no measure could reasonably be taken by the parties to mitigate that effect
- has concurrent access requests—such as if one of the access requests were granted then one or more of the remainder would not be needed by the access seeker.

Cost recovery where no access agreement

The 2015 DAU entitles Queensland Rail to recover its reasonable costs incurred in dealing with an access seeker:⁷⁴

- in each circumstance where Queensland Rail refuses to deal with an access seeker (as listed above)
- when a negotiation period ends without the execution of an access agreement, that is, when the:
 - access seeker notifies that it no longer wishes to proceed with its access application
 - negotiation timeframe expires
 - access seeker does not execute the access agreement, within specified timeframes.

An access seeker's failure to pay the costs may entitle Queensland Rail to:⁷⁵

- refuse to accept a future access request from that access seeker until those costs are paid
- make any access agreement in relation to another access application of that access seeker conditional on the payment of those costs within a prescribed time.

Stakeholders' comments

Circumstances for refusing to provide access

On refusing access due to passenger safety considerations, Asciano said Queensland Rail's proposal highlighted that it (Queensland Rail) prioritised passenger services over freight services and that the interests of passenger services and freight services may conflict. Asciano said that in circumstances where Queensland Rail's interests were conflicted, an independent body (such as the QCA) should be involved to ensure neutrality.⁷⁶

⁷⁴ Queensland Rail, 2015 DAU, cl.2.10(a)

⁷⁵ Queensland Rail, 2015 DAU, cl.2.10(b)

⁷⁶ Asciano, sub. no. 5: 25

On refusing access due to non-compliance, Glencore and New Hope wanted Queensland Rail to specify all the factors, other than prudential requirements, that it would consider in assessing an access seeker's likely compliance with an access agreement.⁷⁷

Cost recovery where no access agreement

Aurizon and New Hope were concerned that Queensland Rail's cost recovery proposal was not transparent.⁷⁸

New Hope questioned:

... why a provision of this nature is required when the reference tariffs already include an allowance for overhead and managements costs (which presumably include costs relating to managing access rights negotiations). It appears to be permitting 'double-dipping' unless this provision is restricted to negotiations for access rights for which no reference tariff applies. If this provision is included then NHC expects to see a deduction from the West Moreton system reference tariff to reflect the overhead allocation for access negotiations that QR will be able to recover through other means.

Aurizon said cost recovery should be limited to incremental costs and that Queensland Rail should provide a quote if it expected to incur incremental costs.

QCA analysis and Draft Decision

We accept that Queensland Rail should be entitled to refuse access in certain circumstances to protect its legitimate business interests. However we have concerns with the discretion the 2015 DAU gives Queensland Rail in refusing access in some of the proposed circumstances and in recovering costs. We have proposed amendments to adequately balance Queensland Rail's legitimate business interests and the interests of access seekers.

Circumstances for refusing to provide access

The QCA Act obliges Queensland Rail to negotiate an access agreement with an access seeker. In doing so, Queensland Rail must negotiate in good faith and must make all reasonable efforts to satisfy the reasonable requirements of an access seeker. The QCA Act envisages that those negotiations will end in either the successful conclusion of an access agreement or in a QCA dispute resolution process. The QCA Act does not provide for Queensland Rail to cease negotiations.⁷⁹

Notwithstanding this, we consider it is reasonable for Queensland Rail to refuse to provide access in certain circumstances to protect its legitimate business interests, for example, when an access seeker has no genuine intention of using access rights. However, that refusal right should be subject to appropriate checks and balances to prevent its misuse and to protect the interests of access seekers. In particular, the circumstances should be based on objective criteria and it should adequately balance Queensland Rail's legitimate business interests as a below-rail operator with the interests of access seekers.

Concurrent requests

The 2015 DAU includes a new circumstance (compared to the 2013 DAU proposal) that entitles Queensland Rail to refuse to deal with an access seeker that has concurrent requests. Queensland Rail's proposed drafting suggests that if an access seeker has three access applications (say A, B and C) under consideration such that if A was granted B would not be

⁷⁷ Glencore, sub. no. 7: 24; New Hope, sub. no. 10: 9

⁷⁸ Aurizon, sub. no. 6: 22; New Hope, sub. no. 10: 10

⁷⁹ QCA Act, ss. 99 to 101, 111 to 127D

needed. In this scenario, Queensland Rail proposes to refuse to deal with this access seeker even though the application C may be needed. Queensland Rail has not provided reasons for this aspect of its 2015 DAU proposal.

If Queensland Rail's intent was to discourage access seekers from submitting applications that are effectively duplicate in terms of the access rights sought, the proposal goes beyond that intent. This is because, as this example illustrates, the 2015 DAU does not include the scenario where, despite access applications being concurrent, one or more of the applications is genuinely required.

The proposal is also discretionary, as Queensland Rail is not obliged to act reasonably. The access seeker is not given an opportunity to justify the reason for submitting duplicate access requests and to select which one of the duplicate access requests it wants to proceed with.

Therefore, we consider Queensland Rail's proposal does not balance its legitimate business interests with the interests of access seekers, having regard to s. 138(2), in particular paragraphs (b) and (e).

To provide a proper balance, we consider this aspect of the 2015 DAU should be amended to limit Queensland Rail's ability to cease negotiations where multiple access applications by an access seeker are genuinely duplicate in nature—such that if one request is granted the remainder of the requests will not be needed by the access seeker. In that case:

- Queensland Rail should act reasonably in forming the view that more than one of the concurrent requests by an access seeker are duplicate in nature
- an access seeker should be given a reasonable opportunity to respond and advise which one of the duplicate access requests it wants to proceed with
- failing a reasonable response, Queensland Rail may refuse to deal with the access seeker with regard to those duplicate access requests.

We consider our proposal allows Queensland Rail to refuse to deal with an access seeker that has submitted duplicate access requests but has no intention of proceeding with them, as well as protects the interests of access seekers by giving them a reasonable opportunity to respond. Accordingly, we consider our proposal duly considers s. 138(2) of the QCA Act, in particular paragraphs (b) and (e).

Passenger safety

The 2015 DAU entitles Queensland Rail to refuse to deal with an access seeker if a proposed train service 'may adversely affect' the safety of passengers using a passenger train service. Queensland Rail argued that it regarded the safety of persons using passenger train services as paramount.⁸⁰ The 2015 DAU no longer entitles Queensland Rail to refuse access on the basis of disruption to passenger train services—an aspect in the 2013 DAU proposal.

We consider Queensland Rail's proposal is an improvement over its 2013 proposal, as it seeks to protect the safety of passengers rather than Queensland Rail's passenger operational interests.

We note Asciano's concern that there is a potential conflict of interest for Queensland Rail—being the operator of passenger train services as well as the access provider for freight train services. For example, Queensland Rail may be conflicted in taking necessary measures as the operator of passenger train services to mitigate the adverse effects on passenger safety. We

⁸⁰ Queensland Rail, sub. no. 1: 20.

accept that Queensland Rail could discriminate against freight train services, in the light of our assessment of Queensland Rail's proposed non-discriminatory provisions (see Chapter 1 of this Draft Decision).

However, we consider that our proposed amendments to the non-discriminatory provisions in the 2015 DAU—aimed at preventing Queensland Rail from unfairly differentiating between users in providing access to a service, including between passenger train services and freight train services—would potentially mitigate the conflict of interest and address Asciano's concerns.⁸¹

That said, we consider the proposed 2015 DAU gives Queensland Rail an inappropriate discretion in assessing the impact on passenger safety, as there is no requirement that Queensland Rail's view about the adverse effects on passenger safety be formed on a reasonable basis.

Therefore, we would be minded to favourably consider this aspect of Queensland Rail's proposal, subject to amending the non-discriminatory provisions and requiring Queensland Rail to form its opinion about the adverse effects on passenger safety on a reasonable basis. This would adequately protect the interests of all parties, having regard to s. 138(2)(b) and (e) of the QCA Act.

Non-compliance with access agreement

Queensland Rail proposed refusing to provide access if it forms the opinion that an access seeker is unlikely to comply materially with an access agreement. In forming that opinion Queensland Rail said that it will consider whether an access seeker complies with the prudential requirements but that its opinion was not limited by that factor. Stakeholders raised concerns on this aspect suggesting that the undertaking should clearly specify the other factors Queensland Rail will consider in forming such an opinion.

We have reviewed Queensland Rail's proposal and note that although Queensland Rail's opinion is not limited by the prudential requirements factor, it is obliged to act reasonably in forming that opinion which would prevent Queensland Rail from acting in an inappropriately discretionary manner. Therefore, we consider this aspect of Queensland Rail's proposal is acceptable.

That said, the proposal requires an access seeker to comply with the prudential requirements, which includes a situation where Queensland Rail may refuse to deal with an access seeker if the access seeker fails to demonstrate, within 10 business days, its satisfaction of the prudential requirements. In that event, Queensland Rail also proposed recovering its costs of dealing with that access seeker.

We consider this is a particularly onerous consequence for non-compliance with a timeframe, particularly given that the access seeker is not given an opportunity to reasonably justify any delays in complying with that timeframe. This does not adequately balance Queensland Rail's legitimate business interests and the interests of access seekers. Accordingly, we do not consider it appropriate to approve Queensland Rail's proposal, having regard to s. 138(2) of the QCA Act.

We consider, consistent with our stated position in the context of negotiation timeframes (see Section 2.2 of this Draft Decision), that the undertaking should allow an access seeker to extend the negotiation timeframe, if it can reasonably justify an extension. Also, Queensland Rail

⁸¹ Chapter 1 of this Draft Decision considers the non-discriminatory provisions in the undertaking.

should not unreasonably withhold its agreement to that extension. We consider our proposal appropriately balances the interests of all parties—it allows an access seeker to seek an extension if it can be reasonably justified and also protects Queensland Rail from unnecessary delay, having regard to s. 138(2)(b) and (e) of the QCA Act.

Cost recovery where no access agreement

The 2015 DAU enables Queensland Rail to recover those reasonable costs it incurred in dealing with access seekers in most circumstances when an access application does not end up in the successful negotiation of an access agreement.

We consider negotiating with access seekers is Queensland Rail's core business as the operator of the declared service and Queensland Rail proposes to recover those costs directly from the access seeker that caused those costs.

However, we accept stakeholders concerns that this proposed cost recovery mechanism is not transparent. For example, it is unclear what costs Queensland Rail proposes to recover, whether those costs are efficient and how Queensland Rail will demonstrate that it is not double dipping. These are material concerns, considering also that Queensland Rail proposes to refuse to deal with the access seeker that fails to pay its costs.

Therefore, we consider this aspect of Queensland Rail's proposal is deficient and is not in the interests of access seekers and access holders, and particularly does not appropriately balance the factors specified in s. 138(2)(b), (e) and (h) of the QCA Act. Accordingly, we do not consider it appropriate to approve Queensland Rail's cost recovery proposal.

However, that is not to say we would not consider an alternative proposal that adequately balances Queensland Rail's legitimate business interests as a below-rail operator and the interests of access seekers and access holders. In particular, we would favourably consider a proposal that seeks to recover efficient incremental costs from relevant access seekers and provides a robust and transparent mechanism to address concerns about the potential for double-counting. In doing so, Queensland Rail should also be able to demonstrate that it is seeking to recover costs which it does not recover through its regulatory allowances.

Draft Decision

2.10 After considering Queensland Rail's proposed access refusal and cost recovery provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.

2.11 The QCA requires Queensland Rail to amend its 2015 DAU so that:

- (a) refusal to provide access on the grounds of concurrent requests is limited to duplicate access requests, provided the access seeker is given a reasonable opportunity to respond, before Queensland Rail considers refusing to deal with the access seeker in respect of those duplicate requests. The required amendments are set out in cl.2.8.1 in Appendix C.
- (b) refusal to provide access on the grounds of passenger safety is subject to Queensland Rail acting reasonably in assessing the impact on passenger safety and complying with the non-discriminatory provisions. The required amendments are set out in cl.2.8.2 in Appendix C.
- (c) an access seeker can seek to extend the time to demonstrate satisfaction with the prudential requirements by reasonably justifying the extension, and Queensland Rail, acting reasonably, agrees to the extended time. The required amendments are set out in cl.2.8.3 in Appendix C.
- (d) the cost recovery proposal is deleted. The QCA invites Queensland Rail to submit an alternative proposal which seeks to recover efficient incremental costs and addresses concerns regarding double-counting.

2.12 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

2.4 Competing access requests

Competing access seekers are generally one of two types—those who seek access rights in respect of either:

- competitive tendering—such as train operators seeking access rights to serve the same customer for the same haulage task; or
- mutually exclusive paths—such as train operators seeking access rights to provide different haulage tasks when there is insufficient capacity to meet their access requirements.⁸²

2.4.1 Competitive tendering

Queensland Rail's 2015 DAU proposal

The 2015 DAU sets out how Queensland Rail will deal with competing access seekers that seek access rights for the same traffic task (**Table 2.5**).

⁸² A third type of competing access seeker is a new access seeker competing for access rights with an existing access holder seeking to renew its access rights. This is related to the matter of access renewal rights and is considered separately in Section 2.5 of this Draft Decision.

Table 2.5 Competing access applications

<i>Competing access seeker</i>	<i>2015 DAU proposal</i>
<i>Where competing access seekers include a customer as access seeker – i.e. where an access seeker (train operator) seeks access rights to provide haulage service to a customer and that customer is also seeking access rights for the same service.</i>	Queensland Rail will only deal with the customer access seeker – i.e. treat the customer access seeker as the sole access seeker and negotiate solely with it. ⁸³
<i>Where competing access seekers do not include a customer as access seeker – i.e. where two or more access seekers (train operators) compete to provide the same train service to a customer. This might occur where a mine conducts a competitive tender for the provision of rail haulage services and multiple train operators submit an access application to provide those services.</i>	Queensland Rail will only deal with the access seeker (train operator) nominated by the customer and suspend the negotiation process pending the customer's nomination – i.e. treat the nominated train operator as the sole access seeker and negotiate solely with it. ⁸⁴

Stakeholders' comments

Stakeholders did not comment on this aspect of the 2015 DAU. Their comments related to competing access seekers for mutually exclusive paths and are considered in Section 2.4.2 of this Draft Decision.

QCA analysis and Draft Decision

We accept Queensland Rail's proposal to explicitly outline the process it will follow for dealing with access seekers that compete for the same haulage task. However, we cannot accept Queensland Rail's proposal that an access seeker (train operator) must be nominated by an end customer, when there are competing access seekers requesting access rights for the same haulage task and the customer has not applied for those rights.

Our key concern is that requiring a customer to nominate a train operator and providing for Queensland Rail to suspend negotiations should the nomination not occur, is likely to frustrate competition between train operators.

The proposal to negotiate with only the nominated train operator and not all the competing train operators means the train operators left out from negotiations will not have the access price and other access terms, which would affect their ability to offer competitive terms to the customer. Therefore we consider that Queensland Rail's proposal artificially restricts competition and is not in the interests of existing or potential future train operators or end users and does not appropriately address the matters specified in s. 138(2) of the QCA Act, particularly paragraphs (a), (b), (d) and (e).

We consider this aspect of Queensland Rail's proposal should be amended to allow for potential train operators to negotiate the price and other terms of access with Queensland Rail, present this to the end customer and allow the end customer to select the operator(s) they wish to engage. Such a mechanism will promote above-rail competition, as train operators would compete to offer the best deal to the end customer, who would choose the train operator for its haulage task; it is also in the interests of access seekers, having regard to s. 138(2)(a), (b), (d) and (e) of the QCA Act.

⁸³ Queensland Rail, 2015 DAU, cl.2.6(a)(i)

⁸⁴ Queensland Rail, 2015 DAU, cl.2.6(a)(ii), (c), (d)

We accept this approach may increase the complexity of Queensland Rail's negotiations, as it may have to negotiate with more than one party for the same traffic task and that minimising such complexity would be in Queensland Rail's legitimate business interests. However, we consider that our proposed mechanism also protects Queensland Rail's legitimate business interests, as access rights are granted based on commercially negotiated terms through a well-defined negotiation process. We have also sought to require that Queensland Rail only progress applications and enter into negotiations with train operators who are engaged in negotiations for potential haulage agreements (or are party to an existing haulage agreement) reflecting the access being sought. This should prevent Queensland Rail from dealing with train operators that are not likely to obtain the access rights. Therefore our proposed approach has due regard to s. 138(2)(b) of the QCA Act.

Draft Decision

- 2.13 After considering Queensland Rail's proposal for dealing with competing access requests, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 2.14 The QCA requires Queensland Rail to amend its 2015 DAU so that, if a customer does not nominate a train operator as its preferred operator, Queensland Rail negotiates with all train operators who are negotiating a potential haulage agreement with that customer, and offers each an access price and the terms and conditions of access. Queensland Rail will then negotiate and execute an access agreement with the train operator eventually selected by the customer. The required amendments are set out in cl.2.6 in Appendix C.**
- 2.15 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

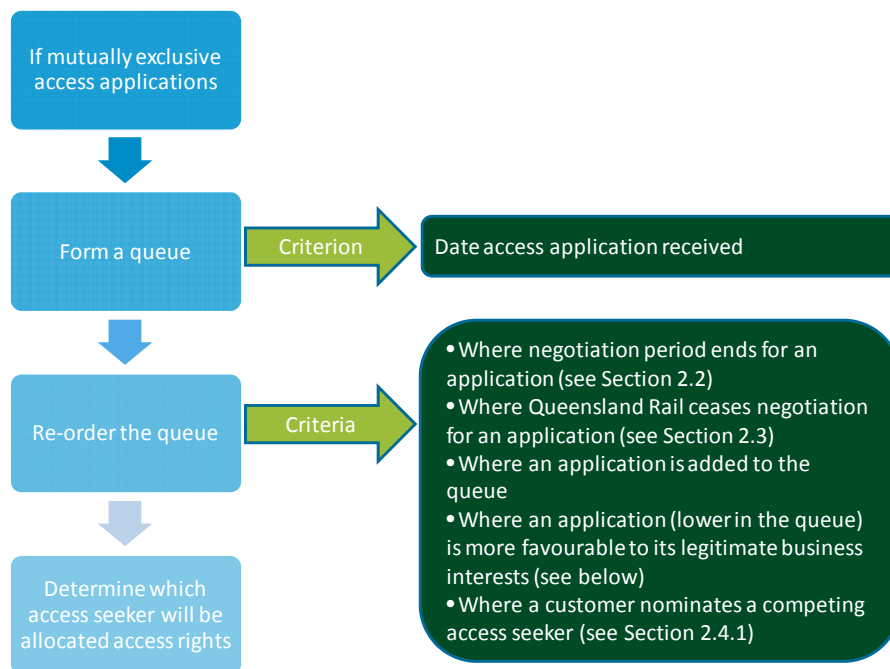
2.4.2 Competition for mutually exclusive paths

Queensland Rail's 2015 DAU proposal

The 2015 DAU sets out how Queensland Rail will deal with multiple access seekers seeking access rights for different traffic tasks when there is insufficient available capacity to fulfil their access requests—that is, when access applications are mutually exclusive.

The 2015 DAU proposes a queuing mechanism to determine which access seeker will be allocated access rights. The order of a queue will initially be based on the access application date; however, Queensland Rail may change that order in various circumstances (see **Figure 2.3**).⁸⁵

⁸⁵ Queensland Rail, 2015 DAU, cl.2.9.2

Figure 2.3 Proposed capacity allocation mechanism

Queensland Rail proposed forming an opinion on which access application is more favourable to its legitimate business interests based on the present value of future returns to it, after considering all associated risks, including factors such as:⁸⁶

- the relative time required to finalise an access agreement
- the ability of the access seeker to satisfy prudential requirements
- any other effects on Queensland Rail's financial and risk position.

In the event there are competing applications (i.e. multiple applications for the same traffic task), for the purposes of forming a queue, Queensland Rail proposed considering the customer's application or the nominated access seeker's application and disregarding other competing applications. However, until such time that a customer's nomination is pending, Queensland Rail proposed identifying the application which required the 'greatest allocation of available capacity' and using the date of that application for forming a queue.⁸⁷

Queensland Rail proposed notifying each access seeker of any change to their position in the queue and the reason for that change.⁸⁸

Stakeholders' comments

Stakeholders said the criteria Queensland Rail proposed to apply for re-ordering a queue gave it considerable discretion.⁸⁹

Glencore and New Hope said that applications for which a reference tariff applied should be prioritised based on the application date. New Hope said:

... reference tariffs are designed to provide an appropriate rate of return that, among other things, reflects the infrastructure providers legitimate business interests, such that there is no

⁸⁶ Queensland Rail, 2015 DAU, cl.2.9.2(i)

⁸⁷ Queensland Rail, 2015 DAU, cl.2.9.2(b)

⁸⁸ Queensland Rail, 2015 DAU, cl.2.9.2(j)

⁸⁹ Glencore, sub. no. 7: 24-25; New Hope, sub. no. 10: 9

justification for separate re-prioritising on the basis of paying more than the reference tariff or otherwise somehow being more favourable to QR's legitimate business interests.⁹⁰

Glencore said that an assessment of how favourable an access application is to Queensland Rail's legitimate business interests should not apply to applications which are subject to the Mount Isa (renewal) pricing mechanism (see Chapter 3 of this Draft Decision).⁹¹

QCA analysis and Draft Decision

We accept Queensland Rail's proposal to use a queuing mechanism for granting access rights to mutually exclusive access applications. However, we consider Queensland Rail's proposal gives it inappropriate discretion in allocating limited available access rights. We have proposed amendments to adequately balance the legitimate business interests of Queensland Rail and the interests of access seekers, having regard to the matters specified in s. 138(2) of the QCA Act.

Competition for mutually exclusive paths

Competition for mutually exclusive paths arises where there is insufficient available capacity to meet all access requests.

In order to provide a transparent and objective mechanism to allocate that capacity a 'first in, first served' queuing mechanism is important to reserve capacity for the access seeker first in the queue. This method of forming a queue provides access seekers with some surety over access rights during negotiations, which would assist with an access seeker's forward planning; therefore queuing protects access seekers' interests.

At the same time, the access provider is allowed to re-order the queue in defined circumstances, for example, where the commercial performance of below-rail services is better served by granting access to a traffic type not first in the queue or where an access seeker has no genuine intention of obtaining/using access rights. This protects the access provider's legitimate business interests.

Issues in Queensland Rail's 2015 DAU proposal

Queensland Rail's proposal raises a number of issues.

First, Queensland Rail proposes to form a queue for determining which access seeker will be allocated access rights, but does not specify how access will be allocated amongst the access seekers in the queue.

Second, Queensland Rail's proposal to change the order of a queue based on which application is more favourable to its legitimate business interests gives it considerable discretion, as that assessment is based on:

- its opinion, which is not subject to it acting reasonably
- its broader business interests and not its legitimate business interests as the owner/operator of the declared service, as required by the QCA Act⁹²
- a net present value (NPV) test, which
 - Queensland Rail 'may' consider but is not obliged to consider

⁹⁰ New Hope, sub. no. 10: 9.

⁹¹ Glencore, sub. no. 7: 24-25.

⁹² QCA Act, ss. 70, 72 and 138(2)(b)

- includes factors that Queensland Rail 'may' take into account
- is not universally applicable, as the NPV analysis is already considered in determining a reference tariff for coal-carrying train services on the West Moreton network
- considers factors such as 'the relative time required to finalise an access agreement' that would discriminate between a complex and a simple application and is unclear about why this factor is relevant in an NPV analysis of future returns

Third, where there are competing applications for the same traffic task, Queensland Rail proposes to consider, for the purpose of forming a queue:

- the application nominated by the customer and disregard other competing applications. As discussed in Section 2.4.1 of this Draft Decision, this aspect of Queensland Rail's proposal could frustrate competition between train operators
- where a customer's nomination is pending, the application which requires the 'greatest allocation of available capacity' without providing how it would do that assessment (if the applications are for the same traffic task they would presumably require the same allocation of available capacity).

Taking all these factors into account, we consider that Queensland Rail's proposal is unduly discretionary, discriminatory and creates considerable uncertainty for access seekers and would adversely affect above-rail competition, which we do not consider appropriate having regard to s. 138(2) of the QCA Act, in particular paragraphs (a), (b), (d) and (e) of the QCA Act.

Amendments required

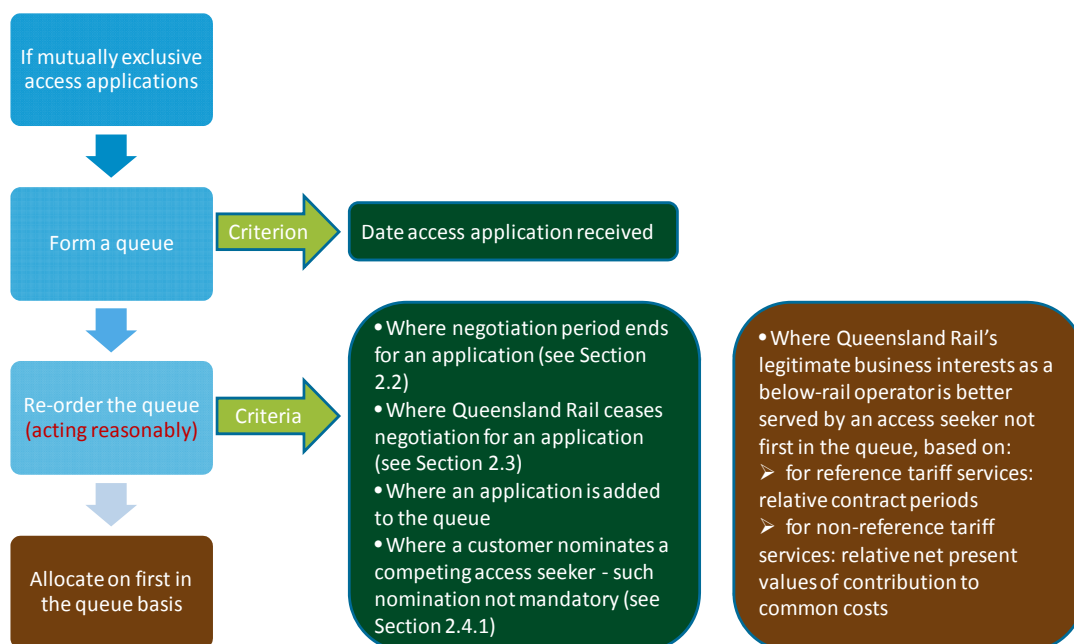
We have approved a queuing mechanism in previous rail access undertakings, for example, in Queensland Rail's 2008 and Aurizon Network's 2010 access undertakings which fairly balances the rights and obligations of the various parties. We consider Queensland Rail's proposal should be amended to be consistent with the queuing principles in those undertakings, namely:

- capacity must be reserved for the access seeker who is at the head of the queue—that is, while Queensland Rail must deal with access seekers lower in the queue (e.g. in relation to extending the infrastructure), allocation of available access rights should be on a first-in-the-queue basis.
- Queensland Rail may re-order a queue and allocate access rights to an access seeker lower in the queue if doing so better serves its legitimate business interests, provided that Queensland Rail:
 - acts reasonably and solely considers its interests as a below-rail operator
 - applies separate criteria for a queue containing multiple applications for train services where there is an applicable reference tariff (based on relative contract periods) and where there is no applicable reference tariff (based on relative NPV of contribution to common costs)
- competing applications for the same traffic task should be collectively positioned in a queue based initially on the date of the earliest of those applications and thereafter subject to the re-ordering rules in the undertaking. Where the competing applications are first in the queue, Queensland Rail should negotiate with all train operators and offer each an access price and other access terms and execute an agreement with the train operator selected by the customer

- Queensland Rail should expand the capacity of the rail infrastructure in order to create sufficient available capacity to provide access rights sought by an access seeker, subject to the capacity investment framework in the undertaking (see Chapter 9 of this Draft Decision).

We consider these amendments will allow the queuing mechanism to provide an orderly and fair process for allocating limited available capacity—where access seekers know what they have to do to get access and there are clear criteria that the access provider needs to follow when deciding on who to grant access rights (see **Figure 2.4**). Therefore, the amendments adequately balance the legitimate business interests of Queensland Rail as a below-rail operator and the interests of access seekers and would also promote above-rail competition, having regard to s. 138(2)(a), (b), (d) and (e) of the QCA Act.

Figure 2.4 QCA's amended capacity allocation mechanism



Transitional provisions

The 2008 access undertaking has lapsed following our Final Decision to refuse to approve an extension of its term beyond 30 June 2015. Therefore, transitional provisions are required to deal with mutually exclusive access applications Queensland Rail may have received before the approval date of this undertaking for which negotiations have not concluded at the approval date.

To the extent a queue exists to deal with those applications, we consider the undertaking should grandfather that queue. This would provide regulatory certainty to all parties and appropriately address matters to be considered under s.138(2) of the QCA Act. We invite stakeholders to comment on this aspect if they consider it does not adequately balance the interests of all parties.

We will form a final view on the transitional provisions after considering stakeholders' comments.

Draft Decision

2.16 After considering Queensland Rail's proposed provisions for mutually exclusive access applications, our Draft Decision is to refuse to approve Queensland Rail's proposal.

2.17 The QCA requires Queensland Rail to amend its 2015 DAU so that:

- (a) the queuing mechanism for allocating limited available capacity to mutually exclusive access applications is consistent with the principles reflected in the 2008 and 2010 access undertakings (as discussed above). The required amendments are set out in cl.2.9.2 in Appendix C.
- (b) transitional provisions are included in the undertaking to deal with mutually exclusive access applications received before the approval date of this undertaking. The required amendments are set out in cl.6.4 in Appendix C.

2.18 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

2.5 Access renewal rights

Queensland Rail's 2015 DAU proposal

The 2015 DAU sets out the process for allocating access rights in situations where a queue includes an application from an existing access holder seeking to renew its access rights—that is, where a renewing access holder competes with a new access seeker for the same access rights.⁹³

The 2015 DAU enables an end customer or its nominee to apply for renewal rights.⁹⁴ The 2015 DAU proposes that the renewing access holder 'may' get priority over a new access seeker in executing an access agreement, if the access rights being renewed are for coal-carrying or other bulk-mineral-carrying train services and satisfies certain other conditions (see **Table 2.6**).

Table 2.6 Conditions for prioritising existing access holder's renewal application

<i>Condition</i>	<i>2015 DAU proposal</i>
Terms for renewing access rights	<ul style="list-style-type: none"> • Contract period: a renewing access holder gets: <ul style="list-style-type: none"> – an evergreen priority if, at each renewal, it matches the competing access seeker's contract period up to 10 years; or – a one-off priority if it cannot match the competing access seeker's contract period and instead chooses a contract period equivalent to the remaining life of its mine.⁹⁵ • Nature of access rights sought: renewing access holder seeks access rights equivalent to its existing rights, including that the origin and destination of the train service are the same.⁹⁶ • Contractual terms: Queensland Rail proposed that it was not obliged to enter into a renewal access agreement on the same terms as the existing access agreement.⁹⁷

⁹³ Queensland Rail, 2015 DAU, cls.2.9.3 and 7.1

⁹⁴ Queensland Rail, 2015 DAU, cl.7.1

⁹⁵ Queensland Rail, 2015 DAU, cl.2.9.3(c)

⁹⁶ Queensland Rail, 2015 DAU, cl.7.1

Condition	2015 DAU proposal
Timeframes	<p>Queensland Rail will notify an existing access holder (and the customer, if applicable) about a competing access seeker's application and the access holder must comply with the following timeframes:</p> <ul style="list-style-type: none"> • Renewal application: submits an application within a window of time that is effectively no more than three years and no less than two years before its existing agreement expires. • Negotiation period: executes an access agreement (including submit application and conducts negotiation) within nine months of either the notification date or the date that is three years before its existing agreement expires (whichever comes later).

On the nature of access rights sought, Queensland Rail said that access renewal rights are appropriate where the origin and destination for the train service remain the same, particularly having regard to the substantial long-term investments associated with mining operations. However:

it is not appropriate for a renewals process to effectively allow an Access Holder to leapfrog access rights to new origins under the guise of a renewal. These circumstances would not commonly be considered a 'renewal' – they relate to different access rights. Treating the circumstances described above as a renewal would operate to potentially unfairly advantage the "renewing" access seeker over other access seekers in a queue.⁹⁸

Stakeholders' comments

Stakeholders said that priority in executing a renewal access agreement should also be given to other bulk and intermodal freight carrying train services.⁹⁹ Glencore said that a renewal right 'needs to apply to intermodal services at least to the extent they support such coal or bulk mineral operations'. Aurizon saw no reason why freight whose origin and destination points remained unchanged should be excluded from the renewal provisions and said that 'freight is subject to the same long term planning dynamics that bulk and coal supply chains are subject to'.

On contractual terms, Glencore said that access holders should be allowed to renew their access agreement on existing terms other than price (which for Mount Isa would be subject to the price capping arrangements—considered in Chapter 3 of this Draft Decision).¹⁰⁰

On renewal timeframes, Glencore and New Hope submitted that Queensland Rail should also notify an access holder about the need to renew access rights when there was no competing application. They also submitted that the negotiation period should be flexible enough to accommodate the possibility of an access dispute.¹⁰¹

QCA analysis and Draft Decision

We accept Queensland Rail's proposal to give priority in renewing access rights for train services carrying coal or other bulk minerals. In doing so, we accept that it is in Queensland Rail's legitimate business interests to earn an adequate return on its infrastructure. But, Queensland Rail's proposal creates considerable uncertainty for access holders (many with sunk

⁹⁷ Queensland Rail, 2015 DAU, cl.2.9.3(d).

⁹⁸ Queensland Rail, sub. no. 1: 21-22.

⁹⁹ Aurizon, sub. no. 6: 21-22; Glencore, sub. no. 7: 9-10.

¹⁰⁰ Glencore, sub. no. 7: 9-10.

¹⁰¹ Glencore, sub. no. 7: 25-26; New Hope, sub. no. 10: 10.

investments) with respect to their ability to continue to access Queensland Rail's infrastructure over the life of their assets (i.e. the asset stranding risk). This has the potential to discourage significant upstream investment and the efficient utilisation of Queensland Rail's infrastructure. As such, we propose not to accept Queensland Rail's proposal having regard to s. 138(2) of the QCA Act, particularly paragraphs (a), (b), (d), (e) and (h).

Given this, we require amendments to provide certainty that a renewing access holder will get the first right to contract access rights for those train services. We also require amendments to provide clarity on the renewal process when there is no competing access seeker.

Access renewal rights

Renewal rights provide certainty to access holders and access seekers (who are potentially future access holders) about retaining access rights at the expiry of their existing agreement, in the event that competing access applications are lodged for those access rights.

We consider the interests of access holders/seekers in renewing access rights should be appropriately balanced against the legitimate business interests of Queensland Rail. That would mean protecting interests of access holders that have made substantial investment in related facilities (e.g. a mine) and allowing Queensland Rail to maximise revenue recovery from its network, particularly where access holders are not exposed to substantial asset stranding risks.

Issues in Queensland Rail's 2015 DAU proposal and amendments required

The 2015 DAU proposes to give priority for renewal rights to coal-carrying and other bulk-mineral-carrying train services. That is consistent with our 2014 Draft Decision which required that priority in renewing access rights be given to West Moreton coal and Mount Isa bulk mineral train services.¹⁰²

Stakeholders said that priority for renewal rights should be extended to other bulk- and intermodal-freight-carrying train services on the basis that loss of access rights would expose customer and/or operators to substantial asset stranding risks.¹⁰³ However, stakeholders did not provide any compelling evidence of the asset stranding risks that they would be exposed to if those other train services' access rights were not renewed. Therefore, we are minded to accept this aspect of Queensland Rail's proposal of giving priority in renewing access rights for train services carrying coal or other bulk minerals.

We also accept Queensland Rail's proposal relating to the:

- *nature of access rights sought*, including that the origin and destination of the train service for renewal rights are the same as the existing access rights. We consider this aspect of Queensland Rail's proposal would allow an end customer to renew access rights in an existing access agreement for another project as long as the access rights use train services with the same origin and destination and is broadly consistent with our 2014 Draft Decision
- *contract period and renewal application timeframe*, which are consistent with our 2014 Draft Decision.

That said, Queensland Rail's proposal raises a number of issues and we require amendments to adequately balance its legitimate business interests with the interests of access seekers and access holders (see **Table 2.7**).

¹⁰² QCA 2014 Draft Decision: 35-37.

¹⁰³ Aurizon, sub. no. 6: 21-22; Glencore, sub. no. 7: 9-10.

Table 2.7 Issues with Queensland Rail's renewal proposal and amendments required

<i>Queensland Rail's proposal</i>	<i>Amendments required</i>
Creates uncertainty about whether the renewing access holder will get a priority, as Queensland Rail proposed that it 'may not' execute an access agreement with the competing access seeker, even if the renewing access holder meets relevant conditions.	Provide certainty that a renewing access holder for coal-carrying or other bulk-mineral- carrying train services 'will' get (not 'may' get) the first right to execute an access agreement.
Creates uncertainty about the access agreement terms that Queensland Rail will offer to a renewing access holder, as Queensland Rail has not proposed offering terms consistent with the standard access agreement and the undertaking.	Oblige Queensland Rail to offer terms consistent with the undertaking and the SAA (unless the parties agree otherwise), which will mean that a renewal access agreement has the most relevant terms. Nevertheless, the access charge at renewal for a reference tariff service will be governed by an approved reference tariff and that for a non-reference tariff service should be consistent with the renewal pricing mechanism considered in Chapter 3 of this Draft Decision.
Requires nomination of a train operator for renewing access rights if customer does not itself seek access rights, which as discussed in Section 2.4.1 of this Draft Decision would frustrate competition between train operators.	Not require nomination by a customer, rather keep nomination optional to allow multiple train operators to compete for a customer's renewal rights.
Requires a renewing access holder to comply with tighter timeframes than those applying to a competing access seeker. Queensland Rail has not justified why this discrimination is appropriate when both competing parties are seeking the same access rights.	Make the timeframes the same as those applying to any other access application (see Section 2.2 of this Draft Decision) and subject also to the same negotiation process – i.e. those relating to information exchange requirements and refusal to deal.
Creates ambiguity about the process that will apply when there is no competing access seeker, as the renewal rights proposal is exclusive to situations when there is a competing access seeker.	<p>Provide that when there is no competing access seeker, an existing access holder submits a renewal application within a window of no more than three years and no less than two years before its existing agreement expires and that application is subject to the same negotiation process as any other application – i.e. relating to information exchange requirements, timeframes and refusal to deal. Nevertheless, the access charge at renewal for a reference tariff service will be governed by an approved reference tariff and that for a non-reference tariff service should be consistent with the renewal pricing mechanism considered in Chapter 3 of this Draft Decision.</p> <p>However, we do not accept stakeholders' suggestion that Queensland Rail should notify an access holder about the need to renew access rights, when there is no competing application. We consider that would impose unnecessary administrative burden on Queensland Rail, when that is something we expect an access holder (and its customer) should be able to manage.</p>

We consider that aspects of Queensland Rail's renewal rights proposal do not appropriately balance the interests of access seekers/holders, and would adversely affect above-rail

competition, having regard to s. 138(2), in particular paragraphs (a), (b), (d), (e) and (h) of the QCA Act.

We consider our proposed amendments, including those aspects of Queensland Rail's proposal we have accepted, will adequately balance the legitimate business interests of Queensland Rail and the interests of access seekers/holders and will promote above-rail competition, considering s. 138(2), in particular paragraphs (a), (b), (d), (e) and (h) of the QCA Act.

Transitional provisions

The 2008 access undertaking has lapsed following our Final Decision to refuse to approve an extension of its term beyond 30 June 2015. Therefore, transitional provisions are required to deal with applications for the renewal of access rights that Queensland Rail may have received before the approval date of this proposed undertaking (i.e. the 2015 DAU) and for which negotiations have not concluded at the approval date.

To the extent arrangements exist that give priority to a renewing access holder, we consider the undertaking should grandfather those arrangements. This would provide regulatory certainty to all parties (having regard to s. 138(2) of the QCA Act). We invite stakeholders to comment on this aspect if it does not adequately balance the interests of all parties.

We will form a final view on the transitional provisions after considering stakeholders' comments.

Draft Decision

2.19 After considering Queensland Rail's proposed process for the renewal of access rights, our Draft Decision is to refuse to approve Queensland Rail's proposal.

2.20 The QCA requires Queensland Rail to amend its 2015 DAU so that:

- (a) Queensland Rail gives priority to a renewing access holder for coal- carrying or other bulk-mineral-carrying train services that satisfy the conditions in the undertaking (e.g. those relating to contract period, nature of access rights sought and timeframes for submitting renewal application). The required amendments are set out in cl.2.9.3 in Appendix C**
- (b) it reflects the amendments summarised in Table 2.7 (e.g. Queensland Rail is obliged to offer terms consistent with the undertaking and the standard access agreement, unless parties agree otherwise) including setting out the process that will apply to a renewal application, when there is no competing access application and the mechanism for the calculation of access charges for a renewal access seeker where no reference tariff applies. The required amendments are set out in cls.2.7.2, 2.9.3, 2.9.4 and 7.1 in Appendix C**
- (c) for the purposes of giving priority rights, transitional provisions are included in the undertaking to deal with renewal applications for coal-carrying or other bulk-mineral-carrying train services received before the approval date of this undertaking for which negotiations have not concluded. The required amendments are set out in cl.6.4 in Appendix C.**

2.21 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

3 PRICING PRINCIPLES (PART 3)

Part 3 of Queensland Rail's 2015 DAU sets out principles for developing access charges, the application of reference tariffs, determination of floor and ceiling revenue/price limits, and limitations on price discrimination.

Pricing principles should protect the legitimate business interests of Queensland Rail, above-rail operators and end users. Competition in the above-rail market, as well as other dependent markets, will be distorted if Queensland Rail earns excessive monopoly profits from its regulated business activities. Similarly, prices that provide insufficient revenue for Queensland Rail to recover its efficient costs or do not generate a return on investment provide no incentive for it to adequately maintain or invest in its network. These are important factors to be addressed in the development of access charges.

In the event that a pricing dispute is brought before us, we must have regard to, amongst other things, the approved undertaking's pricing principles.

We consider the proposed pricing principles require amendments to provide greater clarity and balance in the way Queensland Rail sets prices. These are discussed below.

Introduction

Pricing is a critical element of access. The intent of the pricing principles is to provide a transparent framework for determining pricing and revenue limits, and dealing with associated pricing matters. In the absence of regulation, Queensland Rail could earn monopoly profits by setting prices that effectively deny access or inefficiently distort production and/or consumption decisions. The pricing framework should afford stakeholders a high degree of certainty surrounding the processes for developing access charges for Queensland Rail's monopoly business activities. The key issues are summarised below in **Table 3.1**. Matters that require a more detailed explanation are discussed in Sections 3.1 to 3.8.

Table 3.1: Pricing principles in the 2015 DAU

<i>2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision¹⁰⁴</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Hierarchy of pricing principles			
Provides for a hierarchy of pricing principles which gives revenue adequacy to Queensland Rail primacy above all others.	Inconsistent as it proposes a hierarchy which is materially different from the 2014 Draft Decision.	Opposed primacy being provided to revenue adequacy ahead of other pricing principles.	See Section 3.1 below.
Revenue adequacy			
Queensland Rail to earn revenue from access charges and transport service contract (TSC) payments.	Partially consistent with 2014 Draft Decision due to approach to determining return on assets.	Stakeholders raised concerns with Queensland Rail achieving revenue adequacy by seeking	See Section 3.2 below.

¹⁰⁴ QCA, 2014 Draft Decision; Chapter 3.

<i>2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision¹⁰⁴</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
		to use an asset valuation approach that provided windfalls gains or recovery of inefficient costs.	
Limits on price differentiation (with the same market)			
Broad price differentiation permitted for non-reference tariff train services.	Inconsistent with 2014 Draft Decision as Queensland Rail proposed to retain significant discretion when applying price discrimination.	Stakeholders raised concerns that the proposed limits on price differentiation provided Queensland Rail with too much discretion.	See Section 3.3 below.
Pricing and revenue limits			
Queensland Rail to have absolute discretion in determining floor revenue and pricing limits.	Inconsistent with the 2014 Draft Decision with Queensland Rail retaining absolute discretion to set prices below incremental costs.	Stakeholders were concerned that Queensland Rail could increase access charges due to reductions in TSC payments.	See Section 3.4 below.
Take or pay arrangements			
Terms subject to commercial negotiation, with prescribed 80% take or pay for West Moreton network coal-carrying train services.	Partially consistent with 2014 Draft Decision, although no capping mechanism has been proposed.	Stakeholders raised issues with there being no capping mechanism for take or pay.	See Section 3.5 below.
Asset valuation methodology for negotiating access charges			
DORC valuation to be used for all pricing negotiations and ceiling pricing limits.	Inconsistent with 2014 Draft Decision as it prescribed a single asset valuation methodology.	Stakeholders said DORC may not be the most appropriate methodology for valuing assets for pricing purposes in every situation.	See Section 3.6 below.
Pricing for access rights at renewal (non-reference tariff services)			
Pricing upon renewal of access rights to be based on existing access agreement parameters (for non-reference-tariff train services).	Inconsistent with 2014 Draft Decision that proposed a price increase capping mechanism for Mt Isa Line traffics only.	Glencore was concerned that the renewal pricing proposal was too restrictive.	See Section 3.7 below.
Rate of return			
Rate of return for access charges and reference tariffs	Partially consistent with the 2014 Draft Decision,	Stakeholders said they would rely on our	See Section 3.8 below.

2015 DAU proposal	Consistency with QCA 2014 Draft Decision¹⁰⁴	Stakeholders' comments	QCA 2015 Draft Decision
to be based on a weighted average cost of capital (WACC) of 6.93%, with a WACC margin approach for future investments.	as it proposed a new WACC margin approach to determine a variable WACC.	assessment of the WACC and noted risk allocations issues with the standard access agreement.	

3.1 Hierarchy of pricing principles

Previous access undertakings that have applied to Queensland Rail's declared service have included a hierarchy of pricing principles to address conflicts that may arise when applying the pricing principles to develop access charges. The hierarchy was included explicitly in the 2008 access undertaking and implicitly in the 2001 access undertaking.

While every effort should be made to accommodate each of the principles during a negotiation in the first instance, the hierarchy provides guidance in the event of a conflict that cannot be resolved.

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed pricing principles to guide the negotiation of access charges in access agreements (Part 3). The principles relate to revenue adequacy (cl. 3.1.1), network utilisation (cl. 3.1.2), floor and ceiling pricing limits (cl. 3.2), and limits on price differentiation (cl. 3.3).

To the extent there is a conflict between the pricing principles Queensland Rail proposed these will be applied in the following order of precedence (cl. 3.4):

- (1) revenue adequacy
- (2) limits on price differentiation (between access seekers/holders within a market)
- (3) pricing limits (upper and lower price and revenue limits for individual train services or combinations of services)
- (4) network utilisation.

Queensland Rail argued that revenue adequacy should be provided primacy in the event of a conflict as this is contemplated in s.168A of the QCA Act (statutory pricing principles), and that in the absence of revenue adequacy Queensland Rail will be unable to provide access, or maintain and invest in its facility.¹⁰⁵

Stakeholders' comments

While stakeholders accepted the development of a hierarchy of pricing principles, they raised a number of concerns with the proposed operation of the 2015 DAU. In particular, stakeholders opposed primacy being provided to revenue adequacy ahead of limits on price differentiation, as well as pricing and revenue limits for combinations of train services.¹⁰⁶

New Hope and Glencore said that the QCA Act requires all of the s. 138 statutory approval criteria be given due regard, and the QCA Act does not provide supremacy to s.168A(a) as it is just one of the matters we are required to have regard to. They said Queensland Rail's approach would be inconsistent with our role under the QCA Act.

¹⁰⁵ Queensland Rail, sub. no. 1: 23.

¹⁰⁶ New Hope, sub. no. 8: 5-6 and Annexure A, and sub. no. 10: 34-35. Glencore, sub. no. 7: 2 and 27.

QCA analysis and Draft Decision

We accept Queensland Rail's proposal that a hierarchy of pricing principles be included in the 2015 DAU, but we require amendments to rearrange the order of the hierarchy. Our key concern is that the 2015 DAU does not provide sufficient protection for access seekers and holders from unfair price discrimination.

There could be a conflict between the principles when Queensland Rail and access seekers are negotiating an access charge, seeking the QCA to arbitrate an access dispute on a pricing matter, or considering approval of a reference tariff.

The hierarchy is not intended to constrain the operation of individual pricing principles per se—all the principles should be considered when developing efficient access prices. However, in the event of a conflict the hierarchy provides certainty as to which takes precedence, so as to avoid conflict, confusion and uncertainty.

In relation to the statutory pricing principles (s. 168A), we accept that revenue adequacy is a pricing objective (s.168A(a)). However, this should be subject to necessary protections to avoid distorting commercial activity in dependent markets (for example, the above-rail market) and should not permit the extraction of inefficient monopoly profits.

We consider that Queensland Rail's proposal does not adequately balance its legitimate business interests with the legitimate interests of access seekers and access holders. This lack of balance could have material adverse impacts on competition in related markets if not addressed.

Queensland Rail's proposed hierarchy, and proposed drafting of the individual pricing principles themselves, could permit Queensland Rail to exercise market power to obtain access charges in excess of the costs of providing a service to an access holder and create inefficient distortions to the efficient operation of dependent markets.

For these reasons we do not accept Queensland Rail's proposal and have proposed amendments to address these deficiencies in the 2015 DAU.

Accordingly, we propose the 2015 DAU include a hierarchy of pricing principles as follows, to address any conflicts between the pricing principles in the 2015 DAU:

- (1) limits on price differentiation as between access seekers/holders (within a market)
- (2) pricing and revenue limits (between different markets)
- (3) network utilisation
- (4) revenue adequacy.

Our reasoning for the above, including how we have given due regard to the statutory pricing principles (s.168A), is discussed below.

Limits on price differentiation as between access seekers/holders (within a market)

We consider that limits on price differentiation should take precedence over other principles, including revenue adequacy.

Imposing a hierarchy with an overriding objective of revenue adequacy could provide excessive discretion in setting prices, which would not provide for the efficient operation of, or investment in, the network. Queensland Rail should not be permitted to achieve revenue adequacy by unfairly or inefficiently discriminating between access seekers within the same market.

Past approved access undertakings have reflected our proposed hierarchy in the event of a conflict between the operation of the pricing principles. These included the QR 2001 and QR 2006 undertakings, as well as subsequently amended versions of the QR Network 2008 undertaking all of which have applied previously to Queensland Rail Ltd's declared service.

Our decisions have sought to provide that in the event there is a conflict between Queensland Rail pursuing revenue adequacy and applying non-discriminatory pricing in a particular market, then the latter should prevail.

- Clause 6.1 of the 2001 undertaking stated that 'QR has an overriding obligation to observe the constraints on price differentiation' while noting Queensland Rail's objective was to achieve revenue adequacy over time.
- Clause 6.3.2 of the 2008 undertaking required revenue adequacy be subject to compliance with pricing constraints—namely, limits on price differentiation, pricing limits and prohibition on establishing access charges for related parties for the purpose of preventing or hindering access.

This approach balances Queensland Rail's legitimate business interests in maximising revenue (including the ability for efficient price differentiation), with the legitimate interests of train operators and end customers in access charges not distorting competition in related markets by inefficient price discrimination between different train operators or end markets.

Our approach provides for appropriate revenue adequacy for Queensland Rail, subject to, amongst other things, price discrimination where it delivers efficient pricing outcomes. The revised hierarchy will thereby promote economic efficiency in respect of infrastructure by which services are provided by Queensland Rail with the effect of promoting effective competition in upstream and downstream markets (ss.138(2)(a) and 69E).

Pricing and revenue limits (between different markets)

Queensland Rail should be able to charge different access charges for train services operating in different markets, but not where this provides for cross-subsidies. Consequently, we consider that pricing and revenue limits should take precedence over revenue adequacy so as to preclude Queensland Rail from charging more than the stand-alone cost of a service in order to achieve revenue adequacy. Price discrimination that permits cross-subsidies between different markets for below-rail services is not efficient as it would distort related markets. This is not consistent with promoting the economically efficient operation and use of Queensland Rail's declared infrastructure, with the effect of promoting effective competition in related markets (s.138(2)(a)).

We also consider that complying with the limits on price differentiation within a market takes precedence over the floor and ceiling price limits. We consider that Queensland Rail must observe the limits on price differentiation irrespective of whether the resulting access charges cover the incremental cost of the individual train service. We have taken this position because if Queensland Rail exercises its discretion to offer one access seeker a price below incremental cost, then it would be inappropriate to charge a direct competitor a higher price (for any other reason than cost or risk differences).

This approach is consistent with s.138(2)(a) as it will promote effective competition in upstream and downstream markets.

Network utilisation and revenue adequacy principles

Queensland Rail's 2015 DAU should provide precedence to the network utilisation principle ahead of the revenue adequacy principle in the event of a conflict.

The proposed network utilisation principle permits Queensland Rail to establish different access charges for access holders serving different markets, which is an efficient pricing practice for monopoly infrastructure subject to necessary constraints of pricing limits and price differentiation.

The network utilisation principle also gives Queensland Rail pricing discretion to quote a maximum access charge in the event that available capacity is insufficient for all current and likely access seekers, irrespective of their ability to pay. Revenue entitlements are then reduced if Queensland Rail does not quote the maximum access charge in these circumstances. Therefore, it is appropriate that network utilisation is afforded primacy above revenue adequacy.

Proposed hierarchy is not inconsistent with s.168A(a)

Queensland Rail's proposition that the statutory pricing principles (s.168A¹⁰⁷) require that revenue adequacy be paramount is not supported.

Significantly, the QCA Act requires that we have regard to all relevant factors outlined in the approval criteria (s.138(2)). This includes all of the statutory pricing principles that say the price of access to a service should:

- (a) *generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and*
- (b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (d) *provide incentives to reduce costs or otherwise improve productivity (s.168A).*

Our proposal means that s. 168A is given due regard, as the hierarchy provides for revenue adequacy subject to necessary constraints that allow efficient price discrimination (that is, within a market, and as between different markets, and for related access provider downstream operations).

We consider our approach is appropriate after having regard to the adverse impacts of inefficient price discrimination, revenue adequacy, the legitimate business interests of the Queensland Rail and interests of access seekers. Our approach has given appropriate regard to the statutory approval criteria, including the pricing principles in s. 168A of the QCA Act.

- Section 168A(a) reflects the intention that regulated access charges should be set so as to generate expected revenue from Queensland Rail's declared service that is sufficient to meet the efficient costs of providing access to the regulated service, including a return on investment commensurate with the regulatory and commercial risks involved. In this way the QCA Act foreshadows a revenue floor, based on efficient costs and a return on Queensland Rail's investments, while enabling us to determine an appropriate valuation for past assets.¹⁰⁸
- While s.168A(b) permits price differentiation where this approach aids efficiency, such as between different access seekers operating in different markets, we do not consider price

¹⁰⁷ Queensland Rail, sub. no. 1: 23.

¹⁰⁸ Refer to Section 3.6 of this Draft Decision regarding approaches to valuation of assets and investments.

differentiation within a market is efficient (other than on a cost or risk basis). Accordingly, we have proposed amendments to the 2015 DAU to provide appropriate pricing and revenue outcomes for Queensland Rail.¹⁰⁹

We consider that our proposed hierarchy protects the legitimate business interests of Queensland Rail, as well as the interests of above-rail operators and end customers. Queensland Rail is able to generate sufficient revenue to recover efficient costs, including a return on investment, while protecting against inefficient price discrimination. Similarly, Queensland Rail is not permitted to realise excessive monopoly profits or distort above-rail competition as this would promote monopolistic behaviour and suppress competition in dependent markets.

Draft Decision

- 3.1 After considering Queensland Rail's proposed hierarchy of pricing principles, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 3.2 The QCA requires Queensland Rail to amend its 2015 DAU to provide for an hierarchy of pricing principles in the following order:**
 - (a) limits on price differentiation**
 - (b) pricing and revenue limits**
 - (c) network utilisation**
 - (d) revenue adequacy.**
- 3.3 The required amendments are set out in Part 3 in Appendix C.**
- 3.4 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

3.2 Revenue adequacy

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that it achieve revenue adequacy¹¹⁰ from access charges and Transport Service Contract (TSC) payments, that is enough to:

- fully recover all efficient costs¹¹¹
- provide a return on the value of assets and investment commensurate with the regulatory and commercial risks.

Queensland Rail proposed that where revenue was in excess of this it may seek to reduce TSC payments rather than access charges.

Queensland Rail also proposed that for pricing purposes its assets will be valued on a DORC basis. Our approach to valuing assets is addressed in Section 3.6 of this Draft Decision.

¹⁰⁹ Refer to section 3.3 and 3.4 on price differentiation and pricing limits.

¹¹⁰ Queensland Rail, 2015 DAU, cl. 3.1.1.

¹¹¹ Defined in the 2015 DAU as "costs reasonably expected to be incurred by a railway manager adopting efficient work practices to provide, operate and maintain the Network at the required service standard and meet its obligations under Access Agreements, having regard to the circumstances in which Queensland Rail operates its business and including business and corporate overheads and QCA Levy".

Stakeholders' comments

Stakeholders did not support Queensland Rail achieving revenue adequacy by using an asset valuation approach that provided windfalls gains, recovery of inefficient costs, or did not promote future investment.¹¹²

QCA analysis and Draft Decision

We do not accept Queensland Rail's proposal as it goes beyond the requirements of the s. 168A(a) statutory pricing principle by seeking a minimum return not just on investments, but also on assets which it proposes are valued universally using its preferred DORC valuation approach.¹¹³

In doing so, Queensland Rail appears to be seeking a return on assets which could result in a windfall gain, for example when the assets have already reached the end of their expected useful lives. This does not adequately balance Queensland Rail's legitimate business with the interests of access seekers.

We therefore require amendment to the 2015 DAU to better reflect s.168A(a) of the QCA Act as well as recognise the approach to valuing assets to which a return may be sought consistent with s.101(2) of the QCA Act. This is addressed further in Section 3.6 of this Draft Decision. Specific matters relating to the appropriate treatment of assets and investments, in the context of the West Moreton network, are discussed in detail in Section 8.7.

In the light of the above, it is appropriate that the 2015 DAU be amended to clarify that the revenue adequacy objective requires that access charge and TSC payments, that:

- is sufficient to meet the efficient costs of providing access to the service; and
- include a return on investment commensurate with the regulatory and commercial risks involved.

Sections 69E and 138(2)(a) of the QCA Act require that we have regard to the object of Part 5 of the QCA Act, namely to promote the economically efficient operation, use of, and investment in, Queensland Rail's below-rail network. Our approach provides that the valuation of Queensland Rail's investments for pricing purposes will be able to be taken into account when determining revenue adequacy.

We consider, pursuant to section 138(2)(b) of the QCA Act, that Queensland Rail's legitimate business interests will be met if it is permitted to recover prudently and efficiently incurred investments.

After consideration of these interests, we consider that Queensland Rail should be permitted to recover the efficient costs and return on investment as identified in section 168A(a) of the QCA Act. In this manner, effective competition in related upstream and downstream markets of Queensland Rail's network will be promoted, as contemplated by the objective of Part 5 specified in section 69E of the QCA Act.

¹¹² Glencore, sub. no. 7: 7, 29. Aurizon, sub. no. 6: 48. New Hope, sub. no. 10: 12.

¹¹³ The related matter of Queensland Rail's proposed requirement that the QCA use a DORC methodology to value assets is discussed below in Section 3.6 of this Draft Decision.

Draft Decision

- 3.5 After considering Queensland Rail's proposed revenue adequacy approach, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 3.6 The QCA requires Queensland Rail to amend its 2015 DAU so that, revenue adequacy should be achieved through the recovery of access charges and TSC payments that reflect efficient costs, including a return on investment commensurate with the regulatory and commercial risks involved.**
- 3.7 The required amendments are set out in Part 3 in Appendix C.**
- 3.8 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.**

3.3 Limits on price differentiation—non-reference-tariff train services

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that it have the ability to charge different access charges to similar access seekers (train services for the same commodity in the same geographical area) where a reference tariff does not apply, namely to reflect:

- (a) differences in the cost and risk of Queensland Rail providing access (cl. 3.3(b)(ii)(A) and cl. 3.3(b)(ii)(B)(2))
- (b) events over time that mean Queensland Rail can no longer 'commercially provide access', for example, changes in TSCs (cl. 3.3(b)(ii)(B)(1))
- (c) material changes in circumstances over time relating to existing access holders' ability to pay (cl. 3.3(b)(ii)(B)(3))
- (d) a maximum access charge quoted for all services where available capacity is over time potentially inadequate to meet all access seeker requests and access holder entitlements.

Stakeholders' comments

Stakeholders raised concerns that the limits on price differentiation in the 2015 DAU provided Queensland Rail with too much discretion in setting access charges where a reference tariff did not operate¹¹⁴ or where TSC payments provided by the state government were varied.¹¹⁵

QCA analysis and Draft Decision

Our position is that the 2015 DAU provides Queensland Rail with excessively broad discretion to engage in price discrimination within markets where a reference tariff does not apply. This is not consistent with s.168(A)(c), which permits price discrimination 'when it aids efficiency'.

Queensland Rail's legitimate business interests (including the ability for efficient price differentiation) are an important consideration for us. But too much discretion in access charges, however, would distort competition in related markets through inefficient price discrimination between different train operators or end markets.

¹¹⁴ New Hope, sub. no. 10: 35-36.

¹¹⁵ Glencore, sub. no. 7: 5 and 27. Aurizon, sub. no. 6: 28.

We propose the 2015 DAU be amended to clarify when price discrimination is permitted, including when there are changes to the treatment of changes in TSC payments, and ensuring price differentiation breaches are able to be remedied when they occur.

Permitted price differentiation within a market

We require Queensland Rail to amend its 2015 DAU proposal such that differentiating access charges between access seekers/holders within the same market be limited to situations where:

- there are changes in the cost or risk to Queensland Rail of providing the below-rail service
- available capacity is inadequate to meet all access seeker requests, permitting the quotation of a maximum access charge (as provided by cl. 3.1.2).

We do not object to Queensland Rail distinguishing between access seekers/holders within a market on the basis of cost or risk differences. These differences can arise from a particular train service having different attributes, including:

- operating characteristics that result in different consumption of network capacity, such as slower/faster cycle times due to different acceleration and braking speeds
- physical characteristics that require additional infrastructure investments, such as tall trains requiring higher headroom clearances in tunnels or wide trains requiring greater side clearances on bridges
- contractual arrangements that impact on Queensland Rail's risk profile, such as capital expenditure requirements less than the access agreement term.

Similarly, we do not object to Queensland Rail quoting a maximum access charge where the system is capacity-constrained.

However, we do not accept Queensland Rail's broader proposals to price discriminate within a market due to:

- it being unable to 'commercially provide access' (for example, changes in TSC payments)
- changes in market circumstances that have a material effect on an access holder's ability to pay access charges.

Both of these approaches could result in Queensland Rail seeking to assess, at its discretion, an access holder's or customer's ability to pay (and increasing charges to those access holders that are considered more profitable than others within the same market). The 2015 DAU could also potentially permit inefficient price discrimination between access seekers in the same market on a broad range of commercial matters relevant to Queensland Rail (even those not relevant to the provision of access, such as unrelated profitability of passenger service operations), or that are relevant to an access holder (such as an above-rail operator's profitability).

We consider that price differentiation on this basis could have adverse competition and efficiency impacts. It could also create investment and pricing uncertainty which could have adverse impacts on access seekers and the public interest, in particular if this uncertainty reduced investment and employment opportunities in Queensland. Accordingly, we propose not to accept Queensland Rail's proposal.

Changes in TSC payments

It is reasonable for Queensland Rail to recover its efficient operating costs and return on investment, consistent with s.168A(a) and its legitimate business interests (s.138(2)(b)). Our

key concern is that the 2015 DAU does not provide sufficient protection for access seekers and holders from unfair price discrimination due to a change in a TSC payment.

We consider that price discrimination within a market on this basis could have adverse impacts on related markets, and/or result in price increases being levied indiscriminately on individual access holders.

Increasing prices for only some access holders/seekers in the same market based on a reduction in a TSC payment could be an inefficient form of price discrimination. Queensland Rail's 2015 DAU provides discretion for it to discriminate within a market, which could generate adverse competition and efficiency impacts. Relevantly, this uncertainty could also spread to any access holder/seeker as there is no proposed limitation on Queensland Rail's discretion.

We have noted in past access undertakings that TSC payments could be used to justify different access charges to access seekers operating in the same market. We consider a better way to justify different access charges is to assess the implications based on TSC payments being a material change event within access agreements for access holders and identifying this as a cost or risk factor to Queensland Rail for access seekers within the undertaking.

In this way, the onus will be on Queensland Rail to justify the extent to which reductions in TSC payments have a net financial impact on the cost or risk to Queensland Rail of providing access to the affected access holder/seeker.

We acknowledge stakeholder concerns that Queensland Rail could increase access charges in the event that TSC payments are reduced, even if Queensland Rail's revenue is above the floor limit. However, matters relating to pricing certainty can be negotiated during the development of an access agreement or raised directly with the state government in terms of the policy intent and operation of the TSC framework. We are primarily concerned with how TSC subsidy arrangements could adversely impact on competition, rather than maintaining subsidised prices for access holders.

Preventing or hindering access

Queensland Rail has not included a requirement in the 2015 DAU that prohibits setting access charges for the purpose of preventing or hindering access by third-party access seekers.

While Queensland Rail is vertically integrated, its above-rail operations relate to passenger services for which there are no current direct competitors. However, that is not to say that Queensland Rail could not quote excessively high access charges to deter non-passenger services from interrupting Queensland Rail's passenger operations or, at some point in the future, enter into above-rail operations in competition with other above-rail operators.

We note that s. 104 of the QCA Act precludes Queensland Rail from preventing or hindering access and s. 168A(c) requires that prices are not used to deny or hinder access for the benefit of related parties of Queensland Rail. Therefore, Queensland Rail cannot engage in conduct that prevents or hinders access by a third party irrespective of whether any approved undertaking contains this requirement.

Nonetheless, we consider that the inclusion of an express prohibition on unfair price discrimination in Part 3 in the 2015 DAU will clarify Queensland Rail's obligations in relation to access pricing.

Remedying price differentiation breaches

We propose that the 2015 DAU provide for an access holder to have its access charge amended in the event Queensland Rail breaches its limitations on price differentiation.

However, reliance on a 'most favoured nation' within an access agreement is problematic in the event another access holder is not aware has Queensland Rail contravened its obligations. Our concern is the asymmetric information between the parties.

To address this, we have added a provision in the access undertaking to provide a means by which price differentiation breaches can be identified across all access holders—not just those who are aware of such a breach. Monitoring will be achieved through the compliance audit provisions contained in Chapter 5 of this Draft Decision.

Our approach will appropriately balance the legitimate business interests of Queensland Rail and the interests of access seekers that may not have access to price information on other access holders.

Draft Decision

3.9 After considering Queensland Rail's proposed approach to price differentiation, our Draft Decision is to refuse to approve Queensland Rail's proposal.

3.10 The QCA requires Queensland Rail to amend its 2015 DAU to:

- (a) where a reference tariff does not apply such that differentiating access charges between access seekers/holders in respect of train services for the same commodity in the same geographical area be limited:**
 - (i) to changes in the cost or risk to Queensland Rail of providing the below-rail service; and**
 - (ii) where available capacity is inadequate to meet all access seeker requests, permitting the quotation of a maximum access charge**
- (b) prohibit Queensland Rail establishing access charges that discriminate in favour of itself or a related party**
- (c) provide that Queensland Rail's access charges comply with Part 3 of the 2015 DAU.**

3.11 The required amendments are set out in Part 3 in Appendix C.

3.12 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.

3.4 Pricing and revenue limits

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed:

- to apply a ceiling revenue limit for access charges for train services (or groups of train services) so that access holders/seekers do not pay for the services above the stand-alone cost of providing access
- to apply a floor revenue limit reflecting the incremental cost of providing access to an individual train service or combination of train services, but providing itself with absolute discretion to charge train services below the floor revenue limit.

Stakeholders' comments

Stakeholders were concerned that Queensland Rail could increase access charges due to reductions in TSC payments at its absolute discretion.¹¹⁶

QCA analysis and Draft Decision

We accept that efficient pricing practices for Queensland Rail should provide that the access charge is set between floor and ceiling revenue limits, and is subject to the operation of the other pricing principles in the 2015 DAU.

But, we do not accept that Queensland Rail should be able to price access to its service below the level that recovers the expected incremental cost of providing access (i.e. floor price limit) without a transparent floor revenue limit methodology, robust pricing principles, and corresponding regulatory reporting requirements.

Pricing and revenue limits are established to assure access seekers/holders and their customers that prices and revenues do not recover more than stand-alone costs or less than incremental costs. Pricing limits provide for equitable prices (e.g. the 'user pays' principle) and address market distortions (i.e. by preventing a customer from demanding services that it then asks someone else to pay for).

Restricting Queensland Rail to recovering its efficient costs and return on investment (s. 168A(a)) provides incentives for it to incur costs efficiently (s. 168A(d)).

Permitting Queensland Rail to charge prices below floor limits could have implications for access charges in other below-rail service markets, depending on the construction and application of other pricing principles.

Our concern is that providing Queensland Rail with too much discretion could result in inefficient price discrimination by shifting costs to other traffics.

To the extent that Queensland Rail is seeking to provide itself with discretion to charge below incremental cost, at its risk and direct cost, and this does not stifle effective competition in upstream and downstream markets, then we are prepared to permit this where Queensland Rail provides a valid justification.

In this regard we propose to maintain revenue floor and ceiling limits (that is, constraints on cross-subsidisation) and limitations on price differentiation to address adverse market impacts. This will mean that any adverse economic consequences of pricing below incremental costs can be monitored to confirm they do not cause distortions to other markets. We propose that Queensland Rail will bear the financial costs and risks associated with pricing below incremental cost.

We consider our approach is not inconsistent with the statutory criteria, as we have given greater weight to the legitimate business interests of Queensland Rail (in having discretion to price services below incremental cost, but at Queensland Rail's costs and risk), and materially less weight to s.168A(a). In doing so, we have given regard to the interests of access seekers (by ensuring efficient price discrimination within discrete markets) and limits on related party practices that prevent or hinder access (see Section 3.3 of this Draft Decision).

¹¹⁶ Glencore, sub. no. 7: 28. New Hope, sub. no. 10: 36.

When taken together with our amendments to other pricing principles, our proposed approach should prevent the pricing practices of Queensland Rail from distorting competition in related markets.

Matters regarding TSC payments will be addressed by means of cost or risk considerations by Queensland Rail (see Section 3.3 of this Draft Decision).

Draft Decision

3.13 After considering Queensland Rail's proposed pricing and revenue limits, our Draft Decision is to refuse to approve Queensland Rail's proposal.

3.14 The QCA requires Queensland Rail to amend its 2015 DAU to provide for:

- (a) a clear methodology to determine floor revenue limits**
- (b) a test to determine cross-subsidies**
- (c) QCA approval for any pricing below incremental cost.**

3.15 The required amendments are set out in Part 3 in Appendix C.

3.16 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.

3.5 Take or pay arrangements

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed to maintain take or pay arrangements. This means that access holders would pay a proportion of the contracted access charge, even in the event that they do not actually use train service entitlements (TSEs).

In particular, Queensland Rail proposes in relation to West Moreton network coal traffic:

- access holders be liable for a pre-determined proportion of the total access charge¹¹⁷
- Queensland Rail to provide take or pay relief where services are not provided due to a Queensland Rail cause¹¹⁸ (Schedule D).

These arrangements, amongst other things, provide revenue certainty for Queensland Rail by transferring a degree of volume risk to access holders.

Stakeholders' comments

Stakeholders raised concerns with the 2015 DAU proposed take or pay arrangements in relation to capping arrangements.¹¹⁹

¹¹⁷ The rate of take or pay for West Moreton network coal traffics is considered in Chapter 8 of this Draft Decision in the context of form of regulation matters.

¹¹⁸ 'Queensland Rail cause' is a defined term in the 2015 DAU, which reflects Queensland Rail's inability to make the network available for the operation to provide train service entitlements as a result of defined events.

¹¹⁹ New Hope, sub. no. 9: 15-16. Glencore, sub. no. 7: 14.

QCA analysis and Draft Decision

We accept, in principle, that efficient take or pay arrangements within access agreements promote:

- Queensland Rail's legitimate business interests by providing revenue certainty and limiting exposure to volume risk
- efficient investment in the network by encouraging access holders to contract for the capacity they are most likely to need.

Non-reference-tariff train services

We do not propose to prescribe defined take or pay arrangements for non-reference-tariff train services. Commercial negotiation of an access agreement between the facility owner and access seeker is the appropriate stage to consider the best package of risks, costs and entitlements.

Should an access seeker consider that a take or pay requirement proposed by Queensland Rail breached the pricing principles, including the revenue limits or limits on price differentiation, the matter could be brought to the QCA for arbitration.

Reference tariff train services

Prescribed take or pay arrangements for reference tariff train services are appropriate given the allocation of risks, rewards and costs has already been determined.

We accept Queensland Rail's proposal to apply take or pay for West Moreton network coal traffic at a pre-determined rate where a reference tariff applies, excluding instances where access is not available due to a Queensland Rail cause (refer to Chapter 8 of this Draft Decision).¹²⁰

This is a reasonable limit which is in Queensland Rail's legitimate business interests, while at the same time being in the interests of access seekers and access holders, consistent with the QCA Act (s.138(2)(b), (e) and (h)). It should also promote the efficient use of capacity (s.138(2)(a)).

¹²⁰ Matters relating to the proportion of, and capping arrangements for, take or pay for West Moreton network coal traffics are considered in Chapter 8 of this Draft Decision in the context of form of regulation matters.

Draft Decision

- 3.17 After considering Queensland Rail's proposed take or pay arrangements, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 3.18 The QCA accepts Queensland Rail's proposals to request take or pay from access holders as a predetermined proportion for reference tariff train services. The QCA does not accept take or pay being set at a pre-determined proportion for non-reference tariff train services.**
- 3.19 The required amendments are set out in Part 3 in Appendix C.**
- 3.20 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.**

3.6 Asset valuation methodology for negotiating access charges

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that the value of assets and investments be determined using a DORC methodology (cls. 3.2.3(a) and (c)).¹²¹ Queensland Rail also proposed to include additional sections into the West Moreton network asset base at DORC value (Schedule E, cl. 1.2(a)(ii)).

Stakeholders' comments

New Hope and Glencore said DORC may not be the most appropriate methodology for valuing assets for pricing purposes in every situation.¹²²

Aurizon¹²³ said the key consideration in establishing an initial asset valuation was the expectation of a return on investments made, rather than inflating the value of existing assets.

QCA analysis and Draft Decision

We consider that given the diverse nature of Queensland Rail's network, it is not appropriate to prescribe a single asset valuation approach to apply to Queensland Rail's entire network of declared infrastructure.

The QCA Act specifies that the price of access to a service should 'include a return on investment commensurate with the regulatory and commercial risks involved' (s.168A(a)). However, there is no legislated approach to establishing the amount of investment on which access charges should be calculated.

Imposing a uniform asset valuation approach risks generating inappropriate valuations of Queensland Rail's rail infrastructure, given the varied traffic types and mixes. Inappropriate asset valuations are prone to:

- distorting prices to end users of commodities delivered via the network (e.g. excessive prices will tend to undermine the competitiveness of Queensland industry in both domestic and international markets)

¹²¹ Note that Chapter 8 addresses specific matters relating to setting the initial asset valuation of the West Moreton network.

¹²² Glencore, sub. no. 7: 7 and 29. New Hope, sub. no. 9: 17-21.

¹²³ Aurizon, sub. no. 6: 44.

- distorting competition between different transport modes (such as between road and intermodal rail)
- altering the efficient operation of related investments in upstream and downstream markets.

Accordingly, we do not accept Queensland Rail's proposal.

We consider that in Queensland Rail's monopoly markets the value of assets should be calculated independently of the prices that are set. However, within markets in which Queensland Rail is not a monopoly provider, such as competitive intermodal transportation, market prices are more likely to shape appropriate access charges.

The asset valuation methodology needs to suit the markets, competitive characteristics and investments that apply to the below-rail services being provided.

In order to perform our statutory functions, consistent with the QCA Act, we require flexibility to choose the appropriate way to value assets in each case. Therefore we propose to maintain sufficient flexibility for access negotiations on asset valuations, while retaining the ability to determine the appropriate asset valuation approach given the circumstances. This approach is consistent with s.101(2)(c) of the QCA Act as it does not prescribe a strict asset valuation methodology in the event of an access dispute.

In this context, we have proposed a modified DORC-based methodology for the West Moreton network (see Chapter 8). However, the QCA has not formed any view on asset valuation methodologies for other systems such as the Mount Isa line (see Section 3.8).

Draft Decision

- 3.21 After considering Queensland Rail's proposed asset valuation methodology for negotiating access charges, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 3.22 The QCA requires Queensland Rail to amend its 2015 DAU to remove the requirement that the asset value for determining a ceiling revenue limit be set solely on the basis of a depreciated optimised replacement cost methodology and that it instead be set by reference to the regulatory asset base or where that is not possible, as agreed by the Access Seeker and Queensland Rail or, failing agreement, as determined by the QCA.**
- 3.23 The required amendments are set out in Appendix C.**
- 3.24 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.**

3.7 Pricing for access rights at renewal (non-reference-tariff services)

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that pricing terms for renewed access rights be based on the same methodology, rates and other inputs for calculating the access charge as that used under the existing access agreement.

However, Queensland Rail said this was subject to the following preconditions:

- There are no other competing applications for the same commodity, in the same geographic area (clause 3.3(c)(i)).

- Access rights being renewed are consistent in all respects as the existing access agreement - namely, for the same commodity, same number of train services and same train characteristics and description (clause 3.3(c)(ii)).
- No reference tariff applies (clause 3.3(c)(iii)).

Queensland Rail also wanted to vary existing access charges based on differences of cost or risk; material changes in circumstances that impact on access holders ability to pay; and for changes that result in Queensland Rail being unable to commercially provide access in that geographic area.¹²⁴

Stakeholders' comments

Glencore¹²⁵ raised concerns that the 2015 DAU proposal was illusory as the proposed scope of the mechanism was too narrow. They said the application for renewing access agreements would be precluded if:

- there were minor changes to the renewing access agreement rights, such as minor change to quantities or train services
- the application was dependent on strict timeframes for renewal applications.

Glencore said that Queensland Rail retained too much discretion due to its broad price differentiation rules. Glencore's view was that using existing access charges as the base reference point was not appropriate as these were already too high, due to monopoly power and inclusion of returns based on assets that had reached the end of their expected useful lives.¹²⁶

Glencore noted that development of a reference tariff may be required if Queensland Rail was unwilling to seek a solution on a cooperative basis.

QCA analysis and Draft Decision

We accept the need to implement a contract renewal pricing mechanism as this approach recognises the importance of providing pricing certainty for access holders, especially those sunk investments with payback periods beyond the term of their access agreement. However, we require amendments to Queensland Rail's approach so that the scope and application provide greater certainty for renewing access holders and Queensland Rail.

Importance of certainty for future investment (for non-reference-tariff services)

The negotiate–arbitrate approach to access pricing is likely to be most effective when the positions of the access provider and access seeker are evenly balanced. However, this may not be the case when an access agreement requires renewal.

At this point, if both the access provider and access seeker have sunk investments that are not fully recovered, there is potential for economic rents to be extracted from the party in the less favourable negotiating position.

A key consideration for us is providing certainty to underpin future investment. While the transfer of economic rents may have limited immediate impact on economic efficiency, the longer-term impact on investment decisions will be detrimental if expectations of future rent

¹²⁴ Refer to section 3.3 of this Draft Decision for discussion of these matters.

¹²⁵ Glencore, sub. no. 7: 3, 5-7.

¹²⁶ Glencore, sub. no. 7: 3, 5-7.

transfers are factored into anticipated returns and therefore on investment decisions. This uncertainty will have an adverse impact on economic efficiency.¹²⁷

We consider that this uncertainty would not promote investment in Queensland Rail's declared infrastructure and, consequently, investment in related markets. It is also not in the public interest, in particular the future economic prosperity of the communities that rely on train services where a reference tariff does not operate. Glencore has raised this issue with respect to the Mount Isa line. While Glencore has significant countervailing market power as the largest user, with significant financial and technical resources, we consider that there is a genuine risk of an investment hold-up if uncertainty on renewal contract pricing remains unresolved.

We have previously considered a renewal pricing methodology for the Mt Isa line,¹²⁸ and Queensland Rail's 2015 DAU proposes a similar approach, which is not reliant on publishing floor and ceiling prices (or even development of a reference tariff).

Queensland Rail's approach is an improvement as it is not system-specific and seeks to address renewal pricing for all non-reference tariff access agreements. But it continues to create uncertainty for users (particularly in respect of sunk investments). This is not consistent with s.138(2), particularly s.138(2)(a) and (e). Accordingly we propose to refuse to approve Queensland Rail's proposal.

The remainder of this analysis outlines the changes to Queensland Rail's proposal we require to be made to the 2015 DAU.¹²⁹

Contract renewal pricing mechanism (for non-reference-tariff services)

Queensland Rail's proposal is an innovative mechanism to address contract renewal pricing uncertainty, which with our proposed amendments will address investment uncertainty thereby promoting future investment in Queensland Rail's network and dependent markets.

In summary, Queensland Rail should have the ability to recover all incremental costs with a contribution towards its common costs, while providing protection to access holders when they renew their access agreements.

This will provide an incentive for Queensland Rail and users to invest in additional capacity.

We propose the 2015 DAU be amended to provide the outcomes in **Table 3.2** below.

¹²⁷ For a discussion of fairness in pricing where access holders have sunk costs, see QCA, August 2013: 27-29.

¹²⁸ QCA 2014 Draft Decision.

¹²⁹ In light of Queensland Rail's 2015 DAU contract renewal pricing mechanism and stakeholder concerns with our 2014 Draft Decision proposal, we intend to progress improvements to the 2015 DAU.

Table 3.2 QCA key amendments to the proposed contract renewal pricing mechanism

<i>2015 DAU proposal</i>	<i>Requirement amendment</i>	<i>Rationale</i>
Allow price discrimination in a broad range of circumstances.	Price differentiation will be limited to cost or risk factors (see Section 3.3 of this Draft Decision).	Queensland Rail will be required to demonstrate variations to access charges on the basis of cost or risk differences.
Renewal access agreements without a competing access application are provided with the renewal pricing mechanism.	All renewal access agreements are provided with the renewal pricing mechanism, not just those without a competing access application. Approval of a relevant reference tariff extinguishes the pricing renewal mechanism, unless the parties have negotiated an agreed pricing methodology for a period longer than the term of the access agreement.	The contract renewal pricing mechanism will apply to all renewal access agreements except where a reference tariff applies. Approval of a reference tariff by the QCA will remove the renewal pricing mechanism as a contractual right at renewal. Contractual rights should be preserved and the mechanism is not intended to replace commercial agreement between the parties.
Mechanism proposed to apply at renewal of access agreements.	The renewal pricing mechanism will be provided on a one-off basis to provide the access seeker with an incentive to match the access agreement term with its expected payback period.	The renewal pricing mechanism is intended to provide certainty to underpin future investment.
Renewal access agreements required to have, in all respects, the same characteristics as the existing access agreement.	Where the renewal train service description varies due to operational or supply chain improvements, such as increased payload or reduced cycle time initiatives, consideration is to be provided for a contribution to common costs on the same per unit basis as the existing access agreement.	A fair contribution towards Queensland Rail's common costs is required where the renewal access agreement is different from the existing train service. This is required to enable a fair allocation of the benefits from operational improvements and provide for Queensland Rail's recovery of common costs (of providing the service to other access holders).

The contract renewal pricing mechanism will commence upon on the approval date of the access undertaking.

Our approach will provide all parties with certainty. Access holders will know that Queensland Rail cannot levy access charges with undue discretion and thereby impose risk premiums on future investments. At the same time, it is in Queensland Rail's legitimate business interest as it provides potential for future, but not open-ended, changes to access charges.

The QCA Act requires us to have regard to both the interests of the facility owner, including the need for a return on investment (s.138(2)(b) and s.168A(a)) and the interests of access seekers and access holders, (s.138(e) and (h)). In particular, Queensland Rail should recover its incremental costs of providing below-rail services, and be permitted to undertake price discrimination where it aids efficiency (s.168A(b)). These factors have been important factors in our proposed refinements to Queensland Rail's 2015 DAU contract renewal pricing mechanism.

Draft Decision

- 3.25 After considering Queensland Rail's position on pricing of non-reference tariff services at contract renewal, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 3.26 The QCA requires Queensland Rail to amend its 2015 DAU to provide a contract renewal pricing mechanism that operates in accordance with the amendments set out in Part 3 in Appendix C.**
- 3.27 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.**

3.8 Rate of return

Background

The regulated rate of return is a key input into determining the maximum allowable revenue for Queensland Rail's proposed reference tariffs and assessing ceiling revenue limits for the rest of its network during the term of the undertaking. The regulated rate of return is calculated using a weighted average cost of capital (WACC), comprising three primary components:

- cost of equity—typically estimated with reference to the Capital Asset Pricing Model (CAPM)
- cost of debt—observed or estimated from the current debt rate
- capital structure—appropriate debt and equity proportions of firm market value, typically determined by benchmarking.

While some elements of the WACC are firm-specific (e.g. the asset/equity beta), other components are more general in nature and typically do not differ from business to business—such as the approach to determining the risk-free rate, market risk premium and value of dividend imputation credits (i.e. gamma). These 'market parameters' are key drivers of the WACC.

Separately, we recently completed a cross-sector review of the WACC parameters as they apply to services regulated under the QCA Act in Queensland (the 'QCA cost of capital methodology review'). That review identified the methodology that we will generally apply in determining the WACC parameters, consistent with the requirements of the QCA Act.

That review has also provided guidance on the components of the WACC that are more general in nature and are unlikely to differ from business to business. Our analysis in the 'Cost of capital: market parameters' Final Decision of August 2014 (the Market Parameters Decision) therefore comprises an important component of our reasoning underpinning this Draft Decision. We have drawn on that review where relevant to our consideration of Queensland Rail's proposal.

Nonetheless, our full consideration of the matters raised by Queensland Rail and its stakeholders, and the statutory factors in section 138(2) of the QCA Act, are set out in this Draft Decision.

Queensland Rail's 2015 DAU proposal

Queensland Rail's WACC proposal for determining reference tariffs and assessing ceiling revenue limits comprises two principal parts:

- as at the approval date, an indicative, nominal post-tax, 'vanilla' weighted average cost of capital (WACC) of 6.93 per cent, comprising a cost of equity of 8.01 per cent and a cost of debt of 6.05 per cent. Queensland Rail¹³⁰ proposed to update the risk-free rate and debt margin once the averaging period for determining them is agreed between the QCA and Queensland Rail
- after the approval date, a variable WACC, derived by adding a WACC margin¹³¹ of 4.12 per cent to the average yield on a five-year Commonwealth Government bond over a 20-day trading period ending as close as practicable to, but not later than, the date that Queensland Rail offers an access agreement to an access seeker.

WACC at approval date

In its 2015 DAU, Queensland Rail¹³² proposed an indicative WACC of 6.93 per cent based on using the 20 business days immediately prior to 1 July 2013 to determine the risk-free rate and debt margin (to be updated prior to our approval of the 2015 DAU), and the non-time-variant WACC parameters consistent with our 2014 Draft Decision on its 2013 DAU.

Specifically, Queensland Rail proposed the following market-based WACC parameters:

- risk-free rate—2.81 per cent, based on the average of a term-matched Commonwealth Government nominal bond yields over the 20 business days prior to 1 July 2013 (to be updated based on the relevant term of bond and agreed averaging period)
- market risk premium—6.5 per cent
- gamma—0.47, reflecting the product of a utilisation rate of 0.56 and a distribution rate 0.84 of dividend imputation credits.

For the firm-specific parameters, Queensland Rail proposed a benchmark capital structure and associated credit rating of 55 per cent and BBB+ respectively. On the basis of these benchmarks and a 10-year term of debt, Queensland Rail proposed a debt premium of 3.24 per cent, including transactions costs.¹³³

Queensland Rail proposed an asset beta of 0.45 and an associated equity beta of 0.80. Queensland Rail¹³⁴ said that its risk profile was likely to be riskier than the proposed comparator, Aurizon Network. Queensland Rail referenced our 2014 Draft Decision that noted potential risk differences between Aurizon Network and Queensland Rail, indicating potentially higher risk for Queensland Rail coal operations, namely:

- *basis of tariffs*—proposed reference tariffs are subject to a price-cap, rather than a revenue cap, form of regulation
- *service diversification*—the West Moreton network has a greater share of mixed traffic operations (compared to the central Queensland coal network), which includes non-coal traffic that is not able to pay the ceiling price

¹³⁰ Queensland Rail, sub. no. 2: 41.

¹³¹ Queensland Rail's 2015 DAU defines the margin as being the difference between the WACC as at the approval date and the risk-free component of the WACC.

¹³² Queensland Rail, sub. no. 2: 39-41.

¹³³ Queensland Rail does not decompose the proposed debt premium of 3.24 per cent into a raw premium and associated debt transaction costs.

¹³⁴ Queensland Rail, sub. no. 2: 40.

- *sources of revenue*—the West Moreton network serves only two thermal coal mines, compared to the numerous mines operating in central Queensland, and the West Moreton mines produce low margin thermal coal.

While noting these differences, Queensland Rail proposed to apply the beta estimates from our 2014 Draft Decision. However, Queensland Rail also said that it may reconsider its WACC proposal if the QCA does not maintain its Draft Decision on Aurizon Network's WACC¹³⁵ when making a Final Decision on that matter.

The WACC parameters proposed for the undertaking period are in **Table 3.3**.

Summary of Queensland Rail's indicative rate of return parameters

Table 3.3 Queensland Rail indicative cost of capital parameters

<i>Parameter</i>	<i>Queensland Rail submission 2015 DAU</i>
Credit rating	BBB+
Risk-free rate	2.81%
Market risk premium	6.50%
Asset beta	0.45
Gearing	55%
Equity beta	0.80
Gamma	0.47
Equity margin	5.20%
Cost of equity	8.01%
Debt margin	3.24%
Cost of Debt	6.05%
WACC Margin	4.12%
WACC	6.93%

(a) The indicative estimation period for the risk-free rate and debt premium is based on the 20 business days prior to 1 July 2013. Queensland Rail said that these parameters would be determined at a date in the future as approved by the QCA (in consultation with Queensland Rail).

Queensland Rail proposed that the resulting rate of return be applied to determine:

- revenue limits¹³⁶
- the present value parameter for quantifying relinquishment¹³⁷ and transfer fees
- the West Moreton network coal reference tariffs, including:

¹³⁵ QCA MAR Draft Decision 2014: 262.

¹³⁶ 2015 DAU, cl. 3.2.3(a).

¹³⁷ Cl. 21.2 standard access agreement.

- the regulated return on capital
- capitalising excluded capital expenditure where this is determined to be in excess of reasonable demand¹³⁸
- revenue adjustments to be accrued within the RAB where forecast capital expenditure varies from approved capital expenditure.¹³⁹

Variable WACC proposal

Queensland Rail said that the second component of its WACC proposal (i.e. proposed 'variable WACC' approach) involves updating the rate of return within the regulatory period when a new/renewing access agreement might be entered.¹⁴⁰ Queensland Rail submitted that the rationale for varying the allowed WACC is to reflect movements in underlying market rates (i.e. changes in the risk-free rate/bond yield) in the allowed rate of return.

Queensland Rail also said the 2015 DAU defines the variable WACC by adding a margin of 4.12 per cent to the average yield on a five-year Commonwealth Government bond.¹⁴¹

Stakeholders' comments

New Hope said that it would rely on our assessment of WACC with a view to responding to our assessment of Queensland Rail's proposal.¹⁴²

Glencore provided a previous submission in which it raised concerns that the proposed reductions in Queensland Rail's existing risk profile, namely those relating to changes in commercial aspects of the proposed standard access agreement (such as liabilities and indemnities), would require corresponding risk reductions to the rate of return.¹⁴³ In this regard, Glencore maintained its concern with the risk profile proposed in the standard access agreements.¹⁴⁴

QCA analysis and Draft Decision

For the 2015 DAU, Queensland Rail has sought a nominal post-tax, 'vanilla' WACC. We note that this definition of the rate of return is consistent with the Officer WACC3 definition typically applied by us for regulatory purposes (Officer 1994).

In summary, regarding Queensland Rail's proposed WACC parameters, our Draft Decision is to approve these, subject to updating the time-variant parameters (i.e. the risk-free rate and debt margin) using a term and methodology consistent with the QCA's standard approach. We note that Queensland Rail has endorsed our methodological approach to estimating the time-varying parameters.

However, regarding the second component of Queensland Rail's proposal, that is, its 'variable WACC' approach, our Draft Decision is not to approve this part of the proposal. These matters are discussed in the following sections.

¹³⁸ Schedule E — Maintaining the Regulatory Asset Bases, section 3.3.

¹³⁹ Schedule E — Maintaining the Regulatory Asset Bases, section 7 capital expenditure carryover account.

¹⁴⁰ Email correspondence, 7 July 2015, clarifying Queensland Rail's WACC proposal.

¹⁴¹ The 4.12 per cent is the difference between the indicative WACC of 6.93 per cent and the indicative risk-free rate of 2.81 per cent.

¹⁴² New Hope, sub. no. 9: 22.

¹⁴³ Glencore, sub. no. 7: 13, 40-42 and Annexure C, number 1: 7.

¹⁴⁴ These matters have been addressed in Chapter 7 of this Draft Decision.

WACC at approval date

Market-wide WACC parameters

In its submission, Queensland Rail¹⁴⁵ either adopted parameters consistent with the outcome of our recent cost of capital methodology review or supported our methodology for estimating the time-varying parameters. Accordingly, we approve Queensland Rail's proposal for the:

- risk-free rate—based on a 20-business-day average of the (interpolated) nominal yields on Commonwealth Government bonds that match the relevant term of the regulatory period. This rate will be set at a point in time in the future over an averaging period agreed between Queensland Rail and us. For purposes of this decision, the indicative risk-free rate is 2.81 per cent.
- market risk premium—6.5 per cent consistent with the outcome of the Market Parameters Decision
- gamma—0.47, consistent with the outcome of the Market Parameters Decision.

Firm-specific WACC parameters

Capital structure and credit rating

Capital structure and credit rating are two related inputs in the assessment of the benchmark WACC.

Capital structure refers to the relative market-value proportions of debt and equity that together finance the regulated entity's assets. The regulated entity's proportion of debt in the total market value of its assets (i.e. equity plus debt) is termed its 'gearing' or 'leverage'. The benchmark credit rating is based on the benchmark capital structure. Firms that face less risk in their operating environment are generally able to sustain higher levels of leverage for a given credit rating, all else being equal.

We propose to accept Queensland Rail's benchmark capital structure (55 per cent debt/45 per cent equity) and credit rating (BBB+) for setting the WACC for the 2015 DAU.

Debt premium

Queensland Rail has proposed to use the WACC parameters consistent with our 2014 Draft Decision. Our approach was determining the debt premium using the methodology from our Final Decision, 'Cost of Debt Estimation Methodology', (August 2014, 'Cost of Debt Decision') to estimate the raw debt risk premium. For the reasons detailed in that decision, we approved the use of an econometric simple portfolio approach as our principal methodology for estimating the debt premium in future regulatory reviews.

We propose to accept Queensland Rail's proposed methodology for determining the raw debt premium—that is, applying the simple portfolio econometric approach as the primary method of estimation, based on an efficient term of debt of 10 years and a BBB+ benchmark credit rating.

This debt premium will be set at a point in time in the future over an averaging period agreed between Queensland Rail and us. For purposes of this decision, the indicative debt risk premium (including transactions costs) is 3.24 per cent.

¹⁴⁵ Queensland Rail, sub. no. 2: 39-40.

Asset and equity betas

The equity beta is a direct input into Queensland Rail's allowed WACC and is based on the underlying asset betas of relevant comparator firms with similar systematic risk. The asset beta of an entity is a relative measure of the inherent 'business' risk of investing in the entity compared to the risk of investing in the market as a whole, assuming the business is 100 per cent equity-financed. The equity beta reflects not only the entity's inherent business risk but also the financial risk borne by equity holders from the use of debt to partially fund the business.

Queensland Rail proposed an equity beta consistent with our 2014 Draft Decision. In doing so, Queensland Rail has taken the view of benchmarking itself with Aurizon Network, proposing an asset beta of 0.45 and an equity beta of 0.80 (sub. no. 2: 40).

Based on our analysis, we note that Queensland Rail's West Moreton network and Aurizon Network share similar characteristics, namely that they have:

- operations in the Queensland coal chain, although there is some difference in the composition of product
- cost-based based regulation that is applied to coal traffic operations
- revenue protection from take-or-pay contract provisions
- cost pass-through provisions within access agreements
- similar institutional arrangements, in that they are both located in the same state and regulated by the same regulator.

While there are some differences between Queensland Rail and Aurizon Network, we have not been presented with evidence from stakeholders at this time that Queensland Rail's coal operations are materially riskier than that of Aurizon Network. Moreover, Queensland Rail has taken a pragmatic approach by seeking to benchmark itself with Aurizon Network, rather than to argue material differences in risk profile.

Also, in response to Glencore's concerns regarding the revised allocation of risks within Queensland Rail's proposed standard access agreement, we do not consider a downward adjustment to the WACC in that context to be appropriate given our decision to allocate contractual risks as outlined in Chapter 7 of this Draft Decision.

Given these considerations, our Draft Decision is that the proposed asset and equity betas of 0.45 and 0.80 respectively are not unreasonable. On this basis, we propose to accept Queensland Rail's proposed asset and equity betas.

Variable WACC proposal

Queensland Rail's 2015 DAU seeks to apply a WACC margin to the average yield on a five-year Commonwealth Government bond over a 20-day trading period before Queensland Rail offers an access agreement to an access seeker.

However, this proposal represents a material departure from our usual regulatory practice, which involves setting the WACC at the start of the regulatory cycle and fixing it for the duration of that period. At this time, we have not been provided with sufficient evidence to depart from this standard approach. Accordingly, we refuse to approve Queensland Rail's variable WACC proposal.

Conclusion on benchmark WACC

For the purpose of Queensland Rail's proposed rate of return for the 2015 DAU, we estimate an indicative WACC of 6.93 per cent per annum as set out in Table 3.3 above.

In assessing Queensland Rail's WACC proposal, we have had regard to the factors listed in section 138(2), as identified in Chapter 10 of this Draft Decision.

Against this background, we consider our approach:

- meets s.168A(a) the QCA Act by including a return on investment commensurate with the regulatory and commercial risks involved.
- gives regard to the legitimate business interests of Queensland Rail, pursuant to section 138(2)(b) of the QCA Act. This matter was one of the relevant legislative requirements given relatively more weight in our assessment of the appropriate WACC
- provides Queensland Rail with a return on investment commensurate with the regulatory and commercial risks involved, pursuant to section 168A(a) of the QCA Act.

Draft Decision

- 3.28 After considering Queensland Rail's proposed rate of return, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 3.29 The QCA requires Queensland Rail to amend its 2015 DAU to only include an indicative WACC of 6.93% per annum, to be consistent with our approved WACC parameters and approved methodology for the risk-free rate and debt margin.**
- 3.30 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.**

4 OPERATING REQUIREMENTS (PART 4 AND SCHEDULES F AND G)

Part 4 of the 2015 DAU provides for the operating requirements that govern how Queensland Rail will deliver train service entitlements (TSEs). These include the network management principles (NMPs) for Queensland Rail to schedule, manage, and demonstrate capacity for train services (Schedule F). They also include the Operating Requirements Manual (ORM), which prescribes rules for use of the network by train operators (Schedule G).

This Draft Decision accepts much of Queensland Rail's 2015 DAU proposal but requires amendments to clarify how the NMPs and ORM will operate and make them consistent with the approval criteria in the QCA Act.

Introduction

The safe and efficient operation and use of Queensland Rail's network will be guided by the NMPs (Schedule F) and ORM (schedule G) in the 2015 DAU. The NMPs set out how Queensland Rail will coordinate maintenance and other track restrictions, schedule and operate trains and demonstrate available capacity. The proposed ORM governs a variety of other procedures for operating trains and addressing matters including safety and emergency responses.

The key issues are summarised below in **Table 4.1**, with technical terms explained following this table. Matters that require a more detailed explanation are discussed in Sections 4.1 to 4.7.

Table 4.1: Operating requirements—NMPs and the ORM

<i>2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision¹⁴⁶</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Transparency of train plans			
Queensland Rail will publish a MTP every six months and provide a DTP to access holders at least one day before operation. Neither document will be redacted. ¹⁴⁷	Broadly consistent with 2014 Draft Decision.	Stakeholders supported publishing the MTP and DTP. ¹⁴⁸	The QCA refers to and relies on its 2014 Draft Decision. The QCA approves the 2015 DAU proposal.
Changes to train plans			
Queensland Rail will notify and consult with access holders for changes to the MTP or DTP. ¹⁴⁹	Inconsistent with the 2014 Draft Decision that required broader notification and consultation.	Stakeholders said all supply chain participants, including end users, should be notified. ¹⁵⁰	See Section 4.1.

¹⁴⁶ QCA, October 2014, Chapter 4.

¹⁴⁷ Queensland Rail, 2015 DAU, Schedule F, cls. 2.1(h)-(j) and 2.2(c).

¹⁴⁸ Asciano, sub. no. 5: 19; Glencore, sub. no. 7: 32-33; New Hope, sub. no. 10: 39-41.

¹⁴⁹ Queensland Rail, sub. no. 1: 27.

¹⁵⁰ Asciano, sub. no. 5: 19; Aurizon, sub. no. 6: 24-25; Glencore, sub. no. 7: 10, 32-33; New Hope, sub. no. 10: 39-41.

2015 DAU proposal	Consistency with QCA 2014 Draft Decision¹⁴⁶	Stakeholders' comments	QCA 2015 Draft Decision
Queensland Rail will use 'reasonable endeavours to minimise' adverse effects of possessions. ¹⁵¹	Inconsistent with 2014 Draft Decision that required effects be mitigated.	Stakeholders raised material concerns. ¹⁵²	See Section 4.2.
Coordination with adjoining networks and other parties			
Queensland Rail will use 'reasonable endeavours to coordinate' with adjoining networks. ¹⁵³	Broadly consistent with 2014 Draft Decision.	Stakeholders said 2015 DAU needed to provide for coordination with adjoining networks. ¹⁵⁴	See Section 4.3.
Passenger services			
NMPs will apply to all services including Queensland Rail's related-party passenger services. ¹⁵⁵	Consistent with 2014 Draft Decision.	Stakeholders did not raise any material issues with the 2015 DAU. ¹⁵⁶	The QCA refers to and relies on its 2014 Draft Decision. The QCA approves the 2015 DAU proposal.
NMPs and SAAs allow Queensland Rail to take pre-emptive action to avoid delays to passenger services only in metropolitan peak periods. ¹⁵⁷	Broadly consistent with 2014 Draft Decision.	Stakeholders did not raise any material issues with the 2015 DAU.	See Section 4.4.
Content of Operating Requirements Manual (ORM)¹⁵⁸			
Queensland Rail proposed a detailed ORM to be part of the undertaking. ¹⁵⁹	Inconsistent with 2014 Draft Decision.	Stakeholders raised issues with proposed risk allocations. ¹⁶⁰	See Section 4.5.
ORM amendment process			
ORM to be amended through a process in the SAAs. ¹⁶¹	Inconsistent with 2014 Draft Decision.	Stakeholders said amendment process needed to be changed. ¹⁶²	See Section 4.6.

¹⁵¹ Queensland Rail, 2015 DAU, Schedule F, Cl. 2.3.

¹⁵² Aurizon, sub. no. 6: 24.

¹⁵³ Queensland Rail, 2015 DAU, Cl. 4.2.

¹⁵⁴ Asciano, sub. no. 5: 27; Glencore, sub. no. 7: 34-35; New Hope, sub. no. 10: 39..

¹⁵⁵ Queensland Rail, 2015 DAU, Schedule F, Cl. 1.

¹⁵⁶ Glencore, sub. no. 7: 34.

¹⁵⁷ Queensland Rail, 2015 DAU, Schedule F, Cl. 3(i)(ii)(c).

¹⁵⁸ Sets out the rules and procedures for use of the network by train operators.

¹⁵⁹ Queensland Rail, 2015 DAU, Schedule G.

¹⁶⁰ Glencore, sub. no. 7: 10, 35; New Hope, sub. no. 10: 14, 20-21, 43-44; Aurizon, sub. no. 6: 29, 30, 31-32; Asciano, sub. no. 5: 19, 27-29.

¹⁶¹ Queensland Rail, 2015 DAU, SAAs, cl. 8.

¹⁶² Glencore, sub. no. 7: 10, 35-36; New Hope, sub. no. 10: 20, 43-44; Aurizon, sub. no. 6: 30; Asciano, sub. no. 5: 26, 27-28.

Key terms: Queensland Rail's train scheduling and planning documents

Queensland Rail's proposed NMPs in the 2015 DAU prescribe two key documents:

- (1) the **master train plan (MTP)** that demonstrates there is sufficient capacity and provides information on planned possessions for maintenance and other purposes (long-term planning)
- (2) the **daily train plan (DTP)** derived from the MTP that shows the actual expected schedule on the day of operation (a short-term planning document).

Queensland Rail can amend its scheduling and planning documents prior to the day of operation and prior to the DTP being scheduled. This can be done either by agreement with access holders or for operational constraints, which may include track closures for maintenance and construction activities or restrictions on train weights or speeds. Operational constraints for maintenance and construction are broken down into:

- (1) **emergency possessions**—correcting 'dangerous or potentially dangerous' faults or 'severe speed restrictions' within five days after they are detected.
- (2) **urgent possessions**—correcting 'potentially dangerous' problems less than three months after they are detected
- (3) **planned possessions**—typically known between three months and two years in advance of the day of operation.

Queensland Rail can amend the DTP after the DTP has been scheduled if requested by an access holder and the change would not affect another access holder's Train Service Entitlement, or for an emergency possession.

4.1 Changes to train plans

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that it would not consult if it varied the DTP from the schedule set out in the MTP or modified the MTP, where access holders' scheduled train services were not affected. In all other cases, the proposed process for changing the MTP and DTP requires that Queensland Rail (except in cases of urgent or emergency possessions):

- **notify** access holders whose activities are affected by any modifications, of changes to the MTP at least 20 business days in advance
- **consult** with relevant access holders where a proposed change to the MTP would result in those access holders' scheduled train services not being met
- **agree** modifications to the MTP with relevant access holders where the change is not within the scope of those access holders' TSEs.

The proposed NMPs provide that if Queensland Rail wishes to make a short-term change to a DTP at least two business days before the DTP is scheduled because of an operational constraint, and the variation would result in an access holder's scheduled train services not being met, Queensland Rail must first consult with that access holder. Queensland Rail has also proposed that it may alter the DTP before the DTP is scheduled if Queensland Rail invites

affected access holders to consider and agree to the changes at least 36 hours before the day of operation.¹⁶³ Queensland Rail said:

*Once scheduled, Queensland Rail cannot vary the DTP so as to adversely affect the access holder except where an Emergency Possession is required.*¹⁶⁴

Queensland Rail said it would notify only access holders, not other entities involved in the relevant supply chain, of changes to the MTP or DTP, as 'supply chain coordination services ... are not part of the declared service'.¹⁶⁵ However, Queensland Rail has instead proposed broader notification by publishing an unredacted MTP on its website every six months.¹⁶⁶

Stakeholders' comments

Stakeholders said Queensland Rail should notify and consult with more than just access holders about changes to the train plans¹⁶⁷ and that Queensland Rail had given itself too much scope to change the DTP without agreement from access holders.¹⁶⁸

QCA analysis and Draft Decision

We propose the 2015 DAU require Queensland Rail to:

- **notify** an expanded range of affected parties about changes to its train and maintenance scheduling and planning documents
- **consult** with affected access holders more often
- **seek agreement** from access holders in more circumstances
- where a change is subject to **dispute**, only implement it once the matter is resolved, except for urgent safety-related issues.

Notify

We require Queensland Rail to notify affected parties of changes to the train services and other activities detailed in its planning and scheduling documents as early as possible and as often as necessary. This includes notifying supply chain participants that are affected by those changes.

We do not accept Queensland Rail's position that, as supply chain coordination services are not part of the declared service, it should be required to provide information on changes to its scheduling only to access holders.¹⁶⁹ In our view distributing relevant information about the declared service to affected parties does not constitute providing supply chain coordination services. Providing that information to various parties is part of the cooperation that Queensland Rail should extend to other supply chain participants and, in turn, is entitled to expect from them.

Timely advice from Queensland Rail that it is closing its network for maintenance, emergency possessions or urgent safety matters is important to a range of parties that are not access

¹⁶³ Queensland Rail, 2015 DAU, Schedule F, Cls. 2.2(e) to (h).

¹⁶⁴ Queensland Rail, sub. no. 1: 28.

¹⁶⁵ Queensland Rail, sub. no. 1: 27.

¹⁶⁶ Queensland Rail, 2015 DAU, Schedule F, Cls. 2.1(h) and (j).

¹⁶⁷ Glencore, sub. no. 7: 33-34; New Hope, sub. no. 10: 39-41.

¹⁶⁸ Asciano, sub. no. 5: 19; Aurizon, sub. no. 6: 24-25.

¹⁶⁹ Queensland Rail, sub. no. 1: 27.

holders, including port unloading facilities or loading points for minerals traffic.¹⁷⁰ Direct notification provides affected parties with the best opportunity to account for, or mitigate, the impact of Queensland Rail's possessions and other operational constraints.

Therefore Queensland Rail's proposal that it only notify access holders is not consistent with the efficient use or operation of its rail infrastructure. Nor is it consistent with the interests of access holders and access seekers in having end customers and other parties they deal with being able to react quickly to the information on changed train schedules. So, while it may be in Queensland Rail's business interest not to notify parties other than access holders, on balance we do not consider it appropriate to approve the proposal.

Further, notifying affected parties is not, in our view, an onerous requirement. Queensland Rail is a sophisticated organisation that already actively notifies affected parties other than access holders. For example, Queensland Rail already publishes service updates and planned closures on its website for its related-party operations.¹⁷¹ We anticipate that Queensland Rail could use a similar website approach for notifying parties about changes to train plans across its network, that affect non-passenger access holders and other parties. Queensland Rail could also reduce the burden on itself by allowing interested parties to nominate that they want to be notified, so that Queensland Rail does not need to select the parties itself.

A broad approach to notifying stakeholders of changes to the train plans when they are proposed and implemented will enable the efficient operation and use of significant infrastructure, by providing affected parties with timely information that they could use to manage and mitigate the impact (ss.138(2)(a) and 69E of the QCA Act). As such, we also consider this requirement to be in the public interest, and in the interests of access holders and seekers (s.138(2)(d), (g) and (e)). Furthermore, it is not inconsistent with the legitimate business interests of Queensland Rail as it does not imply an onerous burden (s.138(2)(b)). This requirement is also consistent with the potential contents of an undertaking envisaged in the QCA Act (s.137(2)(ba) – 'information to be given to the authority or another person').

Draft Decision

- 4.1 After considering Queensland Rail's proposed notification provisions included in the NMPs, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 4.2 The QCA requires Queensland Rail to amend the NMPs in its 2015 DAU to provide for notifying a broader range of parties about changes to its train plans. The required amendments are set out in Schedule F, cls. 2.1(d) and 2.2(c) in Appendix C.**
- 4.3 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

Consult

We accept Queensland Rail's proposal that it consult only with affected access holders about relevant changes to the MTP and DTP. However, we do require that Queensland Rail consult with those access holders in a wider range of circumstances. Given our requirement for

¹⁷⁰ For example, mining companies that ship by both the Mount Isa line and West Moreton network have requested that end users be notified of changes to train plans. See Glencore, sub. no. 7: 32-33; New Hope, sub. no. 10: 39-41.

¹⁷¹ This includes upcoming closures for the next 14 days and those planned over the next 12 months. In addition, Queensland Rail announces delays to services and provides clear, regular updates for its passenger operations. See <http://www.queenslandrail.com.au/RailServices/City/Pages/Plannedclosures.aspx>.

notifying other affected parties, such parties will be able to raise concerns through an access holder, or contact Queensland Rail directly.

Queensland Rail has proposed to consult on all changes to the MTP where the modification would result in an access holder's scheduled train service not being met.¹⁷² However, Queensland Rail has not proposed to apply this to the DTP. Queensland Rail said it was not practical to consult on all operational constraints that affect the DTP, as these might include matters such as speed restrictions that were urgently needed for safety reasons.¹⁷³

Stakeholders argued the NMPs should require Queensland Rail to consult on most operational constraints, except those required to address safety concerns, or for urgent and emergency possessions.¹⁷⁴

While it may be in Queensland Rail's business interest not to consult on operational constraints that affect the DTP, we consider that it does not promote the efficient use and operation of rail infrastructure (s. 138(2)(a) and (b)). Nor is it in the interests of access seekers or holders (s. 138(2)(e) and (h)). We therefore do not find it appropriate to approve the proposal.

We consider Queensland Rail should consult with access holders for all operational constraints that affect the access holder's scheduled paths on the DTP, except that it need only make reasonable endeavours to consult in the case of urgent or emergency possessions and pressing safety issues that may make this impractical.¹⁷⁵

We understand that Queensland Rail consults on most operational constraints in practice, as consulting about changes to its DTP is an essential part of providing a service to its customers.

Given this, a broad obligation to consult is not an onerous requirement on Queensland Rail, and is not inconsistent with Queensland Rail's legitimate business interest (s.138(2)(b)). It is also consistent with the efficient use and operation of the rail network, as it provides access seekers and access holders with greater certainty they will receive a standard of service consistent with their TSEs (s.138(2)(a), (e) and (h)).

Draft Decision

- 4.4 After considering Queensland Rail's proposed consultation provisions included in the NMPs, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 4.5 The QCA requires Queensland Rail to amend the NMPs in its 2015 DAU to provide for consulting access holders for all operational constraints that affect the access holder's scheduled paths on the DTP, except that it need only make reasonable endeavours to consult in the case of urgent or emergency possessions and pressing safety issues. The required amendments are set out in Schedule F, cls 2.2(f) and 2.2(j)(iii) in Appendix C.**
- 4.6 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

¹⁷² Queensland Rail, 2015 DAU, cl. 2.1(m).

¹⁷³ Queensland Rail, sub. no. 1: 28.

¹⁷⁴ Glencore, sub. no. 7: 33; New Hope, sub. no. 10: 41.

¹⁷⁵ Many safety issues will be addressed by urgent or emergency possessions, but some result in other measures such as speed restrictions.

Seek agreement

Queensland Rail has committed to seek agreement from access holders for all changes to the MTP that are not consistent with contracted TSEs. We require that Queensland Rail also make reasonable endeavours to agree with access holders about changes to the DTPs that affect those access holders' TSEs.

We accept that Queensland Rail can make an exception for urgent and emergency possessions and pressing safety matters such as speed restrictions, but still propose that its planners and controllers should make reasonable endeavours to consult about such changes to the DTP.

Queensland Rail has proposed to give itself wide-ranging powers to vary the DTP from the MTP without seeking agreement, including for any 'modification to an existing planned possession', and 'any other operational constraint affecting the DTP'.¹⁷⁶

Aurizon said Queensland Rail's proposed treatment of the DTP gave it 'the right to override any obligation to consult and seek agreement where a variation to the MTP is required in the Daily Train Plan'.¹⁷⁷

Timeliness on the start and finish of planned possessions is a fundamental indicator of the efficiency of the management of a rail network. As their name implies, planned possessions are typically settled well in advance—sometimes two years or more before the day of operation. If planned possessions are changed at the last minute, a range of parties that had relied on those long-established plans will be adversely affected. Therefore, varying the DTP from the MTP for changes to planned possessions should be an unusual event, particularly given all traffics on Queensland Rail's network are timetabled.

We therefore consider that Queensland Rail's proposed requirements for making such changes do not have sufficient regard to the interests of access seekers and holders in terms of giving them certainty about receiving their TSEs (s.138(2)(e) and (h)). They are also not consistent with the efficient use and operation of the rail infrastructure as they place too little onus on Queensland Rail to adhere to the timing of its planned possessions (s.138(2)(a)). So, while it may be in Queensland Rail's business interest to change the time of possessions (s.138(2)(b)) we consider that, on balance, we cannot approve its proposal.

However, we consider that it is not appropriate at this time to go so far as to require that Queensland Rail seek agreement for changes to planned possessions. Rather, we propose that Queensland Rail make reasonable endeavours to agree any changes to planned possessions in the DTP compared with the MTP, where those changes affect TSEs. We consider that Queensland Rail should be able to vary the DTP from the MTP without seeking agreement from affected access holders in cases of emergency possessions and pressing safety issues.

We would be concerned, however, if Queensland Rail consistently failed to adhere to the timing of planned possessions. We therefore require that Queensland Rail report on whether it has adhered to the timings of the planned possessions in its MTP. If the data shows there is a persistent issue with changes to planned possessions when they are scheduled in the DTP, that can be addressed in a future undertaking.

This best-endeavours regime for changes to planned possessions in the DTP is consistent with the efficient use and operation of the rail network, and with the interests of access seekers and holders, in giving them certainty about receiving their TSEs (s.138(2)(a), (e) and (h)).

¹⁷⁶ Queensland Rail, 2015 DAU, Schedule F, cl. 2.2(f).

¹⁷⁷ Aurizon, sub. no. 6: 24-25.

(See Section 4.2 of this Draft Decision for a discussion of Queensland Rail's proposed requirement to minimise the adverse effects of possessions.)

Draft Decision

- 4.7 After considering Queensland Rail's proposed agreement provisions included in the NMPs, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 4.8 The QCA requires Queensland Rail to amend the NMPs in its 2015 DAU to provide for making reasonable endeavours to seek agreement from access holders where it varies the DTP from the MTP, except for emergency possessions and pressing safety issues. We also require Queensland Rail to report on its adherence to timings of planned possessions in the MTP. The required amendments are set out in cl. 5.1.2(a)(x) and Schedule F, cl. 2.2(f) in Appendix C.**
- 4.9 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

Dispute

We consider that where an access holder disputes a change to the MTP, other than an emergency or urgent possession or pressing safety matter, then the change should take effect once the dispute is resolved.

Queensland Rail said a dispute by one access holder should not hold up changes to the MTP.¹⁷⁸ However, stakeholders said allowing changes to be imposed while they were subject to dispute would not 'properly protect access holders from adverse impacts arising from unjustified changes'.¹⁷⁹

We consider that allowing changes to the MTP to go ahead while they are subject to a dispute is not consistent with the interests of access seekers and holders (s.138(2)(e) and (h)) and that this outweighs any legitimate business interest Queensland Rail may have in going ahead with changes it has decided are desirable. So, on balance, we consider we cannot approve Queensland Rail's proposal for treatment of disputes about changes to the MTP.

We note that for changes to the MTP, an access holder's agreement is 'not to be unreasonably withheld'.¹⁸⁰ Given that any change to the MTP that is not an urgent or emergency possession or pressing safety matter should come at least three months before the day of operation, Queensland Rail and its access holders should have sufficient time to resolve disputes under the provisions in the access agreements.

Therefore we propose that any change to the MTP that is not for an emergency or urgent possession or pressing safety matter should only be implemented after any dispute about that change is resolved.

This rule is consistent with the efficient use and operation of the rail network and with the interests of access seekers and holders and not inconsistent with Queensland Rail's legitimate business interests (s.138(2)(a), (b), (e) and (h)).

¹⁷⁸ Queensland Rail, sub. no. 1: 28.

¹⁷⁹ Glencore, sub. no. 7: 32; New Hope, sub. no. 10: 40.

¹⁸⁰ Queensland Rail, 2015 DAU, Schedule F, cl. 2.1(m)(ii).

Draft Decision

- 4.10 After considering Queensland Rail's proposed dispute provisions included in the NMPs, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 4.11 The QCA requires Queensland Rail to amend its 2015 DAU to provide for delaying changes to the MTP until related disputes are resolved. The required amendments are set out in Schedule F, cl. 2.4 in Appendix C.**
- 4.12 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

4.2 Minimising the adverse effects of operational constraints

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed to use reasonable endeavours to minimise any material adverse effects of planned, urgent or emergency possessions, that prevent train services from operating 'substantially in accordance with the Access Holder's Train Service Entitlement'.¹⁸¹

Stakeholders' comments

Stakeholders said Queensland Rail's proposed approach to minimising effects should cover all operational constraints and include greater obligations to provide usable replacement train paths.¹⁸²

QCA analysis and Draft Decision

We consider Queensland Rail should use reasonable endeavours to minimise any resulting material adverse effects of all operational constraints, consistent with the obligations in its access agreements. We are also of the view that where Queensland Rail intends to provide a replacement path, the replacement path must be a path the access holder is able to use efficiently.

Obligation to address adverse effects

Any operational constraint has the potential to result in an access holder's scheduled train services not being met.

Queensland Rail's proposal that it will use reasonable endeavours to address adverse effects only for possessions means that a range of disruptions including speed restrictions and other safety-related matters will not be covered.¹⁸³

Glencore has argued 'the reasonable endeavours obligation to minimise any material adverse effects should be applied to all operational constraints (not just unscheduled possessions)'.¹⁸⁴

Minimising adverse effects only where operational constraints are possessions is not in the interest of access seekers or access holders in receiving their TSEs, or consistent with the efficient use and operation of the rail network (s.138(2)(a), (e) and (h)). This concern outweighs any legitimate business Queensland Rail may have in leaving the adverse effects unaddressed (s.138(2)(b)). We therefore consider we cannot approve Queensland Rail's proposal.

¹⁸¹ Queensland Rail, 2015 DAU, Schedule F, cl. 2.3.

¹⁸² Aurizon, sub. no. 6: 24; Glencore, sub. no. 7: 32.

¹⁸³ Queensland Rail, 2015 DAU, Schedule F, cl. 2.3(a).

¹⁸⁴ Glencore, sub. no. 7: 32.

Accordingly, we propose that Queensland Rail use reasonable endeavours to minimise the effects of operational constraints wherever a TSE is affected. This broad application is reasonable because the proposed requirement is not open-ended. In particular, in using 'reasonable endeavours to minimise' the effects of the change, Queensland Rail may take into account a range of commercial and operational matters, including safe operation of the network.¹⁸⁵

We consider that this is in the legitimate business interest of Queensland Rail as it provides enough flexibility in complying with the requirement (s.138(2)(b)). It also places sufficient onus on Queensland Rail to consider the interests of access seekers and holders in receiving their TSEs (s.138(2), (e) and (h)).

Useful train paths

We note Aurizon's concern that the proposed NMPs, in combination with the SAA, would have the effect of allowing Queensland Rail to disregard the ability of an access holder to use a replacement path when offering that path.¹⁸⁶

While we have had regard for Queensland Rail's legitimate business interests, the flexibility the replacement path rules provide to Queensland Rail is not in the interests of access seekers or access holders in receiving their TSEs (s.138(2)(b)). In particular, Queensland Rail's proposal is sufficiently one-sided that it is in conflict with the interests of access seekers and holders and it could make the operation and use of the network less efficient (s.138(2)(a), (e) and (h)). We therefore consider that, on balance, we cannot approve Queensland Rail's proposal.

Aurizon has proposed that the terms 'Alternative Schedule Time' and 'Usable Schedule Time' be defined in the undertaking and SAA, to ensure that Queensland Rail consider the logistical issues faced by the access holder.¹⁸⁷

We agree with Aurizon's proposed approach. We consider a requirement to provide usable paths is a reasonable clarification of Queensland Rail's obligations when offering an alternative scheduled train time, that is in Queensland Rail's business interest as it is consistent with its role as provider of below-rail services (s.138(2)(b)). It is also consistent with the efficient use of the network, as well as the interests of access seekers and holders (s.138(2)(a), (e) and (h)).

¹⁸⁵ Queensland Rail, 2015 DAU, Schedule F, cls. 2.3(a) and (b).

¹⁸⁶ See Queensland Rail, 2015 DAU, SAA, cl. 7.6.

¹⁸⁷ Aurizon, sub. no. 6: 24.

Draft Decision

- 4.13** After considering Queensland Rail's proposed approach to minimising adverse effects of operational constraints, our Draft Decision is to refuse to approve Queensland Rail's proposal.
- 4.14** The QCA requires Queensland Rail to amend its proposal to require that it make reasonable endeavours to minimise the material adverse effects of all operational constraints and offer usable replacement train paths. The required amendments are set out in Schedule F, cls. 2.3(a) and 2.3(c) and definitions of 'Alternative Schedule Time' and 'Usable Schedule Time' in Appendix C.
- 4.15** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

4.3 Coordination with adjoining networks

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed in the body of the 2015 DAU to use reasonable endeavours to consult with other railway managers on coordinating maintenance activities, the development of MTPs and amendments to the ORM, and to minimise adverse effects on through-running trains.¹⁸⁸

Stakeholders' comments

Stakeholders were concerned that Queensland Rail's proposal did not place a strong enough requirement on Queensland Rail to align its operations with those of adjoining railway managers.¹⁸⁹

QCA analysis and Draft Decision

We consider Queensland Rail should always consult with adjoining network managers on scheduling and other operating matters affecting both networks and should use reasonable endeavours to minimise the effect of any scheduling decisions or changes on through-running trains.

Queensland Rail has proposed that it use reasonable endeavours to consult with an adjoining network's railway manager on shared issues such as maintenance and scheduling, 'with a view to minimising adverse effects' on through-running trains.¹⁹⁰

We consider this is too weak a level of obligation for such an important matter given that a large proportion of freight services contracted to use Queensland Rail's network use track managed by other operators for part of their journey. This includes all services travelling along the North Coast line between Gladstone and Rockhampton.

As New Hope said, 'the rail network will not operate efficiently unless [Queensland Rail] is properly engaged in alignment/coordination activities'.¹⁹¹ Similarly, Asciano said it was 'seeking

¹⁸⁸ Queensland Rail, 2015 DAU, cl. 4.2.

¹⁸⁹ Asciano, sub. no. 5: 27; Glencore, sub. no. 7: 34-35; New Hope, sub. no. 10: 14, 39..

¹⁹⁰ Queensland Rail, 2015 DAU, cl. 4.2.

¹⁹¹ New Hope, sub. no. 10: 39.

that Queensland Rail continues to be cognisant of the need to ensure seamless interfaces between the Aurizon Network and Queensland Rail network where possible'.¹⁹²

Glencore and New Hope have argued that consulting with other railway managers should be mandatory and Queensland Rail should endeavour to minimise the effect of maintenance and other scheduling effects on through-running trains.¹⁹³

We have had regard for Queensland Rail's legitimate business interests in considering its proposed rules for scheduling through-running trains (s.138(2)(b)). We consider that Queensland Rail's proposal is not consistent with the interests of access holders and seekers in receiving their TSEs and is therefore not consistent with the efficient use and operation of the rail infrastructure (s.138(2)(a), (e) and (h)). Accordingly we consider that, on balance, we cannot approve the proposal.

We therefore agree with stakeholders that Queensland Rail should be required to consult on scheduling changes that affect other railway managers and that it should use reasonable endeavours to minimise the effects of these changes, rather than just having 'a view' to doing so.¹⁹⁴

This stronger requirement is not inconsistent with Queensland Rail's legitimate business interests as it provides for Queensland Rail to improve efficiency and minimise disputes (s.138(2)(b)). It is also consistent with the efficient use and operation of Queensland Rail's infrastructure, as well as the public interest and the interests of access seekers and holders in receiving their TSEs (s.138(2)(a), (d), (e) and (h)).

Draft Decision

- 4.16 After considering Queensland Rail's proposed coordination with adjoining networks provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 4.17 The QCA requires Queensland Rail to amend its proposal so that Queensland Rail is required to consult with other railway managers on scheduling and other matters affecting both networks, and use reasonable endeavours to minimise the effect on through-running trains. The required amendments are set out in Clause 4.2 in Appendix C.**
- 4.18 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

4.4 Passenger services

We propose that Queensland Rail amend the NMPs in its 2015 DAU so that a network controller must be 'acting reasonably' when forming a belief that it is necessary to give priority to passenger train services.

Queensland Rail has proposed that it be able to give passenger train services priority over other train services if a network controller believes this is necessary to bring a late passenger service closer to being on time, or prevent it from becoming later, consistent with the TI Act. Queensland Rail may also take pre-emptive action if the controller believes a passenger train

¹⁹² Asciano, sub. no. 5: 27.

¹⁹³ Glencore, sub. no. 7: 34-35

¹⁹⁴ Queensland Rail, 2015 DAU, cl. 4.2.

operating in peak periods on the Metropolitan network may become late, which goes beyond the requirements of the TI Act.¹⁹⁵

For the most part, these provisions balance the public interest in safe and timely operation of passenger trains and the legitimate business interests of Queensland Rail as operator of those passenger trains and provider of below-rail services, against the interests of non-Queensland-Rail access seekers and holders (s.138(2)(d), (b), (e) and (h)).

However, Queensland Rail has not specified that the network controller must act reasonably in forming a belief that it is necessary to act to favour passenger services in such circumstances. Given that, in relation to passenger services, Queensland Rail is a related access provider,¹⁹⁶ Queensland Rail may have a potential conflict of interest and be inclined to support actions (beyond those provided in the QCA Act or envisioned by the QCA in relation to peak services in the metropolitan system) to prevent passenger trains from becoming late.

We therefore consider Queensland Rail's passenger service provisions do not appropriately balance the interests of Queensland Rail and access seekers and access holders. As such, we do not consider it appropriate to approve Queensland Rail's proposal in accordance with s.138(2).

We consider that it would be in the interests of access holders and the legitimate business interests of Queensland Rail to promote efficient use and operation of Queensland Rail's network if the network controller was required to be 'acting reasonably' when forming a view about scheduling to favour passenger trains (s.138(2)(a), (e) and (h)).

Draft Decision

4.19 After considering Queensland Rail's proposed passenger services provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.

4.20 The QCA requires Queensland Rail to amend its proposal to specify that a network controller be 'acting reasonably' when forming a belief that it is necessary to give priority to passenger train services. The required amendments are set out in Schedule F, cls. 3(i)(i) and 3(i)(ii) in Appendix C.

4.21 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

4.5 Operating requirements manual

Queensland Rail's 2015 DAU proposal

Queensland Rail has proposed that a variety of rules and procedures for use of the network by train operators be set out in the ORM. These standard provisions, most of which were included in the SAAs in the 2008 undertaking, are common across the network and not subject to individual variation between different access agreements. They address, among other things:

- interface risk management¹⁹⁷, including environmental risk management
- safe working procedures and safety standards
- incident and emergency response procedures
- various technical requirements for train control and network planning

¹⁹⁵ Queensland Rail, 2015 DAU, Schedule F, cl. 3(i)(ii).

¹⁹⁶ See QCA Act, definition of "Related Access Provider".

¹⁹⁷ How different stakeholders on the network interface with each other.

- requirements such as those for forecasts by the operator of expected train services and how and when safety notices will be issued.¹⁹⁸

Queensland Rail said in its material accompanying the 2015 DAU that the ORM reflected 'an appropriate allocation of risks for its business'.¹⁹⁹

Stakeholders' comments

Stakeholders said Queensland Rail's risk profile from the ORM should be comparable to the risk profile that applied when the provisions were in the SAAs.²⁰⁰ They said the ORM needed to be amended to remove prescriptive risk management provisions and make it clear that obligations relating to matters such as network incidents applied to Queensland Rail as well as to operators.²⁰¹ Asciano said all of the QCA's recommendations from the October 2014 Draft Decision should be implemented.²⁰²

QCA analysis and Draft Decision

Our view is that Queensland Rail should amend the ORM to balance the obligations and requirements between Queensland Rail and train operators, clarify how various procedures will operate and link with relevant provisions in the undertaking and SAAs.

We consider that much of the ORM proposed by Queensland Rail represents a reasonable way of moving a variety of procedures from individual access agreements to a document that will apply to all access holders.

However, we accept stakeholders' concerns that the ORM requires a variety of amendments to improve the balance of risks and responsibilities between Queensland Rail and its access holders, and make various provisions clearer or more reasonable.²⁰³

For example, various obligations, such as responding to emergencies and considering environmental risks, have been drafted to apply only to access holders rather than as mutual obligations.²⁰⁴ Queensland Rail has also proposed that the network will be taken to meet all standards if baseline environmental data is not available²⁰⁵ and has omitted an environmental risk management process.

We consider that, while it is in Queensland Rail's legitimate business interest to manage its network in a way that it considers safe and efficient, in order to meet its regulatory and contractual obligations, in some cases the proposed ORM goes beyond what is required to achieve this (s.138(2)(b)). In particular, Queensland Rail's proposal is sufficiently one-sided in areas such as emergency responses and the treatment of baseline environmental standards that it is against the interests of access seekers and holders and is likely to make the operation and use of the network less efficient (s.138(2)(a), (e) and (h)). Therefore, while we accept much of the ORM, we consider that, on balance, we cannot approve it as submitted.

¹⁹⁸ Queensland Rail, 2015 DAU, schedule G.

¹⁹⁹ Queensland Rail, sub. no. 1: 31.

²⁰⁰ Glencore, sub. no. 7: 10, 35; New Hope, sub. no 10: 20, 43.

²⁰¹ Aurizon, sub. no. 6: 29, 30, 31-32; Asciano, sub. no. 5: 27-29. .

²⁰² Asciano, sub. no. 5: 19.

²⁰³ Aurizon, sub. no. 6: 29, 30, 31-32; Asciano, sub. no. 5: 27-29. The various matters covered by the ORM are discussed in more detail in our October 2014 Draft Decision: 71-74 and 178-187.

²⁰⁴ Appendix C, Schedule G, cls. 4.3 and 2.4(a)-(e).

²⁰⁵ Appendix C, Schedule G, last paragraph of cl. 2.4 (deleted).

To address these concerns, we propose that the ORM be amended in a number of places to make certain requirements more reasonable, improve its operation and clarity and make it work properly with the 2015 DAU and SAAs.

Some of the more significant proposed amendments relate to interface risk training, environmental standards and environmental risk management.

This includes a requirement to provide providing training to an access seeker/holder's staff or contractors on how to address an interface risk, where they can only obtain that training from Queensland Rail.²⁰⁶ This is a reasonable requirement as it also provides that Queensland Rail will be able to recover a reasonable commercial charge for providing the training. Our proposed amendment reflects the drafting of an equivalent clause in the 2008 undertaking SAAs.²⁰⁷

We also propose that Queensland Rail remove a provision that the network will be taken to meet all standards if baseline environmental data is not available, for the purpose of assessing any future environmental impacts.²⁰⁸ We consider this requirement is not balanced, as it relates to information that Queensland Rail is most likely to have, given it operates the rail infrastructure. If there is a future environmental impact, it should be assessed based on all the information that can be gathered at that time, without being constrained by an assumption that is not supported by data.

In addition, we propose that the ORM include an environmental risk management process to specify how the operator will prepare an Environmental Impact and Risk Management Report (EIRMR) and agree it with Queensland Rail.²⁰⁹ Queensland Rail did not include such a process in its proposed ORM. We consider that it will be more efficient and protect the interests of access seekers and holders if the EIRMR process is specified. Our proposed amendment reflects the drafting of an equivalent clause in the 2008 undertaking SAAs.²¹⁰

We also propose a range of other amendments that improve the operation of the ORM and the procedures it specifies, including to

- define the meanings of 'Safeworking Procedures' and 'Safety Standards' to remove any ambiguity²¹¹
- amend the definition of 'Comparison Train Length' to provide for variation of parameters²¹²
- specify that a sample IRMP be published on Queensland Rail's website to give new access seekers an indication of what is addressed in the document, as it is required in order to conclude an access agreement²¹³
- specify that an operator's obligations to provide emergency response and incident management plans will be subject to the terms of an access agreement²¹⁴
- require that operators notify only the train control centre about contact details²¹⁵

²⁰⁶ Appendix C, Schedule G, cl. 2.3.

²⁰⁷ Queensland Rail, 2008 undertaking, Operator SAA, cl. 11(h).

²⁰⁸ Appendix C, Schedule G, last paragraph of cl. 2.4 (deleted).

²⁰⁹ Appendix C, Schedule G, cl. 2.6.

²¹⁰ Queensland Rail, 2008 undertaking, Operator SAA, cl. 8.1.

²¹¹ Appendix C, Schedule G, cl. 2.1(v) and definitions.

²¹² Appendix C, Schedule G, definitions.

²¹³ Appendix C, Schedule G, cl. 2.1(a).

²¹⁴ Appendix C, Schedule G, cls. 4.1 and 4.2.

- require that Queensland Rail consult (but not agree on) the location of train crew breaks²¹⁶
- require that the operator's controller (not train crew) notify Queensland Rail's controller and consult about crew changes²¹⁷
- provide for Queensland Rail's controllers to use reasonable endeavours to relay messages between an operator's controllers and train crew²¹⁸
- require Queensland Rail to notify operators about changes to network control radio channels 'as soon as reasonably possible'²¹⁹
- provide for Queensland Rail to notify operators about changes to online documents or the location of control centres and interface points.²²⁰

In addition, we require several minor changes of wording that balance the obligations so that Queensland Rail bears joint, or equal, responsibility for complying. These include changes to the sections on:

- the contents of the Interface Risk Management Plan (IRMP)²²¹
- environmental risks to be considered²²²
- emergency responses²²³
- operational meetings.²²⁴

We consider that the above changes, individually and together, do not place onerous requirements on Queensland Rail and are therefore not inconsistent with its legitimate business interest (s.138(2)(b)). They are in the interest of the efficient use and operation of the rail network and in the interest of access seekers and holders (s.138(2)(a), (e) and (h)).

²¹⁵ Appendix C, Schedule G, cl. 6.2(a).

²¹⁶ Appendix C, Schedule G, cl. 6.3(a).

²¹⁷ Appendix C, Schedule G, cl. 6.3(d).

²¹⁸ Appendix C, Schedule G, cl. 6.3(e).

²¹⁹ Appendix C, Schedule G, cl. 6.5(c).

²²⁰ Appendix C, Schedule G, cls. 6.8(b) and 6.9(b).

²²¹ Appendix C, Schedule G, cls. 2.2(a)(i)-(vi), (b) and (c).

²²² Appendix C, Schedule G, cls. 2.4(a)-(e).

²²³ Appendix C, Schedule G, cl. 4.3.

²²⁴ Appendix C, Schedule G, cls. 7.4(c) and (d).

Draft Decision

- 4.22 After considering Queensland Rail's proposed ORM, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 4.23 The QCA requires Queensland Rail to amend its proposed ORM to balance the obligations and requirements between Queensland Rail and train operators, clarify how various procedures will operate and link with relevant provisions in the undertaking and SAAs. The required amendments are set out in Schedule H in Appendix C consistent with the clauses referred to in Section 4.5 of this Draft Decision.**
- 4.24 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

4.6 ORM amendment process

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed that the ORM be a schedule to the 2015 DAU.²²⁵ However, it proposed that the process for amending the ORM, including compensation provisions, be included in the SAAs.²²⁶

Stakeholders' comments

Stakeholders did not comment whether the ORM amendment process should be in the 2015 DAU or in the SAAs. But, they said Queensland Rail's proposed amendment process for the ORM did not provide adequate compensation if the changes imposed costs on operators. They were also concerned that the amendment process for the ORM did not provide for consultation about safety-related matters or material changes.²²⁷ Glencore and New Hope said the compensation provisions should extend to end users.²²⁸

QCA analysis and Draft Decision

We accept Queensland Rail's proposal to include the ORM as a schedule to the 2015 DAU, but require Queensland Rail to remove any mechanisms in the SAAs for changing the ORM, as an access agreement cannot be used to amend a schedule to an access undertaking.

ORM as part of the undertaking

When Queensland Rail proposed an ORM in its 2012 and 2013 DAUs, it said it was 'inefficient and unnecessarily time consuming' to have to renegotiate a variation to each of its access contracts if it amended an operational requirement. It therefore proposed moving various process-related provisions from the SAAs into the ORM that would be published on the web as a stand-alone document separate from the 2012 and 2013 DAUs. As each access agreement would cross-reference the relevant approved ORM, the ORM could be amended for all customers at once, without the need to renegotiate all the contracts.²²⁹

²²⁵ Queensland Rail, 2015 DAU, Schedule H.

²²⁶ Queensland Rail, 2015 DAU, SAAs, cl. 8. The compensation provisions are in cl. 8.3.

²²⁷ Glencore, sub. no. 7: 10, 35-36; New Hope, sub. no. 10: 20, 43-44; Aurizon, sub. no. 6: 30; Asciano, sub. no. 5: 26, 27-28.

²²⁸ Glencore, sub. no. 7: 10, 35-36; New Hope, sub. no. 10: 20, 43-44.

²²⁹ Queensland Rail, 2013 February [Explanatory Submission to 2013 DAU]: 16.

We accepted this approach as reasonable and efficient, but sought to prevent access holders' rights from being eroded by this increased flexibility for Queensland Rail.²³⁰ Our October 2014 Draft Decision therefore considered in some detail the best way to amend the ORM. We proposed to retain much of the amendment process in Queensland Rail's 2013 DAU. However, we proposed amendments to make the criteria for access holders to raise disputes about changes more effective and include provisions for compensation if Queensland Rail implemented a change with material consequences for an access holder.²³¹

Queensland Rail's 2015 DAU omitted the amendment process for the web-based ORM that was included in its 2013 DAU. Rather, Queensland Rail proposed that the ORM be a schedule to the undertaking.

We accept having the ORM as a schedule to the access undertaking, as that removes the need to amend individual access agreements. However, we do not accept Queensland Rail's proposal to have a mechanism for amending the ORM in the SAAs in the 2015 DAU. This is unworkable because amendments to the undertaking (which would include the ORM under Queensland Rail's proposal) must be effected through the process in the QCA Act.

Therefore, Queensland Rail will need to submit a DAAU to implement any changes to the document. This is likely to be less flexible than the appeal-based mechanism from the 2013 DAU. However, we consider that the rights of access holders and other parties including end users and Queensland Rail will be protected as the QCA considers the DAAU through the processes prescribed in the QCA Act.

The approval process in the QCA Act provides for the QCA to seek submissions from stakeholders and apply the criteria in s. 138(2) to decide whether or not to approve the DAAU.

Safety issues and minor matters

There will be some matters, including safety-related issues, minor matters such as typographical errors, and updated people and positions, where the protections from the DAAU process will be unnecessary when amending the ORM.

Queensland Rail included provisions in the SAAs to address these possibilities. However, as it is not appropriate for the undertaking to be amended through a process in an access agreement, we propose to remove those provisions from the SAAs and include equivalent provisions in the undertaking. Our proposed drafting is largely consistent with Queensland Rail's proposal in the 2015 DAU SAAs, although we have made changes to reflect that any discretionary amendments to the ORM apart from safety-related issues and minor issues will be through a DAU or DAAU.

Consistent with this, we have also amended the definition of 'Operating Requirements Manual' to remove the reference to it being amended through a process in the access agreements.

Compensation

We note stakeholders' concerns about compensation for changes that impose costs on access holders, and the miners' desire for this to extend to end users.²³² While we accept that there needs to be an effective compensation mechanism for access holders, we consider that the way compensation is managed for end users that do not hold access directly is a matter for their above-rail contracts.

²³⁰ QCA, 2014 October: 71, 74.

²³¹ QCA, 2014 October: 76-78.

²³² Glencore, sub. no. 7: 10, 35-36; New Hope, sub. no. 10: 20, 43-44; Aurizon, sub. no. 6: 30; Asciano, sub. no. 5: 26, 27-28.

Accordingly, while we propose to amend the 2015 DAU SAAs to remove the mechanism for amending the ORM, we also propose to leave the provisions in the SAAs for compensating access holders for material adverse affects from ORM changes. Our proposed drafting is largely consistent with Queensland Rail's proposal in the 2015 DAU, although we have made changes to reflect that any amendments to the ORM will be through a DAU or DAAU.

Draft Decision

- 4.25** After considering Queensland Rail's proposed ORM amendment process, our Draft Decision is to refuse to approve Queensland Rail's proposal.
- 4.26** The QCA requires Queensland Rail to amend its 2015 DAU to remove the process for amending the ORM from the SAAs, but provide in the main part of the undertaking that Queensland Rail can amend the ORM from time to time for safety matters, typographical errors and to update people and positions. We propose to retain the provisions in the SAAs for compensating access holders for changes to the ORM. The QCA's required amendments are set out in clauses 4.3.1 and 4.3.2 and the definition of 'Operating Requirements Manual' in Appendix C and in Appendix D.
- 4.27** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

5 REPORTING (PART 5)

Part 5 of the 2015 DAU sets out Queensland Rail's reporting responsibilities, as well as its auditing and information obligations. Ideally, a reporting regime should provide interested parties with information on how efficiently Queensland Rail has been operating and whether it is complying with certain aspects of its undertaking or access agreements, while ensuring the obligations on Queensland Rail are not excessive.

This Draft Decision accepts much of Queensland Rail's 2015 DAU proposal but requires amendments to increase transparency.

Introduction

Reporting and compliance monitoring are important parts of the regulatory regime, as they place accountability on Queensland Rail and provide for greater levels of transparency.

However, it is important that there is a balance between the benefits to access seekers and users from reporting and compliance monitoring, and the burden of obligations and costs that are imposed on Queensland Rail.

The key issues are summarised in **Table 5.1**. Matters that require a more detailed explanation are discussed in Sections 5.1 to 5.4.

Table 5.1: Reporting responsibilities overview

<i>2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 comments</i>
Performance and access reporting			
Quarterly reporting on operational matters, certain complaints, and causes of significant changes in operating performance.	Consistent with the 2014 Draft Decision.	Stakeholders accepted proposed quarterly reporting. ²³³	The QCA approves the 2015 DAU proposal.
Annual reporting on timeframes associated with access negotiations, capacity information, as well as expenditure items for each system.	Inconsistent with 2014 Draft Decision which required more transparent reporting on indicative access proposals (IAPs). ²³⁴	Stakeholders did not support the reporting regime for IAPs. ²³⁵	See Section 5.1.
Key documents to be published on website, including preliminary information for access seekers, the access	Inconsistent with 2014 Draft Decision that required reporting for these key documents. The documents were not	Stakeholders did not raise concerns with this proposal. They supported preliminary information being	The QCA approves the 2015 DAU proposal. Publishing preliminary information avoids the need to report on this

²³³ Asciano, sub. no. 5: 13; New Hope, sub. no. 10: 15, 44; Glencore, sub. no. 7: 36.

²³⁴ An IAP is a non-binding document which describes the approved rolling stock permitted to operate on the Queensland Rail network, the applicable operating characteristics and the indicative capacity.

²³⁵ Glencore, sub. no. 7: 36; New Hope, sub. no. 10: 15, 45.

application form and operating plan templates.	proposed to be published on the Queensland Rail's website (i.e. not freely available).	made available on website. ²³⁶	matter.
Reporting of cost and price information			
Where a reference tariff applies, annual reporting of actual and forecast maintenance costs and scope, capital expenditure, and operating expenditure.	Inconsistent with our 2014 Draft Decision as it does not contain a requirement to publish the forecasts used to develop reference tariffs.	Stakeholders supported a reference tariff reporting regime consistent with the 2014 Draft Decision. ²³⁷	See Section 5.2.1.
Where a reference tariff does not apply, annual reporting on maintenance and operating costs, and volumes.	Inconsistent with 2014 Draft Decision as there is no requirement to report on capital spending beyond the preceding financial year.	Stakeholders supported reporting requirements consistent with our 2014 Draft Decision. ²³⁸	See Section 5.2.2.
Regulatory accounts and cost allocation manual			
Queensland Rail did not include any reference to regulatory financial accounts.	Consistent with 2014 Draft Decision for regulatory accounts in that the undertaking did not include provisions that govern financial account preparation. Cost allocation manual to be developed under QCA Act.	Stakeholders supported Queensland Rail preparing below-rail financial statements on a regular basis. ²³⁹	See Section 5.3.
Audit requirements			
Audit powers limited to information contained in a quarterly or annual report. The QCA permitted to publish related audit report and audit statement.	Inconsistent with 2014 Draft Decision to require compliance audit with any aspect of QCA Act or undertaking.	Stakeholders considered audit provisions were insufficient. ²⁴⁰	See Section 5.4.

²³⁶ Glencore, sub. no. 7: 22; New Hope, sub. no. 10: 16.

²³⁷ New Hope, sub. no. 10: 45–46.

²³⁸ Glencore, sub. no. 7: 37–38.

²³⁹ Aurizon, sub. no. 6: 34; Asciano, sub. no. 5: 10.

²⁴⁰ New Hope, sub. no. 10: 16, 47; Glencore, sub. no. 7: 39; Asciano, sub. no. 5: 26–27.

5.1 Performance and access reporting

Queensland Rail's 2015 DAU proposal

The 2015 DAU proposes quarterly reporting on operational matters, certain complaints, and causes of significant changes in operating performance.

The 2015 DAU also proposes annual reporting on various measures across the access negotiation process, referred to as access reporting matters. These include the number of—and delays in responding to—capacity information requests, access applications, IAPs, negotiation cessation notices and access agreements.

Stakeholders' comments

Stakeholders accepted the majority of the proposals on performance and the access reporting regime²⁴¹, but raised issues with the proposal on reporting the timeframe for obtaining an IAP.

For example, Glencore supported the detailed reporting proposed by the QCA in its 2014 Draft Decision on time taken to respond to IAPs, noting that an average can be misleading, with efficient responses 'masking' the number of delayed responses. New Hope said reporting based on averages can be misleading as a number of quick responses can reduce the impact on the average of a number of IAPs which required a substantial period of time to issue.²⁴²

QCA analysis and Draft Decision

Queensland Rail's proposed reporting does not clearly indicate the length of time required to provide an IAP.

In the 2014 Draft Decision the QCA required the annual report to include the time taken to issue IAPs broken down into ranges. Queensland Rail's proposal is to report by reference to the number and percentage of IAPs provided within the applicable timeframe and by the average delay in providing IAPs by the applicable timeframe.

The QCA considers it is inappropriate to approve clauses 5.2.2(d) and (f) of the 2015 DAU having regard to section 138(2), in particular paragraphs (b) and (e). The QCA has considered Queensland Rail's submission that the 2015 DAU addresses the points made in the 2014 Draft Decision by different means; however, it is not persuaded that this is the case. The QCA considers that the proposed reporting of average information does not provide an accurate portrayal of the performance of Queensland Rail in a manner that is meaningful to access seekers. Queensland Rail has not made a submission that reporting in ranges is an onerous requirement.

We require Queensland Rail to report on the time taken to issue IAPs to access seekers, as well as the time taken by access seekers to provide their intent to negotiate (see also Chapter 2 of this Draft Decision), in the following categories:

- less than 10 business days
- 10 to 20 business days
- 21 to 40 business days
- more than 40 business days.

²⁴¹ New Hope, sub. no. 10: 15, 44; Glencore, sub. no. 7: 36.

²⁴² New Hope, sub. no. 10: 15.

This approach will provide original, as opposed to average, information which is useful for access seekers in assessing the performance of Queensland Rail. This information would be readily available to Queensland Rail and will not impose an unnecessary or significant burden on the organisation.

Having regard to section 138(2) including section 138(2)(b),(d) and (e) of the QCA Act, we consider accurate and unmodified information on the time required to obtain an IAP is both in the public interest and the interests of access seekers, as it allows an assessment of whether Queensland Rail is acting reasonably and diligently while negotiating access agreements. We recognise that under section 138(2)(b), it is in Queensland Rail's legitimate business interests that the 2015 DAU not impose an unreasonable burden on it by way of administrative effort and cost. We believe reporting IAP response times in ranges will not place an unreasonable administrative burden on Queensland Rail.

Reporting IAP response times in ranges increases performance transparency and thus supports the efficient use of and investment in the network (ss.138(2)(a) and 69E).

Draft Decision

5.1 After considering Queensland Rail's proposed performance and access reporting provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.

5.2 The QCA requires Queensland Rail to amend its 2015 DAU to report annually on the time taken to issue IAPs to access seekers, and on the time taken by access seekers to provide their intent to negotiate, in the following categories:

- (a) less than 10 business days**
- (b) 10 to 20 business days**
- (c) 21 to 40 business days**
- (d) more than 40 business days.**

The required amendments are set out in Clause 5.2.2(d) in Appendix C.

5.3 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

5.2 Reporting of cost and price information

5.2.1 Reporting for reference tariff train services

Reporting of cost and price information for reference tariff services is only required for the West Moreton system as it is the only system for which the QCA has approved a reference tariff (see Chapter 8).

Queensland Rail's 2015 DAU proposal

Queensland Rail proposes annual reporting of information relevant to reference tariffs, namely maintenance costs, scope of work undertaken, capital expenditure, operating expenditure and volumes.

Queensland Rail also proposes to publish an annual roll-forward of any approved regulatory asset base (RAB).

Stakeholders' comments

New Hope supported a reference tariff reporting regime that is consistent with the 2014 Draft Decision. In particular, New Hope noted that unlike the 2014 Draft Decision, the 2015 DAU does not contain a requirement to publish the forecasts used to develop reference tariffs.²⁴³

In this regard, New Hope submitted that 'characteristics of the West Moreton system ... make it critically important to report on a comparison of actual costs to the forecast costs used to develop the tariff.'²⁴⁴

QCA analysis and Draft Decision

We consider there is merit in the proposition that Queensland Rail should report its actual expenditure, and compare it with forecasts used to develop any reference tariffs. Access holders are entitled to transparency regarding the calculation of tariffs.

Queensland Rail has argued that publishing forecasts is unnecessary given the 'QCA will be able to carry out the comparison as it holds the forecast information'. Furthermore, Queensland Rail considered 'it is not applicable to report on traffic breakdown for systems where a reference tariff applies'²⁴⁵.

We do not accept Queensland Rail's proposal. After having regard to section 138(2) of the Act, we do not consider Queensland Rail's position achieves an appropriate balance between the interests of access holders (s.138(2)(h)), access seekers (s.138(2)(e)) and the business interests of Queensland Rail (s.138(2)(b)). If the QCA were to publish this information separately it would likely delay access seekers' and access holders' comparison of forecasts with actual expenditure and create unnecessary regulatory process.

More importantly, if the QCA were to publish this information, we do not consider that interested parties—particularly access seekers—would receive sufficient information to understand key determinants of QCA pricing decisions as compared to the actual costs of Queensland Rail.

Therefore, providing relevant forecasts as well as appropriate system volume and cost breakdowns is reasonable and consistent with the interests of access seekers and access holders (s.138(2)(e) and (h)). Stakeholders would be able to review how Queensland Rail is performing against its own approved forecasts and in doing so, understand the underlying costs of obtaining access.

Moreover, we consider the additional information required would be readily available to Queensland Rail. Therefore, our approach will not significantly burden or impact on the legitimate business interests of Queensland Rail (s.138(2)(b)).

More broadly, better reporting of cost and price information increases the transparency of Queensland Rail's operations and should clarify the financial context within which access holders and seekers make investment decisions. This is consistent with the object of Part 5 (s.69E) of the QCA Act, which is to promote the economically efficient operation of, use of, and investment in, significant infrastructure and promote effective competition in upstream and downstream markets.

²⁴³ New Hope, sub. no. 10: 45–46.

²⁴⁴ New Hope, sub. no. 10: 15.

²⁴⁵ Queensland Rail, sub. no. 1:33.

Draft Decision

- 5.4 After considering Queensland Rail's proposed reporting for reference tariff train services, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 5.5 The QCA requires Queensland Rail to amend its 2015 DAU so that for systems with reference tariffs, it reports annually for the relevant financial year on:**
- (a) maintenance costs of its system and scope of maintenance, compared with the maintenance forecasts used to develop the tariff**
 - (b) operating expenditure, compared with the forecasts used to develop the tariff**
 - (c) capital investment and a roll-forward of its regulatory asset base**
 - (d) system volumes (broken down by type of tariff).**
- The required amendments are set out in Clause 5.2.2(i) in Appendix C.**
- 5.6 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

5.2.2 Reporting for non-reference tariff train services

Queensland Rail's 2015 DAU proposal

In relation to the systems without reference tariffs, the 2015 DAU proposes to annually report on the previous financial year's maintenance and operating costs, capital expenditure and volumes.

Stakeholders' comments

Glencore supported reporting requirements which included reporting of past and forecast capital expenditure to provide a greater understanding of this key cost driver for Queensland Rail of providing access.²⁴⁶

QCA analysis and Draft Decision

In addition to reporting on the previous year's capital expenditure, we consider that Queensland Rail should publish its proposed capital expenditure forecasts over a five-year period. This requirement should be consistent with Queensland Rail's master planning obligations.²⁴⁷

We do not accept Queensland Rail's position, that this information is unnecessary as it is not relevant to the provision of access (see Chapter 2 of this Draft Decision).²⁴⁸

Having regard to the matters raised in section 138(2), we consider Queensland Rail's proposal does not achieve an appropriate balance between the legitimate business interests of Queensland Rail and those of access holders and access seekers. Specifically, the proposal would not provide access seekers and access holders with sufficient information, particularly given costs are less transparent for access holders and access seekers when access charges are negotiated rather than set as an approved reference tariff.

To address the information asymmetry in relation to Queensland Rail's forecast cost information, we consider that it is reasonable for the reporting of cost information to be at least

²⁴⁶ Glencore, sub no. 7:37.

²⁴⁷ See Chapter 4 for further details of Queensland Rail's proposed Master Train Plan.

²⁴⁸ Queensland Rail, sub. no. 1: 34.

as comprehensive as that provided for reference tariff train services (see Chapter 2 of this Draft Decision).

As noted by Glencore, greater transparency of forecast cost information is important as without reporting obligations of this nature, the current negotiations on the Mt Isa line are characterised by asymmetric information.²⁴⁹

We agree with Glencore that forecast capital expenditure is:

*highly relevant to the Mt Isa line – as it is used by QR to justify higher charges. If such capex is not occurring then that should be taken into account.*²⁵⁰

Providing costs and capital expenditure forecasts should ease the degree of information asymmetry by allowing interested parties to form a view on the incremental cost of providing a service. We do not consider that these requirements are likely to impose an unreasonable burden on Queensland Rail (s.138(2)(b)) and do not outweigh considerations of the interests of access holders and access seekers (s.138(2)(e) and (h)).

Draft Decision

5.7 After considering Queensland Rail's proposed reporting for non-reference tariff train services, our Draft Decision is to refuse to approve Queensland Rail's proposal.

5.8 The QCA requires Queensland Rail to amend its 2015 DAU to report certain information in relation to non-reference tariff train services that includes capital investment over the previous financial year and expected capital investments over one and five years as well as:

- (a) maintenance costs of its system and scope of maintenance performed**
- (b) operating costs of the Regional Network**
- (c) system volumes.**

The required amendments are set out in Clause 5.2.2(j) in Appendix C.

5.9 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

5.3 Regulatory accounts and cost allocation manual

The QCA Act requires that an access provider keeps separate accounts for its declared service in a manner approved by the QCA (s.163). In addition, the Act gives the QCA the power to require a cost allocation manual that sets out how those accounts will be prepared (s.159).

Queensland Rail's 2015 DAU proposal

Queensland Rail's 2015 DAU does not include any reference to the regulatory financial statements referred to in the QCA Act.

Stakeholders' comments

Stakeholders considered Queensland Rail should prepare below-rail financial statements in accordance with the approved cost allocation manual on an ongoing basis.²⁵¹

²⁴⁹ Glencore, sub. no. 7: 38.

²⁵⁰ Glencore, sub. no. 7: 38.

²⁵¹ Aurizon sub. no.6: 34; Asciano sub. no. 5: 10.

QCA analysis and Draft Decision

We do not consider it necessary for Queensland Rail to repeat the financial statement requirements included in the QCA Act as part of the undertaking. We note the QCA Act has sufficient powers to address accounting separation and allocation of costs related to Queensland Rail's declared service. However, we do require Queensland Rail to amend the 2015 DAU to include a requirement to publicly release audited financial statements for the declared service.

As stated above, the QCA Act requires Queensland Rail to prepare separate accounts for its regulated network business and gives the QCA the power to determine how those accounts will be prepared, through a costing manual. The QCA will seek comments on Queensland Rail's proposed costing manual when it is submitted following approval of the new undertaking. It may be that after receiving these comments some further amendments to the costing manual may be required.

However, because Queensland Rail is only required to publish these accounts if directed to do so by the QCA (s.163(4)), without a provision to require the routine public release of the accounts, the QCA would need to send a notice every year to achieve the same result. This would create unnecessary regulatory process and reduce access seekers'/holders' certainty of timing for the public release of these accounts (s.138(2)(e) and (h)).

It is therefore in the interests of access holders and access seekers (s.138(2)(e) and (h)), and in the public interest (s.138(2)(d)), to provide greater certainty by requiring Queensland Rail to regularly publish the accounts provided for by the QCA Act. Publishing these accounts annually is in the public interest as it provides regular and transparent information about Queensland Rail's operations to all competing access seekers and access holders.

Furthermore, requiring Queensland Rail to publish these accounts is unlikely to significantly impact Queensland Rail's legitimate business interests given section 163(1) of the QCA Act requires Queensland Rail to prepare these accounts (s.138(2)(b)).

In any event, in considering section 138(2), we do not consider that potential costs outweigh amendments under section 138(2)(e). Our decision is consistent with the 2008 undertaking, which requires that Queensland Rail's network business publicly releases financial statements within six months of the end of each financial year (cl. 9.2.1).

Draft Decision

- 5.10 After considering Queensland Rail's proposed regulatory account requirements, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 5.11 The QCA requires Queensland Rail to amend its proposal so that Queensland Rail is required to publicly release audited financial statements for its declared services, consistent with the requirements in the QCA Act, within six months of the relevant financial year. The required amendments are set out in Clause 5.3.1 in Appendix C.**
- 5.12 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

5.4 Audit requirements

Queensland Rail's 2015 DAU proposal

The proposed QCA audit powers in the 2015 DAU apply to information contained in a quarterly report or annual report. The 2015 DAU also permits the QCA to publish an audit statement as well as an audit report, relating to the audit of information contained in a quarterly report or annual report (cl. 5.3.4).

Stakeholders' comments

Stakeholders²⁵² considered the scope of Queensland Rail's audit provisions are insufficient. Stakeholders supported increased regulatory audit requirements consistent with our 2014 Draft Decision. That is, the 2015 DAU should include powers to audit Queensland Rail's compliance with any aspect of the undertaking or QCA Act.

New Hope said that an audit regime with this wider scope is 'highly appropriate in the context of QR seeking a lighter-handed, less-prescriptive undertaking than it has previously been regulated under'.²⁵³

QCA analysis and Draft Decision

The QCA's audit powers should apply to compliance with all provisions in the undertaking and the QCA Act—not just the information contained within Queensland Rail's quarterly and annual reports. This requirement is consistent with our 2014 Draft Decision, and also provides appropriate checks and balances in the context of a less prescriptive undertaking.

Queensland Rail noted that section 150AA of the QCA Act requires Queensland Rail to provide information regarding its compliance with the undertaking. Therefore, Queensland Rail considered that 'a third party audit right is not prescribed by the QCA Act and is not necessary given section 150AA'.²⁵⁴

We consider Queensland Rail's proposed audit powers for the QCA are not sufficiently robust to support a light-handed regulatory regime.²⁵⁵ After having regard to the criteria in section 138(2) of the Act, we consider that the 2015 DAU does not achieve an appropriate balance between the interests of access seekers and holders and those of Queensland Rail (s.138(2)(b),(e) and (h)). Given the proposed audit powers are restricted to information contained in a quarterly or annual report, we consider the 2015 DAU does not provide access seekers/holders, their customers, and other stakeholders with confidence that Queensland Rail's conduct will be compliant with the QCA Act and the undertaking.

Indeed, we agree with New Hope that section 150AA of the QCA Act by itself does not make an audit function unnecessary as it 'does not allow the QCA to have an audit conducted where there are concerns about how particular matters were handled'.²⁵⁶

Queensland Rail should therefore amend the 2015 DAU so that the audit powers in cl. 5.3.4 apply to all provisions of the undertaking and QCA Act. In addition, the results of such audits should be made public in sufficient detail to allow stakeholders to understand the findings. This

²⁵² New Hope, sub. no. 10: 46; Glencore sub. no. 7: 39; Asciano, sub. no. 5: 26–27.

²⁵³ New Hope, sub. no. 10: 16;

²⁵⁴ Queensland Rail, sub no. 1: 35.

²⁵⁵ New Hope, sub. no. 10: 47.

²⁵⁶ New Hope, sub. no. 10: 16.

will provide access seekers/holders and other stakeholders (s.138(2)(e) and (h)) with confidence that the QCA will be able to discover and address conduct which is contrary to the QCA Act or undertaking.

We consider that the benefits to stakeholders of widening these audit powers are likely to outweigh the minor additional administrative burden on Queensland Rail associated with expanding the scope of the 2015 DAU's audit powers (s.138(2)(b)).

Draft Decision

- 5.13 After considering Queensland Rail's proposed audit requirements, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 5.14 The QCA requires Queensland Rail to amend its proposal so that the regulatory audit requirements allow the QCA, acting reasonably, to require an audit of compliance with any aspect of the undertaking or the QCA Act. The required amendments are set out in Clause 5.4.4 in Appendix C.**
- 5.15 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

6 ADMINISTRATIVE PROVISIONS (PART 6)

Administrative provisions give access seekers/holders and their customers certainty on how Queensland Rail will give effect to its obligations in the undertaking, while having regard to Queensland Rail's legitimate business interests.

These administrative provisions provide clarity on a range of miscellaneous administrative mechanisms that are designed to assist in dispute resolution, notices, QCA decision-making processes and transitional reporting arrangements.

The QCA has proposed one change to Part 6 of Queensland Rail's 2015 DAU, to specify that reporting of tariff-related information should occur from 1 July 2013, rather than the date the undertaking commences.

Introduction

Part 6 of Queensland Rail's 2015 DAU provides for dispute resolution, and transitional arrangements for reporting and negotiations started under the 2008 undertaking.

This section addresses the administrative provisions contained in the 2015 DAU, and additional matters that we consider would improve the operation of the undertaking. Uncontroversial matters are summarised in **Table 6.1** below, with matters requiring a more detailed explanation discussed further in Section 6.1 below.

Table 6.1 Administrative provisions

<i>2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision²⁵⁷</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Dispute resolution			
Provides flexibility in dispute resolution processes through a framework that provides two options for resolving disputes.	Consistent with 2014 Draft Decision.	Stakeholders did not raise any material issues with the 2015 DAU.	The QCA accepts Queensland Rail's proposal.
QCA decision-making			
Provides decision-making procedures and criteria. The provisions on QCA decision-making apply to both Queensland Rail and other relevant parties.	Consistent with 2014 Draft Decision.	Stakeholders did not raise any material issues with the 2015 DAU.	The QCA accepts Queensland Rail's proposal.
Notices			
Provisions to clarify the form, means of giving, and effect of notices relating to this undertaking.	Consistent with 2014 Draft Decision.	Stakeholders did not raise any material issues with the 2015 DAU.	The QCA accepts Queensland Rail's proposal.

²⁵⁷ QCA, 2014 Draft Decision; Chapter 6.

2015 DAU proposal	Consistency with QCA 2014 Draft Decision²⁵⁷	Stakeholders' comments	QCA 2015 Draft Decision
Transitional provisions			
Before approval date, reporting requirements consistent with the 2008 undertaking; tariff-related reporting to apply from date the access undertaking commences.	Inconsistent with 2014 Draft Decision 6.2 which provided for tariff-related reporting information to be provided from 1 July 2013.	New Hope considered tariff-related reports should be provided for the entire period covered by interim tariffs to date.	See Section 5.1 below.
Negotiating for access—all matters and negotiations that commenced under the 2008 undertaking have to be finalised under the 2015 undertaking once it has been approved.	Consistent with 2014 Draft Decision.	Stakeholders did not raise any material issues with the 2015 DAU.	The QCA accepts Queensland Rail's proposal.

6.1 Transitional provisions—tariff-related reporting requirements

Transitional provisions provide certainty to stakeholders on how matters which extend across more than one undertaking will be treated.

Queensland Rail's 2015 DAU proposal

Part 6 of the 2015 DAU includes, among other things, transitional provisions for tariff-related reporting. The actual costs and values which are required to be included in tariff-related reports are discussed separately in Part 5 (see Chapter 5).

For the period prior to the undertaking's approval date, Queensland Rail's 2015 DAU proposes to only provide reporting information as would have been required under the 2008 access undertaking.

Stakeholders' comments

New Hope²⁵⁸ considered that if an adjustment charge regime were to apply, 'tariff related reports should be provided for the entire period which have been covered by interim tariffs to date.'

QCA analysis and Draft Decision

We disagree with Queensland Rail that providing information before the approval date of the access undertaking is not relevant (Queensland Rail, sub. no. 1: 35).

As outlined in Chapter 8, we accept the access undertaking will operate prospectively from the date it commences. However, as Chapter 8 makes clear, we also require Queensland Rail to pay an adjustment amount to access holders for previous over-recovery of revenues under interim tariffs.

Access holders and their customers are reasonably entitled to transparent information on the various costs and values that are used to derive reference tariffs (see Chapter 5 of this Draft

²⁵⁸ New Hope, sub. no. 10: 48. No other stakeholders commented on the transitional provisions.

Decision). This transparency allows them to understand the basis of a related QCA decision and form a view over the life of the undertaking on whether the costs and volume forecast were reasonable. This position is consistent with our 2014 Draft Decision.

For the period prior to the approval date of this undertaking, Queensland Rail proposes to report information as would have been required under Part 5 of the 2008 access undertaking, with the new reporting provisions of the 2015 DAU only applying from the date the undertaking commences.

While the previous undertaking's reporting requirements are similar in many aspects to those proposed in the new undertaking, the level of reporting on costs as well as forecasts used to calculate a reference tariff varies between the two undertakings. Specifically, the 2008 undertaking does not include a requirement to report on matters such as actual costs, maintenance scope and volumes.

As the QCA has proposed to apply an adjustment amount to future reference tariffs to address Queensland Rail's over-recovery of revenues since 1 July 2013, the date the 2008 access undertaking was originally scheduled to expire (see Chapter 8), stakeholders are reasonably entitled to understand the basis on which this adjustment was calculated. Therefore, in the interests of access holders and seekers (s.138(2)(e) and (h)), Queensland Rail should provide tariff-related reports for the West Moreton network from 1 July 2013, rather than from the approval date of the 2015 undertaking.

Having regard to the legitimate business interests of Queensland Rail (s.138(2)(b)), the transitional tariff-related reporting information required for the West Moreton network relates to specific information that should be readily available to Queensland Rail such as actual maintenance costs and scope, changes to the RAB and system volumes (Chapter 5 discusses tariff-related reporting in greater detail).

On balance, although the tariff-related reporting from 1 July 2013 will impose some additional requirements on Queensland Rail, the QCA considers the requirements are not onerous and will be outweighed by the benefits to access holders and seekers (s.138(2)(e) and (h)) through greater transparency of reference tariffs.

Draft Decision

- 6.1 After considering Queensland Rail's proposed transitional provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 6.2 The QCA requires Queensland Rail to amend its proposal so that it will provide tariff-related reports for the West Moreton network to access seekers, as set out in the 2015 undertaking, from 1 July 2013. The required amendments are set out in Clause 6.4 in Appendix C.**
- 6.3 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

7 STANDARD ACCESS AGREEMENT

The 2015 DAU includes a Standard Access Agreement (2015 SAA) which provides a set of standard terms and conditions on which Queensland Rail will provide access to its network for all traffic types.

Access agreements are essential for the provision of access to Queensland Rail's network. An SAA facilitates the timely development of access agreements by providing a 'safe harbour' access agreement which parties can adopt without the need for further negotiation or can use as a guide if negotiating alternative terms of access.

Stakeholders have expressed concerns that Queensland Rail's 2015 SAA is imbalanced because it significantly weakens Queensland Rail's obligations to deliver its contracted access services and materially increases the contract risks held by the access holder.

Our Draft Decision is to not approve Queensland Rail's 2015 DAU SAA as it is currently drafted. Instead, we propose amendments to the SAA to appropriately balance the rights and responsibilities of Queensland Rail, access seekers and, where relevant, end customers, consistent with section 138(2) of the QCA Act.

Our proposed amendments to the 2015 DAU and the 2015 SAA are attached to this Draft Decision.

Introduction

Access agreements form the contractual basis between Queensland Rail and an access seeker for the granting and use of access rights in relation to Queensland Rail's network. They contain the agreed terms and conditions of access, set out the rights and obligations of each party, and underpin the access rights and operation of train services on the network.

Part 2 of the 2015 DAU sets out provisions for the development and execution of an access agreement providing rights to access Queensland Rail's network. The 2015 DAU also includes a template SAA (2015 SAA) which contains the standard terms and conditions on which Queensland Rail proposes to provide access to its declared networks to all access seekers. There are important linkages between the 2015 SAA and the 2015 DAU.

We have previously considered the version of an SAA (2013 SAA) that was submitted by Queensland Rail with its 2013 DAU. In October 2014, we released the 2014 Draft Decision that recommended substantial amendments and a complete rewrite of the 2013 SAA before our approval could be given. This regulatory process ended in late 2014 when Queensland Rail withdrew the 2013 DAU.

In its 2015 DAU submission, Queensland Rail advised us that its 2015 SAA²⁵⁹ adopts some but not all of the positions we outlined in our 2014 Draft Decision, and some positions we outlined in our 2014 Draft Decision have not been adopted in full.

A summary of Queensland Rail's 2015 SAA compared to our 2014 Draft Decision is outlined in **Table 7.1**. Note that the key 2013 SAA issues which we discussed in our 2014 Draft Decision are used as convenient reference points, given:

²⁵⁹ Queensland Rail, sub. no. 1: 35-40.

- Queensland Rail referenced our 2014 Draft Decision in explaining its position on the 2015 DAU
- stakeholders similarly referenced their position on the 2015 SAA based on Queensland Rail's tabulated explanation in its 2015 DAU submission.²⁶⁰

Nevertheless, in coming to this current Draft Decision, we have reviewed 'afresh' Queensland Rail's 2015 SAA and related provisions in Part 2 of the 2015 DAU.

Table 7.1: 2015 DAU SAA

<i>Summary of 2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision</i> ²⁶¹	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Access principles			
No reference to core access principles to underpin all access agreements.	Inconsistent with the 2014 Draft Decision.	Concerned with the exclusion of access principles from the 2015 DAU.	See Section 7.2.
2015 SAA contracting framework			
2015 SAA applies to all traffic types	Consistent with 2014 Draft Decision.	Supported, with the exception of Aurizon, who requested the 2015 SAA only apply to traffic for which an approved reference tariff applies.	See Section 7.3.
The 2015 SAA tripartite structure allows an access seeker and end customer to be a party to the SAA.	Inconsistent with 2014 Draft Decision.	Willing to accept the 2015 SAA subject to amendments giving end user the ability to control access rights.	See Section 7.3.
Risk allocation embedded in the SAA			
Network maintenance obligations.	Inconsistent with the 2014 Draft Decision.	Concerned with removal of objective standards and contractual liabilities.	See Section 7.4.
Key performance indicators (KPIs)	Inconsistent with the 2014 Draft Decision.	Concerned with exclusion of KPIs.	See section 7.4.
Risks and indemnities	Inconsistent with 2014 Draft Decision.	Does not appropriately allocate risks and liabilities between the contracting parties	See Section 7.4.
Limitation of liabilities	Inconsistent with 2014 Draft Decision.	Does not appropriately allocate risks and liabilities between the parties	See Section 7.4.

²⁶⁰ Glencore, sub no. 7: 15-52, Asciano, sub no. 5: 29-39, New Hope, sub no. 10: Annexure A

²⁶¹ QCA, 2014 Draft Decision; Chapter 5.

<i>Summary of 2015 DAU proposal</i>	<i>Consistency with QCA 2014 Draft Decision²⁶¹</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Dangerous goods	Inconsistent with 2014 Draft Decision	Does not appropriately allocate risks and liabilities between the parties.	See Section 7.4.
Noise mitigation	Inconsistent with 2014 Draft Decision.	Should be objectively determined by reference to objective noise levels.	See Section 7.4.
Force Majeure	Inconsistent with 2014 Draft Decision.	Concerned with changes in the risk profile.	See Section 7.4.
Take or Pay	Not dealt with in the context of SAA.	Want take or pay capped based on common ownership.	See Section 7.4.
Remaining provisions	Inconsistent with 2014 Draft Decision.	Material concerns with the allocation of risks.	See Section 7.4.
Connection to the declared network			
Removal of any reference to a standard connection agreement.	Inconsistent with 2014 Draft Decision.	Objected to the exclusion of standard connection agreement principles.	See Section 7.5.

7.1 QCA assessment approach

Our approach in assessing the 2015 DAU is based on our assessment of whether the 2015 SAA and related provisions in the 2015 DAU have due regard to all the factors listed in section 138(2) of the QCA Act. In broad terms, we consider the factors listed in section 138(2) of the QCA Act are best balanced when the 2015 SAA and related provisions in the 2015 DAU:

- facilitate the timely development and execution of an access agreement for all access seeker
- protect Queensland Rail's legitimate business interests
- appropriately balance the rights, obligations, risks, liabilities and indemnities between all the contracting parties
- balance Queensland Rail's legitimate business interests with the rights and legitimate business interests of access seekers
- promote efficient and non discriminatory use of the network
- promote effective competition in other markets.

Given the above, and in accordance with section 137(2)(h) of the QCA Act, we also consider the 2015 DAU should:

- take appropriate account of the regulatory precedents established by:
 - the standard access principles (Schedule E) and the standard access agreement coal (Schedule H) of the now expired Queensland Rail 2008 undertaking
 - the split form standard access agreement of the approved Aurizon Network 2010 undertaking

- not give Queensland Rail the means to delay or frustrate an access seeker's application for access when the access seeker is willing to execute an access agreement based on the terms and conditions contained in an approved undertaking.

To promote the economically efficient operation of, use of and investment in the network, it is important the 2015 DAU provides clarity and certainty on the nature and form of access agreements that will be executed by an access seeker in order to obtain access to the network.

Table 7.2 provides more detail on how we consider how the issues detailed in section 138(2) should be addressed to enable us to approve the 2015 SAA.

Table 7.2 QCA's assessment of the 2015 SAA with respect to section 138(2) of the QCA Act

<i>Assessment criterion</i>	<i>QCA's assessment approach</i>
<p>Does the 2015 SAA facilitate the timely development and execution of an access agreement for all access seekers?</p> <p>Does the SAA appropriately take account of the stated regulatory precedents established in Queensland Rail's 2008 undertaking and Aurizon Network's 2010 undertaking?</p>	<p>We consider the 2015 SAA will facilitate the timely development and execution of access agreements if it:</p> <ul style="list-style-type: none"> • allows the 2015 SAA to be used as a 'safe harbour' so that, unless otherwise agreed by Queensland Rail and the access seeker, the terms of the 2015 SAA will apply as the default access agreement • enables all access seekers and end customers to obtain access to the declared network, including in circumstances where the access seekers and end customers who require a network extension to accommodate their access application • establishes appropriate dispute mechanisms so that the 2015 SAA remains a relevant and effective agreement over the term of the access undertaking • clearly defines the terms and conditions of the 2015 SAA so that they are readily understood by parties and are relatively simple to negotiate and administer • represents a workable and commercially balanced agreement which can be used to guide negotiations or as a safe harbour agreement without the need for further negotiation.
<p>Does the SAA address Queensland Rail's legitimate business interests?</p>	<p>We consider the 2015 SAA will address the legitimate business interests of Queensland Rail if it:</p> <ul style="list-style-type: none"> • allows Queensland Rail to deliver all access services in accordance with its executed access contracts • recognises Queensland Rail's responsibility to deliver access services consistent with its passenger priority obligations under the Transport Infrastructure Act • applies a commercially balanced approach to allocating risks to the contracting party best placed to manage or mitigate the risks • recognises maintenance and rail renewal responsibilities with respect to specific line segments identified as subject to minimum service standards and funding levels through Queensland Rail's TSC's with the Queensland Government²⁶² • provides an access service consistent with all of its accreditation responsibilities as a rail infrastructure manager under the TRSA • means efficient costs incurred in the provision of an access service are appropriately reflected in the negotiated access charge payable under the

²⁶² For more information on Transport Service Contracts negotiated between Queensland Rail and the Queensland Government see <http://www.tmr.qld.gov.au/business-industry/Transport-sectors/Rail-services-and-infrastructure/Transport-Service-Contracts.aspx>.

Assessment criterion	QCA's assessment approach
	<p>agreement</p> <ul style="list-style-type: none"> means Queensland Rail will permit, but not necessarily fund, an extension to the network to enable an access seeker to obtain access to the network allows Queensland Rail to recover all efficient costs from the construction and ownership of a network extension consistent with the 2015 DAU, including Schedule E.
<p>Does the SAA appropriately balance the rights, obligations, risks, liabilities and indemnities between all the contracting parties?</p> <p>Does the SAA appropriately take account of the stated regulatory precedents established in Queensland Rail's 2008 undertaking and Aurizon Network's 2010 undertaking?</p>	<p>We consider the SAA will appropriately balance Queensland Rail's access seekers' and end customers' rights and interests if it:</p> <ul style="list-style-type: none"> provides an ability for an end customer to be the access holder with the flexibility to assign operational utilisation rights to different rail operators establishes a reasonable and commercially balanced allocation of rights, obligations and risks between the parties in the provision of access services, including in the contracting arrangements to underpin a network extension, regardless of the funding source provides certainty and security regarding the nature and quality of the access rights being sold/purchased and the ability for parties to manage their contractual risks establishes transparent and clearly defined processes through which access rights can be varied (renewed, resumed, relinquished, transferred, suspended and/or terminated).
<p>Do the arrangements promote efficient and non discriminatory use of the network?</p>	<p>We consider the SAA will promote the efficient and non-discriminatory use of the network if it:</p> <ul style="list-style-type: none"> provides an access holder and access seeker with flexibility in the use and management of its access rights provides non-discriminatory access rights on the same terms and conditions as outlined in the 2015 DAU regardless of whether <ul style="list-style-type: none"> Queensland Rail elects to fund the network extension the access seeker funds the network extension because Queensland Rail is unwilling to fund it provides a rail operator with the ability to operate train services in accordance with the access rights contained in the relevant access agreements clearly delineates the rights and responsibilities of all parties to the 2015 SAA, namely Queensland Rail, rail operators, and end customers consistently applies the same arrangements across all access holders with respect to Queensland Rail's operational, safety, and environmental requirements.
<p>Do the arrangements promote effective competition in other markets?</p> <p>Do the arrangements take appropriate account of the stated regulatory precedents established in Queensland Rail's 2008 undertaking and Aurizon Network's 2010 undertaking?</p>	<p>We consider the SAA will promote effective competition in other markets if it:</p> <ul style="list-style-type: none"> provides an efficient network service at an efficient cost that is commensurate with the regulatory and commercial risks held by all the parties provides a clear separation of roles relating to the ownership and management of access rights and the operation of train services on the network provides opportunities for end customers (i.e. bulk commodity companies) to hold the access rights and assign operational rights to different train operators through the term of the agreement provides the ability for access seekers and end customers to obtain access to the network when a network extension is required to accommodate its access application.

7.2 Access principles

The third party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation, with the access regime incorporating the primacy of contractual negotiations. Access principles²⁶³ have previously been used as a contractual guide to establishing the core terms and conditions according to which Queensland Rail is obliged to provide access. By allocating the main commercial and operational risks between the contracting parties in a balanced manner, access principles are designed to facilitate the timely negotiation of access agreements. Queensland Rail's 2008 undertaking outlined its access principles in Schedule E.²⁶⁴

7.2.1 Queensland Rail's 2015 DAU proposal

Queensland Rail has removed any reference to access principles in the 2015 DAU. Instead, Queensland Rail has embedded its proposed access principles within the terms and conditions of the 2015 SAA provided in Schedule H of the 2015 DAU. By making the 2015 SAA applicable to all traffic types running on the declared network Queensland Rail has advised that it is no longer necessary to include access principles as a separate schedule to the 2015 DAU.²⁶⁵

7.2.2 Stakeholders' comments

Stakeholders²⁶⁶ outlined their concerns with the 2015 SAA with specific reference to:

- the access principles identified in Schedule E of both Queensland Rail's 2008 and Aurizon Network's 2010 undertakings
- our 2014 Draft Decision
- the general risk allocation principle that a contract should allocate a risk to the contracting party best positioned to manage that risk.

Stakeholders were divided on whether standard access principles should be included as a separate schedule to the 2015 DAU or appropriately addressed in the 2015 SAA:

- New Hope and Glencore accepted Queensland Rail's exclusion of the access principles, but raised significant concerns with the 2015 SAA²⁶⁷
- New Hope and Glencore believed the 2015 SAA does not reflect a balanced approach to the access principles and recommended the incorporation of the access principles previously contained in Schedule E of Queensland Rail's 2008 undertaking²⁶⁸
- Asciano and Aurizon raised serious reservations with the exclusion of the access principles from the 2015 DAU.²⁶⁹

²⁶³ Schedule E in both Aurizon Network and Queensland Rail's approved undertakings (2001, 2006, 2008 and 2010) have remained relatively consistent since the approval of the 2001 undertaking. Aurizon Network's 2010 undertaking is the last time we approved access principles required to reflect a network providers obligations under the QCA Act.

²⁶⁴ Schedule E is used as a guide by all contracting parties when negotiating a customised access agreement while the SAA provided a 'safe harbour' agreement for traffics (including non-coal traffics) to fall back on if negotiations were not successful.

²⁶⁵ Queensland Rail, sub no. 1: 35-36.

²⁶⁶ Glencore, sub no. 7: 12-14, Aurizon, sub no. 6: 22-32, Asciano, sub no. 5: 16-23, New Hope, sub no. 11: 1-23.

²⁶⁷ Glencore, sub no. 7: 40; New Hope, sub no. 10: 21 and 48.

²⁶⁸ Glencore, sub no. 7: 12-14, 8-9; New Hope, sub no. 11: 4-5.

²⁶⁹ Asciano, sub no. 5: 11; Aurizon, sub no. 6: 22-23.

Table 7.3 Asciano and Aurizon concerns about the removal of the access principles

<i>Issue</i>	<i>Stakeholders' concerns</i>
Lack of transparency and certainty	<p>Asciano advised that the removal of the access principles from the 2015 DAU:²⁷⁰</p> <p>(a) reduces transparency and certainty for access seekers</p> <p>(b) increases the potential for discrimination between rail operators.</p>
Limited flexibility in negotiating non-standard terms and conditions	<p>Aurizon was concerned the removal of core access principles limits the ability of an access seeker to negotiate alternative access agreements.²⁷¹</p> <p>Core access principles should identify what are the non-negotiable terms and conditions in the provision of access.²⁷²</p>

7.2.3 QCA analysis and Draft Decision

Our position is to accept Queensland Rail's proposal to not include in the 2015 DAU, a separate schedule of standard access principles to underpin the negotiations of an access agreement between Queensland Rail and an access seeker.

We consider Queensland Rail's decision to apply the 2015 SAA to all traffic types on the existing network is sufficient to justify its decision to not include a separate schedule of access principles in the 2015 DAU.²⁷³ Accordingly, it is our view that Queensland Rail's decision to only include the 2015 SAA in the 2015 DAU reflects an appropriate balancing of each of the stated matters in section 138(2) of the QCA Act.

Draft Decision

7.1 After considering Queensland Rail's reasoning on why it did not include a separate schedule on the standard access principles in the 2015 DAU, our Draft Decision is to approve the 2015 DAU without a separate schedule on the standard access principles.

7.2 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria in section 138(2) of the QCA Act.

7.3 2015 SAA

Since 2001, there have been a number of different SAA formats approved by the QCA for the provision of access services on the declared rail networks across Queensland, including the:

- Operator Access Agreement²⁷⁴—based on the model of bundling the rights and obligations associated with access rights (including rail operator responsibilities and liabilities) into a single agreement between the rail operator and the network provider. The rail operator is then responsible for contracting the use of a bundled rail service with end customers. This form of SAA has been used by Queensland Rail to provide access to its network since 2001

²⁷⁰ Asciano, sub no. 5: 11.

²⁷¹ Aurizon, sub no. 6: 22-23.

²⁷² Aurizon, sub no. 6: 22-23.

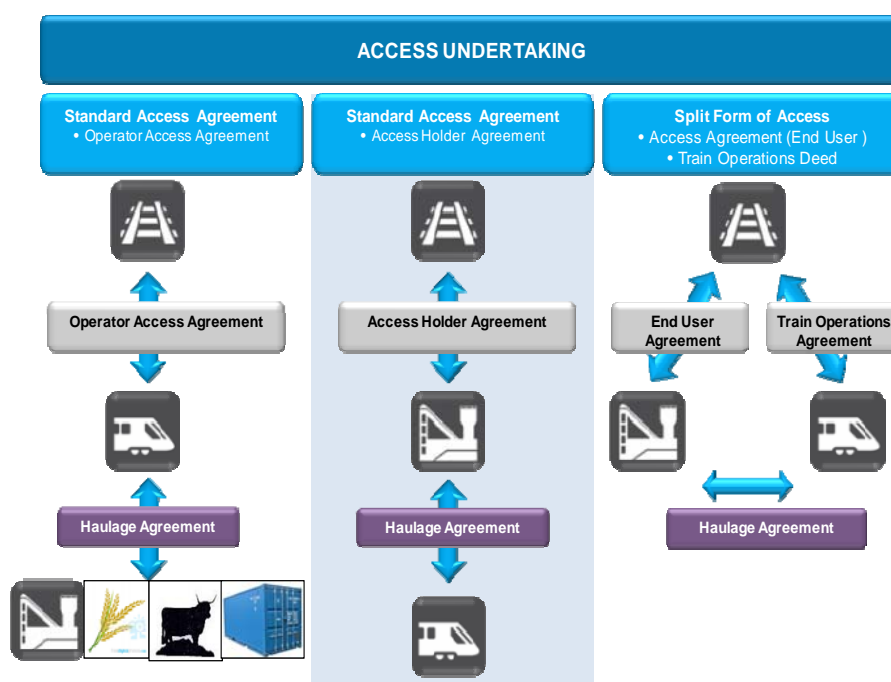
²⁷³ We consider the intention of Schedule E in the 2008 Undertaking was to provide a fall-back position for negotiations between Queensland Rail and an access seeker to operate non-coal train services on the network.

²⁷⁴ Queensland Rail, 2008 undertaking, Volume 2; Aurizon Network, 2010 undertaking, Volume 2.

- Access Holder Agreement²⁷⁵—allows an end customer to directly contract with the network provider and be responsible for all matters relating to the access rights held (including the rail operator responsibilities and liabilities). The end customer is responsible for sub-contracting with a rail operator to utilise the access rights but remains ultimately responsible and liable for all rights and obligations associated with the access rights (including rail operators' responsibilities and liabilities). This form of contract has been used by some coal companies in their negotiations with Aurizon Network in central Queensland
- split form SAA²⁷⁶—allocates the rights, responsibilities and liabilities of access to the three parties to the contract, namely Queensland Rail, the rail operator and the end customer. This form of SAA is appropriate for unit trains where the commodity or product carried by the train service is the property of one end customer. This form of contract has been offered as an option by Aurizon Network to coal customers since 2012.

Figure 7.1 outlines how the different contracting frameworks apply depending on the different access scenarios required by the access seeker.

Figure 7.1 SAA rail infrastructure contracting frameworks operating in Queensland



7.3.1 Queensland Rail's 2015 DAU proposal

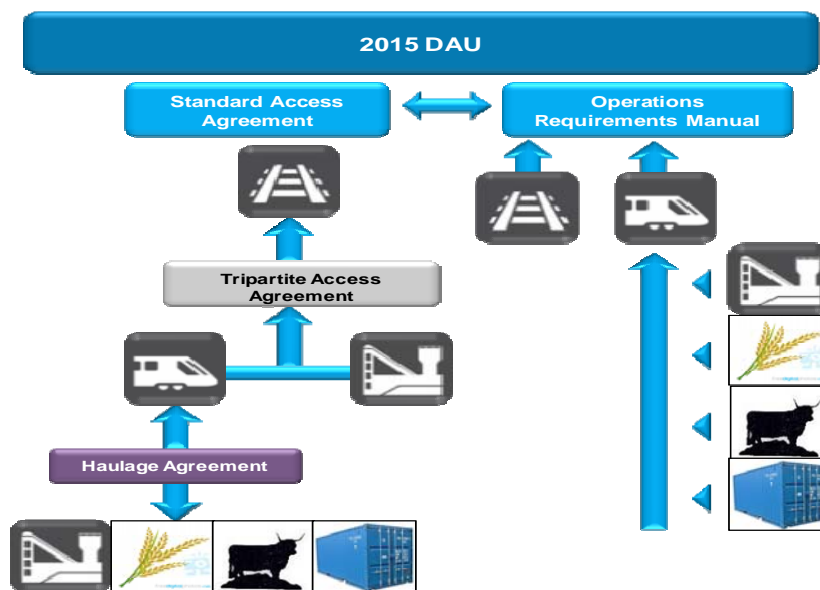
Queensland Rail has proposed a 2015 SAA that can be executed by Queensland Rail, a rail operator and, if required, a rail operator's end customer.²⁷⁷ The 2015 SAA also links through to the ORM which has been included as a separate schedule in the 2015 DAU.²⁷⁸ Together, the 2015 SAA and ORM outline the rights, responsibilities, commercial risk allocation and operational obligations underpinning the provision of access services consistent with the 2015 DAU (see **Figure 7.2**).

²⁷⁵ Queensland Rail, 2008 undertaking, Volume 2; Aurizon Network, 2010 undertaking, Volume 2.

²⁷⁶ Aurizon Network, 2010 undertaking, Volume 2.

²⁷⁷ Queensland Rail, 2015 DAU, Schedule H.

²⁷⁸ Queensland Rail, 2015 DAU, Schedule G and Schedule H, cl. 4.

Figure 7.2 Queensland Rail's new tripartite structure for the SAA

The contractual terms, conditions and allocation of risks between Queensland Rail, the rail operator and the end customer in the 2015 SAA contract structure are summarised below.

Access rights

The 2015 SAA has a fixed term with obligations to negotiate the renewal of an access agreement subject to specified renewal timeframes for coal- or other bulk-mineral-carrying train services in the undertaking.²⁷⁹ Access obligations under the 2015 SAA are largely split between the rail operator and Queensland Rail. The SAA does not allow an end customer to hold the access rights directly.

Specifically, the 2015 SAA provides that:

- the rail operator is the only party that can hold the access rights. As the access holder, the rail operator is the party with:
 - the obligation to pay access charges²⁸⁰
 - the right to hold, renew, reduce, relinquish or assign the access rights²⁸¹
 - in most instances, the right to receive notices issued by Queensland Rail under the agreement²⁸²
 - limited rights of termination.²⁸³
- Queensland Rail has full discretion to:
 - require security from the rail operator in the form of a bank guarantee or another form acceptable to Queensland Rail²⁸⁴

²⁷⁹ Queensland Rail, 2015 DAU, Schedule H, cl. 1.

²⁸⁰ Queensland Rail, 2015 DAU, Schedule H, cl. 5.1, 5.2.

²⁸¹ Queensland Rail, 2015 DAU, Schedule H, cl. 1, 21, 22.2.

²⁸² Queensland Rail, 2015 DAU, Schedule H, cl. 25, in some limited cases Queensland Rail is obliged to notify both parties (cl.18.1(e)).

²⁸³ Queensland Rail, 2015 DAU, Schedule H, cl. 15.2.

- identify the level of security they require from the customer²⁸⁵
- terminate the agreement²⁸⁶
- Queensland Rail is the only party in the 2015 SAA with the right to suspend the access agreement.²⁸⁷

Infrastructure management

Queensland Rail is obliged to maintain the network in a condition which allows the rail operator to provide train services in accordance with the agreement.²⁸⁸ The rail operator must warrant the satisfactory standard of the network at the time the agreement is executed.²⁸⁹

Environmental protections

The rail operator is required to contribute to the noise mitigation costs incurred by Queensland Rail in complying with relevant laws. Queensland Rail must consult with the rail operator on planned measures and notify it how costs will be allocated between the parties.²⁹⁰

Indemnities and liabilities

The rail operator indemnifies all parties in respect of losses and injuries to the extent caused or contributed to by the operator's negligence or breach. The rail operator's indemnity to Queensland Rail also includes losses resulting from a failure to comply with inspection obligations, claims regarding land tenure provisions and claims in relation to monies due and payable under the agreement.²⁹¹

The end customer provides a reciprocal indemnity to Queensland Rail and the rail operator.²⁹²

Queensland Rail provides a similar indemnity to the rail operator and the end customer.²⁹³

Queensland Rail's indemnities are subject to a number of exclusions and limitations. Significantly, Queensland Rail has excluded itself from any liability for the condition of the network, any defects or maintenance standards except as can be attributed to Queensland Rail by the operation of clauses 6.1 and 13.4 of the 2015 SAA. Limitations on Queensland Rail's liability include amongst other things:²⁹⁴

- a maximum claims cap of \$50 million
- the timing thresholds for claims
- the majority of claims regarding Queensland Rail's non-provision of access.

²⁸⁴ Queensland Rail, 2015 DAU, cl. 17.1.

²⁸⁵ Queensland Rail, 2015 DAU, Schedule H, cl. 17.1.

²⁸⁶ Queensland Rail, 2015 DAU, Schedule H, cl. 15.1.

²⁸⁷ Queensland Rail, 2015 DAU, Schedule H, cl. 14.

²⁸⁸ Queensland Rail, 2015 DAU, Schedule H, cl. 5.1.

²⁸⁹ Queensland Rail, 2015 DAU, Schedule H, cl. 23(a)(ix).

²⁹⁰ Queensland Rail, 2015 DAU, Schedule H, cl. 10.7.

²⁹¹ Queensland Rail, 2015 DAU, Schedule H, cl. 12.

²⁹² Queensland Rail, 2015 DAU, Schedule H, cl. 12.1.

²⁹³ Queensland Rail, 2015 DAU, Schedule H, cl. 12.

²⁹⁴ Queensland Rail, 2015 DAU, Schedule H, cl. 13.4.

Consequential loss exclusion

Consequential loss is excluded from all parties' liability, except for:²⁹⁵

- the rail operator's (or end customers') liability to Queensland Rail in relation to dangerous goods
- losses to all parties resulting from a failure to comply with inspection obligations
- claims regarding the land tenure provisions
- claims in relation to money due and payable under the agreement.

Dangerous goods

The rail operator must seek permission from Queensland Rail before carrying dangerous goods and must comply with all relevant authorisations, laws and Queensland Rail's emergency management plan procedures. The rail operator must indemnify Queensland Rail for any losses or claims brought in connection with a mixed goods train service which carries dangerous goods. Also, the rail operator (or end customer) remains liable to Queensland Rail for consequential loss in relation to dangerous goods.²⁹⁶

Queensland Rail has no liability for the carriage of dangerous goods on its rail network regardless of whether or not it was caused or contributed to by Queensland Rail (for example, via breach or negligence).²⁹⁷

Accreditation

The rail operator must be accredited as a rail operator under the TRSA. Queensland Rail must also comply with its accreditation under the TRSA.²⁹⁸

Disputes

The SAA provides an escalating dispute mechanism with recourse to arbitration by an independent expert.²⁹⁹ However, in the case of certain specified safety and environment related disputes, Queensland Rail has absolute discretion to determine the outcome of the dispute.³⁰⁰

Force Majeure

All obligations under the agreement (other than the obligation to pay monies) are suspended during force majeure (FM) events. Queensland Rail has full discretion to decide whether to fund, repair or replace any part of the network affected by FM. The SAA also provides the rail operator with the right to terminate the agreement if an FM event continues for longer than three months.³⁰¹

Insurance

The rail operator is required to hold insurances for activities and responsibilities under the agreement. The end customer is not required to hold insurance under the agreement. The SAA does not address Queensland Rail's insurance obligations.³⁰²

²⁹⁵ Queensland Rail, 2015 DAU, Schedule H, cl. 10.5, 13.

²⁹⁶ Queensland Rail, 2015 DAU, cl. 10.5, 13.

²⁹⁷ Queensland Rail, 2015 DAU, cl. 12.3.

²⁹⁸ Queensland Rail, 2015 DAU, cl. 4.

²⁹⁹ Queensland Rail, 2015 DAU, cl. 19.

³⁰⁰ Queensland Rail, 2015 DAU, cl. 19.5.

³⁰¹ Queensland Rail, 2015 DAU, cl. 20.

³⁰² Queensland Rail, 2015 DAU, cl. 16.

Operational rights and obligations³⁰³

Queensland Rail and the rail operator are required to comply with the obligations, rights and responsibilities in the ORM. The ORM is contained in a schedule to the 2015 DAU. However, in certain circumstances, Queensland Rail proposes to amend the ORM without submitting a DAAU. Our position on this issue is provided in Chapter 4 of this Draft Decision.³⁰⁴

7.3.2 Stakeholders' comments

Stakeholders' submissions indicated material concerns with the 2015 SAA, particularly with the access principles which underpin the contractual framework and with the 2015 SAA not allowing an end customer to be the access holder under the agreement. At the same time, all stakeholders indicated they are willing to accept the tripartite structure of the SAA so long as their material concerns are addressed.³⁰⁵

End customer as the access holder

New Hope and Glencore stated they would be agreeable to the tripartite contract structure if the 2015 SAA is amended to allow either a rail operator or an end customer to be the access holder under the agreement.³⁰⁶ In the situation where an end customer is the access holder, New Hope and Glencore preferred the 2015 SAA to operate in a similar manner to the Aurizon Network split form access agreement in relation to treatment of access rights held by an end customer.³⁰⁷ This would give New Hope and Glencore the flexibility to appoint and transfer the right to utilise access rights between rail operators.

In their submissions on the 2015 DAU, Asciano and Glencore both included previous submissions on the 2012 and 2013 Queensland Rail DAUs.³⁰⁸ In these submissions, Asciano and Glencore also requested Queensland Rail provide a SAA which allowed for:³⁰⁹

- either a rail operator or an end customer to be the access holder
- an end customer that elects to be an access holder to nominate a rail operator to use the access rights
- an allocation of contract risks to the relevant contracting parties in the SAA, namely, Queensland Rail, an access holder and, if relevant, the rail operator.

³⁰³ Relates generally to sections 7–13 and 16–19 of the access principles outlined in Schedule E of the 2008 undertaking.

³⁰⁴ Queensland Rail, 2015 DAU, cl. 8.

³⁰⁵ Glencore, sub no. 7: 9; New Hope, sub no. 11: 3; Asciano, sub no. 5: 11-15; Aurizon, sub no. 6: 22-30. Although Asciano, does note that the QCA's proposed split form SAA for Queensland Rail (released in April 2015) would avoid the practical difficulties of tripartite contracting.

³⁰⁶ Glencore, sub no. 7: 9; New Hope, sub no. 11: 3.

³⁰⁷ As demonstrated by the QCA in its working draft of a split form access agreement for Queensland Rail's network which was released in April 2015.

³⁰⁸ Asciano and Glencore advised that they did this to allow the issues they raised in previous regulatory processes to be considered by us when assessing the 2015 DAU.

³⁰⁹ Asciano, sub no. 5: 11, July 2012: 8, 18-22, September 2012: 4-8, 14, April 2013: 7-14, May 2013: 7-11; Glencore, sub no. 7: 7-10, 40, Submission 1: 22-23.

Access principles

Stakeholders believed the 2015 SAA provides an unreasonable and unbalanced risk allocation between the network provider and the access seeker.³¹⁰

*QR has changed the wording of the standard access agreement quite substantially from that which formed the existing undertaking. Glencore's concern is that as part of those changes, the risk profile of access holders appears to have worsened or deteriorated when compared to the risk profile which exists under the current standard access agreement. There has been no justification for such changes other than simplification, and while simplification may be desirable, it should not be pursued in a way that changes the allocation of risks between the parties.*³¹¹

*Asciano continues to be strongly concerned with Queensland Rail's unbalanced approach to risk allocation and risk management. This unbalanced approach is particularly evident in the standard access agreement in Schedule H of the 2015 DAU. Asciano has taken a consistent position throughout the 2012 and 2013 DAU consultation processes that risks should be borne by whichever party is best able to control that risk. Queensland Rail takes an alternative approach to risk which requires the operator to bear the risk regardless of which party is best placed to manage the risk. The Queensland Rail position is unacceptable to Asciano.*³¹²

Stakeholders also identified their material concerns with the 2015 DAA by providing specific comments on Queensland Rail's tabulated reasoning on how it treated the 2013 SAA matters that were raised by us in the 2014 Draft Decision in the 2015 SAA.³¹³ Stakeholders recommended significant amendments to the 2015 SAA to reflect the agreed risk allocation matrix contained in schedules E and H of the approved 2008 undertaking.

Stakeholders also requested that we conduct a comprehensive review of the 2015 SAA to compare the risk position proposed in the 2015 SAA against the existing risk position in the 2008 undertaking.³¹⁴

*This requires a clause by clause comparative review and NHC requests that the QCA carefully consider the substantive changes which have been made given the limited time stakeholders have had to undertake such a review.*³¹⁵

Table 7.4 Stakeholders' material concerns and proposed amendments to the SAA

Material concern	Recommended stakeholder amendments to the SAA
Access Rights	
Access holder/ principal contractor ³¹⁶	Either the rail operator or the end customer should be able to hold the access rights and be the principal contractor under the agreement.
Access rights ³¹⁷	An end customer who elects to be the access holder should be able to: <ul style="list-style-type: none"> • execute the access agreement without nominating a preferred rail

³¹⁰ Aurizon, sub. no. 6: 22-25; Asciano, sub. no. 5: 11, July 2012: 8, 15-22, September 2012: 15-16, April 2013: 7-8, 12, May 2013: 7-11; Glencore, sub. no. 7: 7-10, 40, Submission 1: 2-33, Submission 2: 2-4; New Hope, sub. no. 4: 4-21 and New Hope, sub. no. 3: 48-52.

³¹¹ Glencore, sub. no. 7: 9.

³¹² Asciano, sub. no. 5: 14.

³¹³ Queensland Rail, sub. no 1: 35-40; Asciano, sub. no. 5: 13-23, 29-39; Aurizon, sub. no. 6: 19-31; Glencore, sub. no. 7: 8-9, 12-14, 40-44; New Hope, sub. no. 10: 9-11, 21, 43-52; sub. no. 11: 1-23.

³¹⁴ Glencore, sub. no. 7: 9.

³¹⁵ New Hope, sub. no. 11: 2.

³¹⁶ Glencore, sub no. 7: 9; New Hope, sub. no. 11: 3.

³¹⁷ Glencore, sub no. 7: 9; New Hope, sub. no. 11: 3-4.

Material concern	Recommended stakeholder amendments to the SAA
	operator <ul style="list-style-type: none"> • appoint one or more rail operators to provide train services in accordance with the agreement.
Renew/ transfer/ reduction/ relinquishment/ suspension/ termination/ assignment and notice provisions ³¹⁸	<p>Either the rail operator or the end customer should be able to elect to pay access charges and have the right to transfer, reduce, relinquish, suspend, terminate and assign the access rights held under the agreement.</p> <p>When the end customer is the access holder, the conduct of the rail operator should not necessarily result in the reduction, relinquishment, suspension or termination of the end customer's access rights.</p>
	The rail operator and the end customer should receive all relevant notices issued by Queensland Rail in accordance with the agreement.
	The rail operator or end customer should be deemed to have rejected a take or pay notice if they do not respond within the specified timeframe. ³¹⁹
Contractual obligations	
Accreditation ³²⁰	Queensland Rail and the rail operator should both be obliged to hold all necessary accreditations and to notify all parties to the agreement if a change occurs in their accreditation status.
Allocation of rights and responsibilities ³²¹	The 2015 SAA should allocate the rights and responsibilities to the party most able to manage them. Stakeholders indicated they supported amendments to implement a balanced risk position in the 2015 SAA.
Network management ³²²	<p>Queensland Rail's network maintenance obligations in the 2015 SAA should be consistent with objective rollingstock infrastructure standards as well as contracted access obligations.</p> <p>Queensland Rail should regularly report on the standard of network service being delivered under each agreement, including track quality, train path availability and track maintenance undertaken or planned so that the network will continue to meet the objective standard and Queensland Rail's contracted access obligations.</p> <p>Queensland Rail should indemnify rail operators and end customers for losses caused by Queensland Rail's failure to maintain the network to the objective standard in the agreement.</p>
Representations and warranties ³²³	The rail operator and end customer should not be required to warrant as to the condition of the network at the commencement of the access agreement.
Force Majeure ³²⁴	Queensland Rail should repair and fund specified parts of the network which

³¹⁸ Glencore, sub. no. 7: 9; New Hope, sub. no. 11: 3-4; Asciano, sub. no. 5: 30.

³¹⁹ Asciano, sub. no. 5: 30; Glencore, sub. no. 7: 12, advises that Queensland Rail's proposed deemed acceptances of notices is an unacceptable risk and could have drastic consequences for an end customer who is liable for the take or pay.

³²⁰ New Hope, sub. no. 11: 7; Glencore, sub. no. 7: 12.

³²¹ Glencore, sub. no. 7: 13; New Hope, sub. no. 10: 48-52 and sub. no. 11: 4-5; Asciano, sub. no. 5: 6-15, 20-21; Aurizon, sub. no. 6: 23-24.

³²² Glencore, sub. no. 7: 13; New Hope, sub. no. 10: 48-52 and sub. no. 11: 4-5; Asciano, sub. no. 5: 6-15, 20-23, 29-38; Aurizon, sub. no. 6: 22-31.

³²³ Glencore, sub. no. 7: 8; New Hope, sub. no. 11: 19; Asciano, sub. no. 5: 34; Aurizon, sub. no. 6: 23-24.

<i>Material concern</i>	<i>Recommended stakeholder amendments to the SAA</i>
	are affected by force majeure and which adversely affect a rail operator or end customer's ability to use the access rights in the relevant agreement.
Insurance ³²⁵	Queensland Rail, the rail operator and end customer should be required to maintain insurance to cover their respective liabilities arising out of the agreement.
Security ³²⁶	The rail operator and end customer should have specified rights with respect to the maximum value and form of security that can be required by Queensland Rail on execution of the agreement.
Operational Obligations	
Tripartite allocation of rights and responsibilities ³²⁷	The agreement should clearly delineate the operational rights and responsibilities which each party must comply with.
Contractual alignment between the SAA and ORM ³²⁸	Any amendments to the ORM terms and conditions should be undertaken in accordance with the ORM amendment provisions contained in the 2015 DAU.

7.3.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is that the 2015 SAA submitted by Queensland Rail does not appropriately balance the factors set out in section 138(2) of the QCA Act and particularly does not reflect an appropriately balanced allocation of the commercial and operational risks associated with the provision of the regulated access service.

Our Draft Decision on the 2015 SAA is outlined in the following sections:

- relevant considerations under section 138(2)(h) of the QCA Act
- tripartite structure of the 2015 SAA
- balanced risk position.

Relevant considerations under section 138(2)(h) of the QCA Act

Under section 138(2)(h) of the QCA Act, we consider the following to be relevant in our consideration of the 2015 SAA:

- schedule E (2008 access principles) and Schedule H (2008 SAA) in Queensland Rail's 2008 undertaking
- the End User Access Agreement and the Train Operations Agreement (split form SAA) in volume 2 of Aurizon Network's 2010 undertaking.

2008 undertaking

We consider the previously approved 2008 access principles³²⁹ and 2008 SAA to be relevant in our consideration of the 2015 SAA (2008 regulatory precedents).³³⁰ We are of the view that the

³²⁴ Glencore, sub. no. 7: 13; New Hope, sub. no. 11: 18; Asciano, sub. no. 5: 37.

³²⁵ New Hope, sub. no. 11: 16; Asciano, sub. no. 5: 36; Aurizon, sub. no. 6: 31.

³²⁶ Glencore, sub. no. 7: 13; New Hope, sub. no. 11: 16; Asciano, sub. no. 5: 36.

³²⁷ Glencore, sub. no. 7: 9; New Hope, sub. no. 10: 10; Asciano, sub. no. 5: 13-14; Aurizon, sub. no. 6: 22-32.

³²⁸ Glencore, sub. no. 7: 13; New Hope, sub. no. 11: 10-11; Asciano, sub. no. 5: 19; Aurizon, sub. no. 6: 30.

2008 regulatory precedents have been effective in providing Queensland Rail, access seekers, access holders and end customers with:

- a considered and balanced approach to contract risk management approach
- a contracting framework that is well understood by all freight traffics operating on the network
- a level playing field in negotiating access rights with a monopoly service provider.

We consider the number of executed access agreements that are currently held by access holders demonstrates the practical efficacy of the 2008 regulatory precedents in facilitating access to the network, maximising freight throughput and promoting competition in markets reliant on access to the network.

We also consider it appropriate for the purposes of section 138(2)(h) to consider the terms, industry practice in relation to, and previous reviews of the 2008 regulatory precedent.

On this basis, we have considered afresh the 2008 regulatory precedents and are of the view that the balanced risk position underlying the 2008 regulatory precedents is relevant in considering each of the stated matters in section 138(2) of the QCA Act. In particular, we consider the symmetrical risk position combined with a clear assignment of accountabilities between the contracting parties facilitates access to the network and an efficient total cost of access.

Aurizon Network 2010 undertaking

We consider the previously approved split form access agreement in Aurizon Network's 2010 undertaking to also be relevant in our consideration of the 2015 SAA (2010 regulatory precedents).³²⁹ We are of the view that the 2010 regulatory precedents have also been effective in providing Queensland Rail, access seekers, access holders and end customers with:

- a considered and balanced approach to contract risk management approach
- a contracting framework that is well understood by all freight traffics operating on the network
- a level playing field in negotiating access rights with a monopoly service provider.

We consider the number of executed access agreements that are currently held by access holders demonstrates the practical efficacy of the 2010 regulatory precedents in facilitating access to the network, maximising freight throughput and promoting competition in markets reliant on access to the network.

We also consider it appropriate for the purposes of section 138(2)(h) to consider the terms, industry practice in relation to, and previous reviews of the 2010 regulatory precedents.

³²⁹ We note that Schedule E of Aurizon Network's 2010 undertaking is our last approved position on the core access principles to be applied in the provision of access to the declared network consistent with section 138(2) of the QCA Act; and that, Queensland Rail's access principles in the 2008 undertaking are substantially the same as Aurizon Network's 2010 access principles, with only minor amendments and formatting differences.

³³⁰ Stakeholders have all identified the importance of retaining the balanced risk position contained in the 2008 access principles and the 2008 SAA. See Asciano, sub. no. 5: 11, 13-14, 29-38; Glencore, sub. no. 7: 9-10; New Hope, sub. no. 11: 4-21; Aurizon, sub. no. 6: 22-31.

³³¹ Stakeholders have all identified the importance of ensuring the 2015 SAA contains the contractual flexibility provided by the split form SAA in the Aurizon Network's 2010 undertaking.

Accordingly, we have considered afresh the split form SAA and are of the view that the balanced risk position underlying the split form SAA is still current and provides for an appropriate balancing of each of the stated matters in section 138(2) of the QCA Act. In particular, we consider the symmetrical risk position combined with a clear assignment of accountabilities between the three contracting parties facilitates access to the network and an efficient total cost of access.

2015 SAA tripartite structure

We do not consider it appropriate to approve the tripartite structure as currently drafted in the 2015 SAA. In applying our assessment approach we do not consider the 2015 SAA has appropriate regard to section 138(2) of the QCA Act. In particular, we consider the failure of the 2015 SAA to provide a genuine contracting option for the end customer to be the access holder and principal contractor under the agreement is inconsistent with section 138(2)(a), (d), (e) and (h) of the QCA Act.

We acknowledge the efforts made by Queensland Rail to streamline the 2015 SAA and allow, if required, an end customer to co-sign the access agreement. However, our clause by clause review of the 2015 SAA has identified that, in practice, the 2015 SAA does not afford the end customer any real rights in relation to owning and controlling the use of access rights held pursuant to the agreement. In only allowing a rail operator to be an access holder, the 2015 SAA gives the rail operator full control of the access rights and the bulk of the rights and responsibilities as the principal contractor with Queensland Rail.

The issue of providing end customers with a genuine right to be the access holder was considered by us in the context of Queensland Rail's 2012 SAA and 2013 SAA. In submissions on the 2015 SAA, all stakeholders reiterated the need for the 2015 SAA to provide the contractual flexibility to allow either a rail operator or a single end customer to be the access holder. Where the end customer elects to be the access holder, stakeholders want the ability for an end customer to execute an access agreement, to have the flexibility to nominate a rail operator(s) to utilise the access rights and to have the ongoing right to transfer access rights between different rail operators throughout the term of the agreement.

We have identified the way in which we consider it is appropriate for Queensland Rail to amend its 2015 SAA to give effect to a workable, credible and effective contracting model for all parties to the agreement, including providing for:

- an end customer to be an access holder with the right to:
 - hold, transfer, assign, relinquish and terminate the access rights independently of an operator
 - negotiate and execute an access agreement without nominating a rail operator
 - switch between rail operators within the term of the access agreement
- operating and contract risks to be allocated three ways, dependent on which party is best placed to manage the risk that is assigned to it.

To provide the contractual flexibility for end customers to be the access holder in the 2015 SAA, we have made substantial amendments to the 2015 SAA. This is because we have largely sought to work within the drafting of the 2015 SAA rather than create a new split form SAA to sit alongside the 2015 SAA. We consider that, with our proposed amendments, the 2015 SAA offers the contractual flexibility required by rail operators and end customers. While the 2015 SAA requires substantial amendments, we do not consider any of our proposed amendments to

be of a minor and inconsequential nature. Rather, we consider them necessary to provide contract clarity, certainty and transparency on terms and conditions by which Queensland Rail will agree to deliver its access services.

We have detailed our proposed amendments in Appendix D of this Draft Decision. We have identified the proposed amendments to key clauses in the 2015 SAA in the table below (see **Table 7.5**).

Table 7.5 QCA's proposed amendments to provide the necessary contractual flexibility in the 2015 SAA

<i>2015 SAA provisions</i>	<i>QCA's amendments to the 2015 SAA</i>
Access holder/principal contractor	Either the rail operator or the end customer should be able to hold the access rights and be the principal contractor under the agreement.
Access rights	<p>An end customer who elects to be the access holder can:</p> <ul style="list-style-type: none"> • execute the access agreement without nominating a preferred rail operator • appoint one or more rail operators to provide train services and utilise the access rights in accordance with the agreement • amend the utilisation rights as between the nominated rail operators • transfer the utilisation rights to a new rail operator.
Train operating rights	A rail operator is responsible for the operational and safety obligations that are required by Queensland Rail in order to operate train services on Queensland Rail's network
Access payment obligations	Either the rail operator or the end customer can elect to have the obligation to pay monies under the agreement
Ownership and control of access rights held under the access agreement	Either the rail operator or the end customer is able to elect to own and control the access rights, including the right to transfer, reduce, relinquish, suspend, terminate or assign the access rights held under the agreement.
	If the end customer is the access holder, the end customer can nominate a rail operator(s) that will use the access rights and amend the nomination at any time within the term of the agreement, subject to Queensland Rail being given notice within a reasonable timeframe.
Notices	The rail operator and the end customer should receive all relevant notices issued by Queensland Rail in accordance with the agreement.
Take or pay notices	The rail operator or end customer should be deemed to have rejected a take or pay notice if they do not respond within the specified timeframe.

We consider our proposed amendments are consistent with section 138(2) of the QCA Act for the following reasons:

- The amendments promote the efficient use of Queensland Rail's network, address the legitimate business interests of Queensland Rail and persons seeking access, comply with the pricing principles and are consistent with the risk position underlying the 2008 and 2010 regulatory precedents (ss. 69E and 138(2)(a), (b), (c) (g) and (h) of the QCA Act). This is achieved by amending the 2015 SAA to:

- allow an end customer or a rail operator to be the access holder and have the necessary flexibility to manage and control the use of access rights held under their executed access agreements
- provide for Queensland Rail to meet its obligations under the TRSA by requiring that all rail operators should be responsible for all of the operational obligations under their access agreement regardless of whether the rail operator is the access holder or the nominated rail operator
- allow Queensland Rail to obtain sufficient access revenue that enables it to receive at least the efficient costs of providing access services to the access holder,³³² regardless of whether the rail operator or the end customer is responsible for the payment of monies under the agreement
- provide Queensland Rail and access seekers with the freedom to negotiate non-standard terms and conditions where the parties see fit
- The amendments address the legitimate business interests of Queensland Rail, access seekers, access holders, rail operators and end customers (s. 138(2)(b), (e), (g) and (h) of the QCA Act). This is achieved by amending the 2015 SAA to:
 - allocate the contract risks, obligations, terms and conditions to the contracting party best placed to manage the risk under the agreement
 - allow an end customer to be the access holder and afford them the right to manage their use of the contracted access rights, including the obligation to pay monies and the rights to nominate different rail operators to use the access rights, to transfer, assign, and relinquish the access rights and to terminate the access agreement
 - provide a safe harbour agreement which can be executed by an end customer and a rail operator when access negotiations with Queensland Rail on the contractual terms and conditions stall.
- The amendments promote the public interest in having competition in related markets (section 138(2)(d) of the QCA Act). End customers are able to nominate more than one rail operator to utilise the relevant access rights held by the end customer. End customers can also vary the nomination of a rail operator(s) to use the access rights at any time during the term of the agreement.

³³² Including receipt of a return on investment commensurate with the regulatory and commercial risks involved in delivering that service.

Draft Decision

7.3 After considering Queensland Rail's proposed approach to allow an end customer to be a signatory to the 2015 SAA, our Draft Decision is to refuse to approve Queensland Rail's proposal.

7.4 The QCA requires Queensland Rail to amend its 2015 SAA to:

- (a) provide an ability for an end customer or an operator to be the access holder and have the necessary flexibility to manage and control the use of access rights under an access agreement**
- (b) adopt a tripartite contract structure which more appropriately divides the contract responsibilities and risks of each of Queensland Rail, a Rail Operator and an end customer**

The required amendments are set out in cls.2.9.4 and 2.9.7 of Appendix C and the SAA in Appendix D to the Draft Decision.

7.5 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

Balanced risk allocation

We do not consider the allocation of rights, obligations and risks between the parties, as currently drafted in the 2015 SAA, has appropriate regard to each of the stated matters in section 138(2) of the QCA Act. In particular, we have identified that the 2015 SAA provides:

- a materially different risk allocation matrix underpinning the 2015 SAA compared to the risk allocation matrix underpinning the 2008 and 2010 regulatory precedents
- a substantial weakening of the obligations and liability held by Queensland Rail in the provision of a contracted access service
- a material and adverse risk position for access seekers, access holders and end customers when negotiating with Queensland Rail to obtain access to the network
- little or no reasoning on why Queensland Rail has adopted a different risk position in the 2015 SAA.

Our detailed analysis of the 2015 SAA is provided at Appendix B of this Draft Decision.

Having regard to our detailed analysis, we consider that the allocation of contract risks in the 2015 SAA cannot be approved in its current form. We consider the risk position in the 2015 SAA inappropriately favours Queensland Rail and results in an asymmetrical risk position which means an access seeker, access holder or end customer does not have:

- any regulatory certainty on the standard of access services they will receive over the life of the agreement
- the ability to manage all of the risks, liabilities and indemnities that Queensland Rail is making them be responsible for under the 2015 SAA
- a 'safe harbour' access agreement that is balanced and reasonable for all contracting parties.

We have identified the amendments required so that the 2015 SAA provides a balanced risk position having regard to section 138(2) of the QCA Act. Again, because we have largely sought to work within the drafting of the 2015 SAA, we have made extensive amendments to a large number of clauses. We do not consider any of our proposed amendments to the risk position in

the 2015 SAA to be of a minor and inconsequential nature. Rather, we consider them necessary to provide an appropriate and symmetrical risk allocation between the contracting parties.

Our proposed amendments are detailed in Appendix D of this Draft Decision. Our proposed amendments to key clauses in the 2015 SAA are identified in the table below.

Table 7.6 QCA's proposed amendments to provide the necessary contractual flexibility in the 2015 SAA

<i>2015 SAA Provisions</i>	<i>QCA's amendments to the 2015 SAA</i>
Accreditation (clause 4 of the 2015 SAA)	Queensland Rail and the rail operator to have symmetrical accreditation responsibilities.
Network management (clauses 6, 7 and 23 of the 2015 SAA)	<p>Queensland Rail's network management obligations in the 2015 SAA to include:</p> <ul style="list-style-type: none"> an obligation on Queensland Rail to maintain the network, consistent with objective rollingstock infrastructure standards an obligation on Queensland Rail to use reasonable endeavours to minimise operational constraints and disruptions to an operator's train services. <p>Removal of any provisions requiring rail operators to warrant the standard of the network.</p>
Indemnities, liabilities and limitations (clauses 12 and 13 of the 2015 SAA)	<p>The indemnities, liabilities and limitations applying to Queensland Rail to allow claims to be made in relation to:</p> <ul style="list-style-type: none"> the standard of the network the non-provision of access caused, or contributed to, by Queensland Rail's negligence or breach third party works undertaken on behalf of Queensland Rail.
Dangerous goods (clauses 10.5 and 13 of the 2015 SAA)	<p>The dangerous goods provisions to better reflect the ability of each party to manage the risks associated with the carriage of dangerous goods on the network, including:</p> <ul style="list-style-type: none"> Queensland Rail to be liable for claims arising out of incidents involving dangerous goods where caused or contributed to by Queensland Rail the rail operator's insurance provisions to not require the rail operator to be insured for Queensland Rail's negligence.
Disputes (clause 19 of the 2015 SAA)	All disputes can be escalated to an independent expert for arbitration.
FM (clause 20 of the 2015 SAA)	The new FM clause will provide an access holder with relief in respect of the payment of monies to the extent that Queensland Rail is unable to provide access rights due to an FM event on the network.

We consider our proposed amendments are consistent with section 138(2) of the QCA Act for the following reasons:

- The amendments promote the efficient use of Queensland Rail's network, address the legitimate business interests of Queensland Rail, comply with pricing principles and are consistent with the risk position underlying the 2008 and 2010 regulatory precedents (ss 69E and 138(2)(a), (b), (g) and (h) of the QCA Act). This is achieved by amending the 2015 SAA to:

- apply, in general, the risk allocation principles commonly applied in contract law, including that each party is to:
 - carry the contract risk that they are best placed to manage
 - be held accountable for their actions, negligence or breach under the agreement
 - indemnify the other parties for loss (personal injury, death or property damage) caused by, or to the extent contributed to by, the wilful default or negligence of the indemnifying party
 - exclude the other parties from liability for consequential loss except in limited circumstances
- apply a consistent risk position to the risk position underlying the 2008 and 2010 regulatory precedents
- promote commercial confidence that access seekers, access holders and rail operators can enter into long-term access contracts with Queensland Rail and hold Queensland Rail accountable for delivering the contracted services over the life of the agreement;
- facilitate access to the network to maximise the operation and use of access rights which, in turn, will improve network productivity and lower the unit cost of access
- The amendments address the legitimate business interests of Queensland Rail, access seekers, access holders, rail operators and end customers and are consistent with the risk position underlying the 2008 regulatory precedents (s. 138(2)(b), (e), (g) and (h) of the QCA Act). This is achieved by amending the 2015 SAA to:
 - provide a consistent set of terms and conditions for all traffics to access the network on a non-discriminatory basis
 - provide a level playing field to underpin access negotiations between access seekers, end customers and Queensland Rail
 - align each contracting party to their relevant contractual obligations and entitlements
 - provide clear and transparent assignment of the risks and accountabilities held by each party to the agreement
 - leave Queensland Rail, access seekers and access holders free to negotiate the setting of access charges for non-reference tariff traffic consistent with the pricing principles in section 168A of the QCA Act
 - provide open and transparent communication channels in the use and delivery of contracted access services
 - allow Queensland Rail and access seekers to negotiate non-standard terms and conditions where there is a mutual benefit for both parties and the non-standard terms reflect the particular regulatory and commercial risks involved
 - minimise the potential for access disputes to be triggered under the 2015 DAU
 - provide a safe harbour agreement to facilitate the timely execution of access agreements.
- The amendments promote the public interest in having competition in markets (s. 138(2)(d) of the QCA Act) where participation in that market is reliant on Queensland Rail's monopoly provision of an access service.

Draft Decision

- 7.6 After considering Queensland Rail's proposed risk position in the 2015 SAA, our Draft Decision is to refuse to approve Queensland Rail's proposed risk position.**
- 7.7 The QCA requires Queensland Rail to amend its draft 2015 SAA to give effect to a more balanced risk position for all parties to the agreement in accordance with the amendments made to the SAA attached in Appendix D.**
- 7.8 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

7.4 Key performance indicators

Consistent with section 137 of the QCA Act, we consider operational performance levels should be included in the 2015 SAA. The 2008 SAA contained a clause on the agreed operational performance levels of both parties. We have generally referenced any discussion on each party's compliance with the operational performance levels in an access agreement as a discussion on the key performance indicators (KPIs) each party is required to report on so they can hold each other accountable for delivering on their contractual commitments under the agreement. It is within this context that we consider whether KPIs should be included in the 2015 SAA in accordance with our obligations under sections 137 and 138(2) of the QCA Act.

7.4.1 Queensland Rail's 2015 DAU proposal

Queensland Rail has not included any reference to KPIs in the 2015 SAA. Queensland Rail's position is that consideration of KPIs is beyond our legislative powers under the QCA Act. Queensland Rail also advised us that its view on excluding KPIs is based on the recent High Court decision of *Andrews v ANZ*.³³³

7.4.2 Stakeholder's comments

Asciano, New Hope and Glencore were of the view that the object of Part 5 of the QCA Act provides sufficient authority for us to require the inclusion of KPIs in the 2015 SAA. Their positions are summarised below.

Table 7.7 Stakeholder's position on the legal status of KPIs in the 2015 SAA

<i>Stakeholder</i>	<i>Position on KPIs</i>
Asciano ³³⁴	<p>A KPI reporting regime should be applied to Queensland Rail in the 2015 SAA to allow access holders, operators and end users to monitor Queensland Rail's compliance with, and its performance against, its obligations and responsibilities in the 2015 DAU.</p> <p>As a provider of monopoly services Queensland Rail's performance should be measured and incentives should be developed to increase its performance. An incentive mechanism on Queensland Rail's performance would provide strong incentives for performance to be improved.</p>
New Hope ³³⁵	<p>Contractual performance issues should be addressed in the 2015 SAA. The key obligation under the 2015 SAA should be to provide access paths and this should be measured.</p>

³³³ Queensland Rail, sub no. 1: 38-39.

³³⁴ Asciano, sub. no. 5: 13.

³³⁵ New Hope, sub. no. 10: 51-52.

Stakeholder	Position on KPIs
	<p>Recommend the 2015 SAA include a Queensland Rail performance deduction for the non delivery of an access path which is not excusable under the agreement. New Hope recommends that a payment deduction of \$500 per path not delivered is based on its estimate of what direct costs are incurred when a train has to be rescheduled because a train path was not delivered.</p> <p><i>ANZ v Andrews</i> is a decision about penalties where the charge applied was deemed to be a penalty because it was not a reasonable estimate of the loss arising from the non-performance of a certain obligation.</p>
Glencore ³³⁶	<p>The 2015 SAA should build in a comprehensive maintenance performance framework so an access holder can monitor Queensland Rail's performance in its obligations under the agreement. For example by including in the agreement standardised provisions for Queensland Rail to:</p> <ul style="list-style-type: none"> • report on maintenance (by actual spend, forecast spend, material maintenance activities carried out and reasons for material variations between forecast and actual spend • be subject to a KPI reporting regime involving financial adjustments for non-provision of access and operational constraints. <p><i>Andrews v ANZ</i> is a decision about penalties where the charge applied was found not to reflect a reasonable estimate of loss. It does not stand as a judgement which prohibits the inclusion of a KPI regime with adjustments for reasonable estimates of loss.³³⁷</p>

7.4.3 QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is that the absence of any reference to KPIs in the 2015 SAA creates an asymmetrical risk profile that inappropriately favours Queensland Rail. Applying our assessment approach we do not consider that the 2015 SAA has appropriately balanced each of the stated matters in section 138(2) of the QCA Act.

It is our view that the absence of any reference to a KPI reporting regime in the 2015 SAA adversely impacts on the rights of access holders to hold Queensland Rail accountable to deliver access services consistent with its contractual commitments. We consider the inclusion of a KPI reporting regime in the 2015 SAA is essential to deliver a balanced risk position for access seekers, access holders and end customers. As a monopoly service provider, we do not consider Queensland Rail is appropriately incentivised to include a KPI reporting regime in any of its executed access agreements.

It is far from clear that *Andrews v ANZ* would apply to performance adjustments in arms-length contracts between sophisticated commercial parties. However, to the extent that the case would apply, the application of the decision to an SAA KPI regime, in each specific instance, would depend primarily on whether the clauses reflect a reasonable pre-estimate of damages for the relevant conduct. We do not consider that the case prohibits the parties from agreeing KPIs but rather it is open for each party to negotiate KPI adjustments having regard to all relevant commercial and legal matters.

We therefore consider it appropriate for Queensland Rail to amend its 2015 SAA to include a KPI regime to enable access holders to monitor Queensland Rail and hold it accountable to deliver on its obligations under the agreement. We have proposed amendments to the 2015

³³⁶ Glencore, sub. no. 7: 8-9.

³³⁷ Glencore, sub. no. 7: 43.

SAA, including a new schedule to the 2015 SAA that requires Queensland Rail to provide the access holder with weekly reports on the performance of its service obligations under the agreement. We acknowledge that our proposed list of KPIs (as outlined in **Box 7.1**) in the new schedule may need to be broadened to deal with the specifics of a contracted service offering, but we consider that parties will negotiate and agree more specific KPIs during the negotiation process.

Box 7.1: KPIs to be included in the 2015 SAA

A new schedule has also been included in the 2015 SAA to identify the minimum weekly operational reporting obligations based on the delivery of weekly train paths on an origin-destination pairing basis consistent with the agreement.

The performance levels to be reported by Queensland Rail under the agreement include:

- contracted versus scheduled versus actual TSE consumption by the access holder
- network availability days for the track utilised by the agreement
- planned and unplanned network maintenance across track utilised by the agreement
- planned and actual track closures across track utilised by the agreement and the performance of actual track closures with Queensland Rail reporting on the percentage of track closures returned to daily services within the planned timeframe
- sectional run time performance for the train services operated under the agreement
- below-rail transit time performance for the train services operated under the agreement
- forecast versus scheduled versus actual GTKs hauled under the agreement.

We consider the proposed KPI reporting regime in the 2015 SAA is consistent with section 138(2) of the QCA Act for the following reasons:

- The KPI reporting regime promotes the efficient operation of Queensland Rail's network and addresses the legitimate business interests of Queensland Rail and interests of persons seeking access to the network (s. 138(2)(a) (b) and (d) of the QCA Act) by:
 - providing clarity and transparency on Queensland Rail's contractual obligations which underpin the provision of an access service
 - enabling an access holder to monitor and hold Queensland Rail accountable for the non-delivery of access services due to Queensland Rail's non-compliance with its operational and service obligations under the agreement
 - providing all access seekers, access holders and end customers with the required level of commercial certainty to enable them to enter into long term access contracts with Queensland Rail confident that they have sufficient contractual remedies available should Queensland Rail not comply with its obligations under the agreement
 - providing Queensland Rail with a level of accountability that is commensurate with the service level obligations contained in the 2015 SAA
 - facilitating access to the network to maximise the operation and use of access rights which, in turn, will improve network productivity and lower the unit cost of access
 - minimising the potential for access disputes to be triggered under the 2015 DAU
 - providing a safe harbour reporting KPI regime to facilitate the timely execution of access agreements.

- The KPI reporting regime promotes the public interest in having competition in markets (s. 138(2)(d) of the QCA Act) where participation in that market is reliant on Queensland Rail's monopoly provision of an access service.

We do not consider that a KPI reporting regime creates an unenforceable penalty and that matters relating to adjustments to apply should be negotiated between relevant parties having regard to all relevant law and the relevant circumstances.

Draft Decision

7.9 After considering Queensland Rail's non-inclusion of a KPI reporting regime in the 2015 SAA, our Draft Decision is to refuse to approve the 2015 SAA.

7.10 The QCA requires Queensland Rail to amend its draft 2015 SAA to include a KPI reporting regime in accordance with the relevant amendments made to the SAA in Appendix D.

7.11 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above

7.5 Development of access agreement for different access scenarios

In accordance with section 137 of the QCA Act, we consider the 2015 DAU should include relevant details on any auxiliary access agreements that will need to be negotiated to enable an access seeker or end customer to obtain access to the network.

7.5.1 Queensland Rail's 2015 DAU proposal

Clause 2.9.4 of the 2015 DAU contains a reference to the development of access agreements consistent with the 2015 SAA provided in Schedule H.

Clause 1.4.3 of the 2015 DAU identifies that funding agreements will need to be executed to enable an access seeker or end customer to obtain access to the network in situations where:

- a network extension is required to accommodate the access rights nominated in the access application
- Queensland Rail elects not to fund the network extension required to accommodate the access rights nominated in the access application.

7.5.2 Stakeholders' comments

Stakeholders have indicated a need for the 2015 DAU to provide a suite of SAAs to deal with the different access-related scenarios that may occur during the 2015 DAU regulatory period. Stakeholders have specifically referred to the following access scenarios for us to consider in our review of the 2015 DAU:

- an access seeker negotiating under section 2 of the 2015 DAU may need to negotiate a:
 - standard funding agreement³³⁸ to fund the network extension required to accommodate the access application

³³⁸ Asciano, sub. no. 5: 11, 22 July 2012: 8, September 2012: 1, April 2013: 12, May 2013: 7, 14-15; Glencore, sub. no. 7: 44, 51-52, Submission 1: 4, Submission 2: 4; New Hope, sub. no. 10: 5-7, 10-11, 57-58, 60.

- standard rail connection agreement³³⁹ to fund the rail infrastructure works required to accommodate the access application
- a positive obligation on Queensland Rail to negotiate with an access seeker for an access agreement which is not necessarily consistent with the 2015 SAA.³⁴⁰

7.5.3 QCA analysis and Draft Decision

Our position, as set out in this Draft Decision, is that the negotiation provisions in the 2015 DAU submitted by Queensland Rail do not appropriately balance the factors set out in section 138(2) of the QCA Act.

We do not consider Queensland Rail's access agreement negotiation provisions take appropriate account of the different access scenarios that could emerge in the negotiation process under section 2 of the 2015 DAU. Specifically, we are of the view that the 2015 SAA does not provide the contractual means for an access seeker to obtain access to the network if a network extension is required to accommodate the access rights nominated in the access seeker's access application. For example an access application may require:

- additional capacity to be created on a rail corridor to deliver the access rights nominated by the access seeker in its access application (this may involve, passing loops, track strengthening for higher axle loads, extending passing loops, bridge strengthening, and signalling upgrades)
- rail connection infrastructure to the mainline to provide an ability for the access seeker to use the access rights nominated in its access application (for example to connect a new load out, freight terminal or private rail infrastructure to the mainline at the most efficient point of entry for both the access seeker and Queensland Rail).

Under both access scenarios identified above, Queensland Rail may require an access seeker to execute a funding agreement to fund the capital required for Queensland Rail's construction and ownership of a network extension to create the additional capacity required by the access seeker to accommodate its access application. Our detailed consideration of Queensland Rail's funding agreement provisions in the 2015 DAU is provided in Chapter 9 of this Draft Decision.

With regard to our assessment approach, we consider the non inclusion of a standard funding agreement in the 2015 DAU inappropriately favours Queensland Rail and inappropriately and adversely increases the commercial risks of an access seeker and an end customer if they are negotiating with Queensland Rail for access to a capacity constrained rail corridor. We consider this outcome is inconsistent with an appropriate balancing of the stated matters in section 138(2) of the QCA Act.

We have addressed this issue in two ways:

- We have included a new schedule to the 2015 DAU which identifies the standard extension access principles that should underpin any negotiations on a funding agreement between Queensland Rail and an access seeker and end customer (see Chapter 9 of the Draft Decision).

³³⁹ Asciano, sub. no. 5: 11,22 July 2012: 8, September 2012: 1, April 2013: 12, May 2013:7, 14-15; Glencore, sub. no. 7: 44, 51-52, Submission 1: 4, Submission 2: 4; New Hope, sub. no. 10: 5-7, 10-11, 57-58, 60.

³⁴⁰ Aurizon, sub. no. 6: 12-16, 22-24. Aurizon specifically notes a growing demand from customers for alternatives to the 2015 SAA.

- We have amended clause 2.9.4 of the 2015 DAU to provide an ability for access funders to reasonably request Queensland Rail to develop a standard funding agreement. In this circumstance, Queensland Rail is then required to produce a standard funding agreement containing reasonable terms.

If any party has issues in relation to the negotiation of a specific or standard funding agreement then the relevant party may commence an access dispute in accordance with the 2015 DAU. In the event of an access dispute, we will arbitrate that dispute consistent with the 2015 DAU, including having regard to the extension access principles, and relevant provisions of the QCA Act.

We consider these proposed amendments will appropriately balance factors under section 138(2) including Queensland Rail's, access seekers' and end customers' rights and obligations in negotiating access to the network in accordance with the 2015 DAU, the objects of the QCA Act and the public interest. Our considerations for the purposes of section 138(2) of the QCA Act include in particular the following:

- The amendment promotes the efficient operation, use of and investment in Queensland Rail's network (s. 138(2)(a) of the QCA Act) by
 - providing competitive tension in the provision of funding to extend the network
 - allowing the network to be efficiently extended regardless of which party provides the funding for the network extension
 - creating flexibility in funding network extensions
 - facilitating the timely extension of the network
 - improving network productivity and maximising freight throughput on the network.
- The amendments address the legitimate business interests of Queensland Rail and interests of persons seeking access to the network (s. 138(2)(b) and (d) of the QCA Act) by
 - ensuring Queensland Rail complies with the legislative framework by permitting, but not necessarily funding, an extension to the network
 - providing for a network extension to be developed, constructed and owned by Queensland Rail consistent with its obligations as the rail infrastructure manager of the declared network under the TRSA
 - instilling confidence in access seekers and end customers that they can enter into funding arrangements with commercial certainty on Queensland Rail's obligations to develop, construct and own an efficient network extension in accordance with schedule E of the 2015 DAU
 - providing an appropriate investment return on the capital contributed and invested in its rail network
 - providing standard terms and conditions for all access seekers and end customers to fund a network extension to accommodate their access application
 - facilitating a balanced negotiating framework for access seekers and end customers to execute a funding agreement in a timely manner and obtain access to the network in a timely manner.
- The amendments promote the public interest in having competition in markets (s. 138(2)(d) of the QCA Act) where participation in that market is reliant on Queensland Rail's monopoly

provision of an access service and by assisting with economic development on reasonable terms.

Draft Decision

- 7.12** After considering Queensland Rail's non inclusion of standard funding agreement in the 2015 DAU, our Draft Decision is to refuse to approve the 2015 DAU.
- 7.13** The QCA requires Queensland Rail to amend its draft 2015 DAU to include provisions to provide for access funders to reasonably require Queensland Rail to provide a standard funding agreement during the 2015 DAU regulatory period containing reasonable terms. In the event of an access dispute, we will arbitrate consistent with the amended 2015 DAU and the QCA Act. The amendments are set out in clause 2.9.4 in Appendix C.
- 7.14** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

8 REFERENCE TARIFFS

The 2015 DAU includes West Moreton network and Metropolitan network reference tariffs for coal-carrying train services. Queensland Rail proposed a rate equivalent to \$19.41/'000 gtk and sought to justify it on the basis that this tariff was below its proposed ceiling price of \$34.92/'000 gtk. These are the only reference tariffs in the 2015 DAU.

Reference tariffs are developed for an applicable reference train service, providing the access charge we approve to set the basis for price negotiations for access to Queensland Rail's below-rail service under an access agreement.

We approve reference tariffs to apply to relevant Queensland Rail operations in order to reduce transaction costs associated with negotiating access charges. In approving tariffs, our role includes assessing the way in which the access charge is calculated, information about the costs of providing the service (including capital, operation and maintenance costs) and how the assets are valued.

Overview

Queensland Rail proposed to develop reference tariffs for coal-carrying train services on the West Moreton network using a common network approach to deal with the rail infrastructure's unique characteristics. The characteristics of the West Moreton network require a different approach than for a purpose-built heavy-haul, bulk commodity railway because:

- it was built in the 19th century for mixed freight and passenger services. Coal traffics commenced in 1996 with upgrades to serve the new traffic being incremental in nature rather than a fundamental reconfiguration of the network
- it does not have sufficient volumes to take advantage of economies of scale
- the coal trains using the West Moreton network are necessarily relatively short with low axle loads and are required to interact with high-frequency metropolitan passenger services in order to travel to the Port of Brisbane
- unlike the central Queensland coal network, a greater number of non-coal traffics (agricultural products, passenger and freight) also use the common network.

Queensland Rail's approach has a particular focus on allocating the costs of the shared parts of the common network between coal and non-coal traffics.

Queensland Rail has adopted a DORC methodology for valuing its network and proposes that coal traffics recover an allocation of coal's share of the West Moreton network common costs to develop a ceiling price for coal services.

The 2015 DAU reflects a significant reduction in coal and non-coal demand since Queensland Rail submitted its previous 2013 DAU. Forecast weekly return coal train paths used for pricing purposes have fallen to 63, compared to 77 contracted paths used in the 2013 DAU. Non-coal services have dropped to 3 from 29. This represents reductions of 18 per cent for coal and 90 per cent for non-coal train services.

Queensland Rail said:

The environment for coal and non-coal services has changed markedly since the 2013 DAU was submitted, with both coal and non-coal volumes declining. This has seen lower contracted tonnages and the operation of more ad hoc train services. While the long term outlook remains

*positive for coal volumes, the current environment presents particular challenges for setting tariffs.*³⁴¹

*This contrasts with the approach used for the 2013 DAU, where Queensland Rail had proposed that contracted volumes be used as the basis for setting forecast volumes (with coal then contracted for 7.5mtpa or 77 return paths/week and freight/passenger contracts for return 29 paths/week). This was proposed in an environment where the network was almost fully contracted, with contracted paths representing 106 out of a possible 112 return paths on the network.*³⁴²

While Queensland Rail proposed to maintain coal's share of the initial regulatory asset value to reflect contracting limits for coal traffics through the metropolitan system, it also proposed a new approach to allocating other shared network costs. That is, remaining traffics (predominantly coal) should bear all of the common network's maintenance, operating and forecast capital expenditure costs in order to maintain Queensland Rail's revenue adequacy.

On this basis, Queensland Rail proposed a ceiling price of \$34.92/'000 gtk and a reference tariff equivalent to \$19.41/'000 gtk. Queensland Rail proposed that this tariff commence from the date the undertaking was approved.

Asset valuation

The West Moreton network was constructed in the 19th century for regional traffic, and it does not reflect the service potential of a modern engineering equivalent asset. It was not originally designed for, or upgraded to operate as, a heavy-haul bulk coal network.

Queensland Rail has been spending increasing amounts on maintenance since 1996 to cope with increased coal volumes. We have largely accepted these as costs necessary to operate a network that was not designed for a bulk coal haulage task.

However, we consider it is not appropriate to also approve a DORC valuation for assets whose useful lives have only been able to be extended because of that maintenance spending. Indeed many assets only exist because maintenance has extended their lives by replacing them (e.g. wooden sleepers and fences).

Further, there are other assets built so long ago that they have exceeded their expected useful lives – that is, tunnels, cuttings and embankments. To avoid inefficient windfall gains, we have not given the tunnels, cuttings and embankments any additional value beyond that given to other assets and hence the network as a whole.

Cost allocation

We do not believe coal traffics should bear the costs of spare capacity that they cannot access because of contracting restrictions. Coal traffics should only pay for paths they are able to contract to use.

To address this, we propose a consistent approach of capping coal traffics' share of fixed costs (such as common network assets and fixed maintenance and operating costs) based on contracting restrictions for coal trains through the Metropolitan network.

Reference Tariff

On this basis, and for indicative purposes only, we propose an indicative draft reference tariff of \$15.88/'000 gtk. This indicative draft tariff has been calculated as if it were to apply from 1 July

³⁴¹ Queensland Rail, sub. no. 2: 4.

³⁴² Queensland Rail, sub. no. 2: 16.

2015. We propose to re-calculate and adjust this indicative tariff to the date the new undertaking is approved to commence.

Adjustment charge

We note that Queensland Rail had previously stated its intention that the tariff (adjusted for inflation) would apply from 1 July 2013, the date when the tariff in the 2008 access undertaking was scheduled to expire. Queensland Rail has changed its position in the 2015 DAU and said that the reference tariff will only apply from the date the new undertaking commences.

Our view is that approving Queensland Rail's proposal to exclude an adjustment amount in the 2015 DAU would create regulatory uncertainty, which would, among other things, adversely impact on investment. Based on the considerations set out in this chapter and having regard to the relevant factors in section 138(2) of the QCA Act, our Draft Decision is that the 2015 DAU should be amended to include a forward-looking adjustment amount to reflect over-recovery of access charges between 1 July 2013 and the day prior to the commencement date of the new access undertaking. We have estimated the adjustment amount payable by Queensland Rail from 1 July 2013 to 30 June 2015 to be \$26.3 million.

This adjustment amount is only indicative and will differ from the final adjustment amount that would reflect the period between 1 July 2013 and the day before the commencement date of the new undertaking.

8.1 Structure of this chapter

Queensland Rail's reference tariff proposal is summarised in Section 8.2 of this chapter.

Our Draft Decision is not to approve the proposed reference tariff. The reasons for our Draft Decision are addressed in the following sections:

- (a) **Regulatory context of our decision** (Section 8.3)
- (b) **Allocation of common network costs to coal traffics**—Queensland Rail proposed various allocators for the regulatory asset base, operating and maintenance costs. We propose that access holders pay the costs of providing the service they can contract to use, based on an efficient allocation of fixed and variable costs (Section 8.4.1).
- (c) **Forecast maintenance costs**—Queensland Rail proposed maintenance costs for the period totalling \$143.0 million.³⁴³ We propose maintenance costs of \$114.6 million, of which \$77.4 million is fixed cost and \$37.2 million is variable cost³⁴⁴ (Section 8.5).
- (d) **Forecast operating costs**—Queensland Rail proposed operating costs for the period totalling \$37.2 million. We are minded to accept Queensland Rail's operating cost and consider that of the \$37.2 million, \$30.3 million is fixed cost and \$6.9 million is variable cost (Section 8.6).
- (e) **The regulatory asset base** (Section 8.7)
 - (i) **Setting the initial asset value**—Queensland Rail proposed an opening asset value of \$471.6 million for the common network (as at 1 July 2015).³⁴⁵ We propose an opening value of \$272.2 million for the common network (Section 8.7.1).

³⁴³ Queensland Rail, sub. no. 2: 41-43.

³⁴⁴ Queensland Rail has proposed its building blocks components over the five years from July 2015 to June 2020. We have used that period for this assessment, although an adjustment may have to be required in the final decision to reflect the eventual approval date of the replacement undertaking.

- (ii) **Past capital expenditure**—Queensland Rail's proposed asset value included \$57.2 million of capital spending we had not previously assessed. We have found that \$37.7 million is acceptable (Section 8.7.2).
 - (iii) **Forecast common network capital expenditure**—Queensland Rail forecast capital expenditure of \$141.9 million.³⁴⁶ We propose a capital expenditure indicator of \$144.2 million (Section 8.7.3).
 - (iv) **Allocating the common network assets (not considering metropolitan operational constraints)**—Queensland Rail proposed to allocate 77.7 per cent of the asset base to coal up to 2014-15, then about 94 per cent for new spending. We propose to consider the 77.7 per cent allocation (including for new spending) with further downward adjustment, resulting in an allocation of 68.8 per cent (Section 8.7.4).
 - (v) **Metropolitan capital expenditure**—Queensland Rail included a new claim of \$15.6 million for capital expenditure in the Metropolitan network between 2007 and 2013, all allocated to coal.³⁴⁷ We propose to allocate \$12.4 million to coal (Section 8.7.5).
- (f) **Capital charges for the coal RAB** (Section 8.8)
- (i) **Depreciation charges**—We propose to approve Queensland Rail's proposal for return of capital using a straight-line depreciation method, based on remaining economic lives³⁴⁸
 - (ii) **Return on capital (WACC) and tax matters**—We propose to accept Queensland Rail's proposed indicative 'vanilla' WACC of 6.93 per cent applied to the regulatory asset base.³⁴⁹ We have also largely accepted Queensland Rail's estimate of tax liability, with some adjustments to reflect changes to the asset base.
- (g) **Form of regulation and tariff structure**—We propose to accept Queensland Rail's proposal for a price cap form of regulation, although with review provisions. We also accept Queensland Rail's proposal for a two-part tariff split between a train path charge and a volume- and distance-based charge (Section 8.9):
- (i) **Metropolitan tariff derivation**—Queensland Rail proposed to apply the same tariff derived on the West Moreton network across the Metropolitan network, with a separate train path charge to cover incremental Metropolitan capex incurred since 2002 for coal. We propose to modify Queensland Rail's proposal to remove double counting of the West Moreton capex since 2002 (Section 8.9.3).
- (h) **QCA proposed ceiling price**—For indicative purposes only, we propose an indicative draft ceiling price for West Moreton network coal services of \$18.88/’000 gtk, calculated as if it were to apply from 1 July 2015 (Section 8.10).
- (i) **Adjustment amount**—We propose to preserve the expectation promoted by Queensland Rail, and accepted by stakeholders, that the new tariff would be applied with effect from 1 July 2013 (Section 8.11).

³⁴⁵ Queensland Rail, sub. no. 2: 52.

³⁴⁶ Queensland Rail, sub. no. 2: 37.

³⁴⁷ Queensland Rail, sub. no. 2: 5 & 24, June 2013c: 7.

³⁴⁸ Queensland Rail, sub. no. 2: 38-39.

³⁴⁹ Queensland Rail, sub. no. 2: 39-40.

- (j) **QCA proposed reference tariffs**—For indicative purposes only, we propose an indicative draft reference tariff of \$15.88/'000 gtk, calculated as if it were to apply from 1 July 2015. We propose to re-calculate and adjust this indicative tariff to the date the new undertaking is approved to commence (Section 8.12).

8.2 Queensland Rail's 2015 DAU proposal

The 2015 DAU included multi-part reference tariffs for coal-carrying train services operating on the West Moreton and Metropolitan networks. Queensland Rail said these were equivalent to \$19.41/'000 gtk. This was based on the continued application of the current reference tariff of \$19.14/'000 gtk (as at 1 July 2014) escalated by inflation, providing an equivalent reference tariff of \$19.41/'000 gtk (as at 1 July 2015).³⁵⁰

Overview of proposed ceiling price

Queensland Rail said that as the reference tariffs were below its derived ceiling price of \$34.92/'000 gtk, we should approve them. This ceiling price was based on a building block approach, reflecting the asset returns, capital expenditure, maintenance and operating costs and other factors discussed in this chapter.

To derive a ceiling price for coal-carrying train services, Queensland Rail used volume forecasts and made various allocations of common costs and assets between coal and non-coal using different allocators for the regulatory asset base, operating and maintenance costs. These allocations and costs are set out in **Table 8.1**.³⁵¹

³⁵⁰ Queensland Rail, sub. no. 2: 5.

³⁵¹ Numbers in the table rounded to one decimal, so the component totals may not be the same as the aggregate. Queensland Rail, sub. no. 2: 52.

Table 8.1 Queensland Rail—proposed allocations of network costs to coal train services

Regulatory asset base (as at 1 July 2015)		
	<i>Allocation approach to coal</i>	<i>Coal share (\$ millions)</i>
Total opening asset value - \$487.6 million (nominal)	Train path basis - available for coal to contract (73%)	\$354.0
Common network asset value • \$471.6 million	Coal's share of 77.7% for investments made between 1995 and 2015. Reflects maximum number of coal train paths of 87, as proportion of 112 total available paths.	\$132.0
	Pre-1995 assets—68.3% pre-1995 (to reflect metropolitan operational constraints)	\$206.1
Coal-specific infrastructure • \$16 million	100% coal	\$16.0
Forecast capital expenditure (2015-16 to 2019-20)		
• <i>Common network</i>	<i>Allocation approach to coal</i>	<i>Coal share (\$ millions)</i>
• \$141.9 million (nominal)	Train paths basis—forecast coal share (94%)	\$133.0
Forecast maintenance costs (2015-16 to 2019-20)		
• <i>Common network</i>	<i>Allocation approach to coal</i>	<i>Coal share (\$ millions)</i>
• \$143.0 million (nominal)	(5) GTK basis – forecast coal share (98%)	\$139.9
Forecast operating costs (excluding working capital)		
• <i>Common network</i>	<i>Allocation approach to coal</i>	<i>Coal share (\$ millions)</i>
• \$37.2 million (nominal)	(6) Train paths basis—forecast coal share (94%)	\$34.9

In the light of the above, Queensland Rail derived a ceiling price of \$34.92/'000 gtk based on the maximum allowable revenue for coal services on the West Moreton network.

Overall, Queensland Rail said that it was incentivised to set a reference tariff that supported a sustainable level of demand for its service.

*Queensland Rail has therefore set its proposed reference tariff at a level that, having regard to a range of factors, will deliver sustainable demand for its service.*³⁵²

³⁵² Queensland Rail, sub. no. 1: 10.

Queensland Rail said that the role of the QCA was to correctly assess whether the reference tariff was within floor and ceiling revenues limits and that it was best placed to set the level of the proposed reference tariff within these parameters.

In this environment, the QCA clearly has a role to ensure that Queensland Rail's proposed price is no greater than a properly determined ceiling price. However, it is appropriate for Queensland Rail to determine the extent of the reduction from the ceiling price as this decision is clearly subject to effective market forces. If Queensland Rail's reference tariff is too high, the market will respond by deferring or reducing demand.³⁵³

Queensland Rail submitted that there was no economic requirement for reference tariffs to be reduced to promote additional volumes and suggested that stakeholders were effectively rent seeking with respect to the level of the reference tariff.

The issue of affordability ... cannot be assessed in the absence of actual evidence before the QCA about the impact of the reference tariff on stakeholder viability as compared to the very significant number of other factors likely to affect a mine's viability. Unsubstantiated assertions from stakeholders seeking to reduce their operating costs is not evidence.³⁵⁴

While customers will certainly argue that Queensland Rail's proposed reference tariff is too high and that it will jeopardise future volumes, this must be recognised as the commercial positioning that it is - clearly it will be to users' commercial benefit if the tariff is reduced and they will strongly argue that this is necessary, regardless of the actual sensitivity of their volume decisions to the access charge.³⁵⁵

On this basis, Queensland Rail proposed a coal reference tariff equivalent³⁵⁶ to that being levied of \$19.14 /'000gtk (as at 1 July 2014).³⁵⁷

Stakeholders' comments

Stakeholders said that Queensland Rail's ceiling price:

- was based on a range of costs that are not efficient³⁵⁸
- overstated the value of the assets given proposed maintenance and capital spending³⁵⁹
- did not reflect that the network was not designed for the purpose of carrying coal traffics.³⁶⁰

Stakeholders said these factors resulted in a reference tariff that was too high and therefore jeopardised future and sunk investments in related markets.³⁶¹ New Hope said the reference tariff was significantly higher than below-rail coal tariffs for comparable networks elsewhere.³⁶² Sekitan said it was concerned about the proposed tariff.³⁶³

³⁵³ Queensland Rail, sub. no. 2: 22.

³⁵⁴ Queensland Rail, sub. no. 1: 9.

³⁵⁵ Queensland Rail, sub. no. 2: 22.

³⁵⁶ Queensland Rail's two-part tariff proposal is equivalent to \$19.41/'000 gtk (as at 1 July 2015).

³⁵⁷ Queensland Rail, sub. no. 2: 5.

³⁵⁸ Aurizon, sub. no. 6: 37; New Hope, sub. no. 9: 22; Yancoal, sub. no. 16: 3.

³⁵⁹ New Hope, sub. no. 9: 3-4, 21; Yancoal, sub. no. 16: 2-3; Aurizon, sub. no. 6: 42, 48-49.

³⁶⁰ Aurizon, sub. no. 6: 42; New Hope, sub. no. 9: 3-4, 20-23; Sekitan, sub. no. 15: 2.

³⁶¹ New Hope, sub. no. 9: 3-4; Sekitan, sub. no. 15.

³⁶² New Hope, sub. no. 9: 5; 28-29.

³⁶³ Sekitan, sub. no. 15: 2-3.

Port of Brisbane said that the proposed pricing model did not facilitate appropriate planning and forecasting for users, and that other predictable and sustainable pricing options should be considered.³⁶⁴

8.3 Regulatory context of our Draft Decision

In assessing Queensland Rail's proposed reference tariff for coal-carrying train services, we have had particular regard to:

- (a) Queensland Rail's legitimate business interests and to enabling Queensland Rail to recover its efficient costs and investments relating to coal-carrying train services
- (b) Users' legitimate interest in not paying for network capacity they are unable to contract, whether that be because those paths are contracted to non-coal traffics or because capacity cannot be contracted due to government-imposed contracting restrictions (required to maintain passenger services³⁶⁵ on the metropolitan system or restrictions on preserved train paths).³⁶⁶

Our Draft Decision is to not approve Queensland Rail's proposed reference tariff as it is inconsistent with the approval criteria in the QCA Act. In particular, Queensland Rail proposed:

- An initial asset valuation that would provide windfall gains to Queensland Rail. Consequently, the proposed return on investment overcompensates Queensland Rail for the regulatory and commercial risks involved (ss. 138(2)(g) and 168A(a)). Windfall gains are not consistent with the efficient investment in and use of the rail infrastructure or the interests of access seekers and holders (s. 138(2)(b), (a), (e) and (h)).
- The recovery of costs that are not deemed to be efficient. The recovery of some costs is not consistent with the pricing principles in the QCA Act (s. 168A(a)) because we consider they are inefficient. It is also not consistent with protecting the legitimate business interests of the owner/operator (s. 138(2)(b)), which includes allowing the owner/operator to recover its efficient costs of providing access to the service.
- Allocating costs to coal services that would allow inefficient price discrimination as it allocates costs to coal-carrying trains for services they are unable to contract, which would be inconsistent with the statutory pricing principles (ss. 138(2)(g) and 168A)).

Our assessment has focused on ensuring Queensland Rail receives a reasonable return on its investment in the West Moreton network for coal-carrying train services, and the recovery of the efficient costs of providing the below-rail service (ss. 138(2)(b) and (g) and 168A(a) of the QCA Act). At the same time, we have also given regard to the other relevant approval criteria, including the efficient operation of, and investment in, Queensland Rail's infrastructure and the interests of access seekers and holders (s. 138(2)(a), (e) and (h)).

While our decision has not given a material weighting to the issue of relative prices of other train services, we do not consider that we must be precluded from taking relative prices into account in the future. Indeed, such comparisons are amongst a range of factors we could give

³⁶⁴ Port of Brisbane, sub. no. 13.

³⁶⁵ *Transport Infrastructure Act 1994*, s. 266.

³⁶⁶ *Transport Infrastructure Act 1994*, s. 266A.

greater weight to when assessing a reference tariff under the approval criteria in the QCA Act, especially in the face of material falling demand on the West Moreton network.³⁶⁷

Based on our investigation, we require Queensland Rail to amend its 2015 DAU as outlined in this Draft Decision. This is based on our consideration of s. 138(2) of the QCA Act, namely:

- (a) the object of Part 5 (s. 138(2)(a))—as it promotes efficient investment in, and operation of, Queensland Rail's declared infrastructure by reflecting the actual investment Queensland Rail has made and will make in its infrastructure that are available for access seekers to contract and will promote effective competition in related markets
- (b) the legitimate business interests of Queensland Rail (s. 138(2)(b) and (c))—as Queensland Rail continues to earn a return on fixed costs we have allocated to coal train services on the basis that they are available for access seekers to contract to transport coal
- (c) the public interest (s. 138(2)(d))—as it promotes the future development of the above-rail market by signalling to customers that they will not have to pay for assets that had reached the end of their expected useful lives, or the costs of providing access to which they are unable to contract
- (d) the interests of access seekers and users of the West Moreton network (s. 138(2)(e) and (h))—as they are not required to pay reference tariffs that include costs for below-rail services that they are unable to contract
- (e) the effect of excluding assets for pricing purposes (s. 138(2)(f))—as excluding assets that have exceeded their expected useful life or are subject to intensive maintenance will not affect the incentive for Queensland Rail to make efficient investments in rail infrastructure
- (f) the pricing principles (ss. 138(2)(g) and 168A)—as it provides a return on Queensland Rail's investments and efficient costs to provide access for coal-carrying train services based on what they are able to contract
- (g) Other relevant matters (s. 138(h))—as the QCA is mindful of including the direct costs incurred by Queensland Rail in providing access for the below rail service, but not costs associated with losses arising from increased competition.

To the extent that Queensland Rail proposes further examination of aspects of non-coal pricing as part of our investigation into the 2015 DAU, then we may give a greater weighting in our final decision to the above-mentioned matters.

While Queensland Rail's application did not seek an assessment of revenue adequacy for non-coal train services, we consider that any anticipated shortfall in non-coal revenue is a commercial matter for Queensland Rail and that reference tariffs for coal services should not recover costs for services coal customers are unable to contract. This would be inconsistent with s.168A(b) as this would give rise to inefficient price discrimination.

Queensland Rail notes that there has been a significant reduction in West Moreton network non-coal freight due to competition from road transportation.³⁶⁸ To the extent that Queensland

³⁶⁷ We note that we did not make 'numerous mentions' of the short term price outcomes for economic viability, as asserted in Queensland Rail's submission (Queensland Rail, sub. no. 1: 9). While we looked at 'relative prices' in our October 2014 Draft Decision (see p. 153) we did not take 'affordability' into account then and have not done so this time.

³⁶⁸ Queensland Rail, sub. no. 2: 18-19.

Rail's proposed reference tariff is seeking compensation (in the form of cross-subsidisation) for losses resulting from increased competition, this may be inconsistent with the QCA Act.

In the light of the above, there is also a *prima facie* case that the QCA should consider the 2015 DAU³⁶⁹ provisions for reducing the value of assets contained in a regulatory asset base where demand for access has deteriorated to such an extent that regulated prices based on an unoptimised asset value would result in a further decline in demand for access.

While optimisation could be applied with respect to coal and non-coal services' share of the common network, we are presently minded to approve reference tariffs for coal-carrying train services as part of our consideration of the 2015 DAU.

8.4 Volumes and allocation of common network costs

8.4.1 Allocation of common network costs

Queensland Rail's proposal is based on allocating the costs of the shared parts of the West Moreton common network between coal and non-coal traffics in order to justify a ceiling price for coal-carrying train services. We support this approach.

This section outlines our approach to allocating common network costs and volume forecasts to be used for pricing purposes.

Queensland Rail's 2015 DAU proposal

Queensland Rail said its 2015 DAU has been developed in light of a material fall in demand for below-rail services on the West Moreton network.

The circumstances have changed from those at the time of Queensland Rails' 2013 DAU as the network is no longer contracted at, or near, its operating capacity.

The number of forecast weekly return train paths for pricing purposes, compared to contracted levels used in the 2013 DAU, is 63 compared with 77 for coal and 3 compared with 29 for non-coal services.³⁷⁰ This represents reductions of 18 per cent and 90 per cent for coal and non-coal train services, respectively.

Queensland Rail said that this necessitated a different approach to allocate common network costs to coal traffics for pricing purposes. Queensland Rail's proposed ceiling price is based on a mix of the allocators, namely:

- train paths available to be contracted for coal services and system capacity, in recognition of metropolitan contracting restrictions (opening asset value)
- coal's share of forecast train paths (forecast capital expenditure and operating costs)
- coal's share of forecast gtk (maintenance costs).

³⁶⁹ Queensland Rail, 2015 DAU, Schedule E, Maintaining the Regulatory Asset Bases, Clause 1.2(b).

³⁷⁰ Queensland Rail, sub. no. 2: 16-20.

Queensland Rail said that it proposed to cap coal's share of the opening asset value in recognition of restrictions on its ability to contract access rights for coal services to operate through the Metropolitan network. Queensland Rail said:

*This approach is consistent with the overarching objectives established by the QCA ... of balancing Queensland Rail's right to recover its costs from users with mining customers' right to not be required to pay for capacity that they are not permitted to use.*³⁷¹

In relation to other common network costs (maintenance, operating and forecast capital expenditure), Queensland Rail said that unless costs were allocated based on forecast usage it would not achieve revenue adequacy due to the significant spare capacity on the common network.

*Queensland Rail will be prevented from recovering all of the efficient costs of providing access to the rail infrastructure to the extent that there are any unused paths*³⁷²

Queensland Rail said its approach provided it the best opportunity to recover its efficient costs, even though it proposed to set reference tariffs below this ceiling limit.³⁷³

Queensland Rail's rationale for allocating common network costs is summarised in **Table 8.2** below.

Table 8.2 Queensland Rail's rationale for allocating common network costs

<i>Allocation</i>	<i>Queensland Rail's rationale</i>
Opening asset value	<p><i>Queensland Rail ... acknowledges that there are a number of factors that restrict it in its ability to contract the full amount of the capacity created by the existing assets (and which is reflected in the opening asset value as at 1 July 2015). The two main constraints are:</i></p> <ul style="list-style-type: none"> <i>preserved freight and passenger train paths from Rosewood to Toowoomba, which is currently 13 paths for freight and two for passenger services; and</i> <i>Queensland Rail's Responsible Ministers³⁷⁴ have specified a constraint of 87 coal paths per week through Metropolitan network.</i>³⁷⁵ <p><i>Queensland Rail therefore considers that it is reasonable that the extent of the opening asset value as at 1 July 2015 that is allocated to coal under the train path allocation methodology is capped to reflect the effect of these constraints. In particular, the binding constraint is the maximum 87 coal paths per week, limiting the proportion of the capacity of the West Moreton network that can potentially be contracted to coal to 87 out of 112 available paths, or 77.7%.</i>³⁷⁶</p>
Maintenance costs	<p><i>For the purpose of allocating maintenance costs, while not all maintenance activities are volume-dependent Queensland Rail considers that the allocation measure should be based on the expected level of activity in coal and non-coal services. Forecast volumes is the best indicator of expected activity on the network.</i>³⁷⁷</p>

³⁷¹ Queensland Rail, sub. no. 2: 48.

³⁷² Queensland Rail, sub. no. 2: 46.

³⁷³ Queensland Rail provided a report by PwC outlining factors relevant for Queensland Rail to determine a reference tariff below a ceiling price (sub. no. 2: Attachment 1).

³⁷⁴ Queensland Rail, 17 July 2015 response to the QCA's request for additional information clarified that the restriction was advised by the Department of Transport and Main Roads.

³⁷⁵ Queensland Rail, sub. no. 2: 48.

³⁷⁶ Queensland Rail, sub. no. 2: 48.

³⁷⁷ Queensland Rail, sub. no. 2: 52.

Allocation	Queensland Rail's rationale
Operating costs	<i>Queensland Rail's key concern with the use of total available paths in allocating operating costs is that it will mean that it will not be able to fully recover its efficient costs ... By using Queensland Rail's general train path allocator [share of forecast train paths], Queensland Rail will have opportunity to fully recover the assessed efficient operating costs from the services that are expected to use the infrastructure.³⁷⁸</i>
Forecast capex	<i>An allocation based on total available paths is considered completely inappropriate as it will prevent Queensland Rail from recovering the efficient costs of investing in the network ... An infrastructure owner cannot expect to commit to what will become a sunk investment on the basis that only a portion of those costs can be allocated to existing users. Queensland Rail therefore considers that the allocation measure must be based on forecast expected usage, not total available paths.³⁷⁹</i>

Stakeholders' comments

New Hope said Queensland Rail's proposed allocation approach to certain common network costs resulted in coal services being required to compensate Queensland Rail for reductions in demand for non-coal traffics.³⁸⁰ New Hope said that this would not provide an incentive to Queensland Rail to promote the efficient use of the network and therefore be inconsistent with the object of the Part 5 of the QCA Act.

New Hope also said Queensland Rail's inability to recover non-coal's share of costs, due to declining demand for non-coal services, was Queensland Rail's commercial risk and that Queensland Rail's proposed allocation approach had the effect of transferring Queensland Rail's risk to coal producers.³⁸¹ New Hope said:

... the regulatory framework need not (and should not) offer any assurance as to the recovery of costs attributable to services that do not fall within the same regulatory framework. The risk to cost recovery posed by declining demand for non-coal services is a commercial risk that is properly borne by QR, or which should be shared by non-coal users.³⁸²

New Hope supported allocating costs on the basis of available capacity rather than forecast usage to overcome the risk that the costs of declining non-coal traffic would be borne by coal traffic.

Specifically, New Hope proposed that common network costs should be allocated on the basis of:

- fixed costs based on the higher of coal's forecast or contracted paths as a share of system capacity
- costs that vary with usage (variable costs) based on coal's share of forecast usage
- recognition provided for restrictions on the number of coal services able to be contracted and metropolitan capacity constraints.³⁸³

³⁷⁸ Queensland Rail, sub. no. 2: 54.

³⁷⁹ Queensland Rail, sub. no. 2: 55-56.

³⁸⁰ New Hope, sub. no. 9: 24-25.

³⁸¹ New Hope, sub. no. 9: 27.

³⁸² New Hope, sub. no. 9: 25.

³⁸³ New Hope, sub. no. 9: 25-26.

In addition, New Hope said that recognition of operational restrictions on coal traffics operating through the Metropolitan network should also be incorporated within any proposed allocation of costs to coal traffics.³⁸⁴

QCA analysis and Draft Decision

We support common network costs being allocated amongst the different classes of users in the West Moreton network. However, we are not approving Queensland Rail's proposed approach of allocating various fixed costs of the common network.

The material reduction in demand for West Moreton network train paths necessitates an efficient approach of allocating common network costs in the presence of spare capacity.

Previous considerations of West Moreton network pricing were undertaken in the context of available capacity being potentially insufficient to satisfy all requests for access rights.³⁸⁵ The 2015 DAU has been developed by Queensland Rail in a fundamentally different market demand context. Queensland Rail's 2015 DAU forecast weekly volumes are:

- 62.8 coal train paths (53 contracted and 9.8 ad hoc services), while the 2013 DAU was based on 77 contracted coal paths (at the maximum level permitted by the government³⁸⁶)
- 3 weekly non-coal return services on the West Moreton network. In comparison, the 2013 DAU assumed 29 contracted weekly return services for non-coal traffic.

A key driver underpinning Queensland Rail's proposed ceiling price of \$34.92/'000 gtk is the significant reduction in expected railings, as it proposes to allocate all maintenance, operating, capital expenditure to remaining forecast traffics, which are predominantly coal.

We propose to cap coal traffics' share of fixed costs (such as common network assets, fixed maintenance and operating costs) based on contracting restrictions associated with the Metropolitan network. This approach is consistent with Queensland Rail's proposed approach to allocating the fixed costs associated with West Moreton network initial asset value. But we have taken this principle to apply to all of Queensland Rail's fixed costs, not just its sunk assets.

Generally, regulators support allocating all of a regulated business's efficient costs to determine ceiling prices, as this provides the business with a reasonable opportunity to recover the efficient costs of investing in and operating the service to provide access. But coal train services should not be required to pay for services that they are not able to contract to use.

Queensland Rail's proposal would result in costs associated with providing access to non-coal services being recovered from coal traffics that cannot access this capacity.

We do not believe that Queensland Rail's proposal to price discriminate on this basis would aid efficiency as coal traffic bearing the costs of capacity that they cannot contract for has a material impact on a mixed traffic system like the West Moreton network. We also do not propose to accept New Hope's approach to allocate common network costs, as it would not give any consideration to the costs of spare capacity available for coal services to contract.

Coal traffics should only pay for the fixed common network costs of the paths they are able to contract to use. Moreover, we are concerned that Queensland Rail's approach would result in

³⁸⁴ New Hope, sub. no. 9: 26.

³⁸⁵ This underpinned reference tariffs being developed on the basis of a maximum access charge that could be quoted to all traffics.

³⁸⁶ While contracting restrictions for coal are at 87 weekly services, ten paths are currently contracted to operate through the Metropolitan network, but not traverse the West Moreton network.

losses in its non-coal below-rail business arising from increased competition being recovered from coal train services.

Our assessment of allocating common network costs has focused on ensuring Queensland Rail receives a reasonable return on its investment in the West Moreton network for coal-carrying train services, and recovers efficient costs of providing the below-rail service in order to develop a reference tariff (s. 138(2)(b) and (g) and 168A(a) of the QCA Act). Queensland Rail's legitimate business interests to recover its efficient costs and investments relating to the coal-carrying train services provided by the West Moreton network is an important factor in our decision.

We have given a greater weighting to the users' legitimate interest in not paying for network capacity they are unable to contract, whether because those paths are contracted to non-coal traffics or because capacity cannot be contracted due to government-imposed contracting restrictions (required to maintain passenger services³⁸⁷ on the metropolitan system or restrictions on preserved train paths that cannot be contracted by coal services).³⁸⁸

At the same time, we have also given regard to other relevant approval criteria, including the efficient operation, use of and investment in Queensland Rail's infrastructure and the interests of access seekers and holders (s. 138(2)(a), (e) and (h)).

A summary of the QCA's approach to allocating common costs is in **Box 8.1**

³⁸⁷ *Transport Infrastructure Act 1994*, s. 266.

³⁸⁸ *Transport Infrastructure Act 1994*, s. 266A.

Box 8.1: Allocating common West Moreton network costs

Constraints on the number of coal services that are able to be contracted to operate through the Metropolitan network (a maximum of 87 paths per week) necessitates an appropriate allocation of common costs. Users of a service should not bear the costs of access that they cannot contract.

Using demand information to allocate common costs so that the highest prices are paid by the users that receive the highest value moves consumption and production toward efficient levels.

If all costs were variable with usage, then all costs could be attributed to specific traffics based on forecasts. However, most below-rail infrastructure costs are common and fixed. Therefore, we are required to make a decision as to the most efficient allocation of common network costs in light of constraints on contracted coal services.

In order to allocate common network costs on a mixed traffic system, we propose a consistent approach that reflects the following.

Guiding allocation principle: *Common network costs should be apportioned to coal train services based on an appropriate allocation factor:*

- *fixed costs being allocated based on the relative proportion of the network capacity available to coal services to contract—that is, based on coal services' maximum proportion of total available paths*
- *variable costs being allocated based on the relative volume forecast for all train services, as variable costs are directly affected by volumes.*

Identification of fixed and variable costs for the common network has been undertaken in the following manner:

- **Fixed common network costs**—those costs that do not vary with usage. These include:
 - common network assets used to determine capital charges (return on and return of capital). This should apply to all assets and forecast investments required for the common network
 - common network maintenance activities that are required to be undertaken irrespective of volumes. These include aspects of maintenance relating to visual inspections, earthworks, fire and vegetation management, signals and fixed structures (such as bridges)
 - common network operating costs for activities undertaken irrespective of volumes. These include engineering services, telecommunications, legal, information technology and working capital requirements.
- **Variable common network costs**—those costs that vary with usage. These include:
 - common network maintenance activities required as traffic volumes increase. These relate to addressing the wear and tear caused by traffics, major variable costs are related to gross tonnage and impact track geometry correction (resurfacing), rail head correction (rail grinding) and ballast cleaning
 - common network operating costs that vary with the traffic task include hourly rates for train controllers (but not the fixed costs associated with providing train control functions) and business management functions.

Revenue adequacy for coal services—a fully allocated approach

Coal train services' share of common network costs will be fully allocated to remaining coal traffics. This approach is compatible with our objective to provide regulated entities with a reasonable opportunity to recover the efficient costs of investing in and operating infrastructure assets to provide access to a regulated service.

Draft Decision

- 8.1** After considering Queensland Rail's proposed allocation of common network costs, our Draft Decision is to refuse to approve Queensland Rail's proposal.
- 8.2** The QCA requires Queensland Rail to amend its 2015 DAU so that common network costs of the West Moreton network are apportioned to coal train services based on an appropriate allocation factor such that:
- (a) fixed costs be allocated based on the relative proportion of the network capacity available to coal services to contract—that is, based on coal services' proportion of total available paths
 - (b) variable costs be allocated based on the relative volume forecast for all train services, as variable costs are directly affected by volumes.
 - (c) Queensland Rail will be entitled to recover these costs from coal-carrying train services, with coal train services making a contribution to the costs of any spare capacity they can contract.
- 8.3** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

8.4.2 Volumes for coal pricing purposes

Forecast traffic levels are an important component of Queensland Rail's proposed coal train service ceiling price and therefore reference tariffs.

More generally, below-rail infrastructure services exhibit significant economies of density in which total costs increase at a lower rate than the growth in traffic, all other things being equal.³⁸⁹ This has the effect of a declining average cost curve as traffics increase.

Traffic forecasts are important because any variation from forecast will result in a corresponding variation to revenues from access charges. Minimising volume risk in the first instance by using the best forecast information also means the parties best placed to manage volume risk are able to do so.

Queensland Rail's proposal

Queensland Rail proposed using demand forecasts for the purposes of:

- allocating certain costs associated with the common network to coal and non-coal train services
- determining the ceiling price for coal traffics.

Queensland Rail said forecast (as opposed to contracted) traffic volumes provided the best estimate of expected train services as coal³⁹⁰ and non-coal services³⁹¹ were operating above contracted levels. Based on this approach, Queensland Rail forecast 62.8 weekly return coal services and three non-coal services. The forecast gross tonne kilometres for the West Moreton network are shown in **Table 8.3** below.

³⁸⁹ Economies of density apply to the extent that spare capacity is available and the network configuration, technology and input costs are constant.

³⁹⁰ Queensland Rail, sub. no. 2: 16-17.

³⁹¹ Queensland Rail, sub. no. 2: 20.

Table 8.3: Queensland Rail's 2015 DAU West Moreton network annual volume forecast

	<i>Rosewood to Jondaryan</i>	<i>Jondaryan to Columboola</i>	<i>Total West Moreton Haul</i>
	'000 gtk	'000 gtk	'000 gtk
Coal train services	1,666,223	444,155	2,110,379
Non-coal train services	30,916	14,873	45,789
Total	1,697,139	459,028	2,156,168

Note: Excludes metropolitan forecasts as these are not directly used to derive Queensland Rail's ceiling price.

Source: Queensland Rail, sub. no. 2: 20.

8.4.3 Volume forecasts for non-coal train services

Queensland Rail's 2015 DAU proposal

Queensland Rail said that since it lodged its 2013 DAU proposal, all non-coal freight access agreements had expired and not been renewed and that it currently maintained two weekly return passenger services and only one return freight service.³⁹²

Queensland Rail said the outlook for non-coal train services, predominantly agricultural products, was subject to range of seasonal issues and competition from road transportation.

Demand for these services is inherently seasonal, with production influenced by climatic conditions from year to year. Volumes are influenced by a number of factors, including rainfall and climate, economic conditions, world prices, exchange rates and government policies (including trade agreements). For example, in recent years there has been a significant drop in livestock volumes as a consequence of the drought.

However, in the longer term, the key issue for the West Moreton Network is the transfer of non-coal volumes from rail to road. In the last few years, Queensland Rail has observed a dramatic reduction in non-coal freight transported on the West Moreton Network, due to a transfer of transport mode to road.³⁹³

Queensland Rail also noted the contrast with non-coal volumes used in its 2013 DAU proposal, in which contracted services were at 29 return paths per week (27 of which were for non-coal freight services, and two for passenger services).³⁹⁴

Stakeholders' comments

Aurizon noted three factors underpinning non-coal traffic demand in the current market environment:³⁹⁵

- drought conditions having a direct adverse impact on the regional freight task
- reluctance of non-coal end-users to enter into access agreements with take or pay obligations, preferring ad hoc services that cannot require take or pay payments
- rail's overall competitiveness with road transportation.

³⁹² Queensland Rail, sub. no. 2: 20.

³⁹³ Queensland Rail, sub. no. 2: 18-19.

³⁹⁴ Queensland Rail, sub. no. 2: 20.

³⁹⁵ Aurizon, sub. no. 6: 36.

Aurizon said non-coal traffic forecasts could be verified against Queensland Rail's actual non-coal railings and Queensland Rail's projections of forecasts.³⁹⁶

QCA analysis and Draft Decision

For the purposes of this draft decision, we have accepted Queensland Rail's non-coal volume forecasts for services operating on the West Moreton network.

In light of the significant uncertainty about non-coal volumes on the West Moreton network and given that Queensland Rail has not proposed reference tariffs for these traffics; we have taken a practical approach to this matter.

We have used Queensland Rail's volume forecasts as the basis of allocating Queensland Rail's variable costs between coal and non-coal train services required for the common network. That said, to the extent we have better forecast information we will take this into account when making future decisions in relation to these matters.

Our approach appropriately balances the legitimate business interests of Queensland Rail with the interests of access seekers/holders given uncertainties about future non-coal demand, including competition from road transportation.

Draft Decision

8.4 After considering Queensland Rail's proposed volume forecasts for non-coal traffics, our Draft Decision is to approve Queensland Rail's proposal.

8.5 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.

8.4.4 Demand forecasts for coal train services

Queensland Rail's 2015 DAU proposal

Queensland Rail's 2013 DAU was developed when coal paths were contracted at the maximum level that Queensland Rail was permitted to contract through the Metropolitan network.³⁹⁷

In the material supporting its 2015 DAU, Queensland Rail said that contracted coal paths had decreased due to the closure of the Wilkie Creek mine. However, Queensland Rail also said that it forecast an additional 9.8 weekly return ad hoc services being operated during the term of the undertaking.

On this basis Queensland Rail's 2015 DAU pricing was developed on the basis of a total coal volume forecast of 62.8 weekly return coal train services (53 weekly contracted paths, plus 9.8 forecast ad hoc paths).

Stakeholders' comments

Stakeholders questioned the extent to which Queensland Rail's forecast for coal train services was reasonable. However, stakeholders did not object to the use of a forecast for pricing purposes.

³⁹⁶ Aurizon, sub. no. 6: 37.

³⁹⁷ Queensland Rail is permitted to contract a maximum of 87 weekly return paths through the Metropolitan network. However, Queensland Rail already has 10 paths contracted to operate through the Metropolitan network, but not traverse the West Moreton network. This results in 77 coal train paths being available to be contracted to operate from the West Moreton network through to the Port of Brisbane.

Aurizon said that we should obtain production estimates from coal mines and then assess them in order to estimate forecast coal volumes.³⁹⁸

New Hope said that Queensland Rail's forecasts were pessimistic in light of existing mine production capacities.³⁹⁹ New Hope said the Cameby Downs and the New Acland mines were permitted to produce and rail significantly more than the volumes being forecast by Queensland Rail, and it expected weekly railings to be 69.39 return paths from 2015 to 2017, increasing to 79.59 paths for the remainder of the regulatory period.⁴⁰⁰

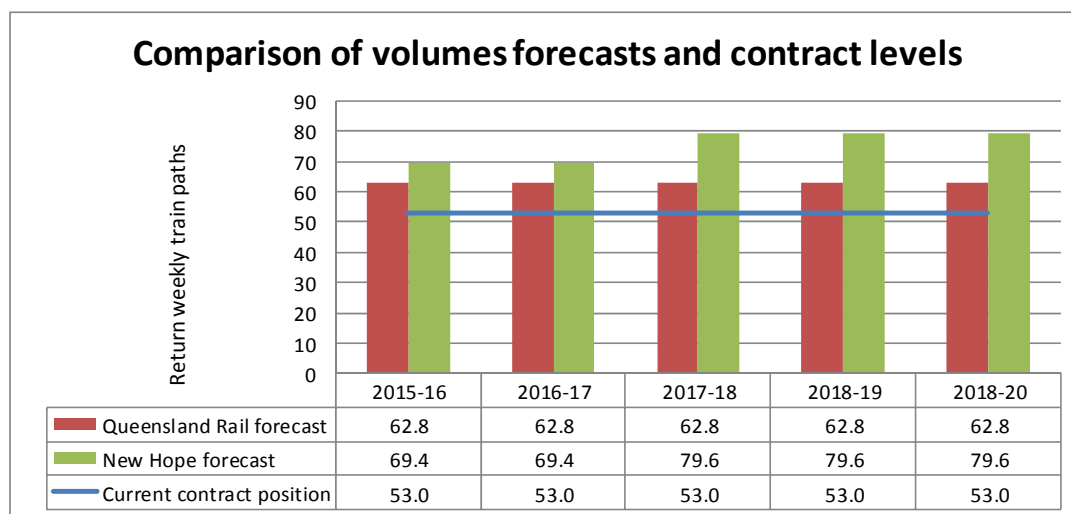
QCA analysis and Draft Decision

We propose to accept Queensland Rail's volume forecasts for coal train services as the basis for setting initial reference tariffs for the purposes of this Draft Decision. Queensland Rail's proposal represents a reasonable estimate, given the uncertainties over future contracting levels and the presence of available capacity to be contracted for coal services.

However, we also propose to address volume risk uncertainty in the context of the form of regulation by means of a volume trigger mechanism.⁴⁰¹

Therefore, our review of volume forecasts has been focused on reasonableness for the purposes of setting the initial reference tariffs for this Draft Decision. **Figure 8.1** below highlights that stakeholders agree that current contracted levels are not representative of expected volume over the regulatory period.

Figure 8.1: 2015 DAU coal volume forecasts and current contract position



Note: Current contract position is the number of contracted coal train paths originating from the West Moreton Network.

Contracted coal train paths have decreased since Queensland Rail's 2013 DAU submission due to the closure of the Wilkie Creek mine. This has resulted in contracted coal capacity being 53 weekly return services—24 fewer paths than Queensland Rail is able to contract on the West Moreton network.

³⁹⁸ Aurizon, sub. no. 6: 37.

³⁹⁹ New Hope, sub. no. 19: 2.

⁴⁰⁰ New Hope, sub. no. 19: 3.

⁴⁰¹ These matters are addressed in section 8.9.1 of this Draft Decision.

However, Queensland Rail said that while the Wilkie Creek mine had closed, it not only had a current access application for haulage from this mine⁴⁰² but also another coal access application that were seeking an additional 42 coal paths in total.⁴⁰³

Therefore we propose to accept Queensland Rail's volume forecasts for the purposes of this Draft Decision to develop reference tariffs, subject to our proposed volume risk arrangements as outlined in section 8.9.1 of this Draft Decision.

Our approach appropriately balances the legitimate business interests of Queensland Rail and the interests of access seekers/holders given uncertainties with future coal demand forecasts and existing contract levels.

Draft Decision

8.6 After considering Queensland Rail's proposed volume forecasts for coal traffics, our Draft Decision is to approve Queensland Rail's proposal.

8.7 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.

8.5 Forecast maintenance costs

The assessment of the maintenance cost allowance for deriving the reference tariff for coal-carrying train services on the West Moreton network involves reviewing both the:

- total maintenance costs allowance for the West Moreton network
- allocators for determining the coal services' share of the maintenance costs.

8.5.1 West Moreton network maintenance costs

Our 2014 Draft Decision considered maintenance costs for the four year period July 2013 to June 2017. Since the first two years in the 2015 DAU proposal overlap with the period in the 2013 proposal, the forecast costs can be compared.

Queensland Rail's 2015 DAU proposal

In the 2015 DAU, Queensland Rail estimated total maintenance costs of \$143.0 million for the five-year period July 2015 to June 2020.⁴⁰⁴

The new proposal projects, in comparison to Queensland Rail's 2013 proposal:

- lower resleeper costs (around \$17 million compared with \$24 million in the 2013 DAU) due to reduced scope (i.e. fewer sleepers requiring replacement) and lower unit cost compared with the 2013 DAU. Queensland Rail also proposed undertaking the resleeper works in a single year (2015–16) compared to its 2013 proposal of spreading it over two years (2015–17)⁴⁰⁵
- an increase in the other maintenance costs due to a new provision for asset management costs and additional allowances for rail renewal and rail management activities.⁴⁰⁶

⁴⁰² Queensland Rail, sub. no. 2: 18.

⁴⁰³ Queensland Rail, sub. no. 2: 21.

⁴⁰⁴ Queensland Rail, sub. no. 2: 41; sub. no. 2, Appendix 6: 22.

⁴⁰⁵ Queensland Rail, sub. no. 2: 41-43, sub. no. 2, Appendix 4: 40, June 2013b: 3; B&H, May 2014: 7-8; QCA, October 2014: 123.

⁴⁰⁶ Queensland Rail, sub. no. 2: 43.

Queensland Rail said it had analysed its 2015 DAU maintenance programme amidst the forecast decline in volume and stated:

However, the downward variation [in maintenance] associated with the current reduced volume outlook has been outweighed by the factors contributing to an increase in maintenance costs ... [presumably referring to the factors for an increase in the other maintenance costs].⁴⁰⁷

Queensland Rail said its maintenance cost proposal did not include a provision for derailments or flooding events. Queensland Rail stated that if a significant event occurred, it might submit a reference tariff variation request or request a one-off contribution from end-users.⁴⁰⁸

Stakeholders' comments

Stakeholders said that Queensland Rail's proposed maintenance costs were excessive and reflected inefficiencies.⁴⁰⁹ New Hope considered that efficient maintenance costs for the West Moreton network should be around \$9.5 million per annum (and not \$28.6 million per annum proposed by Queensland Rail).

Stakeholders also said that the proposed maintenance costs reflected neither the expected decline in volumes nor the effect of any efficiency improvements that would arise from the capital expenditure projects.⁴¹⁰

QCA analysis and Draft Decision

Our Draft Decision proposes total maintenance costs of \$114.6 million, which is 80 per cent of Queensland Rail's proposed costs of \$143.0 million.

In arriving at our Draft Decision, we have considered many aspects of Queensland Rail's maintenance cost proposal are acceptable—for example, costs relating to track monitoring and signalling maintenance. However, our Draft Decision is that aspects of Queensland Rail's maintenance cost proposal are excessive in scope (for example costs relating to track maintenance) and some aspects are capital in nature (for example, ballast undercutting activity).

QCA's approach to total maintenance costs

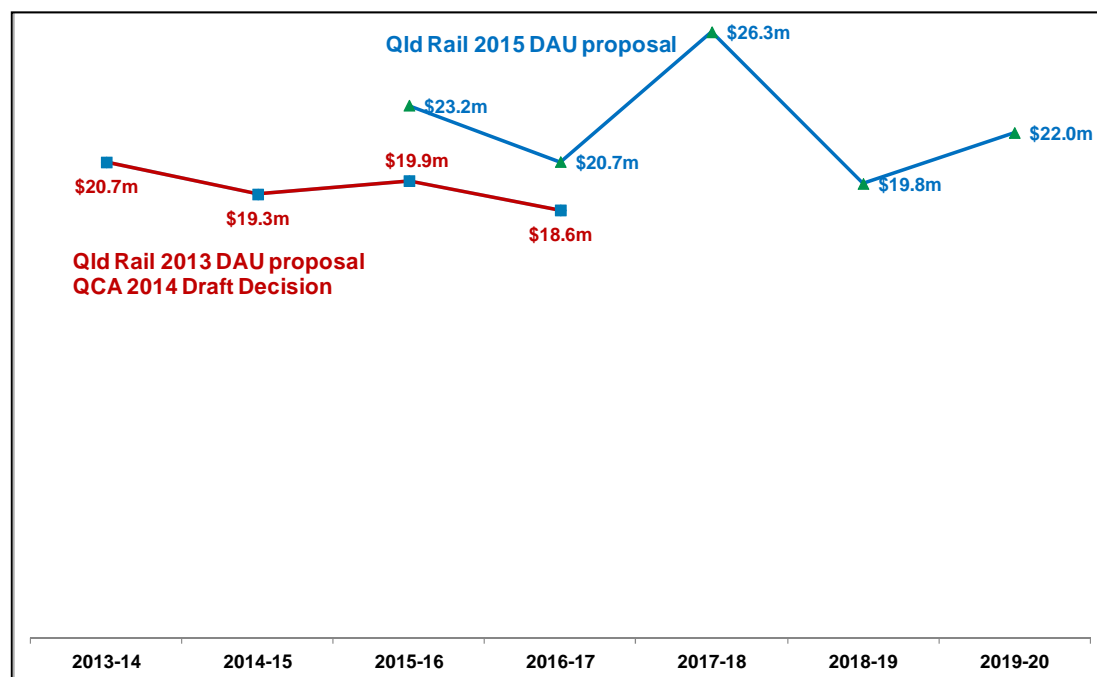
Excluding the one-off resleeper costs, the other maintenance costs proposed in the 2015 DAU show a significantly higher level than those proposed in the 2013 DAU (**Figure 8.2**). Therefore, as part of our assessment, we engaged B&H Strategic Services (B&H) to independently assess Queensland Rail's proposed 2015 DAU maintenance costs, including resleeper costs.

⁴⁰⁷ Queensland Rail, sub. no. 2: 43.

⁴⁰⁸ Queensland Rail, sub. no. 2: 41.

⁴⁰⁹ Aurizon, sub. no. 6: 37; New Hope, sub. no. 9: 22; Yancoal, sub. no. 16: 3.

⁴¹⁰ Aurizon, sub. no. 6: 37-38; New Hope, sub. no. 9: 22-23.

Figure 8.2 Maintenance costs (excluding resleeper costs), in June 2014 dollars

Source: QCA calculation based on data reported in *Queensland Rail*, June 2013b: 3; QCA, 2014 Draft Decision: 123; *Queensland Rail*, sub. no. 2, Appendix 4: 40, sub. no. 2, Appendix 6: 22.

B&H's assessment of total maintenance costs

B&H assessed that aspects of Queensland Rail's proposed maintenance costs were reasonable—for example, costs relating to asset management, inspections and monitoring, signalling and telecommunications maintenance, management of rail joints, rail grinding and repairs to bridges, rail and fences.⁴¹¹

However, B&H assessed that several aspects of Queensland Rail's proposed maintenance costs were excessive in scope (due to other related maintenance activities and lower forecast volumes) or excessive in cost (due to higher unit costs). For example:

- Ballast maintenance and resurfacing allowances—B&H observed that Queensland Rail's proposed rail joint elimination and management program was a proven strategy to reduce the need for resurfacing and ballast usage but that program had little effect on the proposed resurfacing and ballast usage and improvement strategies. Therefore, B&H suggested reducing the ballast maintenance and resurfacing allowances.⁴¹²
- Resleeper costs—B&H observed that Queensland Rail's proposed unit sleeper cost was excessive considering the track configuration and lower forecast volume, and recommended a unit sleeper rate of \$242.⁴¹³

B&H also considered that some aspects of Queensland Rail's proposed maintenance activities were capital in nature. For example, B&H observed that ballast undercutting has the effect of prolonging the life of the formation and in that respect it is essentially the same as formation repair and strengthening (a capital expenditure item). Therefore, B&H suggested combining

⁴¹¹ B&H, September 2015: 3-26.

⁴¹² B&H, September 2015: 13, 18-20.

⁴¹³ B&H, September 2015: 23-25. The \$242 unit rate is equivalent to the B&H recommended unit rate of \$233 (in June 2014 dollars).

ballast undercutting and formation repair and strengthening as one activity under the capital program.⁴¹⁴

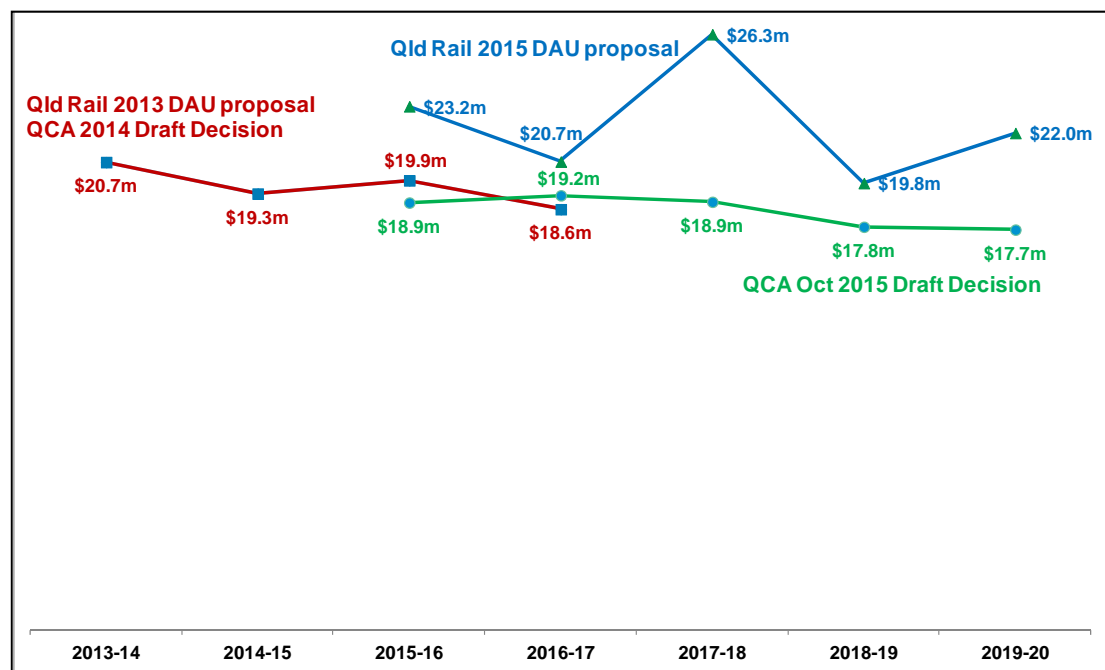
Ultimately, B&H recommended total maintenance costs allowance of \$114.6 million⁴¹⁵ for the West Moreton network in the 2015 DAU.

QCA's draft position on total costs

We accept B&H's assessment that aspects of Queensland Rail's proposal are excessive and unreasonable. We consider Queensland Rail's proposal would allow it to recover inefficient costs, which is inconsistent with the pricing principles in the QCA Act (s. 168A(a)). That would also be inconsistent with protecting the legitimate business interests of the owner/operator (s. 138(2)(b)), which includes allowing the owner/operator to recover its efficient costs of providing access to the service. It would also not be in the interests of access seekers and access holders and would not promote the efficient use of the network, having regard to s. 138(2)(a), (e) and (h).

Based on B&H's recommendation, we consider as acceptable total maintenance costs of \$114.6 million in the 2015 DAU. Excluding the one-off resleeper costs of \$13.7 million that we consider acceptable, the other maintenance costs show a trend consistent with the costs we were minded to accept in our 2014 Draft Decision (**Figure 8.3**).

Figure 8.3 Maintenance costs (excluding resleeper costs), in June 2014 dollars



Source: QCA calculation based on data reported in Queensland Rail, June 2013b: 3; QCA, 2014 Draft Decision: 123; Queensland Rail, sub. no. 2, Appendix 4: 40, sub. no. 2, Appendix 6: 22; B&H, September 2015: iii.

We consider the maintenance costs we are minded to accept in the 2015 DAU represent efficient costs for maintaining the West Moreton network and will promote the efficient use of the network. They are also in the legitimate business interests of Queensland Rail (as they will allow Queensland Rail to recover its efficient costs of providing access to the service) and in the

⁴¹⁴ B&H, September 2015: 12.

⁴¹⁵ This is equivalent to the B&H recommended total maintenance cost of \$105.8 million (in June 2014 dollars), B&H, September 2015: iii.

interests of access seekers/holders, having regard to s. 138(2)(a), (b), (e), (g) and (h) of the QCA Act.

8.5.2 Coal services' share of maintenance costs

Our 2014 Draft Decision had accepted Queensland Rail's proposed approach of allocating maintenance costs based on relative forecast volumes of coal and non-coal services, which resulted in an allocation of about 90 per cent of maintenance costs to coal services.⁴¹⁶

Queensland Rail's 2015 DAU proposal

In the context of the 2015 DAU, Queensland Rail stated that not all maintenance activities were volume-dependent. However, Queensland Rail proposed allocating maintenance costs between coal and non-coal services based on their relative forecast volumes, which it said was the best indicator of the expected level of activity on the network. Queensland Rail said its proposed allocation approach was consistent with its 2013 DAU proposal.⁴¹⁷

In the 2015 DAU Queensland Rail has allocated around 98 per cent of the total maintenance costs to coal services and used the resultant \$139.9 million costs to derive the reference tariff for West Moreton coal services in the 2015 DAU.⁴¹⁸

Stakeholders' comments

New Hope said that there was a general causal link between maintenance costs and rail volumes, but was concerned that Queensland Rail's proposal did not adequately take into account the impact of declining demand on the proposed maintenance costs.⁴¹⁹ New Hope added that:

In the event that QR successfully argues that it has little or no opportunity to reduce maintenance costs despite substantial reduction in volumes, we suggest that maintenance costs must be allocated using the method which is applied to fixed costs (i.e. coal usage/capacity).⁴²⁰

New Hope also said that Queensland Rail's inability to recover fully the non-coal share of fixed costs as non-coal volume declined was Queensland Rail's commercial risk and that Queensland Rail's proposed allocation approach had the effect of transferring that risk to coal producers.⁴²¹

QCA's analysis and Draft Decision

Our Draft Decision proposes allocating \$89.6 million to coal services, which is about 78 per cent of the total maintenance costs that we are minded to accept.

Our Draft Decision reflects our view that it is appropriate to identify the fixed and variable components of the maintenance costs. We consider it is appropriate for coal services to pay for the portion of the fixed costs reflecting the part of the network they can access—that is, an allocation based on the relative train paths available for contracting by coal services (see Section 8.4.1 of this Draft Decision). We also consider it is appropriate to allocate the variable costs based on the relative volumes of coal services.

⁴¹⁶ QCA, October 2014: 123.

⁴¹⁷ Queensland Rail, sub. no. 2: 52.

⁴¹⁸ Queensland Rail, sub. no. 2: 52-53.

⁴¹⁹ New Hope, sub. no. 9: 23.

⁴²⁰ New Hope, sub. no. 9: 27.

⁴²¹ New Hope, sub. no. 9: 27.

QCA's approach to determining coal services share of maintenance costs

The forecast traffic volume in the 2015 DAU is significantly lower than that in the 2013 DAU while Queensland Rail's proposed average maintenance cost is slightly higher. For example:

- the annual average volume is lower by 28 per cent when comparing the 2.2 billion gtk in the 2015 DAU with the 3.0 billion gtk in the 2013 DAU.⁴²²
- the annual average cost per track kilometre (a measure of unit cost) is slightly higher by one per cent when comparing the \$68,044 proposed in the 2015 DAU with the \$67,126 proposed in the 2013 DAU.⁴²³

This data indicates that the relation between maintenance costs and traffic volume is weak. We also note that Queensland Rail acknowledged that not all maintenance activities were volume-dependent and stakeholders raised concerns about the relation between volumes and maintenance costs.

Given these considerations, we engaged B&H to independently assess the maintenance costs in the 2015 DAU on the basis of fixed and variable components.

B&H's assessment of fixed and variable maintenance costs

B&H observed that at small volumes the maintenance program on a rail network is directed at time-related activities (i.e. fixed components) such as inspections. As volumes increase the wear and tear component (i.e. variable component) such as ballast cleaning and rail grinding activities become increasingly important.⁴²⁴

Considering the expected volumes in the 2015 DAU, B&H assessed that the maintenance task in the West Moreton network displayed both time-related activities and replacement or refurbishment activities due to wear and tear.

Ultimately, B&H assessed that about 67.4 per cent of the maintenance costs that we consider acceptable in the 2015 DAU related to fixed maintenance activities and the remainder (32.6 per cent) related to variable maintenance activities.⁴²⁵

QCA's draft position on cost allocation

We accept B&H's assessment that the maintenance program in the 2015 DAU comprises fixed and variable components and that the proportion of the fixed component in the 2015 DAU is 67.4 per cent of the total maintenance costs. Thus, of the \$114.6 million maintenance costs that we consider acceptable, about \$77.4 million is fixed cost and about \$37.2 million is variable cost.

As a general rule, we consider costs should be assigned to coal services based on an appropriate allocation factor (see Section 8.4.1 of this Draft Decision). Thus:

- variable maintenance costs should be allocated based on the relative volume of coal services, as variable costs are directly affected by volumes. On this basis, 98 per cent variable cost is allocated to coal services, which amounts to \$36.4 million

⁴²² Queensland Rail, sub. no. 2: 20, June 2013a: 18

⁴²³ QCA calculation based on data reported in Queensland Rail, June 2013b: 3, sub. no. 2, Appendix 6: 22; QCA, 2014 Draft Decision: 123; B&H, September 2015: iii & 4. Amounts are in June 2014 dollars.

⁴²⁴ B&H, September 2015: 29.

⁴²⁵ B&H, September 2015: 30.

- fixed maintenance costs should be allocated based on the relative proportion of the network capacity available to coal services to contract – that is, based on coal services' proportion of total available paths, which is also applied for allocating the other fixed charges (for example, incremental capital expenditure). On this basis, about 69 per cent of the fixed cost is allocated to coal services, which reflects the ratio of 77/112 paths⁴²⁶ and results in an amount of \$53.2 million.

Therefore, we consider it is appropriate to allocate \$89.6 million of the acceptable maintenance costs to coal services for the purposes of deriving the West Moreton reference tariff. In comparison, Queensland Rail's proposed allocation approach would have resulted in allocating \$112.2 million of maintenance costs to coal services, but this also includes paying for fixed maintenance costs that they are unable to contract to use. Our view is that coal services would then have paid more than their fair share of maintenance costs.

Accordingly, we consider that Queensland Rail's proposed approach for allocating maintenance costs to coal services would not promote efficient use of the network and is not in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act.

We consider our proposed approach to allocating maintenance costs to coal services provides a fair and reasonable allocation of costs that will send the right signals for the efficient use of the network's capacity and is in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act. We also consider our proposed approach is in the legitimate business interests of Queensland Rail, as it will allow Queensland Rail to recover its efficient costs of providing access to coal services from coal customers. However, whether Queensland Rail recovers the non-coal share of maintenance cost from non-coal services is not relevant for setting reference tariffs for coal-carrying train services on the West Moreton network.

On this basis, we consider our proposed approach to allocating maintenance costs in the 2015 DAU adequately balances the interests of all parties and will promote efficient use of the network, having regard to s.138(2) of the QCA Act, in particular paragraphs (a), (b), (e), (g) and (h).

8.6 Operating costs

Our 2014 Draft Decision had recommended determining the operating cost allowance for the West Moreton network on the basis of the more recent data from Queensland Rail's 2012–13 below-rail financial statements. However, we recommended a lower allowance for train control costs to reflect efficient costs.⁴²⁷

⁴²⁶ Of the maximum 87 paths available for contracting by coal trains through the Metropolitan network, 10 paths are currently contracted for coal services to operate through the Metropolitan network which do not traverse the West Moreton network leaving 77 paths for coal trains originating on the West Moreton network. This is why we have used 77 paths as the numerator for allocating costs on the West Moreton network. Furthermore, for this Draft Decision, we have used Queensland Rail's calculation of total capacity (i.e. 112 paths) on the West Moreton network. However, B&H has estimated the West Moreton network capacity to be in the order of 135 paths (B&H, September 2015: 65-67). Therefore, subject to stakeholders' comments, the allocation factor is subject to our final views on the capacity of the West Moreton network.

⁴²⁷ QCA, 2014 Draft Decision: 124.

Queensland Rail's 2015 DAU proposal

Queensland Rail accepted our 2014 Draft Decision approach of establishing the operating cost allowance on the basis of its 2012-13 financial results, including our proposed lower allowance for train control costs. Queensland Rail said it did not consider the operating costs data from its 2013-14 financial results because they were higher than the 2012-13 results and did not 'reflect its longer term expectation of efficient operating costs'. On that basis, Queensland Rail proposed a total operating cost allowance of \$37.2 million for the five year period July 2015 to June 2020.⁴²⁸

Queensland Rail proposed allocating the operating cost allowance to coal services based on the ratio of forecast train paths, resulting in allocating about 94 per cent (i.e. \$34.9 million) of the costs to coal services. To this amount, Queensland Rail added a working capital allowance of about \$1.2 million and worked out a total coal-allocated operating cost allowance of \$36.1 million for the purposes of deriving the West Moreton network reference tariff.⁴²⁹

Queensland Rail said that its proposed allocation approach will provide it the 'opportunity to fully recover the assessed efficient operating costs from the services that are expected to use the infrastructure'.⁴³⁰

Stakeholders' comments

Stakeholders were concerned that Queensland Rail had not considered reducing the operating costs despite a substantial reduction in forecast demand, which was largely due to the substantial reduction in forecast non-coal traffic, and requested the QCA to assess whether those costs were efficient.⁴³¹

Stakeholders also did not accept Queensland Rail's proposed allocation approach. New Hope said:

*The inability to recover these apparently fixed operating costs as customers are lost is rightly QR's commercial risk; however the proposed allocation has the effect of transferring risk from QR to coal producers.*⁴³²

QCA analysis and Draft Decision

We are minded to accept Queensland Rail's forecast total operating cost allowance of \$37.2 million, which is consistent with our 2014 Draft Decision approach.

However, our Draft Decision proposes allocating about \$27.6 million (74 per cent) to coal services and an additional \$0.6 million working capital allowance.⁴³³ This results in an operating cost allowance of \$28.2 million for the purposes of deriving the West Moreton network reference tariff, which is about 78 per cent of Queensland Rail's proposed amount of \$36.1 million.

In arriving at our Draft Decision, we consider it is appropriate to identify the fixed and variable components of the operating costs. We consider it is appropriate for coal services to pay for the portion of the fixed costs reflecting the part of the network they can access – that is, an

⁴²⁸ Queensland Rail, sub. no. 2: 43-44. This amount is calculated by escalating with CPI the 2012-13 cost data.

⁴²⁹ Queensland Rail, sub. no. 2: 54-55.

⁴³⁰ Queensland Rail, sub. no. 2: 54.

⁴³¹ New Hope, sub. no. 9: 23-24; Yancoal, sub. no. 16: 3.

⁴³² New Hope, sub. no. 9: 27.

⁴³³ The working capital allowance is 0.3 per cent of the maximum allowable revenue we have assessed as appropriate for recovering from coal services in the 2015 DAU.

allocation based on the relative train paths available for contracting by coal services (see Section 8.4.1 of this Draft Decision). We also consider it is appropriate to allocate the variable costs based on the relative volumes of coal services.

On this basis, we have assessed the level of operating costs to be borne by coal services for the 2015 DAU.

QCA's approach to determining coal services share of operating costs

The operating costs we assessed as acceptable in our 2014 Draft Decision were based on a higher volume task. Although the 2015 DAU proposes operating costs consistent with our 2014 Draft Decision, we note the traffic task is expected to be substantially lower. Stakeholders have also raised concerns about the relation between volumes and operating costs.

Given these considerations, we engaged B&H to independently assess the operating costs in the 2015 DAU on the basis of fixed and variable components. B&H assessed that about 82 per cent of the operating costs in the 2015 DAU related to fixed operating activities and the remainder (18 per cent) displayed variable activities.⁴³⁴

We accept B&H's assessment and consider that of the \$37.2 million total operating costs that we consider acceptable, about \$30.3 million is fixed and \$6.9 million is variable.

We consider the fixed and variable components of the operating costs should be allocated on the same basis as the maintenance costs (see Section 8.5.2 of this Draft Decision). Thus:

- variable operating costs should be allocated based on the relative forecast volume of coal services and on that basis 98 per cent of the variable cost is allocated to coal services, which amounts to \$6.7 million.
- fixed operating costs should be allocated based on the relative proportion of the network capacity available for contracting to coal services and on that basis about 69 per cent of the fixed operating cost is allocated to coal services, which amounts to \$20.9 million.

Therefore, we consider it is appropriate to allocate \$27.6 million of the operating costs to coal services. In comparison, Queensland Rail proposed allocating \$34.9 million costs to coal services, but this also includes paying for fixed operating costs that they are unable to contract to use. Our view is that coal services would then have paid more than their fair share of operating costs.

Accordingly, we consider that Queensland Rail's proposed approach for allocating operating costs to coal services would not promote efficient use of the network and is not in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act.

We consider our proposed approach to allocating operating costs to coal services provides a fair and reasonable allocation of costs that will send the right signals for the efficient use of the network's capacity and is in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act. We also consider our proposed approach is in the legitimate business interests of Queensland Rail, as it will allow Queensland Rail to recover its efficient operating costs of providing access to coal services from coal customers. However, whether Queensland Rail recovers the non-coal share of operating costs from non-coal services is not relevant for setting reference tariffs for coal-carrying train services on the West Moreton network.

⁴³⁴ B&H, September 2015: 31-32.

On this basis, we consider our proposed approach to allocating operating costs in the 2015 DAU adequately balances the interests of all parties and will promote efficient use of the network, having regard to s. 138(2) of the QCA Act, in particular paragraphs (a), (b), (e), (g) and (h).

8.7 Regulatory asset base

8.7.1 Initial asset base

The valuation of the initial asset base for the West Moreton network has never been settled, because an initial asset base was not established when the West Moreton network was declared. Recent stakeholder submissions on the valuation of the West Moreton Network have informed the QCA's consideration of this question.

Queensland Rail's 2013 DAU derived an initial asset valuation for the West Moreton network using a DORC valuation methodology.⁴³⁵ Queensland Rail said it used this methodology as it wanted to be consistent with our 2009 Draft Decision that proposed a similar DORC valuation approach.⁴³⁶

We note that subsequent QCA decisions in 2010 did not approve a specific methodology for deriving the initial asset value.⁴³⁷ Further, as discussed below, information about the condition and cost of maintaining the railroad developed in recent years needs to be taken into consideration for purposes of establishing a value going forward.

The June 2013 DAU proposed an 82 per cent increase in maintenance costs and continued high levels of capital investment.⁴³⁸ In response to the 2013 DAU, stakeholders said Queensland Rail's proposed DORC valuation should be rejected and all assets that were in place before coal train services began in 1996 should be disregarded when establishing the initial asset value. They favoured a depreciated actual costs (DAC) valuation derived from capital expenditure incurred since 1995.

Our June 2014 Consultation Paper sought comment on the way forward for the western system asset valuation in light of the step change in maintenance spending and continued high capital investment. We drew on stakeholder comments and provided two indicative options to derive the initial asset value; namely a DORC and DAC (historical cost) approach. Submissions on the June 2014 Consultation Paper highlighted the divergent views of Queensland Rail and other stakeholders on an appropriate valuation methodology. In particular, stakeholders were concerned that the level of maintenance costs suggested the DORC asset valuation was overstated.

Our October 2014 Draft Decision on Queensland Rail's June 2013 DAU proposed a common network asset value for the West Moreton network between Rosewood and Columboola that, among other things:

- (a) used the asset register and unit costs from the 2009 Draft Decision (that were also used in Queensland Rail's 2013 DAU)

⁴³⁵ QCA, 2014 October: 131

⁴³⁶ Queensland Rail, 2013 June: 3.

⁴³⁷ For a more detailed account of previous proposals and decisions on the West Moreton network tariff, see Appendix C of our October 2014 Draft Decision, pp. 195–199.

⁴³⁸ Queensland Rail proposed maintenance costs of \$81.7 million for the four years from July 2013 to June 2017, compared with our December 2009 proposal of \$44.8 million (both numbers in July 2013 dollars, for Rosewood to Macalister). Proposed capital expenditure was little changed at \$78.8 million (QCA, 2014 October: 122, 153).

- (b) applied interest during construction to reflect Queensland Rail's financing costs
- (c) took into account Queensland Rail's historical capital expenditure on the West Moreton network, subject to data availability⁴³⁹
- (d) amended Queensland Rail's proposal by placing a zero value on assets that could reasonably be considered to be fully depreciated or were still in service only because of the ongoing maintenance allowance.⁴⁴⁰

Queensland Rail's 2015 DAU proposal

Queensland Rail's 2015 DAU proposed an initial asset value of \$463.6 million for the West Moreton common network, as at 1 July 2013.⁴⁴¹ This proposed value was based on a brownfields DORC methodology that included values for all assets.

Queensland Rail said that a DORC approach is the standard in Australia for establishing the opening regulated asset value. It said the DORC valuation should be forward-looking and be used to set a ceiling price or stand-alone cost for the purpose of preventing inefficient bypass.

In its material accompanying the 2015 DAU, Queensland Rail addressed the QCA's October 2014 Draft Decision by arguing:

- (a) there was 'no reasonable basis' for the QCA to change its valuation methodology from past practice, including the one previously used by the QCA and other regulators, as that would create regulatory uncertainty⁴⁴²
- (b) ascribing a zero value to assets that had exceeded their expected useful life was not reasonable given:
 - (i) DORC was forward-looking and should focus on the remaining service potential of the assets, not an accounting treatment⁴⁴³
 - (ii) even if it were appropriate to exclude assets for 'double counting' the QCA could not do this without evidence; the QCA would need enough information to compare and distinguish between previous cost recovery and remaining service potential⁴⁴⁴
 - (iii) many of the assets ascribed a zero value had been renewed since construction⁴⁴⁵
 - (iv) the initial valuation by the QCA's consultant was consistent with Queensland Rail's 2013 DAU methodology and valued remaining service potential⁴⁴⁶

⁴³⁹ Queensland Rail provided substantial data on its past spending on the West Moreton network, both in the explanatory documents and financial models that accompanied its 2013 DAU submission and in responses to subsequent information requests.

⁴⁴⁰ QCA, 2014 October: 138.

⁴⁴¹ Queensland Rail, sub. no. 2: 35-36. Queensland Rail rolled forward this July 2013 value with additional capital expenditure (see Section 8.7.3 of this Draft Decision) to give a 1 July 2015 nominal common network asset value of \$471.6 million.

⁴⁴² Queensland Rail, sub. no. 1: 7.

⁴⁴³ Queensland Rail, sub. no. 1: 8.

⁴⁴⁴ Queensland Rail, sub. no. 1: 8.

⁴⁴⁵ Queensland Rail, sub. no. 1: 8.

⁴⁴⁶ Queensland Rail, sub. no. 1: 8-9.

- (v) the QCA should not rely on the issue of affordability it mentioned in its June 2014 consultation paper and October 2014 Draft Decision, as affordability cannot be assessed without evidence, and does not apply equally to all users.⁴⁴⁷

Queensland Rail also referred to a report from PwC⁴⁴⁸ that cited a number of precedents for applying DORC in Australian regulatory decisions. PwC said:

- (a) there was a 'requirement [for Queensland Rail] to receive a return on the value of the useful service potential of the asset'⁴⁴⁹
- (b) DORC provided an indication of the opportunity cost to the owner of the asset⁴⁵⁰
- (c) DORC represented the bypass value of the assets and therefore the value that would be consistent with the price charged by an efficient new entrant.⁴⁵¹

In June 2015 Queensland Rail responded to the QCA's request for comments on Queensland Rail's 2015 DAU and on a preliminary report on the asset valuation for the West Moreton network (the preliminary Menezes Valuation Report⁴⁵²) that the QCA published with Queensland Rail's 2015 DAU. This further submission included:

- (a) a report by Queensland Rail that focused on concerns that publishing the preliminary Menezes Valuation Report represented a 'potential serious flaw in process'⁴⁵³
- (b) another report from PwC that:
 - (i) argued the initial asset value needed to reflect the service potential of the assets⁴⁵⁴
 - (ii) said the preliminary report failed to recognise regulatory precedents for applying a DORC valuation and that DORC challenges could be overcome⁴⁵⁵
 - (iii) argued that the windfall gains and adverse effects of DORC valuation cited in the preliminary Menezes Valuation Report were not substantiated⁴⁵⁶
 - (iv) said the intention of an investor at the time an asset was commissioned could not be known and questioned whether it was relevant in valuing that asset⁴⁵⁷
 - (v) said the preliminary report over-simplified the ease of a DAC valuation⁴⁵⁸
 - (vi) argued dynamic efficiency required an expectation of a return while 'asset write-downs' created uncertainty⁴⁵⁹

⁴⁴⁷ Queensland Rail, sub. no. 1: 9.

⁴⁴⁸ Queensland Rail, sub. no. 2, Appendix 2.

⁴⁴⁹ Queensland Rail, sub. no. 2, Appendix 2: i, 3, 5, 7-11. See also sub. no. 2: 7, 33-34.

⁴⁵⁰ Queensland Rail, sub. no. 2, Appendix 2: ii, 6.

⁴⁵¹ Queensland Rail, sub. no. 2, Appendix 2: 5,

⁴⁵² Menezes, Flavio, 2015 April.

⁴⁵³ Queensland Rail's concerns about regulatory process are addressed below in section 8.7.1: Process Matters.

⁴⁵⁴ Queensland Rail, sub. no. 3, Attachment C: 7, 9-10, 12.

⁴⁵⁵ Queensland Rail, sub. no. 3, Attachment C: 12.

⁴⁵⁶ Queensland Rail, sub. no. 3, Attachment C: 8

⁴⁵⁷ Queensland Rail, sub. no. 3, Attachment C: 15.

⁴⁵⁸ Queensland Rail, sub. no. 3, Attachment C: 11.

⁴⁵⁹ Queensland Rail, sub. no. 3, Attachment C: 14.

- (c) a report by Frontier Economics that:
 - (i) argued regulators should avoid breaking commitments and that predictable regulatory behaviour, past cost recovery and availability of information favoured a DORC approach over DAC⁴⁶⁰
 - (ii) said standard DORC attributed a positive value to assets in service and questioned the basis for excluding from the valuation assets that were built before 1995 as being opportunistic.⁴⁶¹

Queensland Rail subsequently provided a further report in July 2015 that detailed a number of instances where the QCA had applied a DORC approach to valuing assets and argued we should do the same for the West Moreton network.⁴⁶²

Stakeholders' comments

Stakeholders said the maintenance and capital spending proposed by Queensland Rail indicated the standard of the asset was not consistent with the value proposed by Queensland Rail.⁴⁶³ They also said the QCA Act gave the QCA discretion to apply a valuation approach suited to the West Moreton network.⁴⁶⁴

QCA analysis and Draft Decision

Our consideration of the value of the initial asset base has had regard to the nature of the West Moreton network and its history. The West Moreton network remains, as it has for the two decades since export mining began, an old network, never designed for heavy-haul coal trains. As a result it provides a substandard service to coal traffic, is expensive to maintain, and requires extensive and ongoing capital upgrades.

We also note that we have recognised the idiosyncratic nature of the network by proposing to accept much of Queensland Rail's maintenance forecast even though it is high for the scope of the network and the scale of the haulage task (see Section 8.5 of this Draft Decision). We have also proposed a capital expenditure allowance that includes much of the work proposed by Queensland Rail (see Section 8.7.3 of this Draft Decision).

Bearing these West Moreton network-specific factors in mind, we will explore the regulatory framework and economic considerations before discussing the details of the West Moreton network initial asset value itself and responding to specific concerns raised by Queensland Rail.

Regulatory framework

The QCA Act includes a number of sometimes competing requirements for approving an access undertaking. We have had regard to all of those requirements in assessing the West Moreton network. Those that are particularly relevant to the West Moreton network asset value include:

- the object of Part 5 of the QCA Act, which is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting competition in upstream and downstream markets (ss. 138(2)(a) and 69E)

⁴⁶⁰ Queensland Rail, sub. no. 3, Attachment D: 9, 13, 14.

⁴⁶¹ Queensland Rail, sub. no. 3, Attachment D: 7-9, 15-16.

⁴⁶² Queensland Rail, sub. no. 17.

⁴⁶³ New Hope, sub. no. 9: 3-4, 21; Yancoal, sub. no. 16: 2-3; Aurizon, sub. no. 6: 42, 48-49.

⁴⁶⁴ New Hope, sub. no. 8: 4-6.

- the pricing principles which specify, among other things, that the access price should:
 - generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved (s. 168A(a))
 - provide incentives to reduce costs or otherwise improve productivity (s. 168A(d))
- the legitimate business interests of the owner or operator of the service (s. 138(2)(b))
- the public interest, including the public interest in having competition in markets (whether or not in Australia) (s. 138(2)(d))
- the interests of persons who may seek access to the service (s. 138(2)(e))
- the effect of excluding existing assets for pricing purposes (s. 138(2)(f))
- the interests of access holders and avoiding monopoly rents and windfall gains (s. 138(2)(h)).

The QCA 'may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the' criteria in s. 138(2).

Queensland Rail has focused on the primacy of the return on investment clause in the pricing principles (s. 168A(a)).⁴⁶⁵

Other stakeholders said the QCA is required to balance the various, sometimes conflicting approval criteria in s. 138(2), including the pricing principles in s. 168A.⁴⁶⁶

Chapter 10 of this Draft Decision, particularly Section 10.1, provides a more detailed discussion of the QCA's consideration of the approval criteria. However we note that for the asset valuation, as with many other matters, there may be tension between the legitimate business interests of Queensland Rail and the interests of access holders and access seekers. Another key matter to consider is the promotion of the economically efficient operation of, use of and investment in, the West Moreton network, with the effect of promoting competition in upstream and downstream markets.

The QCA has had regard to each factor in s. 138(2) in forming the views in this chapter.

Economic considerations

The QCA Act says an access price should include a return on investment commensurate with the regulatory and commercial risks of providing access (s. 168A(a)).

The QCA and other regulators seek to achieve this by applying the Financial Capital Maintenance (FCM) principle (also known as the NPV=0 principle). This principle means that investors in regulated monopoly infrastructure have the opportunity to receive returns on, and of, their capital investment and have an incentive to make economically efficient investments in the future. FCM achieves this by requiring that the net present value (NPV) of the expected future cash flows, including returns on and of capital, equals the amount invested to provide the regulated service.⁴⁶⁷

One way of looking at FCM is that investors should expect to receive a return of their capital investment, but not more than once. For example, if an asset's actual life exceeds its expected

⁴⁶⁵ Queensland Rail, sub. no. 1: 4-5; sub. no. 2, Appendix 1: 6.

⁴⁶⁶ New Hope, sub. no. 8: 5-6; Glencore, sub. no. 7: 2.

⁴⁶⁷ For a more detailed discussion of FCM and the NPV=0 principle, see QCA, 2014 February [QCA information paper Financial Capital Maintenance and Price Smoothing].

useful life⁴⁶⁸ it can be reasonably anticipated that its full economic cost has been recovered via depreciation. Under the FCM approach, that asset should not then be revalued and included in the RAB for the investor to expect further recovery of and on its capital.

We applied this approach in our October 2014 Draft Decision by placing a zero value on assets that had exceeded their expected useful life, as this avoided windfall gains and monopoly rents, while providing a return on investment commensurate with the regulatory and commercial risks of providing access.

Valuing a network

Railway networks have a large number of essential individual parts, including sleepers, rails and tunnels. Generally no single element has service potential for a particular network unless it is able to be combined with the other parts of that particular network. The valuation of individual assets has to be viewed in the context of the service potential of the network as a whole.

In a competitive market the asset value is based on buyers' and sellers' assumptions about the present value of expected future returns from the network. However where these returns are set by reference to the regulated asset value, the present value of those returns cannot guide the asset value. For a regulated network, the asset value is a necessary part of a building blocks approach to setting a regulated tariff. This 'circularity problem' is typically solved in two ways by Australian regulators:

- (a) For new assets built once regulation has started, the predominant valuation methodology has been DAC.⁴⁶⁹ This is because, among other things, the necessary cost information is available and the DAC approach gives an incentive for the asset owner to invest as it can expect to recover its efficient investments through return on and of capital over the life of the asset. However, DAC has the potential to understate or overstate service potential because it is a cost-based approach.
- (b) For the assets that are in place at the start of regulation, regulators and governments have applied a variety of methodologies to establish an initial asset value. These have included:
 - (i) DAC, although this has tended to be difficult, particularly for older assets, due to a lack of information⁴⁷⁰
 - (ii) line in the sand, often imposed by a government to achieve a policy outcome
 - (iii) DORC, usually adjusted to suit the particular nature of the asset being valued.⁴⁷¹

The Productivity Commission did a thorough review of asset valuation techniques in its first review of the national access scheme more than a decade ago. The Commission found that there were:

⁴⁶⁸ The expected useful life is the regulatory life ascribed to the asset. This is the period of time over which the asset, for regulatory purposes, is depreciated to zero.

⁴⁶⁹ For example, the capital expenditure approval process applied for Aurizon Network is a DAC approach. Queensland Rail has proposed a similar DAC-style mechanism for new assets in Schedule E of its 2015 DAU.

⁴⁷⁰ Queensland Rail, sub. no. 3, Att. D: 12-14.

⁴⁷¹ For example, the QCA opted to use a brownfields DORC approach when establishing the initial asset value for the central Queensland coal region assets in 2001. Other asset valuations have departed from a 'standard' DORC approach, including those for the Victorian electricity distribution networks and Queensland's gas distribution networks.

... two implications that the characteristics of infrastructure have for the choice of asset valuation method:

- *to the extent that the assets are sunk, the facility owner will continue to supply infrastructure services so long as the regulated value exceeds scrap value (the next best alternative use); and*
- *if the facilities providing these services are natural monopolies, inefficient duplication is likely to occur only rarely regardless of the asset valuation method.*

*This suggests that a range of valuation methods could reasonably be used and that no method is likely to be intrinsically superior. Indeed, at least conceptually, both DORC and DAC would appear to be equally able to deliver outcomes which are allocatively and productively efficient.*⁴⁷²

It also found that:

*Clearly, the myriad of specific issues that arise across infrastructure sectors means that regulators should not be bound to use one particular asset valuation approach in all situations. Rather, the Commission considers that the approach used should have regard to specific circumstances.*⁴⁷³

Past practice has shown that regulators and governments have tailored the valuation approach to the situation.⁴⁷⁴ The QCA Act does not prescribe a particular asset valuation methodology.

Menezes Valuation Report

We engaged Professor Flavio Menezes of the University of Queensland as an independent expert to advise us on the economic issues relating to the West Moreton network asset valuations. A key aspect of his task was to establish which asset valuation approaches were most appropriate for the network, with regard to the economic principles of allocative, productive and dynamic efficiency that are relevant to the matters mentioned in sections 138(2)(a) and (d) of the QCA Act.

In May 2015, QCA staff published a preliminary draft of the Menezes Valuation Report on alternative approaches to setting the initial asset value. In that preliminary report, Professor Menezes considered the following options:

- a DAC option with no value for pre-1995 assets, as per our June 2014 Consultation Paper (Post-1995 DAC)
- a DORC option similar to Queensland Rail's 2015 DAU proposal (Queensland Rail DORC)
- a hybrid option suited to the particular nature of the network, as per our October 2014 Draft Decision.

In response, Queensland Rail provided substantive reports from PwC and Frontier Economics⁴⁷⁵ in support of the Queensland Rail DORC approach.

In their submissions on Queensland Rail's 2015 DAU proposal and the preliminary Menezes Valuation Report, Yancoal and New Hope both supported the Post-1995 DAC and QCA 2014 Draft Decision approaches.⁴⁷⁶ Aurizon did not support the Queensland Rail DORC approach, nor

⁴⁷² Productivity Commission, 2001: 360.

⁴⁷³ Productivity Commission, 2001: 366.

⁴⁷⁴ For a discussion of regulatory practice in applying DORC, see Appendix B of our October 2014 Draft Decision, pp. 188-194.

⁴⁷⁵ Queensland Rail, sub. no. 3, Attachments C and D – the major points in these reports are set out above as part of the summary of Queensland Rail's 2015 DAU proposal.

⁴⁷⁶ New Hope, sub. no. 9: 19; Yancoal, sub. no. 16: 2.

did it state a position on either of the other two approaches. Rather, Aurizon said the future economic and financial viability of the network needed a value that supported efficient investment.⁴⁷⁷

We have published Professor Menezes' updated preliminary report with this Draft Decision. The paper has given regard to the matters raised by Queensland Rail, including the reports by PwC and Frontier Economics, and by stakeholders, including New Hope, Yancoal and Aurizon, in response to the preliminary report.

The updated Menezes Valuation Report found that a price that allows a return on investment for assets that have exceeded their effective lives is not necessary to encourage investment (because investors make a decision about whether to invest based on returns on assets over their effective lives). Thus setting a price that includes a return on such assets that have exceeded their effective lives risks setting a price that includes a component of monopoly rent.⁴⁷⁸

DORC approaches that value assets whose actual life has exceeded their expected useful life would yield windfall gains to Queensland Rail, whereas either a Post-1995 DAC or QCA 2014 Draft Decision approach is more likely to promote the economically efficient operation of the network, provide incentives for Queensland Rail to efficiently invest, and promote competition in relevant markets.⁴⁷⁹

The updated Menezes Valuation Report also addresses a number of the specific criticisms raised in the PwC and Frontier reports submitted by Queensland Rail in June 2015. We have not sought to duplicate those detailed responses in this Draft Decision, but our views on several of the matters are discussed below.

Nature of West Moreton network

The West Moreton network was constructed in the 19th century for regional traffic (e.g. livestock, grain and other agricultural commodities, passenger and general freight). It does not provide the service potential of a modern engineering equivalent asset as it was not designed for coal transport. Particular attributes of the West Moreton network are:

- a maximum length of 675 metres for coal trains, with an axle load of 15.75 tonnes. In contrast, in the central Queensland coal network, coal trains are two kilometres long with an axle load of 26 tonnes or more
- train speeds limited by sharp curves and steep grades on the range east of Toowoomba
- trains carrying less than 2,000 tonnes, compared with about 10,000 tonnes in central Queensland.

The old, idiosyncratic West Moreton network has a standard and configuration that would never be replicated in a competitive market. The significant disparity from the modern equivalent means that standard valuation methodologies including a brownfields DORC can only be applied with significant adjustments.

Queensland Rail pointed out in its submission accompanying the 2015 DAU that:

⁴⁷⁷ Aurizon, sub. no. 6: 48-49.

⁴⁷⁸ This explains the common regulatory practice of using a DAC-style methodology to roll forward the asset base after the initial asset value has been set.

⁴⁷⁹ Menezes, Flavio, 2015 July (b): 34-35.

*As the network was initially designed to cater for non-coal traffics, investment in infrastructure improvements, by both Queensland Rail and West Moreton Network end-users, has been necessary to accommodate coal carrying train services. Being built on a black soil plain and having tight radius curves down the Toowoomba and Little Liverpool Ranges has created additional challenges.*⁴⁸⁰

Stakeholders said the QCA needed to choose a valuation approach with regard to the unusual features of the West Moreton network.⁴⁸¹ New Hope said there were precedents for a wide range of modified DORC and non-DORC approaches and noted that:

*... given the circumstances of the West Moreton system, it would be surprising if mindlessly following the most common approach did produce a tariff which was appropriate.*⁴⁸²

High ongoing maintenance and capital spending

The economic value of a railway network will reflect factors including the expected cost of maintaining and replacing parts of the network to make it fit for purpose and keep it that way. That is why Queensland Rail's proposed near-doubling of its maintenance spending on the West Moreton network in the forthcoming regulatory period, compared with the 2009–13 spending, has caused us to test the assumptions behind our proposed valuation from the 2009 Draft Decision.

Queensland Rail's maintenance expenditures are high relative to the value and capacity of its West Moreton network. Queensland Rail's forecast annual cost of maintaining a kilometre of the West Moreton network is \$68,044⁴⁸³, while we have proposed that the efficient cost for Aurizon Network to maintain the Goonyella network in central Queensland is \$82,660 per kilometre.⁴⁸⁴ Yet Goonyella carries about 106 million tonnes of coal a year—more than 15 times the annual volume of 6.2 million tonnes of coal Queensland Rail is forecasting for the West Moreton network.⁴⁸⁵ Queensland Rail has predicted that the elevated levels of spending on the West Moreton network infrastructure will continue for at least another decade.⁴⁸⁶

Against this background, Queensland Rail has proposed to include substantial valuations in its asset base for the same assets that require such high maintenance spending.

Approving both Queensland Rail's proposed initial asset value and its proposed high ongoing expenditure is not necessary to give Queensland Rail the proper incentives to invest in and maintain its network and would provide Queensland Rail with monopoly rents. Such an outcome would be contrary to the object of Part 5 of the QCA Act (s. 138(2)(a)) and contrary to the public interest, including the public interest in having competition in markets (s. 138(2)(d)).

The imbalance between the maintenance and capital costs⁴⁸⁷ and the asset valuation might be addressed by reducing those ongoing costs to be consistent with the standard of the network implied by Queensland Rail's proposed asset value. However, we consider the high maintenance and capital costs are necessary to keep the network operating. Therefore, for this assessment, we have proposed to approve much of Queensland Rail's forecast maintenance and

⁴⁸⁰ Queensland Rail, sub. no. 2: 9.

⁴⁸¹ Aurizon, sub. no. 6: 41-42, 48-49; New Hope, sub. no. 8: 7; Yancoal, sub. no. 16: 2-3.

⁴⁸² New Hope, sub. no. 8: 7.

⁴⁸³ See Section 8.5.2 in this Draft Decision.

⁴⁸⁴ QCA, 2014 September.

⁴⁸⁵ QCA, 2014 November, Table 13; Queensland Rail, sub. no. 2: 20.

⁴⁸⁶ Queensland Rail, sub. no. 2, Appendix 6 – West Moreton System Asset Management Plan.

⁴⁸⁷ Queensland Rail's forecast capital expenditure in the 2015 DAU of \$141.9 million is about the same level as its proposed maintenance costs of \$143.0 million (see Sections 8.5 and 8.7.3 of this Draft Decision).

capital costs⁴⁸⁸ and concentrated instead on considering an efficient asset value for the old, idiosyncratic network, consistent with those high ongoing costs.

Queensland Rail's concerns

Queensland Rail made submissions in relation to specific aspects of its proposal, with reference to the proposed valuation in our October 2014 Draft Decision and to matters discussed in the preliminary Menezes Valuation Report. Several key matters Queensland Rail raised are discussed below. In cases where our proposed approach in this Draft Decision is similar to our October 2014 proposal, we have generally referred to that proposal.

Treatment of renewal assets

Queensland Rail said assets in which it had invested should not be treated as life-expired.⁴⁸⁹ Queensland Rail argued:

*Given the extent of renewal works that have been undertaken on Queensland Rail's key assets, most particularly its track, signals and telecommunications assets, and given that this renewal work in many cases improved the standard of the asset originally constructed, there is no reasonable basis for the QCA's view that these assets are life expired, simply because of the time that has elapsed since the construction of the original version of these assets.*⁴⁹⁰

We note that our proposed valuation, discussed below, explicitly seeks to address this issue by including assets that Queensland Rail has made capital investments in and that have remaining expected useful lives. This includes \$169.0 million for track,⁴⁹¹ and \$2.34 million for signals and telecommunications assets—more than 70 per cent of the total valuation at 1 July 2013. All of the value of these assets reflects asset renewal expenditure, since 1983 for rail, and more recently for signals and telecoms.⁴⁹²

Similarly, our proposed valuation does not apply a cut-off at 1995, as asserted in the Frontier paper.⁴⁹³ Specific values for assets, particularly rail and bridges, that were installed as capital (rather than maintenance) items before 1995 are included in the valuation where they have remaining expected useful lives.⁴⁹⁴

As this Draft Decision explains, our approach is not an 'accounting treatment' as claimed by Queensland Rail.⁴⁹⁵ This is because it gives assets a regulatory life over which their full economic cost will be recovered. Our approach recognises assets prior to 1995 where the capital cost of those assets is yet to be returned in full, rather than simply using 1995 as the regulatory cut-off point. Our approach assesses the extent to which assets have remaining regulatory life by assessing the age of the assets against their expected regulatory life (i.e. an asset that is 10 years old, but has a regulatory life of 30 years is one-third life-expired).

⁴⁸⁸ The combined maintenance and forecast capital costs we are minded to accept is about 91 per cent of Queensland Rail's proposed amount (see Sections 8.5 and 8.7.3 of this Draft Decision).

⁴⁸⁹ Queensland Rail, sub. no. 1: 8; sub. no. 3, Att D: 7-9, 15-16.

⁴⁹⁰ Queensland Rail, sub. no. 2: 34.

⁴⁹¹ The 'track' category includes rails, sleepers, ballast and other related assets, as Queensland Rail does not separately record its spending on these items after 2007. The valuation for rails in place before 2007 is \$87.6 million.

⁴⁹² See B&H, 2015 September: 48-56.

⁴⁹³ Queensland Rail, sub. no. 3, Att. D: 15-16.

⁴⁹⁴ See B&H, 2015 September.

⁴⁹⁵ Queensland Rail, sub. no. 1: 8.

Queensland Rail also said the QCA had 'treated most asset renewal activities as maintenance, even where this asset renewal has resulted in higher standard assets being installed'.⁴⁹⁶ We note that Queensland Rail's own proposal treats most of these renewal activities as maintenance.⁴⁹⁷ Where the asset replacement has been capital in nature, and treated as such by Queensland Rail (for example, steel rail and concrete bridges), we have included it in our proposed asset base.

If Queensland Rail wishes to capitalise some of its maintenance activities that are more capital in nature, then there may be a case to do so.⁴⁹⁸ But it would not then be appropriate to also include costs for those activities in the annual maintenance allowance used in the building blocks for the tariff. This applies to a range of assets, including ballast and timber sleepers.

Service potential

Queensland Rail argued that the assessment of asset value needs to be forward-looking and should reflect the remaining service potential of the asset.⁴⁹⁹ PwC said in its May 2015 report that accompanied the 2015 DAU that there was a 'requirement [for Queensland Rail] to receive a return on the value of the useful service potential of the asset'.⁵⁰⁰

Queensland Rail claims that the assets of the West Moreton network have service potential (and therefore value) because coal trains are using the network which, in turn, is generating a revenue stream for Queensland Rail.

We have taken the argument into account, but we consider that Queensland Rail does not properly take account of the concept of value in an economic regulation context where the network requires a high level of maintenance to remain in operation.

As discussed below in describing our proposed approach, we have had regard to the remaining service potential of tunnels, cuttings and embankments⁵⁰¹ in arriving at an asset value. However, we have also had regard to other relevant considerations (discussed elsewhere in this Draft Decision), and consider that the value of the tunnels, cuttings and embankments is reflected in the value we have given to the network as a whole.

In simple terms, our approach compares the actual lives of Queensland Rail's assets against their expected useful lives based on the return of the capital invested in those assets, not their remaining service potential. To do otherwise for tunnels, cuttings and embankments, whose characteristics do not, in fact, materially change over time, would overcompensate Queensland Rail and might provide it with a return in perpetuity.

We consider our approach is consistent with the regulatory treatment by the QCA and other regulators of assets once they have been accepted in the regulatory asset base. If we accept an asset in the regulatory asset base, it is then depreciated over a given period of time, allowing

⁴⁹⁶ Queensland Rail, sub. no. 2: 34.

⁴⁹⁷ Queensland Rail, sub. no. 2: 41-43; sub. no. 2, Appendix 4.

⁴⁹⁸ See section 8.5 of this Draft Decision.

⁴⁹⁹ Queensland Rail, sub. no. 1: 7, 8-9; sub. no. 2: 7, 33-34; sub. no. 2, Appendix 2: i, 3, 5, 7-11; sub. no. 3, Attachment C: 7, 9-10, 12.

⁵⁰⁰ Queensland Rail, sub. no. 2, Appendix 2: i.

⁵⁰¹ Cuttings and embankments are similar to tunnels as they receive only incidental maintenance. In this assessment cuttings and embankments are captured within the 'earthworks' asset category. Nevertheless, there are aspects of 'earthworks' that are dissimilar to tunnels, as earthworks receive some maintenance (about 7 per cent of the proposed maintenance budget for vegetation control, drain cleaning and minor earthworks maintenance) and some capital expenditure (about 12 per cent of the proposed capital expenditure budget for formation strengthening works).

the regulated entity to earn a return of capital allowance each year (reflecting a loss in economic value via depreciation). After the asset is fully depreciated, it is given a value of zero (or scrap) in the regulatory asset base. It is not re-valued for regulatory purposes, even if it continues to have service potential. To do otherwise, would be to provide a regulated entity with windfall gains.

We reiterate our view that there is no one way to undertake an asset valuation, and regulators regularly adopt an approach suited to the circumstances before them. Moreover, the regulatory underpinnings of s. 138(2) do not require the QCA to choose any particular approach. Given the old and idiosyncratic nature of the West Moreton network, the QCA has given weight to ensuring that Queensland Rail does not receive windfall gains on its assets or monopoly rents.

PwC has asserted that a valuation of the West Moreton network should reflect the opportunity cost of the assets.⁵⁰² We note there is little opportunity cost associated with tunnels, cuttings and embankments as they are sunk assets for which there would be very few, if any, alternative uses that had the revenue-producing potential of their use for coal haulage.⁵⁰³ An opportunity cost assessment supports our proposal not to give tunnels, cuttings and embankments a value beyond that included in the other assets of the network.⁵⁰⁴

Further, we consider that any modern equivalent network would be completely different in scale and configuration to the West Moreton network. Tunnels, cuttings and embankments have exceeded their expected useful lives and are of no value in a market sense. Indeed, their service potential is entirely dependent on the renewal of other assets in the network, whose efficient cost we do allow Queensland Rail to recover, either by including it in the maintenance allowance, or capitalising it into the asset base, but not both. According to the updated Menezes Valuation Report:

... [a] DORC valuation can be seen as an estimate of the price that an asset would sell for if that asset was traded in a market for used assets. The difficulty is that often such a market does not exist and so an access seeker would not have the ability to purchase it. Instead, to bypass the existing facility, an access seeker would likely build a different asset, which would provide a different (likely improved) level of service.⁵⁰⁵

A DORC approach cannot cater for the gap between modern engineering equivalent and the assets on the ground in the West Moreton network. It would never be economically feasible to build the West Moreton network to serve the limited coal traffics that exist.

We have therefore applied a valuation approach that is consistent with the efficient utilisation of and investment in Queensland Rail's assets—it seeks to provide a balance between providing an efficient return to Queensland Rail on its West Moreton network, while at the same time recognising the limitations of its service potential which impacts on both upstream and downstream users. This is consistent with the object of Part 5 of the QCA Act (ss.69E and 138(2)(a)).

⁵⁰² Queensland Rail, sub. no. 2, Appendix 2: ii, 6.

⁵⁰³ The right of way, including tunnels, might be used for a recreational rail trail, as has been done with abandoned rail infrastructure in various places in Australia or overseas, or for covered storage or growing mushrooms or similar crops, for example.

⁵⁰⁴ Our proposal does, however, account for the opportunity cost of Queensland Rail's capital invested to support traffic on the network, by giving a value to assets that still have remaining useful lives.

⁵⁰⁵ Menezes, Flavio, 2015 July (b): 25.

Regulatory precedent

Queensland Rail questioned our 2014 Draft Decision approach, saying the valuation Queensland Rail proposed in the 2015 DAU followed regulatory precedent, while the QCA was doing something 'unique to Australian regulatory practice'.⁵⁰⁶

PwC's report for Queensland Rail provided a list of regulatory precedents, all of which involved DORC valuations.⁵⁰⁷ It also listed a number of instances where the QCA had used a DORC valuation. Queensland Rail provided a further report that listed instances where the QCA had applied DORC valuations.⁵⁰⁸

There is no requirement in the QCA Act that we apply a DORC valuation or, indeed, any particular pricing approach. The requirement is that we have regard to the considerations in the QCA Act, including the sometimes competing approval criteria (s.138(2)).

Australian regulators have, over time, considered and used a variety of pricing approaches. For example, the QCA's Statement of Regulatory Pricing Principles for the Water Sector endorses deprival value, which in turn is bounded on the high side by DORC. It says:

... the Pricing Principles should be viewed as a broad statement of regulatory intent to be applied with a discretion that reflects particular circumstances.

*As a result, any particular approach cannot be considered to be definitive or binding on the Authority in a specific instance.*⁵⁰⁹

For similar issues in Western Australia, Allen Consulting Group advised the Economic Regulation Authority that:

*While economic principles suggest that regulated assets should not be valued at less than scrap value or more than a (correctly-determined) DORC value, the principles do not provide guidance as to whether a regulatory asset value should be set as scrap value or at DORC value, or at any particular value in between. There is no economic efficiency reason for regulated assets to be valued at a level that is commensurate with the cost structure of a hypothetical (efficient) new entrant.*⁵¹⁰

Professor Menezes said in his report that DORC is used in particular contexts and the characteristics of the West Moreton network, that was not built for carrying heavy haul coal services, create particular challenges for a DORC valuation.⁵¹¹ As Professor Menezes notes, the history of initial asset valuations by regulators:

*... illustrates that while DORC has played a prominent role, there is a range of asset valuation methods that have been used by regulators in Australia, and highlights that determining initial asset values also entails wider considerations that are likely to vary on a case-by-case basis.*⁵¹²

A well-known example of applying valuations to suit the circumstances came with the five Victorian electricity distribution businesses in the 1990s, where the DORC values were adjusted up or down to promote uniform pricing across urban and rural consumers.

We note that all of the specific examples discussed by PwC in its May report, and repeated in its report accompanying Queensland Rail's June submission, were built to serve the particular

⁵⁰⁶ Queensland Rail, no. 1: 7-8; sub. no. 2: 32; sub. no. 3, Attachment C: 12.

⁵⁰⁷ Queensland Rail, sub. no. 2, App. 2: 6, 9-11.

⁵⁰⁸ Queensland Rail, sub. no. 17.

⁵⁰⁹ QCA, 2000 December: ii.

⁵¹⁰ Allen Consulting Group, 2005 March: 3.

⁵¹¹ Menezes, Flavio, 2015 July (b): 11.

⁵¹² Menezes, Flavio, 2015 July (b): 29.

purpose for which they are being used.⁵¹³ Further, their general characteristics were consistent with modern engineering practice.

The West Moreton network is an unusual regulated asset in that it was not built for the purpose for which it is being used. As a result, it departs significantly from the sort of asset that would be built today to transport coal—indeed, as discussed below, if the asset was built today it would have much greater capacity and a different configuration. Our asset valuation approach seeks to address these circumstances.

Queensland Rail has also said that our proposed valuation in the October 2014 Draft Decision differed from the assessment B&H made in its May 2014 report on West Moreton costs.⁵¹⁴ We note that, while the May 2014 B&H assessment looked at 'life-expired assets', it was a purely technical review that did not take into account economic considerations.

We published our June 2014 Consultation Paper with two potential valuation approaches in mind because we were concerned that the possibilities we were considering might not appropriately address the issues on the West Moreton network.

We subsequently reviewed the approaches in that report with regard to stakeholders' concerns, including those about the conflict between the maintenance and capital spending proposed by Queensland Rail and its proposed asset valuation. The September 2014 B&H report applied a valuation approach as directed by us and that approach took account of these concerns and was based on economic considerations. This approach has been applied in our consideration of this Draft Decision, with adjustments to reflect comments from Queensland Rail and other stakeholders, and updated advice from B&H's September 2015 report.

The approach used in the September 2014 B&H report, that formed the basis for the October 2014 Draft Decision valuation, has been assessed by Professor Menezes in the preliminary and updated Menezes Valuation Reports, and found to be a way to mitigate the risk that some DORC-based prices will adversely affect competition in relevant markets, and allow for windfall gains and monopoly rents.⁵¹⁵

Mindset and evidence

Queensland Rail has made the related arguments that:

- (a) the mindset of the investor at time of investment cannot be known⁵¹⁶
- (b) the QCA needs 'conclusive evidence' to support the assertion that there has been double recovery of costs, in order to exclude assets to prevent windfall gains and avoid adverse effects on allocative efficiency.⁵¹⁷

We do not consider that it is necessary to establish the mindset of investors in 1867, in order to draw the reasonable conclusion that they would not have expected to be recovering the cost of their tunnels, cuttings and embankments in 2015. The tunnels, cuttings and embankments have now been there for almost 150 years. There are no accounting records to show that they have or have not been fully recovered. However, there is no doubt that the economic costs of the investments have been recovered. This view is supported by Professor Menezes' report in which he says:

⁵¹³ Queensland Rail, sub. no. 2, App. 2: 9-11; sub. no. 3, Att. C: 9.

⁵¹⁴ Queensland Rail, sub. no. 1: 7, 8-9.

⁵¹⁵ Menezes, Flavio, 2015 July (b): 35.

⁵¹⁶ Queensland Rail, sub. no. 3, Att. C: 15.

⁵¹⁷ Queensland Rail, sub. no. 1: 8; sub. no. 2: 7; sub. no. 3, Att. C: 7-8

*... the DORC approach proposed by the QCA in its 2014 Draft Decision values many assets, those with non-expired expected useful lives. In such instances, it is neither possible or necessary to consider the mindset of the investor at the time of the investment.*⁵¹⁸

As mentioned, their value is implicit in the value otherwise attributed to the other network assets in our assessment.

The situation for shorter-lived assets, such as wooden sleepers, is similar. We are aware that they are still in service. However it is clear that this is because they have been replaced through maintenance. Indeed Queensland Rail has proposed significant spending on maintaining these assets in its 2013 and 2015 DAU submissions. It has also provided evidence of past maintenance spending on the West Moreton network over the last 20 years. Over the same period, Queensland Rail has received coal tariff revenue, a large part of which has gone towards that maintenance.

Equally, the assessment of windfall gains and the adverse effects on allocative efficiency of Queensland Rail's proposed asset valuation is based on economic logic. Professor Menezes' analysis shows that a return on assets that have exceeded their expected useful lives yields windfall gains and this increases the risk that allocative efficiency may be affected.⁵¹⁹

Queensland Rail also said the QCA should not rely on the issue of affordability in assessing the West Moreton network tariff, as affordability cannot be assessed without evidence, and does not apply equally to all users.⁵²⁰

We note that our June 2014 Consultation Paper and October 2014 Draft Decision cited comments from stakeholders about affordability and the recent closure of one of the West Moreton network mines. Nevertheless, we have not had regard to the effects of short-term business cycles and hence affordability in considering the asset valuation for this Draft Decision.

Regulatory certainty

Queensland Rail argued there was 'no reasonable basis' for the QCA to change its valuation methodology in the October 2014 Draft Decision from past practice, including that previously used by the QCA and other regulators, as that would create regulatory uncertainty.⁵²¹ PwC made a similar comment in its response to the preliminary Menezes Valuation Report, saying dynamic efficiency required an expectation of return and asset write-downs created uncertainty.⁵²²

Queensland Rail again made similar comments in its July 2015 submission, saying that 'the QCA set the initial asset base for the West Moreton network on 30 June 2010 when it approved reference tariffs in the 2008 access undertaking under the Extension DAAU (Pricing)'.⁵²³ It went on to say:

*Queensland Rail is entitled to expect that the QCA would act consistently with its past decisions, including in relation to the application of a conventional DORC valuation and its past approval of the initial asset base relevant to the West Moreton Network, and would not, for example, seek to replace the initial asset value that it has already approved.*⁵²⁴

⁵¹⁸ Menezes, Flavio, 2015 July (b): 13.

⁵¹⁹ Menezes, Flavio, 2015 July (b): 10-11.

⁵²⁰ Queensland Rail, sub. no. 1: 9.

⁵²¹ Queensland Rail, sub. no. 1: 7-8.

⁵²² Queensland Rail, sub. no. 3, Attachment C: 14.

⁵²³ Queensland Rail, sub. no. 17: 11

⁵²⁴ Queensland Rail, sub. no. 17: 11-12.

The QCA specifically stated in its June 2010 pricing decision that 'the Authority has not achieved its desired objective of finalising a repeatable and transparent methodology for deriving the western system [West Moreton network] tariff'.⁵²⁵ The June 2010 final decision on QR Network's June 2010 Extension DAAU approved new prices for the West Moreton network, but did not change the view that the derivation of that price had not been resolved.⁵²⁶ It certainly did not 'set the initial asset base' for the network.

We note that the asset valuation for the West Moreton network has been unresolved since access regulation for Queensland's rail networks began in the 1990s. This is in large part because of the idiosyncratic nature of the rail infrastructure. We have sought to finalise an efficient valuation to end the uncertainty for both Queensland Rail and its stakeholders. The pricing regime we propose, including the asset valuation discussed below, provides for recovery of future investment by Queensland Rail and of existing assets with remaining useful lives. This gives Queensland Rail certainty and an incentive to invest. An efficient valuation also minimises the chances of future write-downs that might arise from assets becoming stranded. As Professor Menezes says:

*... not allowing the firm to earn these windfall gains cannot increase regulatory risk. Put differently, an investor today will not invest less for fear that she will not be able to earn a return on an asset beyond its expected useful life.*⁵²⁷

In this context, the QCA does not consider that its approach to valuing the West Moreton network would impact on Queensland Rail's future investment decisions.

Queensland Rail proposal not approved

We have considered Queensland Rail's 2015 DAU and further submissions, as well as stakeholder submissions in accordance with our obligations in the QCA Act. We do not consider it appropriate to approve both Queensland Rail's proposed high ongoing expenditure on maintenance and capital investment and Queensland Rail's proposed initial asset base. Unless an assessment of the West Moreton network balances the asset valuation and the ongoing costs, Queensland Rail will receive a windfall return. As Aurizon, whose related party Aurizon Network owns the central Queensland coal network, said:

*The objective of promoting efficient investment and utilisation of rail infrastructure requires that increased weight should be given to improving the standard and capacity of the rail infrastructure relative to providing a return on tunnels, land and civils where the original costs were incurred over a century ago.*⁵²⁸

It is in Queensland Rail's legitimate business interest to recover a return on (and of) assets (s. 138(2)(b)). However, an access price calculated on the valuation proposed by Queensland Rail would be more than sufficient to generate expected revenue that is at least enough to meet the efficient costs of providing access to the service and provide it with a return on investment commensurate with the regulatory and commercial risks of providing access (s. 168A(a)).

A return materially above a 'sufficient' amount (i.e. one that provided for monopoly rents) would be inconsistent with economically efficient investment, operation and use of the infrastructure that provides below-rail services on the West Moreton network and would therefore have the potential to adversely affect competition in upstream and downstream

⁵²⁵ QCA, 2010 June(a): 89.

⁵²⁶ QCA, 2010 June(b).

⁵²⁷ Menezes, Flavio, 2015 July (b): 12.

⁵²⁸ Aurizon, sub. no. 6: 49.

markets (s. 138(2)(a)). Section 168A(a) refers to expected revenue that is at least enough to meet the efficient costs of providing access to the service and a return on investment commensurate with the regulatory and commercial risks involved. Queensland Rail's proposed valuation would lead to a price that generates returns that exceed this amount. Whilst such an outcome is not precluded by section 168A(a), as Professor Menezes says:

*... a DORC approach that places a positive value on longstanding assets with expired expected useful lives yields a higher return than could have been anticipated by an investor undertaking the initial investment decision. This increases the risk that access prices are sufficiently high to distort competition in relevant markets and impact adversely on investment in coal exploration and production.*⁵²⁹

Further, it is in the interest of access seekers and holders to pay a return on and of an asset value that does not provide windfall returns (s. 138(2)(e) and (h)).

In this regard, we consider that preventing windfall gains and monopoly rents is a matter to which we should have regard in considering the West Moreton network tariff, including the initial asset valuation for the purposes of setting that tariff (s. 138(2)(h)).

It would also be against the public interest to allow windfall gains as that would have potential to reduce competition and discourage investment in downstream markets such as coal mining and coal tenements, reducing economic growth in Queensland (s. 138(2)(d)).

Therefore, having regard to all the approval criteria in the QCA Act (s. 138(2)), we do not consider it is appropriate to approve the 2015 DAU which contains the asset valuation proposed by Queensland Rail.

QCA approach

There are alternative ways of valuing a network, each tailored to the particular circumstances of the relevant asset. The potential for windfall gains and monopoly rents might be addressed through a DAC approach. DAC would exclude many old historical assets that were not originally built or designed for coal transport, and which have had their full economic cost recovered through depreciation and therefore paid for in full. However, a DAC approach is heavily reliant on precise accounting records and would likely give rise to prolonged arguments as to Queensland Rail's and its owners' expectations for every past investment. For example, Queensland Rail's consultant Frontier Economics raised concerns about the quality of the information on Queensland Rail's asset values. These included issues associated with a change from deprival value to imputing 'cost values' and various asset revaluations, transfers and amalgamations.⁵³⁰ On balance, these shortcomings suggest that, while a DAC-style methodology is suited to assessing some of the West Moreton network assets, it is not appropriate on its own for deriving the overall initial asset value.

⁵²⁹ Menezes, Flavio, 2015 July (b): 34.

⁵³⁰ Queensland Rail, sub. no. 3, Attachment D: 12-13.

An alternative possibility is a greenfields DORC. But defining the hypothetical new entrant that a greenfields DORC is supposed to model is particularly problematic in this case. Evidence from the Galilee Basin in central Queensland is that a new entrant, where there was no railway line, would only develop a new rail system at a scale several times the size of the West Moreton network.⁵³¹ The new Galilee projects are planned to be served by modern rail lines with above- and below-rail scale efficiencies including trains carrying as much as 25,000 tonnes of coal—more than 12 times as much as West Moreton network trains—and lower maintenance costs than the West Moreton network.

Entry at the current scale of the West Moreton network would not occur, as there would be too much spare capacity. In other words, it would not be economically feasible to build a network with the service potential of the West Moreton network today. Therefore, bypass is not a realistic possibility. This means a greenfields assessment is not an appropriate DORC methodology for valuing the West Moreton network as there is no direct modern engineering equivalent of these assets.

The appropriate valuation for the West Moreton network must reflect the unique characteristics of the actual assets in place and the service they provide in order to provide useful or valid information.

Conceptually all assets, viewed in isolation, can contribute to the overall service potential of the network. But that is not the determining factor of whether a value should be given to the asset for the purposes of a valuation in a regulatory context. The regulatory context does not exactly mimic the outcomes of a competitive market—for example, regulation allows a return on and of sunk investments. It follows that a valuation in a regulatory framework occurs in the context of achieving the objectives of the regulatory regime, having regard to the particular circumstances of the assets in question, and need not follow a theoretical construct.

Coal trains are able to use the West Moreton network only because of the high maintenance spend. The QCA has recognised the critical importance of the very high maintenance costs to the viability of the network by including substantial compensation for these costs in the reference tariff.

If the maintenance spend were to be cut, coal trains would no longer be able to use the West Moreton network and therefore the assets could not be used for coal traffic. The value of the network is therefore created by, and reflected in, the high maintenance costs. Without such high levels of maintenance, Queensland Rail could not generate revenue from coal services.

In other words, the revenue stream from the West Moreton network and hence the value of the network is dependent on the continuing high maintenance spend. Some of the assets that are particularly maintenance-intensive are wooden sleepers and ballast, each of which require regular replacement.⁵³²

While some assets continue to function well beyond their expected regulatory life due to maintenance, other assets require only incidental further work once they have been built. Key among these on the West Moreton network are the tunnels, cuttings and embankments, all of

⁵³¹ See <https://publications.qld.gov.au/dataset/queensland-coal-mines-advanced-projects>, pp. 2-3. Planned annual production of Galilee Basin thermal coal export projects ranges from 15 million tonnes to 60 million tonnes, with an average of 35 million tonnes. Queensland Rail forecasts that the West Moreton network will have annual volumes of 6.2 million tonnes of thermal coal during the 2015–20 regulatory period (Queensland Rail, sub. no. 2: 17).

⁵³² B&H, 2015 September: 23-25 for sleepers and 20 for ballast.

which were completed by the time rail services to Toowoomba began in 1867. The tunnels, cuttings and embankments are essentially perpetual, and do not depend on significant maintenance to remain in service. Indeed, they are now akin to a natural feature of the landscape and will most likely have the same remaining service potential in 100 years as they have now, with no further capital expenditure and subject to them continuing to form part of a viable rail network.

Tunnels, cuttings and embankments depend on the other assets that are integral to a rail network, such as rail and sleepers, to have any value at all. Without tracks going through them and trains carrying goods or passengers on those tracks, the tunnels, cuttings and embankments of and by themselves have no value. The question for an economic regulator (using a building blocks approach to setting a tariff) is, what allowance should be given in the tariff for investment in tunnels, cuttings and embankments?

The tunnels, cuttings and embankments on the West Moreton network were built almost 150 years ago and the accounting records to enable a DAC valuation are not available. We have therefore had to form a judgment about the valuation of the tunnels, cuttings and embankments having regard to how long ago they were built, the fact that they have exceeded their expected useful lives and the interests of stakeholders including Queensland Rail. In these circumstances, the tunnels, cuttings and embankments do not add any additional value to the West Moreton network (beyond the value of the other assets in the network itself).

Therefore, for the purposes of developing a tariff for the West Moreton network, we have adopted a valuation approach that reflects these factors as follows:

- (a) giving value to assets such as rail, concrete sleepers and concrete bridges that have been replaced as capital items and have not been fully depreciated
- (b) assigning no additional value beyond the allowed maintenance expenditure to assets such as wooden sleepers and fences that have been replaced through maintenance expenditure, or ballast and wooden bridges that require so much maintenance to keep them in service that they are effectively worthless without that high maintenance spending
- (c) not giving tunnels, cuttings and embankments any additional value beyond that given to other assets and hence the network as a whole.

The asset value that results from our approach is \$235.8 million, for the network from Rosewood to Columboola, as at 1 July 2013.⁵³³ The largest component of the asset value is track,⁵³⁴ at \$169.0 million. The proposed valuation has been developed with regard to information from Queensland Rail on investments in the West Moreton network since 1995, to the extent the information is available. The valuation is explained in more detail in a report from B&H Strategic Services, published with this Draft Decision.⁵³⁵

The QCA's valuation approach addresses the imbalance between Queensland Rail's need to spend money on the network and its proposed asset value, and the inefficiency consequences of that imbalance.

⁵³³ Our proposed common network asset value of \$272.2 million at 1 July 2015 includes our assessment of Queensland Rail's past capital expenditure (see Section 8.7.2 of this Draft Decision).

⁵³⁴ The 'track' category includes rails, sleepers, ballast and other related assets, as Queensland Rail does not separately record its spending on these items after 2007. The valuation for rails in place before 2007 is \$87.6 million.

⁵³⁵ B&H, 2015 September: 48-56.

Draft Decision

The QCA has had regard to and weighed up the relevant criteria in s. 138(2) and given appropriate weight to each criterion in forming a Draft Decision on whether it is appropriate to approve the 2015 DAU opening asset value of \$471.5 million proposed by Queensland Rail. The QCA has similarly done so in reaching its required amendment of the opening asset value.

The QCA's proposed valuation will allow for a return on investment that is commensurate with the regulatory and commercial risks of providing access for West Moreton network coal services, as it provides an appropriate return but does not provide windfall gains or monopoly rents (s. 168A(a)).

To allow a return on assets that have reached the end of their 'expected' useful life would mean that access holders and end users were paying for both high maintenance spending and for assets that were either renewed through that maintenance spending, or had reached the end of their expected useful lives. This would not be consistent with economically efficient investment in rail infrastructure as it would overcompensate Queensland Rail for the regulatory and commercial risks of providing access, which would not be consistent with the object of Part 5 of the QCA Act.

We have had regard to the effect of excluding existing assets for pricing purposes, forming the view that excluding assets that have exceeded their expected useful life or are subject to intensive maintenance will not affect the incentive for Queensland Rail to make efficient investments in rail infrastructure (s. 138(2)(f)).

At the same time, giving maintenance-intensive assets a zero value and not providing a value for tunnels, cuttings and embankments beyond that given to the other assets of the network is consistent with providing incentives for Queensland Rail to efficiently invest in its network and with promoting competition in relevant markets, including those for above-rail haulage, coal production and coal tenements. For similar reasons, the proposed valuation is in the public interest as it will promote economic growth in Queensland (s. 138(2)(a) and (d)).

The proposed valuation is also in the interests of access seekers and holders in paying a return on and of an efficient asset value that is commensurate with Queensland Rail's regulatory and commercial risks of providing access (s. 138(2)(e) and (h)).

Further, as the valuation prevents windfall gains and monopoly rents, it is consistent with matters to which we should have regard in considering the West Moreton network tariff, including the asset valuation (s. 138(2)(h)).

On this basis and having regard to the criteria in section 138(2), the QCA's Draft Decision is that it is not appropriate to approve the 2015 DAU proposed by Queensland Rail and the undertaking should be amended to apply an initial asset value of \$272.2 million for the West Moreton common network between Columboola and Rosewood, at 1 July 2015.⁵³⁶

⁵³⁶ Our proposed common network opening asset value at 1 July 2015 includes our assessment of Queensland Rail's past capital expenditure (see Section 8.7.2 of this Draft Decision).

Draft Decision

- 8.8** Having considered Queensland Rail's proposed opening asset value for the West Moreton network derived using the DORC valuation methodology, our Draft Decision is to refuse to approve Queensland Rail's proposal.
- 8.9** The QCA requires Queensland Rail to amend its 2015 DAU to include an opening asset value derived using the QCA's proposed valuation for Queensland Rail's West Moreton network common network between Rosewood and Columboola, giving a common network opening asset value of \$272.2 million as at 1 July 2015.
- 8.10** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

Process matters

Queensland Rail raised a number of process-related matters about the West Moreton network asset valuation in its material accompanying the 2015 DAU. It said in its submission in response to the Menezes Initial Valuation Report that:

- (a) the QCA did not have a statutory power to commission the report and that doing so raised a 'potential serious flaw in process'
- (b) the views in the preliminary Menezes Valuation Report could not be preliminary and that Professor Menezes views could not be given weight as a 'truly independent expert opinion on asset valuation methodologies'.⁵³⁷

We consider that commissioning the preliminary Menezes Valuation Report was clearly within the QCA's powers and that the updated Menezes Valuation Report is an important consideration for the QCA in assessing Queensland Rail's proposal.

Statutory power

Queensland Rail submitted the QCA did not appear to have power or function to commission the preliminary Menezes Valuation Report before the submission of the 2015 DAU or the notice of investigation in respect of that DAU.⁵³⁸

The QCA does not agree and relies on s. 10(h) and (n) and s. 11(1)(e) of the QCA Act. The initial undertaking notice under s. 133 of the QCA Act, requiring Queensland Rail to give the QCA a draft access undertaking, was dated 4 February 2015.

⁵³⁷ Queensland Rail, sub. no. 3: 3-7.

⁵³⁸ Queensland Rail, sub. no. 3: 5.

The preliminary Menezes Valuation Report was published in the context of what Queensland Rail has described as 'intense debate throughout the assessment process of the 2013 DAU, and also through the process of developing the current access undertaking' about the opening asset value.⁵³⁹ We were also aware that Queensland Rail intended to raise matters relating to the West Moreton asset valuation in its 2015 DAU, as it had cited concerns about the valuation in its explanations for withdrawing the 2013 DAU.⁵⁴⁰

As the QCA said at the time of its publication, the preliminary Menezes Valuation Report was published in the interests of a timely consideration of the 2015 DAU and for early participation and efficiency in the decision-making process.

The QCA has published a preliminary independent economic expert report assessing the asset valuation methodologies which were considered by the QCA prior to the withdrawal of the 2013 DAU. Accordingly, it does not take into account Queensland Rail's 2015 DAU. The QCA will consider the 2015 DAU afresh pursuant to section 134 of the QCA Act.

However, in the interests of the 2015 DAU being considered in a timely manner, the QCA is publishing the preliminary expert report now and invites stakeholders to make submissions on the report as part of commenting on Queensland Rail's 2015 DAU. This will enable the QCA to address any stakeholder submissions as part of its Draft Decision on the 2015 DAU, making for early participation and efficiency in the decision making process. The independent expert report is preliminary only and does not in any way reflect the views of the QCA with respect to the 2015 DAU.

Procedural fairness

Queensland Rail complains of a lack of procedural fairness by saying the QCA did not engage with it before the submission of the 2015 DAU or the notice of investigation in respect of that DAU.⁵⁴¹

The QCA does not agree. The QCA did not engage with Queensland Rail on the preliminary Menezes Valuation Report before we published it. However, that does not mean Queensland Rail was denied procedural fairness, because we have not formed a final view on this matter.

We published the preliminary Menezes Valuation Report precisely so that all stakeholders, including (but not only) Queensland Rail, had the opportunity for early participation in the decision making, as in the usual course such a report would not have been published until this Draft Decision.

In the event, Queensland Rail has taken the opportunity to submit two reports in response to the preliminary Menezes Valuation Report and a detailed submission. The QCA has published an updated Menezes Valuation Report with this Draft Decision and Queensland Rail now has an opportunity to respond to it as well as other stakeholder submissions made in response to the preliminary Menezes Valuation Report. These opportunities go beyond that which an access provider would normally see in a regulatory decision making process. The QCA's two-step process promotes procedural fairness for Queensland Rail.

⁵³⁹ Queensland Rail, sub. no. 2: 29.

⁵⁴⁰ Queensland Rail's 12 December 2014 letter withdrawing its 2013 DAU said one of the reasons was the 'significant changes in the QCA's regulatory approach'. In a subsequent 'frequently asked questions' document available on Queensland Rail's website in January 2015, Queensland Rail said 'a different asset valuation methodology for the West Moreton system' was one of the changes that led it to withdraw the 2013 DAU.

⁵⁴¹ Queensland Rail, sub. no. 3: 5-6.

Legal opinions

Queensland Rail submits Professor Menezes expresses legal opinions. That is not the case. Insofar as Professor Menezes mentions s. 138(2) of the QCA Act, he does not express a legal opinion but merely refers to it as background for his clear statement that the 'economic aims of the objects clause and the pricing principles will be used in my assessment of the appropriateness of various methodologies to determine the initial value of the regulatory asset base'.⁵⁴² That he relies solely on those economic aims is obvious from reading his Preliminary Valuation Report.

In any event, the QCA has not approached the reports on the basis that what they say about legal matters is binding on the QCA.

8.7.2 Past capital expenditure

Queensland Rail's 2015 DAU proposed opening asset value at 1 July 2015 includes:

- historical capital expenditure incurred during 2007–08 to 2012–13 (historical capital expenditure)
- capital expenditure incurred during 2013–14 and 2014–15 that overlaps with the 2013 DAU period (pre-2015 DAU capital expenditure).

Historical capital expenditure

Queensland Rail's 2015 DAU proposal

In the 2015 DAU, Queensland Rail included a new claim of \$17.9 million for capital expenditure in the West Moreton network incurred during 2007–08 to 2012–13.⁵⁴³ This claim was not included in the 2013 DAU.

Queensland Rail said that its 2013 DAU proposal had not included this capital expenditure as the underlying projects were triggered by freight (i.e. non-coal) services. It referred to this as transport service contract (TSC) capital. However, its 2015 DAU proposal included all capital expenditure on the common network, regardless of whether it was triggered by coal or non-coal services. In doing so, Queensland Rail said that it had adopted the QCA's 2014 Draft Decision approach that all common network capital expenditure should be included in the asset value, which should be allocated to all beneficiaries of the common network.⁵⁴⁴

Queensland Rail said that TSC projects attracted government support, which funded the return on, and of, TSC assets.⁵⁴⁵

Stakeholders' comments

Stakeholders did not comment on this aspect of Queensland Rail's capital expenditure proposal, rather their comments related to the pre-2015 DAU capital expenditure (considered below in this section of the Draft Decision) and the forecast capital expenditure (considered in Section 8.7.3 of this Draft Decision).

QCA analysis and Draft Decision

We reiterate our 2014 Draft Decision that on a shared system, it is reasonable to allocate investments on the common network amongst the different classes of users. That is based on

⁵⁴² Menezes, 2015 April: 7.

⁵⁴³ Queensland Rail, sub. no. 2: 35.

⁵⁴⁴ Queensland Rail, sub. no. 2: 35, 49.

⁵⁴⁵ Queensland Rail, 2015g: 2; June 2013a: 16.

the view that the underlying investment, where it is on the common network shared with other traffics, improves the standard of the track for all traffics that benefit from the resulting increased reliability and lower maintenance requirement.

We also reiterate a regulatory principle from our 2014 Draft Decision that investors need only receive a return on and of their investments once to avoid windfall gains (see Section 8.7.1 of this Draft Decision, for an application of this principle in determining the initial asset value of the West Moreton network).

Queensland Rail's proposal to include in the regulatory asset base the capital expenditure for which it already is receiving a return on and of investment from a third-party (the government) amounts to windfall gains, which will adversely affect the interests of access seekers and access holders. It would also be against the public interest as allowing windfall gains would discourage investment in downstream markets such as coal mining and coal tenements. We also consider this proposal is not in Queensland Rail's legitimate business interest as it is not reasonable for Queensland Rail to seek to recover the investment costs more than once.

Therefore our Draft Decision is to not approve this aspect of Queensland Rail's proposal and to not consider the TSC-funded capital expenditure for the purposes of deriving the West Moreton reference tariff, having regard to s. 138(2)(a), (b), (d), (e) and (h) of the QCA Act.

Pre-2015 DAU capital expenditure

Queensland Rail's 2015 DAU proposal

In the 2015 DAU, Queensland Rail included a claim of \$39.3 million for capital expenditure carried out in the West Moreton network during 2013–14 and 2014–15.⁵⁴⁶ Queensland Rail said this expenditure claim was within 5 per cent of the amount it had proposed in its 2013 DAU proposal.⁵⁴⁷ The expenditure included works such as:

- replacement of turnouts and upgrade of about 31 kilometres of track
- slope stabilisation works on the Toowoomba range
- strengthening and replacing of timber bridges.⁵⁴⁸

Queensland Rail proposed allocating 77.7 per cent of the expenditure to coal services (i.e. \$30.5 million) for the purposes of deriving the West Moreton coal reference tariff, reflecting the ratio of 87/112 paths (see Section 8.4.1 of this Draft Decision).⁵⁴⁹

Stakeholders' comments

Stakeholders suggested that the QCA scrutinise the capital expenditure incurred during 2013–14 and 2014–15. Aurizon said that in reviewing the capital expenditure projects, the QCA should exclude investment associated with the rail infrastructure that was optimised in the original [2007] DORC valuation, particularly in relation to the duplicated section between Rosewood and Helidon.⁵⁵⁰

QCA's analysis and Draft Decision

Our Draft Decision proposes to accept as prudent \$37.7 million of the capital expenditure and allocate 68.8 per cent of that to coal services (i.e. \$25.9 million) for the purposes of deriving the

⁵⁴⁶ Queensland Rail, sub. no. 2: 36.

⁵⁴⁷ The corresponding amount proposed in the 2013 DAU was \$41.1 million (Queensland Rail, sub. no. 2: 36).

⁵⁴⁸ Queensland Rail, sub. no. 2, Appendix 3: 3–20.

⁵⁴⁹ Queensland Rail, sub. no. 2: 49.

⁵⁵⁰ Aurizon, sub. no. 6: 38; Yancoal, sub. no. 16: 3–4.

West Moreton coal reference tariff, reflecting the ratio of 77/112 paths. Our proposed coal allocated amount is about 85 per cent of Queensland Rail's 2015 DAU proposal.

[QCA's approach to assessing the prudence of pre-2015 DAU capital expenditure](#)

In our 2014 Draft Decision, we had accepted Queensland Rail's then proposed forecast capital expenditure (including for the period 2013–14 and 2014–15) in the capital indicator for tariff calculation purposes. We also said that we will assess the prudence of the proposed expenditure in detail, including assessing whether Queensland Rail had explored the feasibility of alternative solutions for the planned works.⁵⁵¹

Accordingly, we engaged B&H to independently assess the prudence of Queensland Rail's capital expenditure claim for the period 2013–14 and 2014–15.

B&H accepted many aspects of Queensland Rail's expenditure claim, for example, expenditure relating to slope stabilisation works on the Toowoomba range and strengthening and upgrade of timber bridges.⁵⁵²

However, B&H identified inefficiencies in the works relating to replacement of turnouts and recommended reducing the corresponding expenditure claim by ten percent.⁵⁵³

B&H also observed that most of the capital expenditure claim related to projects that extended into the 2015 DAU period and were included in Queensland Rail's proposed forecast capital expenditure—for example, the Toowoomba range stabilisation project. Considering the extensive nature of the work that had already been carried out for that project (and some other works) in the pre-2015 DAU period, B&H suggested reducing the cost and scope of those works in the forecast capital expenditure for the 2015 DAU period (see Section 8.7.3 of this Draft Decision).

[QCA's draft position on the pre-2015 DAU capital expenditure](#)

We accept B&H's assessment that many aspects of Queensland Rail's expenditure claim are prudent. We also accept B&H's recommendation to reduce Queensland Rail's expenditure claim for replacing turnouts due to inefficiencies in the works undertaken. On that basis, we consider Queensland Rail's proposal would allow it to recover inefficient costs, which is inconsistent with the pricing principles in the QCA Act (s. 168A(a)). That would also be inconsistent with protecting the legitimate business interests of the owner/operator (s. 138(2)(b)), which includes allowing the owner/operator to recover its efficient costs of providing access to the service. It would also not be in the interests of access seekers and access holders and would not promote the efficient use of the network, having regard to s. 138(2)(a), (e) and (h).

Based on B&H's recommendation, we are minded to accept a total capital expenditure claim of \$37.7 million for expenditure incurred during 2013–14 and 2014–15.⁵⁵⁴ We consider that expenditure claim is reasonable.

Furthermore, we consider it appropriate to allocate 68.8 per cent of that expenditure to coal services (i.e. \$25.9 million) for the purposes of deriving the West Moreton coal reference tariff, reflecting the ratio of 77/112 paths (see Sections 8.4.1 and 8.7.4 of this Draft Decision).

⁵⁵¹ QCA, 2014 Draft Decision: 126.

⁵⁵² B&H, September 2015: 43–47.

⁵⁵³ B&H, September 2015: 43.

⁵⁵⁴ This amount includes capitalised interest. The amount reported in B&H's report (\$36.4 million) is the project cost that excludes capitalised interest.

We consider our allocation of that expenditure to coal services is fair and reasonable, as it makes coal services pay for the portion of the expenditure reflecting the part of the West Moreton network they can access—that is, an allocation based on the relative train paths available for contracting by coal services.

Accordingly, we consider our position on Queensland Rail's expenditure claim will send the right signals for the efficient use of the network's capacity and is in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act. We also consider our position is in the legitimate business interests of Queensland Rail, as it will allow Queensland Rail to recover its efficient expenditure of providing access to coal services from coal customers. On this basis, we consider our position adequately balances the interests of all parties and will promote the efficient use of the network, having regard to s. 138(2) of the QCA Act, in particular paragraphs (a), (b), (e), (g) and (h).

8.7.3 Forecast capital expenditure

Queensland Rail's 2015 DAU proposal

Queensland Rail's 2015 DAU proposes:

- (a) *a capital indicator process*—where a provision for forecast capital expenditure is reflected in the proposed reference tariffs
- (b) *a subsequent prudence assessment process*—where the prudence of capital expenditure is assessed for inclusion in the regulatory asset base and permanently reflected in the reference tariffs. This detailed process is designed to examine the scope, standard and cost of the works.⁵⁵⁵

Under these processes, Queensland Rail proposed \$141.9 million in forecast capital expenditure for the five-year period July 2015 to June 2020.⁵⁵⁶

Since the first two years in the 2015 DAU proposal overlap with the period in the 2013 proposal, the forecast capital expenditure for those two years is about \$17.1 million higher than in the 2013 DAU proposal, which our 2014 Draft Decision had accepted for the purposes of the capital indicator. Queensland Rail said this was due to an increase in the cost and scope of works including replacing timber bridges, strengthening steel bridges and relaying check rail curves.⁵⁵⁷

Queensland Rail submitted an asset management plan (AMP) and said that provided the strategic framework for its planned capital and maintenance activities. In relation to the effect of the lower forecast volumes on the capital program, Queensland Rail argued that its forecast capital program was primarily aimed at 'replacing assets that have reached the end of their useful life' and that deferring the capital program [in response to a short-term reduction in volumes] would deteriorate the network's service standards.⁵⁵⁸

Queensland Rail proposed allocating the forecast capital expenditure to coal services based on the ratio of forecast train paths, resulting in allocating about 94 per cent (i.e. \$133.0 million) of the proposed \$141.9 million capital expenditure to coal services for the purposes of deriving the West Moreton reference tariff. In doing so, Queensland Rail rejected our 2014 Draft Decision to

⁵⁵⁵ Queensland Rail, sub. no. 2: 36; 2015 DAU, Schedule E.

⁵⁵⁶ Queensland Rail, sub. no. 2: 37.

⁵⁵⁷ Queensland Rail, sub. no. 2: 37-38.

⁵⁵⁸ Queensland Rail, sub. no. 2: 38.

allocate the forecast capital expenditure based on the ratio of available train paths (see Section 8.4.1 of this Draft Decision).⁵⁵⁹

In relation to the prudency assessment process, Queensland Rail said that it had 'partially accepted' the amendments required by our 2014 Draft Decision. However, Queensland Rail proposed that the asset value for determining a ceiling revenue limit will be set solely on the basis of a DORC methodology, and rejected our 2014 Draft Decision requiring it to not prescribe the DORC valuation methodology (see Chapter 3 of this Draft Decision).⁵⁶⁰

Stakeholders' comments

Stakeholders expressed concerns about the high forecast capital expenditure despite the expected reduction in volumes.⁵⁶¹ New Hope noted several deficiencies in Queensland Rail's proposed capital program, including 'no connection between maintenance, capital renewals, capital improvements and capital expansion investments'.

New Hope and Yancoal said that Queensland Rail's AMP lacked sufficient detail about the scope of planned works, development of estimates and the investment outcomes. New Hope said that the capital program has the appearance of a 'wish list' rather than a rigorously analysed and scoped program.

In relation to allocating the forecast capital expenditure to coal services, New Hope said that it should be allocated on the same basis as the opening asset base—that is, an allocation reflecting the limitations placed on the capacity that can be contracted to coal. New Hope said that 'it appears inconsistent that the allocation of the opening asset value is capped, but if the relevant assets are replaced, the cap ceases to apply'.⁵⁶²

In relation to the prudency assessment process, Aurizon said that Queensland Rail's proposed drafting requires the QCA to accept the prudency of scope of a customer-specific capital expenditure project if the customer accepts the scope. However, Aurizon said that project may include investments which may increase the reference tariff to existing access holders who were not consulted. Aurizon suggested that Queensland Rail should be required to consult with access holders who may be affected by the inclusion of a customer-specific investment in the RAB.⁵⁶³

QCA analysis and Draft Decision

Our Draft Decision proposes to accept forecast capital expenditure of \$144.2 million for the purposes of the capital indicator, which is greater than Queensland Rail's proposal due to treating some maintenance activities as capital works. We will assess the planned capital works in detail through the prudency assessment process in the approved undertaking. A key aspect of that assessment will be to determine whether Queensland Rail explored the feasibility of alternative solutions.

We also propose allocating 68.8 per cent of that expenditure to coal services (i.e. \$99.2 million) for the purposes of deriving the West Moreton coal reference tariff, which reflects the ratio of 77/112 paths (see Sections 8.4.1 and 8.7.4 of this Draft Decision). Our proposed coal allocated amount is about 75 per cent of Queensland Rail's amount of \$133 million.

⁵⁵⁹ Queensland Rail, sub. no. 2: 55-56.

⁵⁶⁰ Queensland Rail, sub. no. 1: 26, 40 & 45

⁵⁶¹ New Hope, sub. no. 9: 21; Yancoal, sub. no. 16: 3-4.

⁵⁶² New Hope, sub. no. 9: 26-27.

⁵⁶³ Aurizon, sub. no. 6: 49.

On this basis, we have assessed the level of forecast capital expenditure to be borne by coal services for the 2015 DAU.

QCA's approach to assessing the forecast capital expenditure

We engaged B&H to independently assess Queensland Rail's forecast capital expenditure program in the 2015 DAU.

B&H accepted many aspects of Queensland Rail's forecast capital program, for example, timber bridges upgrades and strengthening, drain renewal, signalling and telecoms upgrades and renewals, and relaying Oakey to Jondaryan.⁵⁶⁴

However, B&H observed that the AMP provided little discussion or evaluation of the alternative solutions Queensland Rail considered for the capital projects. B&H also observed that the capital program and maintenance program appeared to have been considered by Queensland Rail in isolation.⁵⁶⁵

Accordingly, B&H suggested reducing the forecast capital expenditure relating to slope stabilisation works on the Toowoomba range (due to past works that had been carried out), the level crossing reconditioning program (due to the inter-relation with the maintenance program) and check rail curves (due to inefficient the cost estimates). This resulted in a \$5.8 million reduction in Queensland Rail's forecast capital expenditure.⁵⁶⁶

Nevertheless, B&H also suggested augmenting the capital program to reflect the maintenance works that were capital in nature. Thus, B&H suggested combining ballast undercutting and formation repair/strengthening as one activity and including rail renewal (a maintenance item) into relaying (rerailling) under the capital program.⁵⁶⁷ This resulted in a \$10.7 million increase in Queensland Rail's forecast capital expenditure.

Ultimately, B&H recommended a forecast capital expenditure of \$144.2 million, which is about \$2.4 million⁵⁶⁸ greater than Queensland Rail's proposal due to treating some maintenance activities as capital works.⁵⁶⁹

B&H noted a statement in Queensland Rail's submission which indicated that coal trains will not continue through the Metropolitan network beyond 2032 and observed that Queensland Rail's capital and maintenance programs did not recognise this 2032 embargo on coal trains. Although B&H's primary analysis was on the basis of coal transport continuing beyond 2032, B&H's analysis suggested a 12 per cent reduction in Queensland Rail's capital program for the scenario where coal transport ceased in 2032.⁵⁷⁰

⁵⁶⁴ B&H, September 2015: 35-37.

⁵⁶⁵ B&H, September 2015: 34.

⁵⁶⁶ B&H, September 2015: iv, 35-37. This amount is equivalent to the \$4.6 million (in June 2014 dollars) reduction reported in B&H's report, that excludes capitalised interest and inflation escalation.

⁵⁶⁷ B&H, September 2015: iv, 35-37. This amount is equivalent to the \$10.3 million (in June 2014 dollars) increase reported in B&H's report, that excludes capitalised interest and inflation escalation.

⁵⁶⁸ For converting real dollars to nominal dollars, we used an inflation escalation factor of 2.5 per cent (rather than Queensland Rail's 4 per cent) to make the escalation factor consistent with that used in the tariff model. This reduced the forecast capital expenditure by \$2.5 million. Therefore, the net effect of an increase of \$2.4 million reflects the \$10.7 million increase and the reductions of \$5.8 million and \$2.5 million.

⁵⁶⁹ The amount reported in B&H's report (\$127.9 million) is the project cost that excludes capitalised interest and inflation escalation.

⁵⁷⁰ B&H, September 2015: 38-42.

QCA's draft position on forecast capital expenditure

There is a threshold issue of why Queensland Rail is engaging in capital expenditure with long asset lives when at the same time Queensland Rail is stating that coal trains cannot operate through the Metropolitan network beyond 2032. But since Queensland Rail's capital program does not consider the effect of the 2032 embargo, our preliminary view, subject to stakeholders' further comments, is to assess Queensland Rail's proposed capital program on the basis that coal transport will continue beyond 2032.

We accept that Queensland Rail needs to make capital improvements to its ageing railway to maintain the integrity of its network. However we also note B&H's observation that Queensland Rail has proposed capital expenditure without rigorously evaluating alternative solutions. Given this, while we are inclined to accept B&H's recommended forecast capital expenditure of \$144.2 million in the 2015 DAU for the purposes of the capital indicator, we will subsequently assess the capital works in detail through the prudence assessment process. A key aspect of that assessment will be to determine whether Queensland Rail has appropriately explored the feasibility of alternative solutions.

In relation to allocating the forecast capital expenditure to coal services, Queensland Rail argued that its expenditure was unaffected by the decline in usage, yet it proposed allocating about 93.7 per cent of that expenditure to coal services based on forecast usage. Queensland Rail said that its proposed allocation approach will allow it to recover the efficient costs of providing access to the rail infrastructure, yet Queensland Rail said that the binding constraint of the maximum coal paths on the Metropolitan network limited 'the proportion of the capacity of the West Moreton network that can potentially be contracted to coal to 87 out of 112 available paths, or 77.7 per cent'.⁵⁷¹

Effectively, based on Queensland Rail's proposed allocation, coal services would pay about an additional 16 per cent of the forecast capital expenditure for train paths that are not available for contracting by coal services—that is, coal services will pay more than their fair share of the forecast capital expenditure.

Accordingly, we consider that Queensland Rail's proposed allocation approach is not appropriate, which would not promote efficient use of the network and is not in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act.

We consider it is appropriate for coal services to pay for the portion of the capital expenditure reflecting the part of the network they can access—that is, an allocation based on the relative train paths available for contracting by coal services (see Section 8.4.1 of this Draft Decision). On this basis, 68.8 per cent forecast capital expenditure is allocated to coal services, which amounts to \$99.2 million.

We consider our proposed allocation approach provides a fair and reasonable allocation of costs that will send the right signals for the efficient use of the network's capacity and is in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act. We also consider our proposed approach is in the legitimate business interests of Queensland Rail, as it will allow Queensland Rail to recover its efficient costs of providing access to coal services from coal customers. However, whether Queensland Rail recovers non-coal share of the planned capital expenditure from non-coal services is not relevant for setting reference tariffs for coal-carrying train services on the West Moreton network.

⁵⁷¹ Queensland Rail, sub. no. 2: 37, 48, 55-56.

On this basis, we consider our proposed approach to allocating the forecast capital expenditure in the 2015 DAU adequately balances the interests of all parties and will promote efficient use of the network, having regard to s. 138(2) of the QCA Act, in particular paragraphs (a), (b), (e), (g) and (h).

QCA's draft position on the prudence assessment process

We have reviewed Queensland Rail's proposed capital indicator and prudence assessment process in Schedule E of the 2015 DAU. We note that many aspects of Queensland Rail's Schedule E are consistent with our 2014 Draft Decision.

However, we do not accept Queensland Rail's proposal to require that the asset value for determining a ceiling revenue limit be set solely on the basis of a DORC methodology. We require Queensland Rail to remove this requirement and to not prescribe any asset valuation methodology (see Chapter 3 of this Draft Decision).

We also require Queensland Rail to amend the Schedule E to enable an access funder to seek an assessment of the prudence of scope, standard and cost of a capital expenditure project (see Chapter 9 of this Draft Decision).

We support Aurizon's comment that Queensland Rail should consult with the access holders that may be affected by a capital project, having regard to s. 138(2)(h) of the QCA Act.

We note Queensland Rail has not included the requirement to optimise assets if there is a possibility of actual bypass. We consider that Queensland Rail's proposal could result in a possible duplication of facilities which would not be in the public interest and not promote the efficient use and operation of the declared service, having regard to s. 138(2)(a), (b) and (d) of the QCA Act. Therefore, we require Queensland Rail to amend its 2015 DAU to enable optimisation of assets if there is a possibility of actual bypass.

We also note that Queensland Rail has proposed maintaining separate regulatory asset bases (RAB) for the Rosewood to Jondaryan and the Jondaryan to Columboola sections of the network. This contrasts with the 2013 DAU proposal which had proposed maintaining separate RABs for the Rosewood to Macalister and the Macalister to Columboola sections.

We understand the 2015 DAU proposal reflects the closure of the Wilkie Creek mine at Macalister. However, our preliminary view is that Queensland Rail should also maintain a separate RAB for the Jondaryan to Macalister section. That will provide transparency about the value of assets for different sections of the network and mean that RABs for the different sections are consistently maintained and unaffected by the closure/reopening of an existing mine. That will be in the interest of all parties, having regard to s. 138(2)(b), (e) and (h) of the QCA Act.

Draft Decision

8.11 After considering Queensland Rail's proposed capital indicator and prudence assessment process in Schedule E in the 2015 DAU, our Draft Decision is to refuse to approve Queensland Rail's proposal.

8.12 The QCA requires Queensland Rail to amend its 2015 DAU to:

- (a) remove the requirement that the asset value for determining a ceiling revenue limit be set solely on the basis of a depreciated optimised replacement cost methodology and not prescribe any asset valuation methodology
- (b) enable an access funder to seek an assessment of the prudence of scope, standard and cost of a capital expenditure project
- (c) provide for consultation with access holders that may be adversely affected by a customer-initiated capital project
- (d) enable optimisation of assets if there is a possibility of actual bypass
- (e) provide for Queensland Rail to maintain separate regulatory asset bases for the three sections of Rosewood to Jondaryan, Jondaryan to Macalister and Macalister to Columboola on the West Moreton network.

The required amendments are set out in Schedule E in Appendix C.

8.13 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

8.7.4 Allocation of common network asset base

Queensland Rail's 2015 DAU proposal

Queensland Rail has proposed that the common network asset base be allocated to coal traffics on the basis of:

- Initial asset base
 - 77.7 per cent cap on recovery of post-1995 assets from coal tariffs (the 77.7 per cent cap is the maximum government-mandated contracted coal train paths of 87, as proportion of 112 total available western system paths)⁵⁷²
 - 68.3 per cent of pre-1995 assets to coal (77.7 per cent post-1995 proportion, less a 12.1 per cent reduction to reflect the metropolitan operational constraint limiting access to West Moreton network capacity)⁵⁷³
- Capital expenditure after 2015 allocated to coal based on proportions of Queensland Rail's forecast of train services
 - 95.4 per cent for Rosewood to Jondaryan
 - 87.5 per cent for Jondaryan to Columboola.⁵⁷⁴

Coal-only assets would be allocated 100 per cent to coal for calculating reference tariffs.

⁵⁷² Queensland Rail, sub. no. 2: 48-49.

⁵⁷³ Queensland Rail, sub. no. 2: 51-52.

⁵⁷⁴ Queensland Rail, sub. no. 2: 48, 55-56.

Queensland Rail said adjustment for the Metropolitan constraint should be 12.1 per cent, rather than the 15 per cent it proposed in the 2013 DAU.⁵⁷⁵ It said the revision to its adjustment percentage was based on a further review of the scheduling across the Metropolitan and West Moreton networks, that considered the effects of both peak passenger periods and planned maintenance.⁵⁷⁶

On this basis, Queensland Rail proposed to apply a \$338.1 million allocation of the common network initial asset value to coal.⁵⁷⁷

This gave an overall initial asset value, of \$354.0 million (at 1 July 2015)⁵⁷⁸, including \$16.0 million of coal-only assets, for calculating the ceiling price for coal services. Queensland Rail also proposed to apply incremental capital spending of \$133.0 million (in nominal dollars)⁵⁷⁹ for calculating the coal ceiling price.

Stakeholders' comments

New Hope said it was inconsistent to cap the allocation of the opening asset value, but not subsequent capital expenditure.⁵⁸⁰ New Hope said the adjustment for Metropolitan constraints should be more than the 22 per cent estimated by the QCA's consultant B&H in a report for the October 2014 Draft Decision, to reflect actual consumption of paths by passenger services.⁵⁸¹

QCA analysis and Draft Decision

We propose allocating \$173.9 million of the West Moreton network common asset base of \$272.2 million for calculating the ceiling price for coal services as at 1 July 2015.⁵⁸² We also propose allocating \$99.2 million of the incremental capital spending. These amounts are 68.8 per cent of the total common asset base that we consider acceptable for post-1995 assets and 57.1 per cent for pre-1995 assets.

In arriving at our Draft Decision, we have considered it is appropriate for coal services to pay for the portion of the fixed costs that reflects the share of network capacity they can contract—that is, an allocation based on the relative train paths available for contracting by coal services (see Section 8.4.1 of this Draft Decision).

On this basis, we have assessed the proportion of the asset base to be borne by coal services for assessing the West Moreton network ceiling price in the 2015 DAU.

We consider that, to apply the principle of coal services only paying for the share of capacity they can access, the allocation capped at that level needs to apply both to the initial asset value and to incremental capital spending on the common network. We note that New Hope has raised a concern that giving a higher allocation to capital spending would mean that coal services ended up paying for a larger proportion of the common network than they were able to contract.⁵⁸³

⁵⁷⁵ QCA, 2014 October: 147.

⁵⁷⁶ Queensland Rail, sub. no. 2: 49-52.

⁵⁷⁷ Queensland Rail, sub. no. 2: 52.

⁵⁷⁸ Queensland Rail, sub. no. 2: 52. The value is split into \$246.4 million from Rosewood to Jondaryan and \$107.6 million from Jondaryan to Columboola.

⁵⁷⁹ Queensland Rail, sub. no. 2: 56.

⁵⁸⁰ New Hope, sub. no. 9: 26.

⁵⁸¹ New Hope, sub. no. 9: 26-27; sub. no. 9, Annexure H.

⁵⁸² This value does not include the value of coal-only assets of \$16.1 million.

⁵⁸³ New Hope, sub. no. 9: 26.

Therefore we propose to apply a 68.8 per cent allocation of the West Moreton network common asset value at 1 July 2015 to coal services for post-1995 assets, including future capital spending, representing 77 paths available to be contracted out of 112 total paths.

Of the maximum 87 paths available for contracting by coal trains through the Metropolitan network, 10 paths are currently contracted for coal services to operate through the Metropolitan network which do not traverse the West Moreton network, leaving 77 paths for coal trains originating on the West Moreton network. This is why we have used 77 paths as the numerator for allocating costs on the West Moreton network. Furthermore, for this Draft Decision, we have used Queensland Rail's calculation of total capacity (i.e. 112 paths) on the West Moreton network. However, B&H has estimated the West Moreton network capacity to be in the order of 135 paths. Therefore, subject to stakeholders' comments, the allocation factor is subject to our final views on the capacity of the West Moreton network (see also Section 8.4.1 of this Draft Decision).

Metropolitan constraints

We have also reassessed the adjustment for Metropolitan constraints, taking into account Queensland Rail's concerns and the comments from New Hope.

We have been advised in this matter by B&H, which has revised its assessments in its report of last year to reflect new information from Queensland Rail, including that not all freight paths are affected by maintenance on the suburban lines in the Metropolitan network. B&H therefore now estimates that the adjustment for Metropolitan constraints should be 17 per cent.⁵⁸⁴

On this basis, we propose a 57.1 per cent allocation of pre-1995 common network assets to coal services, based on the 68.8 per cent post-1995 allocation, adjusted down by the Metropolitan constraint of 17 per cent.⁵⁸⁵

Consistent with past practice, coal-only assets will be allocated 100 per cent to coal services.

The allocations and resulting asset values are set out in **Table 8.4**.

Table 8.4 QCA-proposed allocation of common network asset values and capital expenditure to coal

<i>Asset group</i>	<i>Common network value (\$ million)</i>	<i>Coal proportion (%)</i>	<i>Coal share (\$ million)</i>
Pre-1995 assets*	\$113.4	57.1%	\$64.7
1995-2015 assets/capex*	\$158.8	68.8%	\$109.3
Coal only assets*	\$16.1	100%	\$16.1
Incremental capital expenditure (2015/16-2019/20)	\$144.2	68.8%	\$99.2

* values as at 1 July 2015

⁵⁸⁴ B&H, 2015 September: 64.

⁵⁸⁵ $57.1\% = 68.8\% \times (1 - 17\%)$

8.7.5 Metropolitan capital expenditure

Queensland Rail's 2015 DAU proposal

In the 2015 DAU, Queensland Rail included a new claim of \$15.6 million for capital expenditure in the Metropolitan network incurred during 2007–08 to 2012–13.⁵⁸⁶ This claim was not included in the 2013 DAU.

Queensland Rail informed that the purpose of this expenditure was to enable the transport of additional coal traffic from the Cameby Downs mine (at Columboola) to the port through the Metropolitan network.⁵⁸⁷ Accordingly, Queensland Rail allocated the entire \$15.6 million expenditure to coal services.

Stakeholders' comments

Stakeholders did not comment on the reasonableness of Queensland Rail's Metropolitan capital expenditure; rather, their comments related to the Metropolitan tariff structure which is considered in Section 8.9.3 of this Draft Decision.

QCA analysis and Draft Decision

Our Draft Decision proposes allocating \$12.4 million to coal services, which is about 80 per cent of Queensland Rail's proposed amount.

In arriving at our Draft Decision, we consider it is appropriate for coal services to share the portion of the capital expenditure reflecting the benefit derived by coal services—that is, an allocation based on the relative train paths available for contracting by coal services (see Section 8.4.1 of this Draft Decision).

On this basis, we have assessed the level of Metropolitan capital expenditure to be borne by coal services for the 2015 DAU.

QCA's approach to determining coal services share of Metropolitan capital expenditure

We engaged B&H to independently assess Queensland Rail's capital expenditure claim. B&H considered that the total project cost was reasonable. However, in terms of the project benefit to different traffics, B&H advised that:

- about one-third of the expenditure (\$5.1 million) was to enable the additional coal traffic from Columboola, and,
- of the remaining two-third expenditure (\$10.5 million)
 - about \$4.3 million benefited existing traffic on freight only lines (i.e. existing coal and non-coal train services)
 - about \$6.2 million benefited all traffics that use the suburban common network (i.e. coal, non-coal and suburban train services).⁵⁸⁸

QCA's draft position on Metropolitan capital expenditure allocation

We accept B&H advice, in particular that a part of the capital expenditure benefited coal train services (new coal traffic and old coal traffic) through the Metropolitan network.

⁵⁸⁶ This represents the expenditure in the Brisbane Metropolitan area incurred under the Columboola to Fisherman Islands Project. Queensland Rail, sub. no. 2: 5 & 24, June 2013c: 7.

⁵⁸⁷ Queensland Rail, 2015h: 2; June 2013c: 7-8.

⁵⁸⁸ B&H, September 2015: 68-73. The capital works that also benefit metropolitan suburban train services are mainline re-railing, track reconditioning and traction design and construction, which amount to at least about \$6.2 million.

On that basis, we consider that Queensland Rail's proposal to allocate the entire capital expenditure to coal traffic is inappropriate, as it would make coal services pay for the expenditure that benefits non-coal services and suburban train services. We consider that Queensland Rail's proposed allocation approach is not appropriate, which would not promote efficient use of the network and is not in the interests of access seekers and access holders, having regard to s. 138(2)(a), (e) and (h) of the QCA Act.

We consider the allocation of capital expenditure to coal services should reflect the proportion of the benefit coal services derive from that expenditure, which is reflected by the coal services' proportion of relative network capacity. Thus:

- the \$5.1 million⁵⁸⁹ expenditure that enabled the transportation of additional coal should be allocated entirely to coal services.
- the \$4.3 million⁵⁹⁰ expenditure should be allocated based on the coal services' proportion of total available capacity on the Metropolitan freight network i.e. in the ratio of 87/112 paths (see Section 8.4.1 of this Draft Decision), which amounts to \$3.3 million.
- an allocation of the \$6.2 million⁵⁹¹ expenditure to coal services should exclude that part of the expenditure which benefits non-coal and suburban train services. Relevantly, information about the train paths consumed by different traffics on the suburban common network is not available. Therefore, we consider a reasonable allocation factor is the relative train paths available to coal services on the Metropolitan freight network (i.e. 87/112 paths), adjusted down by the Metropolitan operational constraint of 17 per cent, which results in an allocation factor of 64.5 per cent (see Section 8.4.1 of this Draft Decision). That results in a coal-allocated amount of \$4.0 million.⁵⁹²

Therefore, we consider it is appropriate to allocate \$12.4 million of the Metropolitan network capital expenditure to coal services for the purposes of deriving the incremental Metropolitan capacity charge, which is about 80 per cent of Queensland Rail's proposed amount.

We consider our proposed allocation approach is fair and reasonable and it will send the right signals for the efficient use of the network's capacity and is in the interests of access seekers and access holders, having regard to s.138(2)(a), (e) and (h) of the QCA Act. We also consider our proposed approach is in the legitimate business interests of Queensland Rail, as it will allow Queensland Rail to recover its efficient costs of providing access to coal services from coal customers. On this basis, we consider our proposed allocation approach adequately balances the interests of all parties and will promote efficient use of the network, having regard to s.138(2) of the QCA Act, in particular paragraphs (a), (b), (e), (g) and (h).

8.8 Capital charges for the coal RAB

Following the setting of the regulatory asset base, we are able to determine the efficient capital charges to be included within approved maximum allowable revenue limit. This involves components for:

- a return on capital—based on a WACC applied to a regulatory asset base

⁵⁸⁹ This includes an amount of about \$4.1 million on track (including turnouts) and \$1.0 million on earthworks (B&H, September 2015: 68-73).

⁵⁹⁰ This amount is part of the expenditure for track (including turnouts).

⁵⁹¹ This amount is part of the expenditure for track (including turnouts).

⁵⁹² These allocations are subject to our final views on the capacity of the West Moreton network (see Section 8.7.4 of this Draft Decision).

- a return of capital—based on a suitable depreciation method.

Return on capital

Identifying an appropriate rate of return is important to the setting of ceiling prices for access charges for coal-carrying train services that operate on the West Moreton network.

As discussed in Section 3.8 of this Draft Decision, Queensland Rail used an indicative WACC of 6.93 per cent in the development of its proposed ceiling price.⁵⁹³

New Hope said that it would rely on our assessment of WACC with a view to responding to our assessment of Queensland Rail's proposal.⁵⁹⁴

For the purpose of Queensland Rail's proposed rate of return for coal reference tariffs, we estimate an indicative WACC of 6.93 per cent per annum as outlined in Section 3.8 of this Draft Decision.

Return of capital

We endorse Queensland Rail's proposed approach of using straight-line depreciation based on asset lives that reflect the physical lives of the assets.

Queensland Rail said its proposed ceiling price was based on applying straight-line depreciation based on assumed asset lives consistent with those recommended by our consultant, except for bridges and culverts.⁵⁹⁵ Queensland Rail said 50 rather than 100 years was a more appropriate asset live for bridges and culverts.

Stakeholders raised a number of issues relevant to setting the initial asset base, to which asset lives are a relevant consideration.⁵⁹⁶

Given the age profile and estimated lives of the West Moreton network below-rail infrastructure, we have formed the view that asset lives should be measured in terms of their physical lives. We also consider that straight-line depreciation is a reasonable approximation of the actual asset valuation-time profile of the West Moreton network's infrastructure.

In relation to Queensland Rail's proposed asset lives for bridges and culverts, we have not been provided with any compelling argument or evidence for us to depart from the asset lives recommended to us by our expert independent consultant, B&H Services.

Accordingly, we approve asset lives outlined in **Table 8.5** below for the purposes of calculating straight-line depreciation charges.

⁵⁹³ Queensland Rail, sub. no. 2: 39-41.

⁵⁹⁴ New Hope, sub. no. 9: 22.

⁵⁹⁵ Queensland Rail, sub. no. 2: 38-39.

⁵⁹⁶ Refer to Section 8.7 of this Draft Decision for a discussion of these matters.

Table 8.5 Approved asset lives⁵⁹⁷

<i>Asset class</i>	<i>Asset life</i>
Track	35
Roads	38
Fences	20
Signals	20
Bridges	100
Tunnels	100
Culverts	100
Earthworks	100
Land acquisition costs	50
Telecommunications	20
Other	20

QCA-approved capital charges

Based on our decisions above, we approve the following capital charges to be included within the maximum allowable revenues used to derive the ceiling price for coal-carrying train services (Table 8.6).

Table 8.6 Capital charges⁵⁹⁸

<i>\$m</i>	<i>2015/16</i>	<i>2016/17</i>	<i>2017/18</i>	<i>2018/19</i>	<i>2019/20</i>
Capital charges	\$15.1	\$16.6	\$18.3	\$20.0	\$21.5

For tax depreciation, we used Queensland Rail's estimates and calculation method with one exception, where data was insufficient.⁵⁹⁹

8.9 Form of regulation, take or pay and tariff structure

The form of regulation and pricing structure developed within a regulatory framework should, amongst other things, promote economic efficiency, provide incentives for investment and allocate risks to the parties best able to manage them.

⁵⁹⁷ These asset lives apply to capex since 2007. The asset lives that apply to assets before 2007 are the value-weighted remaining lives based on B&H's DORC assessment (B&H, September 2015: 49).

⁵⁹⁸ Capital charges are calculated as return on capital, plus return of capital, less inflationary gain (to avoid double counting).

⁵⁹⁹ The exception was the tax depreciation for the Western System Asset Replacement (WSAR) project.

West Moreton and Metropolitan coal reference tariffs have operated using a price cap arrangement in combination with access agreements that include take-or-pay obligations.

The structure of West Moreton coal reference tariffs has varied over time. The first approved reference tariff was a single charge, levied per thousand gtk, that applied from July 2005 to June 2009. Since July 2009, a two-part tariff has applied, with an additional train-path tariff component.

8.9.1 Form of regulation and take or pay

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed to continue the price cap form of regulation with take-or-pay obligations set at 80 per cent of the access charge payable. Queensland Rail said its proposed:

- price cap approach meant it would 'bear all costs and retain any benefits associated with actual volumes varying from forecast'⁶⁰⁰
- take or pay arrangements should not be subject to processes that limited its potential revenue upside (when actual volumes exceeded forecast), as it was exposed to volume risk (when actual volumes were less than forecast).

Queensland Rail also said it was concerned that capping take or pay obligations on the basis of system performance could create incentives for access holders to over-contract.⁶⁰¹

Stakeholders' comments

Overall, stakeholders wanted the form of regulation and take or pay arrangements to address a range of financial, commercial and regulatory issues.

Form of regulation

Aurizon favoured a price cap where there was a 'line in the sand' asset valuation.⁶⁰² It said pricing should provide financial incentives for Queensland Rail to make more paths available and to increase productivity through allowing a greater amount of coal per train.⁶⁰³ Port of Brisbane also said there should be an incentive to carry more tonnes per train path.⁶⁰⁴

New Hope said it supported the form of regulation and tariff structure in our October 2014 Draft Decision, but was concerned with Queensland Rail's application, as opposed to the rate, of the take or pay arrangements.⁶⁰⁵

Take or pay arrangements

New Hope said that Queensland Rail should:⁶⁰⁶

- be able to retain take or pay revenue up to its revenue limit
- be able to retain revenue upside when volumes exceed forecasts (given contracted levels were below Queensland Rail's proposed forecasts), but not also collect take or pay if this provided more than its revenue limit in any one year

⁶⁰⁰ Queensland Rail, sub. no. 2: 25.

⁶⁰¹ Queensland Rail, sub. no. 2: 25-26.

⁶⁰² Aurizon, sub. no. 6: 39.

⁶⁰³ Aurizon, sub. no. 6: 39.

⁶⁰⁴ Port of Brisbane, sub. no. 13: 1-2.

⁶⁰⁵ New Hope, sub. no. 9: 15.

⁶⁰⁶ New Hope, sub. no. 9: 15-16.

- not construe that take or pay relief will necessarily result in over-contracting.

To address these concerns, New Hope said that take or pay obligations should be capped based on common ownership of mines if they operated on the same system, so as to offset take-or-pay obligations for underutilised access rights. After this, New Hope proposed that take or pay revenues be capped on a system basis.⁶⁰⁷

Aurizon⁶⁰⁸ proposed that Queensland Rail should not:

- obtain revenue from both access charges and take-or-pay revenue for the same train path
- recover take or pay when access revenue from actual train services exceeds that required from contracted train services.

Aurizon noted that in the absence of take or pay capping where excess capacity was available, this would provide an incentive for under-contracting and greater use of ad hoc services.⁶⁰⁹

QCA analysis and Draft Decision

Form of regulation

We consider a price cap remains the appropriate form of regulation for Queensland Rail's coal reference tariffs as it provides incentives for Queensland Rail to utilise existing capacity efficiently. We therefore accept the proposal in Queensland Rail's 2015 DAU to apply a price cap, but propose a hybrid approach that applies a contract-based volume trigger.

The benefit of a price cap is that it offers incentives for the regulated party to provide capacity, encouraging the most efficient use of the available infrastructure. However, where the price is set at the start based on forecast volumes, the access provider has an incentive to under-forecast volumes to generate a higher price, while access holders/seekers and their customers have the opposite incentive.

In this case, Queensland Rail has proposed volumes higher than contracted levels, based on its expectation that coal services will use a substantial number of ad hoc paths. As discussed in Section 8.4.4, we have not sought an independent assessment of Queensland Rail's volume forecasts, but have proposed to accept those forecasts for calculating our indicative coal reference tariffs.

However, we also propose to implement a volume trigger mechanism so that if contracted volumes rise substantially, reference tariffs will be recalculated to reflect the higher expected utilisation of the network.

This is necessary because, while Queensland Rail's proposal for a price cap without a volume trigger may be in its legitimate business interest as it provides incentives for the most efficient use of capacity, it is not in the interest of access holders and seekers as it does not allow for any adjustment if Queensland Rail's forecasts are incorrect (s. 138(2)(b), (e) and (h)).

We therefore propose to implement a volume trigger as an endorsed variation event in the undertaking. This would require Queensland Rail to review reference tariffs when contracted volumes are greater than the forecast volumes⁶¹⁰ that were used to develop reference tariffs.

⁶⁰⁷ New Hope, sub. no. 11: 21.

⁶⁰⁸ Aurizon, sub. no. 6: 39-40.

⁶⁰⁹ Aurizon, sub. no. 6: 39-40.

⁶¹⁰ Queensland Rail's forecasts include both contracted and *ad hoc* paths. See Section 8.4.

This trigger would be applied on an origin-destination basis, so that the tariffs would be reviewed if contracted volumes from any single loading point exceed the forecast used to assess the reference tariff. This approach has the additional benefit of resetting reference tariffs in the event that the Wilkie Creek mine resumes operations.

These endorsed variation event arrangements⁶¹¹ provide for:

- Queensland Rail submitting a variation of relevant reference tariffs within three months of contracted train service entitlements being greater than those used to develop reference tariffs (that is, forecast volumes)
- reference tariffs being determined as if all reference tariffs were also being recalculated due to the increase in contracted demand

A volume-based endorsed variation event trigger has the desirable features of:

- mitigating uncertainty about forecast volumes and their corresponding impact on the level of the approved reference tariffs, by allowing reference tariffs to be revised to reflect the impact of material changes in contracted volumes (that is, when they are greater than forecast volumes)
- satisfying expectations that, as contracted volumes increase above those used to determine reference tariffs (initially based on forecast volumes), reference tariffs will reduce to reflect economies of density
- providing incentives for users to contract capacity as, to the extent the contracted volumes are greater than those forecast to develop reference tariffs, the variation approach results in a lower approved reference tariff
- mitigating incentives to use ad hoc services in preference to contracting capacity.

Overall, our approach seeks to achieve a better alignment of incentives and an allocation of risks to the parties best able to manage them. It exposes Queensland Rail to volume risk to the extent that actual volumes are less than its forecasts, but provides Queensland Rail with an increasing share of take-or-pay protection (see take-or-pay section below) when contracted volumes are greater than forecasts.

The volume trigger proposal is in Queensland Rail's legitimate business interest as it does not apply to ad hoc paths and provides an incentive for access seekers to contract capacity (s.138(2)(b)). At the same time it is in the interests of access seekers/holders as they benefit when contracting access rights above forecast volumes by means of lower prices (s.138(2)(e) and (h)).

Take-or-Pay arrangements

We propose that Queensland Rail's West Moreton and Metropolitan networks take-or-pay revenue from coal services be capped at the total revenue allocated to coal services in assessing coal tariffs, and that take-or-pay obligations be 100 per cent of access charges.

The purposes of take-or-pay include encouraging customers to contract for capacity they are most likely to need, and providing a degree of revenue certainty to Queensland Rail. There are a number of competing considerations in assessing the treatment of take or pay for the West Moreton coal services. These include that:

⁶¹¹ 2015 DAU, Schedule D, cl. 6.

- (a) Queensland Rail is exposed to a level of volume risk, as some of its forecast volumes between 2015 and 2020 are not contracted
- (b) to the extent forecast coal demand is contracted, Queensland Rail's volume risk is mitigated through take-or-pay arrangements
- (c) under our proposed cost allocation mechanism Queensland Rail will receive revenue sufficient to support the paths available to be contracted to coal services on the West Moreton network.⁶¹² Queensland Rail will achieve revenue adequacy, as forecast coal traffics are, in effect, underwriting revenue not expected to be recovered during the term associated with unused coal train paths (although they are not cross-subsidising the paths that are not available to be contracted to coal train services)
- (d) our volume-based tariff reset trigger means Queensland Rail can recover more than the revenue sufficient for coal train services if it achieves efficiencies that provide ad hoc paths beyond the number available to be contract to coal.

Queensland Rail has proposed that its take-or-pay revenue not be capped – that is, it could recover more than the revenue used to assess its proposed reference tariffs, by collecting take-or-pay revenue for unused paths from one origin, while also receiving ad hoc revenue for selling the same paths for services from another origin.

Stakeholders, on the other hand, said Queensland Rail should be able to retain revenue upside when volumes exceeded forecasts, but not obtain revenue from both access charges and take-or-pay revenue for the same train path.⁶¹³

We consider that, while it is reasonable for the take-or-pay regime to protect Queensland Rail's revenues from coal train services up to the amount required to recover coal's share of West Moreton network costs, take or pay should not be used to increase revenues beyond that level.

Increasing revenues (as opposed to helping secure revenues) through take or pay serves the legitimate business interest of Queensland Rail in receiving a degree of revenue certainty from take-or-pay provisions (s. 138(2)(b)). But it would not promote the efficient use of Queensland Rail's network or be in the interests of access seekers and holders (s. 138(2)(e) and (h)). So, on balance, we consider we cannot approve Queensland Rail's proposal.

Accordingly, we propose a limited take-or-pay capping mechanism to avoid over-recoveries of revenue. This capping would include both take-or-pay and the revenue upside from payments such as relinquishment fees,⁶¹⁴ as these are the outstanding future access revenue recovered when train service entitlements are surrendered.

Under our proposal, Queensland Rail will be able to recover take or pay sufficient to bring its West Moreton and Metropolitan network revenue from contracted coal traffics up to coal's share of the network costs used to assess the coal reference tariff (that is, the revenue required

⁶¹² At the time of this Draft Decision, Queensland Rail was permitted to contract 87 weekly return coal carrying train services through the Metropolitan network. However, as 10 were already contracted to traverse the Metropolitan network, 77 were available to be contracted from the West Moreton network. Queensland Rail is forecasting that 62.8 of those weekly paths will be used in the term.

⁶¹³ New Hope, sub. no. 11: 21; Aurizon, sub. no. 6: 39-40.

⁶¹⁴ Relinquishment fees are determined on outstanding take or pay obligations.

for the 77 weekly return train paths available for West Moreton coal train services to contract). But it will not be able to charge take-or-pay once its revenues have reached that level.⁶¹⁵

However, we consider that this limited capping should be balanced by giving Queensland Rail more certainty about its revenue from contracted services, by making the take-or-pay proportion 100 per cent of the access charges. This will support both the objectives of encouraging customers to contract for capacity they are most likely to need, and providing a greater degree of revenue certainty to Queensland Rail.

While customers will face more stringent take-or-pay, they will benefit from a fall in reference tariffs if they contract above Queensland Rail's forecast volumes that we have used in assessing the West Moreton network reference tariffs.

We consider that the take-or-pay cap is not against Queensland Rail's legitimate business interest, as it allows Queensland Rail to recover the costs required to support the share of network costs up to the level coal is able to contract. Further, Queensland Rail will be able to recover more than that amount if it outperforms by delivering more than the total tonnes or paths that it has contracted to provide (s. 138(2)(b)).

The proposed take-or-pay regime, combined with the volume review triggers, also supports efficient use of the network by encouraging access seekers and Queensland Rail to sign contracts (s. 138(2)(a)). And it is in the interests of access seekers and holders by ensuring that they do not pay for the cost of capacity that they are unable to contract (s. 138(2)(e) and (h)).

The relevant revenue amount above-which take or pay may not be levied is set out in the reference tariff table in Appendix A.

⁶¹⁵ Note that our allocation approach means that these revenues sufficient for 77 paths will be recovered from the 62.8 paths Queensland Rail has forecast, although this could change if more paths are contracted above the level that requires an endorsed variation event.

Draft Decision

8.14 After considering Queensland Rail's proposed form of regulation and take-or-pay approach, our Draft Decision is to refuse to approve Queensland Rail's proposal.

8.15 The QCA requires Queensland Rail to amend its 2015 DAU so that:

- (a) Queensland Rail is required to submit a variation of relevant West Moreton Network and Metropolitan Network Reference Tariffs within three months of contracted Reference Train Services on the West Moreton Network being greater than those used to develop Reference Tariffs for any origin-destination pair.

The required amendments are set out in Schedule D and the definition of 'Endorsed Variation Event' in Appendix C.

- (b) Queensland Rail will be able to recover take or pay sufficient to bring its West Moreton Network and Metropolitan Network revenue from contracted Reference Train Services on the West Moreton Network up to coal's share of the network costs used to assess the coal Reference Tariff.

- (c) Take or pay will be applied at 100%.

The required amendments are set out in Schedule D, cl. 5 in Appendix C.

8.16 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.

8.9.2 West Moreton network tariff structure

Queensland Rail's 2015 DAU proposal

Queensland Rail proposed in the 2015 DAU to continue the two-part tariff structure that has applied since July 2009.

It said the two-part tariff would 'recover overall revenues through a broadly equal split of train path based charges and gtk-based charges'. Queensland Rail proposed to separately identify the portions of the train path charge that applied to the West Moreton and Metropolitan networks, and have a separate incremental capital charge for the Metropolitan network.⁶¹⁶

Stakeholders' comments

Aurizon favoured a pricing structure that provided financial incentives for Queensland Rail to make more paths available and to increase productivity by allowing a greater amount of coal per train.⁶¹⁷ Port of Brisbane also said there should be an incentive to carry more tonnes per train path.⁶¹⁸

QCA analysis and Draft Decision

We accept Queensland Rail's proposal for a two-part tariff structure for the West Moreton network, split between a train path charge and a volume- and distance-based charge (i.e. a price per gtk).

⁶¹⁶ Queensland Rail, sub. no. 2: 23-24.

⁶¹⁷ Aurizon, sub. no. 6: 39.

⁶¹⁸ Port of Brisbane, sub. no. 13: 1-2.

Aurizon and Port of Brisbane have requested that the tariff provide incentives for more intensive use of the network through higher-capacity trains.⁶¹⁹ Aurizon said that where higher axle loads or longer trains resulted in more coal being carried per train service, there should be an 'efficiency sharing mechanism' that gave Queensland Rail half the benefit, with the other half going to access holders.⁶²⁰

We note that the two-part tariff structure achieves the 'efficiency sharing' objective sought by Aurizon, as the train path charge will not rise as capacity per train increases, while the weight-based charge (per gtk) will go up.

The two-part tariff also provides a distance taper that encourages development of coal resources, which in turn provides a public benefit by supporting economic growth in Queensland.

8.9.3 Metropolitan tariff

Surat Basin coal trains travel through the Metropolitan network for more than one-quarter of their journey from mine to port. They follow a complicated route that uses portions of several of the Brisbane commuter rail lines, as well as some sections of track that are largely or entirely dedicated to freight traffic.

The 2009–13 tariffs approved for QR Network extended the West Moreton network tariff across the Metropolitan network—that is, the same tariff calculated for the sections west of Rosewood was applied to the track east from Rosewood to the port. This avoided the complicated and potentially inconclusive task of determining specific costs and asset values for the metropolitan section. The cost build-up for the tariff included incremental capital spending for freight services on the Metropolitan network, but there was no separate Metropolitan component of the AT2 train path charge.⁶²¹

We proposed a similar approach in our October 2014 decision on the 2013 DAU. However we considered there needed to be an explicit mechanism for Queensland Rail to recover coal- and freight-specific investment in the Metropolitan network. We proposed to do this by separately identifying a Metropolitan AT2 tariff component, derived from incremental capital spending on the Metropolitan network.

At the same time, we proposed to fix the remainder of the tariff for crossing the Metropolitan network and indexing it by CPI, so that future West Moreton network capital spending was not double-counted across the Metropolitan network. This avoided an issue with the 2013 DAU tariff proposal, that meant the incentives to invest in either the Metropolitan or West Moreton networks were distorted.⁶²²

Queensland Rail's 2015 DAU proposal

Queensland Rail said in the material accompanying the 2015 DAU that it would continue to apply the tariff developed for the West Moreton network to the Metropolitan network.

It said it would also recover 'incremental capacity expansion capex' on the Metropolitan network through a charge added to the AT2 path-based tariff component, adding:

⁶¹⁹ Aurizon, sub. no. 6: 39; Port of Brisbane, sub. no. 13: 1-2.

⁶²⁰ Aurizon, sub. no. 6: 39.

⁶²¹ See QCA, 2009 December: 92-93.

⁶²² QCA, 2014 October: 148-150.

*While this results in a small increase in the total reference tariff, it also enables the payment of rebates to mining companies in relation to user funded capex within the Metropolitan Network. This is consistent with the approach recommended by the QCA in its Draft Decision on the 2013 DAU.*⁶²³

Stakeholders' comments

Aurizon supported extending the gtk rate to the Metropolitan network, although it said that might exceed the incremental cost of coal trains operating on the system as, among other things, the Metropolitan configuration was driven by passenger capacity and it was maintained to a higher standard than was needed for 15.75 tonne axle load trains.⁶²⁴ New Hope 'accepted' the QCA's proposal in the October 2014 Draft Decision, but said it was not clear Queensland Rail's proposal was consistent due to concerns including that it appeared to double-count capital spending between the West Moreton and Metropolitan networks.⁶²⁵

QCA analysis and Draft Decision

We approve the general principle of extending the West Moreton network tariff across the Metropolitan network for trains travelling to and from the port. The extended tariff provides for coal trains to make a contribution to the cost of providing below-rail services on the Metropolitan network, that is based on costs assessed on a network where the specific costs that apply to coal services are easier to identify. Queensland Rail, its customers and the QCA can therefore avoid the complex task of identifying efficient costs for the particular parts of the Metropolitan network used by coal trains.

Queensland Rail has proposed in its 2015 DAU to apply the same tariff derived for the West Moreton tariff for access to the Metropolitan network. It has also proposed a separate train path charge to recover its investment in coal- and freight-specific infrastructure in the Metropolitan network.

Double-counting

This tariff approach is generally consistent with past approaches by QR Network, Queensland Rail and the QCA, including the proposed tariff in our October 2014 Draft Decision. However, we note New Hope's comment that it was unclear how the metropolitan tariff would be established in future undertakings and that Queensland Rail's proposed treatment of the 'incremental RAB' was inconsistent with the October 2014 Draft Decision. New Hope said:

*To the extent that capex was also incurred in the West Moreton System during the relevant period, the application of the West Moreton System tariff to the metropolitan system effectively 'deems' that similar capex (per gtk) was incurred in the metropolitan system. Adding actual capex of the metropolitan system for the same period appears to involve double-counting.*⁶²⁶

As previously stated, the intention of having a separate asset base and tariff component for Metropolitan network capital expenditure is to provide appropriate incentives for efficient investment, by enabling Queensland Rail to recover that investment. However, it would not be appropriate for the mechanism to result in West Moreton network capital investment, already recovered through the West Moreton network tariff, to also be recovered through the tariff applying to the Metropolitan network.

⁶²³ Queensland Rail, sub. no. 2: 5.

⁶²⁴ Aurizon, sub. no. 6: 39.

⁶²⁵ New Hope, sub. no. 9: 14-15.

⁶²⁶ New Hope, sub. no. 9: 15.

Our proposal in the June 2014 Consultation Paper and October 2014 Draft Decision sought to lock in the West Moreton network tariff at 1 July 2013, then inflate it without further adjustment. We said this 'grandfathering' approach 'resolves the concern that, as the tariff extended from the western system will include new capital spending west of Rosewood, the metropolitan tariff will rise because of investment in a separate part of the network'.⁶²⁷

However we accept New Hope's argument that, given the Metropolitan incremental capital expenditure charge relates to investments dating back to 2002, the 'grandfathering' point should be consistent with that period.

Therefore, while we consider the broad approach to the Metropolitan network access tariff is consistent with all the approval criteria including Queensland Rail's legitimate business interests and the interests of access seekers and holders, we do not approve the treatment of the incremental investment on the West Moreton network, as it is applied across the Metropolitan network.

Queensland Rail's proposal to inflate the tariff at the approval date, and also charge access holders the Metropolitan incremental capital charge for investments dating back to 2002, will result in double-counting of returns for the period between 2002 and the approval date, so it is not consistent with Queensland Rail's legitimate business interests (s.138(2)(b)).

The double-counting means Queensland Rail's proposal will also not be consistent with the efficient investment in the rail network, or with the interests of access holders and access seekers (s. 138(2)(a), (e) and (h)).

Therefore, weighing all the approval criteria, we cannot approve Queensland Rail's proposal to inflate the West Moreton network tariff that applies at the approval date, for application across the Metropolitan network.

Adjusted Metropolitan tariff approach

We have considered two possible ways to resolve this double-counting issue—either through an adjustment to the 2015 DAU approach of inflating the tariff, or through a modified approach that inflates the extended Metropolitan asset base separately.

The 'inflated tariff' approach would involve adjusting the asset base for the West Moreton network, when calculating the tariff that would apply across the Metropolitan network (the adjusted West Moreton tariff). This adjustment to the West Moreton asset base would remove the incremental capital spending on the West Moreton network from 2002 onwards—the period for which Queensland Rail has used capital expenditure on the Metropolitan network to calculate the incremental capital charge. Under this approach, the Metropolitan tariff would be the adjusted West Moreton tariff inflated by CPI plus the Metropolitan incremental capital charge.

The 'inflated asset base' approach would 'carry over' the adjusted West Moreton network asset base (i.e. removing the incremental capital spending on the West Moreton network from 2002 onwards) to the Metropolitan network. This would be done on a *pro rata* basis, that reflected the relative lengths of the sections used for coal services in the West Moreton and Metropolitan networks. However, in order to recognise that Queensland Rail would be making ongoing capital investments in the Metropolitan network to serve other traffics, including passenger services, that would also benefit coal services, this 'carried over' asset base would be inflated but not depreciated. Under this approach, the Metropolitan tariff would be calculated from the

⁶²⁷ QCA, 2014 June: 39.

adjusted West Moreton network asset base inflated by CPI, the rolled-forward incremental Metropolitan capital expenditure and the *pro rata* maintenance and operating expenditure for the relevant regulatory period (extended from the West Moreton network).

Both options would avoid double-counting for the period since 2002 and achieve our objective of ensuring that incremental capital spending for each of the West Moreton and Metropolitan networks was recovered from traffic using those networks.

However, for this assessment we have opted to use the 'inflated tariff' approach as it is more similar to the approaches in our October 2014 Draft Decision and Queensland Rail's 2015 DAU.

Accordingly, the QCA proposes to set the metropolitan tariff so that it gives Queensland Rail an incentive to make efficient investments in the Metropolitan network by:

- (a) maintaining an asset base for investments made since 2002 and into the future to support coal and freight traffic in the metropolitan system and using it to derive an annual revenue requirement
- (b) adjusting the West Moreton network asset base used for deriving the Metropolitan network tariff to exclude incremental capital investment from 2002 onwards, then increasing the resulting Metropolitan tariff annually by CPI.

We consider that applying the West Moreton network investment up to 2002 across the Metropolitan network, then separately accounting for new investment in the West Moreton and Metropolitan networks is not against Queensland Rail's legitimate business interest as it allows Queensland Rail to recover its efficient incremental capital investment, while not double-counting that recovery.

It also provides incentives for efficient investment in rail infrastructure on the two networks, which is in the interests of access seekers and access holders (s. 138(2)(a), (e) and (h)).

The indicative tariffs that we propose for the Metropolitan network, applying the approach discussed above, are shown in Appendix A.

8.10 QCA-proposed ceiling price

Having regard to all of the above, and for indicative purposes only, we propose an indicative draft ceiling price for West Moreton network coal services of \$18.88/000 gtk. This indicative draft ceiling price has been calculated as if it were to apply from 1 July 2015. We propose to re-calculate and adjust this indicative tariff to the date the new undertaking is approved to commence. The building blocks pricing model used to derive this indicative draft ceiling price is shown in Appendix A.

8.11 Adjustment amount

The 2008 access undertaking was extended by the QCA to 30 June 2015⁶²⁸, as an interim position and on the basis that each of the (now withdrawn) replacement DAUs proposed by Queensland Rail provided for the new tariffs approved by the QCA to apply from 1 July 2013. In addition, the now withdrawn replacement DAUs included an adjustment charge provision which provided, in effect, for recovery or refund (as applicable) of the difference in access charges paid by access holders since 1 July 2013 and the access charges that would have been paid if calculated in accordance with the new reference tariff approved by the QCA ('adjustment

⁶²⁸ This was given effect to by a series of extensions approved by the QCA

amount'). The adjustment charge provision required Queensland Rail to recover or reimburse the adjustment amount by making adjustments to future access charges to be paid by access holders.⁶²⁹

In contrast to its previous proposed DAUs, Queensland Rail's 2015 DAU now proposes to apply the new tariff approved by the QCA from the date of approval of the new undertaking, rather than from 1 July 2013. The effect of this change is that an adjustment charge provision is not triggered to require Queensland Rail to reimburse (or recover) the adjustment amount to access holders.

The QCA has determined that the access charges that have been received by Queensland Rail since 1 July 2013 significantly exceed the access charges that it would have received if calculated on the basis of the reference tariff now proposed to be approved. The QCA has determined in this Draft Decision that the amount of over-recovery in 2013–14 and 2014–15 revenues⁶³⁰ is as follows:

- for 2013–14: over-recovery of \$16.9 million
- for 2014–15: over-recovery of \$9.4 million.

In this section, the QCA considers the impact of the change in Queensland Rail's approach to the application of the new proposed reference tariff and the operation of the adjustment charges provision, stakeholders' submissions with respect to that issue and whether, in these circumstances and having regard to the criteria in section 138(2), it is appropriate to approve the 2015 DAU.

Background

Queensland Rail and its predecessors have applied for, and received or paid, adjustment amounts in the past through approved access undertakings to reflect the difference between access charges paid by reference to interim (extended) and approved tariffs.

This method of addressing delays in finalising tariffs in an approved replacement undertaking has been used both when the adjustments were in the rail companies' favour and when they favoured access holders.⁶³¹ These adjustments were applied in:

- 2006, to refund to customers the difference between access charges paid from July 2005 to June 2006 and the access charges that would have been paid pursuant to the reference tariff approved for that period by the QCA in QR Network's 2006 undertaking
- 2010, to recoup from customers the difference between access charges paid from July 2009 to June 2010 and the access charges that would have been paid pursuant to the reference tariff approved for that period by the QCA in June 2010 amendments to QR Network's 2008 undertaking. The adjustment was applied both by QR Network for tariffs in the central Queensland coal network and Queensland Rail for the West Moreton network coal tariffs.

Queensland Rail proposed this adjustment amount (with the new reference tariff applying from 1 July 2013) in all of its (now withdrawn) voluntary DAUs to replace the 2008 undertaking—each of Queensland Rail's March 2012, February 2013 and June 2013 DAUs provided for applying the

⁶²⁹ See for example Schedule A to the February 2013 DAU

⁶³⁰ This is based on revenue and billing parameters provided by Queensland Rail for the Rosewood to Miles section of the West Moreton network.

⁶³¹ Similar arrangements are not uncommon in other jurisdictions, including Part IIIA (third party access) and Part XIC (for telecommunications)⁶³¹ of the Competition and Consumer Act (Cth) 2010.

proposed tariffs with effect from 1 July 2013 with an adjustment amount to account for any difference in the access charges.

These adjustment amounts in the voluntary DAUs were further confirmed by Queensland Rail's letters accompanying its May 2013, November 2013 and May 2014 extension DAUs, each of which said it intended to apply its tariffs from 1 July 2013 through adjustment charge provisions in its replacement DAU.

In October 2014, the QCA released its draft decision on the June 2013 DAU. On 12 December 2014, Queensland Rail withdrew the June 2013 DAU.

The 2008 access undertaking expired on 30 June 2015.

Queensland Rail's 2015 DAU proposal

Queensland Rail submitted its 2015 DAU on 5 May 2015. Queensland Rail does not propose to apply an adjustment charge provision in the 2015 DAU to, in effect, recoup or refund the difference in access charges it has received since 1 July 2013 and the access charges it would have received applying the reference tariff approved by the QCA under this 2015 DAU process. In other words, Queensland Rail does not propose an adjustment amount to address any previous over or under recovery of revenues.

Stakeholders' comments

On 15 May 2015, QCA staff published a staff paper inviting stakeholders to provide further information in response to the following questions:

- (1) In relation to the West Moreton network, did stakeholders expect there would be an adjustment in a replacement access undertaking to reflect the difference between: (a) tariffs paid or payable since 1 July 2013 and (b) tariffs, if different, that would have been paid or payable since 1 July 2013, if those tariffs were effective from that date?
- (2) If so,
 - (a) what was the basis for that expectation?
 - (b) did stakeholders rely on that expectation and, if yes, in what way?
- (3) What impact does Queensland Rail's proposal not to apply the new reference tariff from 1 July 2013 in its 2015 DAU have on stakeholders including, for example, impacts on regulatory certainty?
- (4) Are there a range of stakeholders (both upstream and downstream) that may be affected? Are there stakeholders whose future decisions may be affected?
- (5) If there are impacts arising from Queensland Rail's proposal not to apply the new reference tariff from 1 July 2013 in its 2015 DAU, what might the consequences be during the term of the access undertaking and beyond? Are those consequences (if any) material and are they a relevant matter for the QCA to consider under s. 138(2)? If so, which aspects of s. 138(2) are relevant and how?

The request for comments was published as part of the QCA's investigation in respect of the 2015 DAU commenced by notice of investigation dated 6 May 2015. In an investigation the QCA is entitled to inform itself on any matter relevant to the investigation in any way it considers appropriate.⁶³² Given the proposed treatment of the West Moreton network tariff in

⁶³² Pursuant to section 173 (1) of the QCA Act

the 2015 DAU differs from that previously proposed by Queensland Rail, the request for comments sought responses to a series of questions as part of the submission process on the 2015 DAU and to assist the QCA in addressing any stakeholder submissions as part of this Draft Decision.⁶³³

Five submissions were received on this matter.⁶³⁴ Queensland Rail objected to the Request for Comments paper on procedural grounds. In particular, that it was not open for QCA staff to seek submissions by way of the request for comment in a parallel process separate to the QCA's investigation. Further, that the request for comment was directed to particular outcomes.

The QCA does not agree with Queensland Rail's objections. The request for comments was issued pursuant to the QCA investigation and all stakeholders have been given an opportunity to provide submissions in response to the issues raised. The request for comments was issued in order to allow early consultation on the questions addressed, assisting the QCA to address stakeholder submissions in this draft decision and provide for efficiency in the decision making process. A further opportunity to make submissions on these topics is provided by this draft decision.

Queensland Rail also said that the QCA could not require an adjustment amount pursuant to the Act. With its submissions dated June 2015 in response to the QCA's Request for Comments Paper, Queensland Rail provided an opinion from Corrs Chambers Westgarth dated 29 May 2015. In that opinion, it is stated that the QCA cannot, as a matter of law, compel Queensland Rail to apply a retrospective reference tariff for a number of reasons, including the Transfer Notice issued under section 9(1)(j) of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld).

In contrast, stakeholders said an adjustment amount is:

- not inconsistent with the pricing principles (s. 168A(a)) in the QCA Act
- one of a range of factors that is relevant in the context of the QCA's approval criteria in s. 138(2).

Stakeholders said that an adjustment amount was required to preserve regulatory certainty and that a failure to include such an amount would impact investment.

New Hope, Yancoal and QRC (on behalf of its members) indicated they had relied on Queensland Rail's previously stated intention to include an adjustment amount in the submitted DAUs.⁶³⁵ Aurizon, New Hope and QRC said adjustments were consistent with past practice in previous regulatory periods, with New Hope referring to the adjustments being applied in 2006 and 2010. New Hope quoted extracts of correspondence from Queensland Rail indicating that the tariffs will be backdated.⁶³⁶ New Hope also supplied material, on a confidential basis, to the amount of an adjustment amount which it would be entitled if 'backdating' occurred.⁶³⁷

New Hope said adoption of Queensland Rail's proposal would be a departure from regulatory precedent and demonstrate that a regulated entity can manipulate the timing of an undertaking process for financial gain.⁶³⁸ New Hope also submitted that if the QCA considered that a lower

⁶³³ Queensland Rail's 2015 DAU- Request for Comments, 15 May 2015

⁶³⁴ QR sub. no. 4; Aurizon sub. no. 6; New Hope subs. no. 8-12; QRC sub. no. 14, Yancoal sub. no. 16.

⁶³⁵ New Hope sub. no. 12: 4, Yancoal sub. no. 16: 5, QRC sub. no. 14: 2.

⁶³⁶ New Hope sub. no. 12: 4.

⁶³⁷ New Hope sub. no. 12: 6

⁶³⁸ New Hope sub. no. 12: 6

tariff than Queensland Rail was currently charging should apply, a failure to apply the reference tariff from 1 July 2013 would result in a windfall gain to Queensland Rail, being a return in excess of that the QCA assesses to be commensurate with the regulatory and commercial risks involved.⁶³⁹

New Hope, Yancoal and QRC all said this would lead to a reassessment of regulatory risk in the future, both in the West Moreton network and Queensland in general. For instance, stakeholders said:

[t]hese factors will have a significant detrimental effect on regulatory certainty and the resulting increase in sovereign risk may be sufficient to reassess the risks of business relating to the QR Network and conversely the attractiveness of opportunities outside the QR Network (New Hope sub. no. 12: 6)

[t]here is a lack of regulatory certainty and a significant increase in sovereign risk in Queensland. It is also worth noting that the change in QR's position from its previous representation has caused Yancoal to be sceptical of many aspects of QR's Undertaking (Yancoal sub. no. 16: 5)

[c]learly all current users of the West Moreton system have now been put on notice and Queensland Rail's written commitments may be reversed at any time. Similarly, all future and prospective users of the system will now have to factor in an escalated risk premium into their calculations to reflect the apparently ephemeral nature of the commitments from Queensland Rail (QRC sub. no. 14: 3).

Aurizon said they would be affected by Queensland Rail retaining past take-or-pay revenue in excess of what it would have been expected to earn from the aggregate level of contract services.⁶⁴⁰ This was based on their expectation that any determination of the adjustment amount would take this into account.

The consistent theme of the stakeholder submissions is that stakeholders relied on Queensland Rail's previously stated intention to include an adjustment amount and if an access undertaking was now approved without the inclusion of such an adjustment amount, there would be a detrimental impact on regulatory certainty and consequential reassessment of regulatory risk in the future.

QCA analysis and Draft Decision

We have considered Queensland Rail's DAU and stakeholder submissions in accordance with our obligations in the QCA Act.

Based on the considerations set out in this chapter and having regard to the relevant factors in section 138(2) of the QCA Act, our Draft Decision is that:

- it is not appropriate to approve the 2015 DAU; and
- the QCA considers that the 2015 DAU should be amended to include an adjustment charge provision which provides for what is effectively a refund to access holders for the difference between access charges paid since 1 July 2013 and the access charges that would have been paid if calculated on the basis of the reference tariff approved in this Draft Decision (i.e. the 'refund' being the adjustment amount).

⁶³⁹ New Hope sub no 12. 8

⁶⁴⁰ Aurizon sub. no. 6: 9.

Adjustment amount would not be retrospective

The QCA does not accept Queensland Rail's position that an adjustment amount is retrospective. The kind of term in question would apply from the date that the 2015 DAU is approved. Such a term would take matters that have occurred in the past as the basis for calculating amounts that are to be paid by or to Queensland Rail after the 2015 DAU is approved. The fact that such a clause would operate by reference to things that have happened in the past would not make it retrospective.

Relevant considerations under s. 138(2)

The QCA may approve Queensland Rail's 2015 DAU, only if it considers it appropriate to do so having regard to each of the factors in section 138(2) of the QCA Act.

The factors in section 138(2) which the QCA considers are of particular significance to the consideration of the issues addressed in this section of this chapter are:

- the object of Part 5 of the Act, to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets) (s. 138((2)(a) and s 69E)
- the legitimate business interests of Queensland Rail (s. 138(2)(b))
- the public interest, including through:
 - regulatory certainty for long lived infrastructure assets
 - preventing a regulated entity from benefiting from delays in the regulatory process to which it has contributed (s. 138(2)(d))
- the interests of persons who may seek access to the service, namely access seekers and holders who have relied on Queensland Rail's representations and actions which suggested that there would be an adjustment charge in the new access undertaking (s. 138(2)(e))
- the pricing principles in section 168A (s. 138(2)(g))
- any other issues we consider relevant (s. 138(2)(h)). The QCA considers the following matters, among other others, to be relevant:
 - Queensland Rail's previously stated intention to include an adjustment amount
 - the expectation of stakeholders of the inclusion of an adjustment amount
 - reliance by stakeholders on that expectation, and on Queensland Rail's previously stated intention
 - the impact of the change in Queensland Rail's position with respect to the inclusion of an adjustment amount in its 2015 DAU.

As in practice the owner and operator of the service are the same, the considerations in s. 138(2)(c) are considered within s.138(2)(b). The QCA has also had regard to s. 138(2)(f), but notes that the adjustment charge does not propose to exclude assets for regulatory pricing purposes.

Some of the matters to which QCA must have regard favour different conclusions. For instance, tension may exist between the legitimate business interests of Queensland Rail and the

interests of access seekers and access holders.⁶⁴¹ This view was echoed by New Hope which provided some examples of obvious tensions:

- between the legitimate business interests of the owner or operator of the service (s. 138(2)(b)) and the interests of persons who may seek access to the service (s. 138(2)(e))
- between the effects of excluding existing assets for pricing purposes (s. 138(f)) and 'providing a return on investment commensurate with the regulatory and commercial risks involved'... [s. 168A(a)]⁶⁴²

The QCA does not accept Queensland Rail's contention that:

... [the] reference tariff must deliver to the access provider at least its efficient costs and a return as required by section 168A(a). Anything less should not be approved and cannot be imposed (QR sub. no. 1: 5).

QCA agrees that the pricing principles mentioned in s. 168A are a significant and important consideration. However, the QCA agrees with the views expressed by stakeholders that:

... contrary to QR's assertions regarding s. 168A(a) QCA Act, no single factor listed in section 138(2) is a 'cornerstone requirement' or a dominant or paramount factor that is required to be given greater weight (New Hope sub. no. 8: 4)

[t]here is no single factor which is to be regarded as a 'cornerstone' or which somehow prevails over other factors (Glencore sub. no. 7: 2).

The QCA has considered whether it is appropriate to approve the 2015 DAU in this context.

The object of Part 5

As noted above, stakeholders' submissions are that reliance was placed on Queensland Rail's previously stated intention to include an adjustment amount which had the effect of reconciling access charges paid since 1 July 2013 and that if a new DAU was approved without such a mechanism, Queensland Rail would receive a windfall gain and regulatory certainty would be adversely impacted with the result that stakeholders would reassess their regulatory risk.

The QCA commissioned Professor Flavio Menezes as an independent economic consultant to explore the likely impacts of the absence of an adjustment amount in the next access undertaking in circumstances where Queensland Rail had previously stated its intention to include such an amount. His view is that access seeker investment decisions can be adversely affected by regulatory risk. In particular, Professor Menezes said that:

There are at least two ways in which QR's proposal may increase regulatory uncertainty. First, it may create a perception amongst access seekers that the regulatory process favours QR through a 'heads I win, tails you lose' situation. That is, access seekers have no certainty that QR will apply these arrangements symmetrically. Indeed, QR's proposal reflects an increased likelihood that the new tariff will be lower than the existing, interim tariff, and that the proposal would not have been put forward if tariffs were likely to increase instead.

*Second, deviating from the expectations of including an adjustment [amount] to refund or recoup differences in the tariffs, in a way that benefits QR, can also increase the perceived risk associated with the overall regulatory framework.*⁶⁴³

Professor Menezes' report is available on the QCA's website.

⁶⁴¹ QCA Draft Decision October 2014: xiv

⁶⁴² New Hope sub. no. 12: 18 (Legal advice).

⁶⁴³ Menezes 2015c: 2

Pricing certainty for rail access is an important underpinning of investments made in long-lived infrastructure investments and expenditure on exploration activities. Indeed, uncertainty about pricing can result in a lessening of competition for upstream coal tenements (limited exploration and mine development expenditure) and inefficient use of Queensland Rail's West Moreton network rail infrastructure (by discouraging new entrants from taking any spare rail capacity). Pricing certainty is consistent with the objects clause.

Specifically, if customers cannot rely on regulatory arrangements to provide for pricing certainty, they will be less willing to make future investments in long-lived sunk investments or undertake exploration activities to develop prospective tenements—both of these have implications for economic efficiency. In this regard, New Hope has previously noted the value it places on regulatory certainty:

... it is essential to establish a transparent and repeatable methodology for determining reference tariffs for the Western System. We believe this will enable greater predictability of tariffs, and hence improving understanding and management of the associated cost risk (New Hope 2013: 10).

Darryl Biggar (2010) has explained this issue as follows:

... users of a monopoly service must typically take some irreversible action which increases the value of the monopoly service — such as the decision of a large gas consumer to locate close to a gas-transmission pipeline, or the decision of a factory to install electrical wiring on its premises. The value of such investments is contingent on continuing to receive access to the monopoly service at reasonable prices and quality. Such an investment is therefore at risk of expropriation through an increase in the price or a decrease in the quality of the monopoly service. The fear of such expropriation has a chilling effect on such investment, reducing overall economic welfare.⁶⁴⁴

This rationale for regulation is also discussed in the QCA's recent Statement of Regulatory Pricing Principles (2013: 27).

Regulatory certainty has been also recognised by Queensland Rail, who said:

An important role regulation plays in competitive environments is to provide certainty to those providing and receiving access to declared services. The QCA cannot compromise regulatory certainty to achieve a particular outcome by adopting positions which vary suddenly and in very material ways from its own precedent and the commonly accepted methodologies used across the regulatory landscape by a range of regulators (QR sub. no.1: 6).⁶⁴⁵

Investment impacts

Regulatory certainty about Queensland Rail's actions is particularly important given existing market conditions and planned investments. For example, Yancoal indicated that it has plans to expand its Cameby Downs mine from 1.4 million to 4 million tonnes per annum⁶⁴⁶, but indicated that increasing regulatory uncertainty was causing its shareholders to reassess the risks of investing in Queensland.

The QCA notes that such regulatory certainty (or uncertainty) may also impact on other pending future investments.

For example, New Hope is proposing to spend \$896 million on its New Acland Stage 3 development, which is expected to extend the life of the mine from 2017 to 2029. New Hope said:

⁶⁴⁴ Biggar, D. 2010, Fairness in public-utility regulation: a theory.

⁶⁴⁵ Queensland Rail's statement was made in the context of asset valuation methodologies.

⁶⁴⁶ Yancoal sub. no. 16: 4.

*The revised Project will directly support approximately \$6.6 billion in economic output from construction/capital and operational expenditure, while indirect and induced output will contribute a further \$12 billion for a total output impact of almost \$19 billion.*⁶⁴⁷

Likewise, Sekitan Resources has made a conditional offer to acquire the Wilkie Creek mine from Peabody for US\$75 million in cash and assumed liabilities⁶⁴⁸ with plans to resume production in 2016.⁶⁴⁹

Consistent with Professor Menezes' report, it is reasonable to expect that such investments could be affected by regulatory certainty.

Relevantly, such investment is directly relevant to s. 138(2)(a) as it relates to the efficient operation of, and use of investment in the West Moreton network, which has faced substantial declines in utilisation. A lack of future investment by miners means increasingly inefficient utilisation of Queensland Rail's infrastructure as substantial spare capacity will remain. This places an increasing burden on remaining users to cover the costs of Queensland Rail to operate its network, which then impacts on the viability of the remaining mines i.e. potential creating a 'death spiral'. For example, Yancoal said:

Should QR take a long term view and price at a level that assumes higher tonnage levels and scale economies, then there is a stronger chance that mines like Cameby Downs could expand. Pricing on the basis of scale economies in future would improve competitiveness with other systems and could facilitate investment and higher volumes (Yancoal sub. no. 16: 4).

This Chapter 8 further discusses the impact of reduced volumes on the proposed tariff for the West Moreton network as part of proposing a tariff methodology.

Legitimate business interests of Queensland Rail

Section 138(2)(b) of the QCA Act relates to the legitimate business interests of the owner or operator of the service.

The legitimate business interests of Queensland Rail include its commercial interest in recovering its costs of providing the service and earning a return on investment.

Queensland Rail had previously submitted the March 2012, February and June 2013 DAUs as well as successive extension DAAUs on the basis that there would be an adjustment amount for access charges back to 1 July 2013. Queensland Rail said that it:

has been prepared to offer retrospective application of tariffs as is evident from its 2012 DAU (QR sub. no. 4: 3).

However, after the release of the QCA's 2014 Draft Decision, Queensland Rail said that an adjustment amount was not in its legitimate business interest. Queensland Rail said its:

position only changed following the QCA's foreshadowed significant change to the long-standing regulatory approach to asset valuation and after the material, negative impact of that change on Queensland Rail's legitimate business interests became evident (QR sub. no. 4: 3).

The QCA does not accept that the QCA's 2014 Draft Decision's approach to asset valuation is an appropriate basis for Queensland Rail to change its approach to the adjustment charge. The 2014 Draft Decision was not a draft version of a final decision and had no force of itself. Moreover, the QCA's approach to asset valuation in the Draft Decision is consistent with the

⁶⁴⁷ http://www.newhopegroup.com.au/files/files/NHG0040_ExecSummary_NAP_EIS_WebRes_Ex.pdf

⁶⁴⁸ <http://www.peabodyenergy.com/investor-news-release-details.aspx?nr=893>

⁶⁴⁹ <http://www.internationalcoalnews.com/storyview.asp?storyID=826952237>

criteria in section 138(2) of the QCA Act and accordingly of itself provides no basis for Queensland Rail's view that an adjustment amount is not in its legitimate business interest.

The QCA accepts that an adjustment amount may not be in Queensland Rail's business interests. This is perhaps most clearly so where it involves Queensland Rail paying an adjustment amount. On the other hand, at times where the application of the adjustment would mean that Queensland Rail receives an adjustment amount, inclusion of the adjustment amount may well be in Queensland Rail's legitimate business interests.

However, the significance of Queensland Rail's legitimate business interests must be assessed against the background of its earlier stated intentions to include an adjustment amount. This is dealt with further below.

Public interest

While the term the 'public interest' is not defined for this section of the QCA Act, the QCA has previously considered the following as matters relevant to a consideration of public interest (QCA, December 2000: 44-45).⁶⁵⁰

Efficient allocation of resources

The public interest in an efficient allocation of resources is best served by the QCA approving an access undertaking that facilitates the delivery of below-rail services at efficient prices and establishes a stable, certain regulatory framework. An important objective is a regulatory framework that provides confidence that in turn underpins investment.

A key issue in relation to Queensland Rail's declared service has been to develop access charges to reflect the efficient costs of delivering below-rail services, with parties acknowledging the importance of regulatory certainty. In this way, rail operators and end users are able to have confidence that access charges promote an efficient allocation of resources which is closely aligned to the public interest in promoting competition (in the above-rail market). In this way, timing differences in the approval of terms of access in an undertaking have been symmetrically provided for (by means of an adjustment amount). That is, an adjustment charge has applied both to apply a refund and a recoupment of access charges.

Given competitiveness relates to the ability of a firm to sell its products in a market, arrangements that provide certainty for access charges are consistent with an efficient allocation of resources.

Competitiveness of Queensland business

The QCA maintains an approved access undertaking that delivers regulatory certainty and provides a major stimulus to the Queensland economy and local employment which is an important public interest consideration.

Given that a number of consumers of rail services (i.e. coal miners in this case that engage rail operators to transport coal) are selling their products in international markets or face intense competition in their domestic markets, the ability of such consumers to pass on rail transport costs is likely to be constrained (that is, they are price takers). In the absence of certainty, this could undermine the competitiveness for rail operators accessing Queensland Rail's declared services and consumers of above-rail services provided by those rail operators.

⁶⁵⁰ December 2000. Draft Decision on QR's Draft Undertaking. Volume 2 – The Draft Undertaking.

Consequently, to improve the competitiveness of rail operators and their customers the QCA believes that pricing certainty, which is necessary to facilitate efficient resource allocation, is particularly relevant.

Regional economic development

Proposed development of new, or replacement, coal mines may be at risk if there is material pricing uncertainty for rail access. To the extent that this occurs, there can be flow-on effects in terms of regional economic development.

Relevantly, New Hope, Yancoal and QRC noted potential impacts of Queensland Rail's position on investment as a relevant matter. For example, New Hope has indicated its proposed New Acland project:

*... will support construction jobs of up to 260 and approximately 435 operational jobs at peak, and attract construction costs of around \$896 million.*⁶⁵¹

Having regard to the above discussion, the QCA considers that it is in the public interest for there to be regulatory certainty with regard to the inclusion of an adjustment amount in circumstances where stakeholders relied on Queensland Rail's previously stated intention to that effect. It is also in the public interest for there to be efficient investment in the infrastructure, which stakeholders have said may be impacted as a result of lack of confidence in the regulatory process. This would also lead to a lessening of competition which is not in the public interest.

The public interest is not served in circumstances where Queensland Rail changes its previously stated intention to include an adjustment amount. Queensland Rail said its position changed following the QCA's foreshadowed change of approach to asset valuation and 'after the material, negative impact of that change on Queensland Rail's legitimate business interests became evident'.⁶⁵² The effect of Queensland Rail's change in position is that it will receive a windfall gain in respect of the period since 1 July 2013 when access charges it has collected will exceed access charges that would have been received if calculated in accordance with the reference tariff proposed to be approved by the QCA in this Draft Decision. Such an outcome is not in the public interest.

Interest of access seekers and access holders

An adjustment amount for overpayment of access charges since 1 July 2013 is clearly in the interests of access seekers and access holders. This is also clear from the submissions made by stakeholders summarised above.

Pricing principles

When considering a DAU, one of the factors that we must have regard to is the pricing principles in section 168A. Relevantly, the pricing principles state that the price of access to a service should generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.

This Chapter 8 applies the regulatory building blocks methodology to determine that the appropriate indicative price of access (i.e. the indicative reference tariff) is \$15.88/'000 gtk as at

⁶⁵¹ www.newhopegroup.com.au/files/files/NHG0040_ExecSummary_NAP_EIS_WebRes_Ex.pdf

⁶⁵² Queensland Rail- Response to request for comments June 2015, section 4, page 3.

1 July 2015⁶⁵³ (after application of the adjustment amount-see Table 8.7 which follows this section). This price of access is less than the price of \$18.88/'000 gtk as at 1 July 2015 which the QCA considers would otherwise generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved .

This corresponds to a reduction in the revenue that Queensland Rail would have expected to earn over the regulatory period of 15% (i.e. \$26.3 million as at 1 July 2015 (see **Box 8.2**)).

However, the pricing principles are only one of a number of factors to which we must have regard pursuant to section 138(2).

Whether a DAU allows recovery of at least enough to meet efficient costs and a relevant return is of course relevant and fundamental to our assessment of the 2015 DAU. But we are not required to consider it appropriate to approve a DAU because the price contained in it will generate revenue that is at least enough to meet the efficient costs of the service and a relevant return. Nor are we precluded from considering it appropriate to approve a DAU that contains a price that is not expected to generate revenue that is at least enough to meet the efficient costs of the service and a relevant return, where other relevant factors in section 138(2) lead to such a conclusion.

It is open to the QCA to consider that a DAU which provides for a price that allows a service provider to recover at least the efficient costs of providing access to the service and a relevant return on investment, is, including by reference to other factors such as the object of Part 5 of the QCA Act (section 138(2)(a)), the interests of access seekers and holders (sections 138(2)(e) and (h)) and the public interest (section 138(2)(d)), not one which it is appropriate to approve.

We therefore do not accept Queensland Rail's contention (that over the regulatory period):

... [t]hat reference tariff must deliver to the access provider at least its efficient costs and a return as required by section 168A(a). Anything less should not be approved and cannot be imposed (QR sub. no. 1: 5)

In this chapter, the QCA identified why it considers the DAU (containing the reference tariff proposed by Queensland Rail) is not appropriate to approve having regard to the criteria in section 138(2). In particular:

- what the QCA considers to be the efficient cost of providing access
- the return on investment that the QCA considers to be commensurate with the regulatory and commercial risks involved
- the reference tariff that the QCA considers is appropriate and the resulting revenue it is expected to generate.

The difference between the maximum allowable revenues that the QCA would have allowed Queensland Rail to collect and the actual revenues Queensland Rail collected during the period 1 July 2013 to 30 June 2015 amounts to \$26.3 million (in NPV terms as at 30 June 2015). This is in effect an over-collection of revenues by Queensland Rail of this amount. If that amount was refunded to access holders over the forthcoming period by way of a reduction in reference tariffs, the result would be that Queensland would receive \$26.3 million less in revenue than

⁶⁵³ This reference tariff is only indicative as the actual tariff will apply from the date that the undertaking commences – and that cannot be determined at this stage of the QCA's review of the 2015 DAU.

would be enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.

Other relevant issues

The QCA considers the following issues to be relevant to its consideration of whether it is appropriate to approve the 2015 DAU.

The recovery of efficient costs plus a return over the longer term

Infrastructure assets are generally long-lived assets which exist beyond the term of a regulatory undertaking. Therefore, while the QCA and other regulators approve undertakings for a fixed regulatory period, the span of regulatory assets across undertakings is taken into account. For instance, there may be circumstances where a regulatory model adopted by a regulator may mean that a regulated asset receives less revenue in a given regulatory period. However, over the life of the regulated entity, the intention would be that they would earn sufficient revenue to meet efficient costs plus a return. This was reflected in the QCA's Statement of Regulatory Pricing Principles which said:

*... the expected present value of the future cash flows of the regulated firm should equal the value of initial investment, using a discount rate that reflects the opportunity cost of the investment.*⁶⁵⁴

It is a relevant matter that over the long-term life of the asset, regulated prices will provide revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.

Consistent with this, the QCA presently, and in the past has imposed a revenue cap model on regulated entities. Under this model, a revenue under- or over-recovery in one year is offset by a corresponding revenue under- or over-recovery in a subsequent year, and that subsequent year may be in the next regulatory period.⁶⁵⁵ This reflects the regulatory reality that a regulated entity may under- or over-recover regulatory revenues in a given year or regulatory period and there must be an adjustment mechanism to address this.

This position was reflected by New Hope:

*[there is a] common regulatory practice of applying many different types of 'carry-over' mechanisms from one regulatory period to another. For example, in addition to the backdating of tariffs through adjustment charges, other provisions approved by Australian economic regulators have included capital carry-over accounts, efficiency/incentive arrangements, 'unders and overs' under a revenue cap and price paths.*⁶⁵⁶

The QCA accepts that it was reasonable for stakeholders to rely on Queensland Rail's previously stated intention to include an adjustment amount in its replacement access undertaking to address any over or under recovery or tariffs during the period since 1 July 2013. The QCA has approved seven extensions to the existing undertaking on the basis of Queensland Rail's inclusion of an adjustment charge provision in its draft access undertakings proposed and

⁶⁵⁴ Statement of regulatory pricing principles, August 2013, p. 10.

⁶⁵⁵ For example, an 'unders and overs' process for the Central Queensland Coal Network is still included in the revenue cap mechanism in the 2008 undertaking (Schedule F, Part B, Section 3 – although those clauses don't apply to Queensland Rail as they are an artefact of when the 2008 undertaking applied to QR Network). The same process has applied for Aurizon Network in the 2010 undertaking (also Schedule F, Part B, Section 3). Similar 'unders and overs' provisions were applied to the revenue caps for Queensland's electricity network businesses when they were regulated by the QCA.

⁶⁵⁶ New Hope sub. no. 12: 8.

withdrawn, up to the submission of the 2015 DAU. Adjustment amounts are not uncommon in regulatory regimes and it is highly unlikely that users would have supported these extensions of the existing access undertaking if it had not been on the basis that an adjustment amount would be made so that neither Queensland Rail nor access holders were advantaged or disadvantaged. Indeed, following Queensland Rail's submission of the 2015 AU, New Hope who would be directly affected by the absence of any adjustment amount in the 2015 access undertaking, supported the rejection of the DAAU as submitted by the QCA.⁶⁵⁷

The impact of Queensland Rail's change in approach in circumstances where stakeholders have relied on previously stated intention to include an adjustment amount are explored above under the 'object criteria' and is also a relevant consideration pursuant to section 138(2)(h).

The integrity of the regulatory framework

The long-living nature of infrastructure assets means that it is important that there is an effective and credible adjustment mechanism to deal with the under- or over-recovery of revenues both during and across regulatory periods. Its absence creates a 'heads I win, tails you lose' position for regulated entities. If a regulated entity thinks it will benefit from an adjustment amount, it will likely include it in its DAU. If it does not, it may choose to withdraw the offer of an adjustment amount or opt not to make the offer in the first place.

Such a mechanism is also necessary to avoid the potential for regulatory gaming. The absence of an adjustment mechanism for dealing with under- or over-recovery of revenues is an incentive for a regulated entity to delay submitting a voluntary replacement DAU until close to the expiry of its existing undertaking in the knowledge that QCA's review will take months beyond the expiry of the existing undertaking to conclude (i.e. the entity could be rewarded for delaying its submission).

Other matters

Other matters relevant to s. 138(2)(h) include:

- Queensland Rail's previously stated intention to include an adjustment amount;
- the expectation of stakeholders of the inclusion of an adjustment amount
- reliance by stakeholders on that expectation, and on Queensland Rail's previously stated intention
- the impact of the change in Queensland Rail's position with respect to the inclusion of an adjustment charge in its 2015 DAU.

As outlined in stakeholders' comments above, the QCA's position is that it accepts that stakeholders had a clear expectation of an adjustment charge and operated on this basis. Relevantly, this was consistent with Queensland Rail's representations in the past. Given this, as outlined above, the QCA considers that the change in Queensland Rail's position will increase regulatory risk, impacting on forward-looking investment.

⁶⁵⁷ New Hope extension DAAU submission.

Weighing of factors under the QCA Act

The QCA has concluded that:

- adverse consequences would arise from approving the 2015 DAU in circumstances described in this section, in particular on:
 - regulatory certainty
 - the future inefficient use of the western system arising from the lessening of competition in the market for upstream coal tenements
 - together with the public interest in economic development and regulatory certainty and other matters (s. 138(2)(a), (d), (e), (h))
- the adverse consequences outweigh the considerations of:
 - approving a price for access which would (absent an adjustment charge) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and a return on investment commensurate with the regulatory and commercial risks involved (s. 168A(a)) and
 - Queensland Rail's interest in obtaining such a price.

The change in Queensland Rail's position means that as at 1 July 2015, Queensland Rail has recovered \$26.3 million more than would have been the case had Queensland Rail maintained its earlier stated intention to include an adjustment charge. If the QCA maintains its draft position on tariff methodology in its Final Decision, this over-recovery will be more. The QCA considers that the failure of Queensland Rail to receive this revenue in the forward looking period of the new undertaking is outweighed by the forward-looking impacts on investment as indicated by Yancoal, New Hope and the QRC. The QCA notes that any such investment impact would also have broader flow-on effects, including on employment and regional development.

On that basis and having regard to the criteria in section 138(2), the QCA's Draft Decision is that:

- it is not appropriate to approve the 2015 DAU proposed by Queensland Rail
- the undertaking should be amended to provide for an adjustment amount.

8.12 QCA-proposed reference tariffs

Having regard to all of the above, and for indicative purposes only, we propose an indicative draft reference tariff equivalent to \$15.88/000 gtk that has been calculated as if it were to apply from 1 July 2015. The QCA will recalculate and adjust this indicative tariff to the date the new undertaking is approved to commence.

The QCA notes that this approach will mean that Peabody Energy that was a user until its Wilkie Creek mine closed in late 2013 will not benefit from any adjustment amount over the regulatory period.⁶⁵⁸ However, this would have been the case if the Queensland Rail's 2015 DAU had proposed an adjustment amount, like its earlier DAUs. The QCA notes that an adjustment amount may be able to be calculated in a range of ways, including through adjusting tariffs over the regulatory period, through a lump-sum bullet payment and by having regard to existing and/or existing as well as previous users. However, the QCA considers that its approach of

⁶⁵⁸ This Draft Decision has not considered the potential windfall gains from access facilitation agreements in light of the closure of the Wilkie Creek mine. These matters will be addressed as part of our further review of the 2015 DAU.

adjusting future tariffs based on Queensland Rail's previous over-recovery of revenues is appropriate as it is consistent with the way the QCA has previously made such adjustments and accordingly enhances regulatory certainty and thus future efficient use of the West Moreton network and economic development.

For illustrative purposes, **Table 8.7** shows our indicative reference tariff, before and after incorporating adjustment amount as at 1 July 2015, against the tariff proposed in 2015 DAU over the proposed regulatory period. Our decision with respect to individual reference tariff components is shown in Appendix A.

Table 8.7 Comparison of Queensland Rail proposed and QCA Draft Decision tariffs

All tariffs in \$/'000 gtk	2015-16	2016-17 ¹	2017-18	2018-19	2019-20
QR proposed reference tariff	\$19.41	\$19.90	\$20.39	\$20.90	\$21.43
QCA indicative ceiling price - no adjustment amount	\$18.88 ²	\$19.35	\$19.83	\$20.33	\$20.84
QCA indicative reference tariff	\$15.88 ²	\$16.28	\$16.68	\$17.10	\$17.53
Decrease in tariff (effective change by adjustment amount)	- \$3.00	- \$3.07	- \$3.15	- \$3.23	- \$3.31

¹ The tariffs for years 2016-17 to 2019-20 are indexed using inflation rates adopted by Queensland Rail in its 2015 DAU.

² These tariffs at 1 July 2015 are indicative only. The QCA will re-calculate and adjust these indicative tariffs to reflect the date to the new undertaking will commence.

Box 8.2 Adjustment amount methodology

The adjustment amount was calculated as the difference between:

- the 'future value' of **actual revenues** charged by Queensland Rail from coal traffic during 2013-14 to 2014-15⁶⁵⁹, and
- the 'future value' of **maximum allowable revenues (MAR)** for coal traffic during 2013-14 to 2014-15 estimated by the QCA.⁶⁶⁰

The 'future values' are as at the start of new regulatory period on 1 July 2015.

The actual revenue data for the two years were provided by Queensland Rail.⁶⁶¹

⁶⁵⁹ Post-tax revenues after taking away calculated tax payments.

⁶⁶⁰ The calculations for 2013-14 and 2014-15 apply the parameters discussed in this Draft Decision.

⁶⁶¹ Provided on 17 July 2015 upon a section 185 information request (QCA Act).

Draft Decision

- 8.17** After considering Queensland Rail's proposed reference tariffs, our Draft Decision is to refuse to approve Queensland Rail's proposal.
- 8.18** Having regard to all of the above, and for indicative purposes only, we propose an indicative draft reference tariff equivalent to \$15.88/'000 gtk that has been calculated as if it were to apply from 1 July 2015. The QCA will recalculate and adjust this indicative tariff to the date the new undertaking is approved to commence.
- 8.19** We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in the analysis above.

9 INVESTMENT, PLANNING AND COORDINATION FRAMEWORK

An effective investment, planning and coordination framework must balance the legitimate business interests of Queensland Rail with those of access seekers and any third parties involved in funding the network extension.

Clause 1.4 of the 2015 DAU identifies Queensland Rail's obligations when an access application is lodged and can only be accommodated with an extension to the declared network.

Stakeholders have said Queensland Rail has too much discretion in making decisions to permit, but not fund, an extension to the network. Stakeholders have sought a better balance in the rights and responsibilities of access seekers and end customers to obtain access to the network when a network extension is required to accommodate an access application.

Our Draft Decision is not to accept Queensland Rail's 2015 DAU investment, planning and coordination framework. Instead we have proposed amendments to clauses 1.4 and 2.7 in the 2015 DAU to provide clarity and certainty on the rights and obligations of all contracting parties in the negotiation process when a network extension is required to accommodate an access application and Queensland Rail is not willing to fund the network extension.

Introduction

An efficient, transparent and accountable investment framework is a critical component of the 2015 DAU. In the absence of regulation, Queensland Rail could use its monopoly position as a means through which it could effectively deny access, earn monopoly profits and inefficiently distort production and/or consumption decisions of access holders, access seekers and end customers. These parties are reliant on access to the network in order to compete in their related upstream and downstream markets.

The investment framework in the 2015 DAU should provide a high degree of certainty for all access seekers if they:

- commence negotiations with Queensland Rail for access to the declared network
- are advised by Queensland Rail that
 - a network extension is required to provide the access sought
 - it is not willing to fund the network extension
- indicate a willingness, in the absence of Queensland Rail electing to fund the extension, to fund the design and construction of the network extension
- commence negotiations with Queensland Rail to fund a network extension.

In order to meet these objectives, the 2015 DAU should provide a process for access seekers and end customers to negotiate and obtain access to the network, conditional only on a network extension being constructed and commissioned.

Key investment framework issues are summarised below in **Table 9.1**. Note that we have summarised the relevant parts of our 2014 Draft Decision for convenience because Queensland Rail, in its 2015 DAU submission,⁶⁶² summarised its 2015 DAU proposal by reference to our 2014

⁶⁶² Queensland Rail, sub. no. 1: 13-47.

Draft Decision. However, in coming to this current Draft Decision, we have reviewed 'afresh' the Queensland Rail's 2015 DAU proposed investment framework which is largely contained in Part 1.4 of the 2015 DAU.

Table 9.1: Queensland Rail's 2015 DAU: capacity and investment framework issues

<i>Summary of the 2015 DAU proposal⁶⁶³</i>	<i>Consistency with QCA 2014 Draft Decision⁶⁶⁴</i>	<i>Stakeholders' comments</i>	<i>QCA 2015 Draft Decision</i>
Network extensions			
Queensland Rail's obligations to extend its network is subject to ensuring its legitimate business interests are protected and access seekers are complying with a list of extension project conditions. Queensland Rail has some discretion in determining if the relevant criteria are met.	Partially consistent with the 2014 Draft Decision.	Stakeholders raised material issues.	See Section 9.2.
Funding agreements			
Access seekers (or their end customers) who are willing to execute an access agreement for access rights created by an extension can trigger the extension process.	Partially consistent with the 2014 Draft Decision.	Stakeholders raised material issues.	See Section 9.3.
Access funding principles are provided in the body of the 2015 DAU.			
There is no regulatory trigger to require Queensland Rail to develop a standard funding agreement for our consideration and approval in the 2015 DAU regulatory period.	Inconsistent with 2014 Draft Decision.		
Network planning			
Master planning and network extension services to be provided at Queensland Rail's discretion.	Inconsistent with 2014 Draft Decision.	Stakeholders raised material issues.	See Section 9.4.

9.1 Our assessment approach

For the purposes of the 2015 DAU we have accepted three core network extension proposals that underpin Queensland Rail's proposed investment framework and the negotiation of access rights with an access seeker under clause 1.4 of the 2015 DAU.

⁶⁶³ Queensland Rail 2015 DAU.

⁶⁶⁴ Chapter 9, 2014 Draft Decision.

- (1) We accept the investment proposal that Queensland Rail may exercise its discretion to permit, but not to fund, an extension to the network. We consider this to be consistent with Queensland Rail's obligations under the QCA Act.⁶⁶⁵
- (2) We accept the ownership proposal that Queensland Rail will own, operate, manage and maintain the extension project as an integrated component of its network. We consider this to be consistent with the QCA Act.⁶⁶⁶
- (3) We accept the construction premise that Queensland Rail will construct the extension project, unless otherwise agreed by Queensland Rail. We consider this to be consistent with the QCA Act.⁶⁶⁷

Given the above, and having regard to section 137(2)(g) of the QCA Act, we consider the negotiation process for a network extension is a key element in the negotiation of access rights for the provision of the declared service. The 2015 DAU should therefore provide certainty and clarity regarding the negotiation process for an extension project, including key steps in the process, the conduct of negotiations, information requirements and timeframes.

Our approach in assessing clause 1.4 of the 2015 DAU is based on our assessment of whether Queensland Rail, in drafting the investment framework provisions of the 2015 DAU, has had due regard to all the factors listed in section 138(2) of the QCA Act. In broad terms, we consider the factors listed in section 138(2) of the QCA Act are best balanced when the investment framework:

- provides a streamlined negotiation process to deliver access to the network in a timely manner and at a reasonable cost
- provides certainty on processes and obligations in negotiations, including the nature and timing of information and assistance required to be provided
- balances Queensland Rail's legitimate business interests with the rights and legitimate business interests of access seekers
- removes perceived⁶⁶⁸ or actual barriers in the negotiation process so all access seekers can be confident they are negotiating for access rights on a level playing field
- delivers access services (which include delivery of an extension project) at a reasonable cost consistent with the pricing principles contained in section 168A of the QCA Act.⁶⁶⁹

When negotiations are effective, access seekers should be able to gain access to the network at a reasonable cost and in a timely manner. This is consistent with the object of the QCA Act to

⁶⁶⁵ Queensland Rail, 2015 DAU, cl. 1.4. Section 118(1)(d) of the QCA Act allows the QCA to make an access determination requiring Queensland Rail to extend the network or permit the extension of the network if it is required by an access seeker in order to gain access to the declared service. At the same time the QCA Act does not require Queensland Rail to fund the cost of extending the network (s. 119(2)(c)).

⁶⁶⁶ Queensland Rail, 2015 DAU, cl. 1.4.4. Section 119(2) of the QCA Act requires that a network extension not result in the access seeker or someone else becoming the owner, or one of the owners, of the network, without Queensland Rail's agreement.

⁶⁶⁷ Queensland Rail, 2015 DAU, cl. 1.4.4. Section 138(2)(b) of the QCA Act requires the 2015 DAU to protect Queensland Rail's legitimate business interest. We consider Queensland Rail's legitimate business interest in this context includes that the extension is constructed in accordance with its legislative obligations as the accredited rail infrastructure manager of the network.

⁶⁶⁸ Queensland Rail's ability to use its market power to choose winners by exercising its discretions in the extension process differentially among access seekers, is a perceived barrier.

⁶⁶⁹ Section 168A of the QCA Act.

promote the economically efficient operation of, use of and investment in Queensland Rail's network. **Table 9.2** provides more detail on how we consider the section 138(2) factors should be addressed to enable us to approve the investment framework in clause 1.4 in the 2015 DAU ('assessment approach').

Table 9.2 QCA assessment of clause 1.4 of the 2015 DAU with respect to section 138(2) of the QCA Act

<i>Assessment criteria</i>	<i>QCA assessment approach</i>
Appropriate balancing of section 138(b), (d) (e) and (h) of the QCA Act	
Does the 2015 DAU protect Queensland Rail's legitimate business interests?	<p>We consider that Queensland Rail's legitimate business interests will be protected if the 2015 DAU provides for Queensland Rail to:</p> <ul style="list-style-type: none"> recover the efficient costs incurred in negotiating an extension project and providing access services to the access seeker deliver contracted access rights to all access holders.
Does the 2015 DAU protect the public interest?	<p>We consider the public interest will be served if the 2015 DAU promotes economically efficient extensions to the network and facilitates competition in markets.</p>
Does the 2015 DAU protect the interests of access seekers?	<p>We consider that access seekers' and access holders' interests will be addressed if the 2015 DAU provides:</p> <ul style="list-style-type: none"> a regulatory process outlining distinct steps to progress an extension project through each stage of the project regulatory principles (access and funding) to underpin negotiations on an extension project an objective and accountable decision-making framework to allow an access seeker to progress an extension project through each investment stage regulatory standards on the prudence of scope, standard and cost of an extension project appropriate project controls to manage the timing for, and cost of, the extension and the timing for the use of the access rights created by the extension.
Does the 2015 DAU protect the interests of access holders?	<p>We consider that access holders' interests will be protected if the 2015 DAU provides reliability and security on the delivery of access rights over the life of all access agreements and beyond.</p>
Does the 2015 DAU objectively address Queensland Rail's rail accreditation obligations? ⁶⁷⁰	<p>We consider that Queensland Rail's legitimate safety and accreditation responsibilities will be addressed if the 2015 DAU enables an extension project to be designed, constructed and commissioned consistent with the objective technical, safety and environment standards applying to the existing network.</p>
Section 138(2)(a) (f) and (g) of the QCA Act	
Does the 2015 DAU promote efficient	<p>We consider an extension project can be undertaken efficiently when:</p> <ul style="list-style-type: none"> the extension project complies with regulatory standards regarding

⁶⁷⁰ Pursuant to section 138(h) of the QCA Act we consider that other relevant factors in this instance include Queensland Rail's responsibilities as an accredited Rail Infrastructure Manager under the Rail Safety Act and Transport Infrastructure Act.

<i>Assessment criteria</i>	<i>QCA assessment approach</i>
investment in network infrastructure?	<p>prudence of scope, standard and cost</p> <ul style="list-style-type: none"> the extension process provides incentives to reduce costs and improve the productive use of the network Queensland Rail can recover all prudent costs associated with an extension of the network, including a return on investment commensurate with the regulatory and commercial risks involved an access seeker can recover all prudent costs associated with the contributed asset, including a return on the asset and receipt of financial benefits obtained by Queensland Rail from the contributed asset.

9.2 Network extensions

Consistent with section 137 of the QCA Act, we consider the 2015 DAU should provide details on how an access seeker can obtain access to the declared service when a network extension project is required to accommodate the access rights nominated in its access application.

We have applied our assessment approach, to consider whether Queensland Rail's proposed 2015 DAU provides for an extension project to be developed from identification through to operation in accordance with the object of the QCA Act—that is, to promote the economically efficient operation of, use of and investment in its declared network.

Queensland Rail's 2015 DAU proposal

In the 2015 DAU, Queensland Rail has identified the access conditions and requirements that it may apply to its negotiations with access seekers when an extension project is required to provide the access rights sought by the access seeker. The 2015 DAU also identifies the rights and responsibilities the access seeker holds when negotiating access rights that are subject to extension conditions.⁶⁷¹

The extension conditions in the 2015 DAU are that the access seeker must:

- provide upfront funding⁶⁷² to Queensland Rail to construct and commission the network project required to provide the access rights sought by the access seeker
- acquire, or be reasonably likely to acquire⁶⁷³
 - all necessary authorisations reasonably required to extend the network
 - all rights and interests in land that, in Queensland Rail's opinion, acting reasonably, are required and are (or will be) acquired on terms satisfactory to Queensland Rail, acting reasonably
- develop the network project to deliver the additional access rights to a scope and standard that, in Queensland Rail's opinion, acting reasonably,⁶⁷⁴
 - is technically feasible
 - is consistent with the safe, reliable provision of access, maintenance and operation of the network

⁶⁷¹ Queensland Rail, 2015 DAU, cl. 1.4.

⁶⁷² Queensland Rail, 2015 DAU, Cls. 1.4.1(c)(ii), 1.4.2(b)(iii) and (iv), (f), 1.4.3(b)(iv), 1.4.7(c), 1.4.8(a).

⁶⁷³ Queensland Rail, 2015 DAU, Cl. 1.4.2(b)(v)(iv).

⁶⁷⁴ Queensland Rail, 2015 DAU, Cl. 1.4.2(b)(vii).

- does not adversely affect existing access rights
- complies with the engineering, operational and other requirements of Queensland Rail
- protects Queensland Rail's legitimate business interests
- execute access agreements for the additional access rights created by the network project which are unconditional in all material respects, except for conditions relating to extending the network which cannot be satisfied until the network has been extended⁶⁷⁵
- enter into construction, funding, operational and other material arrangements that are reasonably required by Queensland Rail which are unconditional in all material respects, except for conditions relating to the network project which cannot be satisfied until the network has been extended.⁶⁷⁶

The 2015 DAU also identifies Queensland Rail's rights and responsibilities in facilitating an access seeker's development of an extension project. In summary, these include that Queensland Rail:

- cannot be obliged to act in a way that does not protect its legitimate business interests⁶⁷⁷
- will construct, own, operate and manage the network project⁶⁷⁸
- will extend the network project if, in Queensland Rail's opinion acting reasonably, the extension⁶⁷⁹
 - is technically feasible
 - is consistent with the safe, reliable provision of access, maintenance and operation of the network
 - does not adversely affect existing access rights
 - complies with the engineering, operational and other requirements of Queensland Rail (acting reasonably)
 - protects Queensland Rail's legitimate business interests
- will use reasonable endeavours to assist an access seeker to develop an extension project to meet the access conditions, including by applying for any authorisation or land tenure where Queensland Rail is the only party or the most appropriate party to do so⁶⁸⁰
 - although, Queensland Rail's obligation to provide such assistance is subject to the access seeker providing upfront capital to cover the costs likely to be incurred by Queensland Rail in providing that assistance.⁶⁸¹

Stakeholders' comments

Stakeholders' submissions indicated their concern with the 2015 DAU is that it does not provide access seekers with sufficient regulatory and commercial certainty that the relevant access

⁶⁷⁵ Queensland Rail, 2015 DAU, Cls. 1.4.2(b)(viii)(ix).

⁶⁷⁶ Queensland Rail, 2015 DAU, Cls. 1.4.2(b)(x).

⁶⁷⁷ Queensland Rail, 2015 DAU, Cls. 1.4.1(c)(iii), 1.4.2(b)(ii)(F) and(iv), (f), 1.4.3(b)(iii), 1.4.7(c), 1.4.8(a).

⁶⁷⁸ Queensland Rail, 2015 DAU, Cls. 1.4.4.

⁶⁷⁹ Queensland Rail, 2015 DAU, Cls. 1.4.2(b)(vii).

⁶⁸⁰ Queensland Rail, 2015 DAU, Cls. 1.4.2(e).

⁶⁸¹ Queensland Rail, 2015 DAU, Cls. 1.4.1(c)(ii), 1.4.2(b)(iv), (f), 1.4.3(b)(iv), 1.4.8(a).

seeker can obtain access to the network if they are willing to fund the required extension.⁶⁸² For example, Glencore specifically identified that Queensland Rail should be compelled to extend the network to provide the access rights sought by an access seeker if the access seeker is willing to fund all of Queensland Rail's reasonable costs.⁶⁸³

A summary of the key issues identified by stakeholders is at **Table 9.3**.

Table 9.3 Stakeholders' comments on the network extension process in the 2015 DAU

<i>2015 DAU issue</i>	<i>Stakeholder's comments</i>
Capital contribution	Stakeholders accepted Queensland Rail may require access seekers to fund all reasonable costs incurred by Queensland Rail in facilitating, assisting, constructing and owning an extension project. ⁶⁸⁴
Perverse incentives	Stakeholders are concerned with the possibility of perverse incentives: <ul style="list-style-type: none"> An extension project on a rail corridor could include network maintenance components such that Queensland Rail can reduce its maintenance and operating costs on the corridor and obtain a higher return from existing access holders.⁶⁸⁵ Queensland Rail could defer major maintenance until the expiry of an access agreement and require an extension project to undertake major asset renewals as a precondition to renewing an access agreement⁶⁸⁶
Scope of an extension project	Aurizon identified a range of circumstances where customer funding may be sought to mitigate the financial risks associated with providing the regulated service. Aurizon believed capital contributions play an important role in allowing projects to proceed where the extension is uneconomic (i.e. imposes uncompensated costs) to Queensland Rail. Examples included strengthening and renewing assets to a higher standard that will increase the number and type of train services available to be contracted. ⁶⁸⁷ Aurizon advised it is not the nature and scope of the network project that requires focus. Instead focus needed to be given to the appropriate documentation and record keeping of any capital contributions so it can be appropriately considered in the development of access charges and the negotiation of new access agreements which will potentially use, or benefit from, the extension project. ⁶⁸⁸
Queensland Rail assistance	Stakeholders stated Queensland Rail should be obliged to provide an access seeker with: <ul style="list-style-type: none"> The detailed information required to develop an extension project so the access seeker can consider the project through each investment stage (concept, pre-feasibility and through to financial close)⁶⁸⁹ expert assistance to assist and/or undertake studies required (technical, design, engineering, operating specifications).⁶⁹⁰

⁶⁸² New Hope, sub. no. 3: 4-5, 54-59; Glencore, sub. no. 7: 10, 45-52; Aurizon, sub. no. 6: 4-5, 14-18; Asciano, sub. no. 5: 24 and attached May 2013: 14-15.

⁶⁸³ Glencore, sub. no. 7: 45.

⁶⁸⁴ Aurizon, sub. no. 6: 16; New Hope, sub. no. 3: 6-7; Asciano, sub. no. 5: 17; Glencore, sub. no. 7: 45-47.

⁶⁸⁵ New Hope, sub. no. 3: 4.

⁶⁸⁶ Glencore, sub. no. 7: 45-47.

⁶⁸⁷ Aurizon, sub. no. 6: 12, 14.

⁶⁸⁸ Aurizon, sub. no. 6: 13.

⁶⁸⁹ Aurizon sub. no. 6: 4-5, 14; New Hope, sub. no. 3: 5.

2015 DAU issue	Stakeholder's comments
	<ul style="list-style-type: none"> the detailed information so an access seeker can execute project construction and infrastructure funding contracts with Queensland Rail in order to obtain access to the network.⁶⁹¹ <p>The 2015 DAU does not adequately define those Queensland Rail costs which are eligible to be funded by an access seeker. Stakeholders have indicated their funding obligation to Queensland Rail should be subject to a reasonableness test and should be able to be costed and audited separately to Queensland Rail's general staff costs.⁶⁹²</p>
Queensland Rail discretion	<p>The 2015 DAU gives too much discretion to Queensland Rail in deciding if an extension project complies with the access conditions.⁶⁹³ Decision-making criteria applying to compliance with the access conditions should be objective, transparent, accountable and disputable. The decision-making criteria should not include the protection of Queensland Rail's legitimate business interests as this decision-making criteria will be taken into account by the QCA in determining the appropriate terms of the investment framework provisions as a whole.⁶⁹⁴</p>
Light-handed capacity investment framework	<p>The 2015 DAU provides a light-handed capacity investment framework which is not ideal. The 2015 DAU should include more detail on developing an extension project capable of obtaining financial close.⁶⁹⁵ The 2015 DAU should include a provision allowing the QCA to require more detail in clause 1.4 of the 2015 DAU if it considers it is warranted consistent with the QCA Act.⁶⁹⁶</p>

QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Queensland Rail's proposed network extension provisions in the 2015 DAU. In applying our assessment approach, we have identified significant asymmetries in the network extension process with respect to the:

- lack of clarity on the negotiation process to be followed by contracting parties to give effect to
 - concurrent negotiations on access and project agreements, recognising the timeframes for construction of an extension project
 - negotiation of each study stage to enable an extension project to reach financial close
 - construction and commissioning to occur on time and within budget
 - delivery of access services consistent with sections 69E and 138(2) of the QCA Act
- absence of mechanisms to provide accountability, transparency and timeliness of Queensland Rail's decision making process, including, for example
 - unclear boundaries and conditions of what is being negotiated at each stage of the extension project

⁶⁹⁰ Asciano, sub. no. 5: 17; Aurizon sub. no. 6: 4-5; Glencore, sub. no. 7: 10, 45-52; New Hope, sub. no. 3: 4-5, 54-59.

⁶⁹¹ Aurizon sub. no. 6: 4-5, 14-16; New Hope, sub. no. 3: 5-6; Glencore, sub. no. 7: 10, 50-51.

⁶⁹² Glencore, sub. no. 7: 48.

⁶⁹³ New Hope, sub. no. 3: 5; Glencore, sub. no. 7: 10, 45.

⁶⁹⁴ New Hope, sub. no. 3: 4-5.

⁶⁹⁵ Glencore, sub. no. 7: 49-52; New Hope sub. no. 3: 5, 57-58.

⁶⁹⁶ Glencore, sub. no. 7: 51-52.

- lack of objective and independently verifiable approval criteria
- unbalanced allocation of project risks, liabilities and indemnities due to Queensland Rail assigning
 - all risks and liabilities for an extension project to the access seeker without sufficient consideration as to whether they can best be mitigated by the access seeker or Queensland Rail
 - full responsibility to an access seeker to fund all costs incurred by Queensland Rail in an extension project regardless of whether those costs would satisfy the prudence tests applied to its own business costs in accordance with the 2015 DAU
- the absence of any obligation on Queensland Rail to provide information and assistance to the access seeker to study the extension project
- the absence of any obligation on Queensland Rail to assist, study, construct and commission the extension project consistent with the 2015 DAU.

Having regard to the above, and having regard to section 138(2) of the QCA Act we consider that the network extension process in the 2015 DAU is not appropriate. Amongst other matters, the provisions proposed by Queensland Rail fail to provide an access seeker with regulatory certainty on the terms and conditions that Queensland Rail will apply to an access seeker when negotiating access where an extension project is identified as a necessary precondition to executing an access agreement and obtaining access to the network.

We are concerned that, if approved, the network extension process in the 2015 DAU would create a negotiating vacuum which could be used by Queensland Rail to:

- frustrate an access seeker's efforts to develop an extension project as a precondition to obtaining access to the network (inconsistent with ss. 69E and 138(2)(a))
- delay project negotiations so an access seeker has to assess the cost and risk of investment hold-up compared to the cost and risk of Queensland Rail's project terms and conditions (inconsistent with ss. 69E and 138(2)(a) and (b))
- extract additional financial benefits from a funding access seeker which are over and above the commonly accepted efficiency and prudence principles for contributed assets (inconsistent with s. 138(2)(b), (d), (e) and (g))
- offset and mitigate Queensland Rail's commercial risks which arise in existing access agreements unrelated to the access seeker⁶⁹⁷ (inconsistent with s. 138(2)(a), (b), (d) and (e))
- agree different project terms and conditions with different access seekers in a way that adversely affects an access seeker's ability to compete in markets, particularly if the access seekers are competing in the same market (inconsistent with s. 138(2)(a), (b), (d), (e) and (g)).

⁶⁹⁷ For example, Queensland Rail could seek funding for major asset renewals which have already been priced in the access charges levied on existing contracted services. Queensland Rail could use the funding agreement provisions to require funding for elements of the extension which are required to defray access costs and risks unrelated to the access seeker funding the extension. For example, an extension could be scoped to address past inefficient operating and maintenance practices which had adversely affected Queensland Rail's return on existing contracts.

Outlined below are the proposed amendments to the network extension process which we consider to be necessary for us to approve the proposed 2015 DAU.⁶⁹⁸ While we have largely sought, in this Draft Decision, to work within the drafting of the 2015 DAU we have had to make significant amendments to give effect to what we consider to be a streamlined and efficient network extension process consistent with our obligations under the QCA Act.⁶⁹⁹ We do not consider our proposed amendments to be of a minor or inconsequential nature. Rather, we consider them necessary to provide regulatory clarity, certainty and transparency on the extension process and principles that will be applied when Queensland Rail elects to require an access seeker to fund an extension project as a precondition to obtaining access to the network.

The key principles underpinning our proposed amendments in Appendix C of this Draft Decision are outlined below. While we have not discussed in detail all of the specific drafting of our proposed amendments to the network extension provisions, we do consider that all of our proposed amendments are consistent with our assessment approach and meet our prescribed statutory assessment criteria.

Clarity on the negotiation process

The 2015 DAU does not sufficiently identify the regulatory steps that an access seeker may take to obtain access when:

- an extension project is required to provide the access rights sought
- Queensland Rail is not willing to fund the extension project.

Applying our assessment approach, we have proposed amendments to the 2015 DAU to simplify the extension provisions in clause 1.4 of the 2015 DAU and also outline the regulatory steps to be followed by Queensland Rail and an access seeker from the initial project identification to execution of an agreement. We consider our amendments to clause 1.4 will also facilitate concurrent negotiations on an extension project and an access agreement and, in doing so, will facilitate timely and efficient access to the network.

The regulatory steps that we have included in our proposed amendments to the 2015 DAU include:

- establishing the regulatory triggers in clause 2.7 to enable an access seeker to commence extension negotiations under clause 1.4 of the 2015 DAU concurrently with access negotiations under Part 2 of the DAU
- allocating risks and responsibilities between parties so that they are consistent with the risk allocations evident when Queensland Rail chooses to fund an extension
- establishing relevant and independently verifiable access conditions for an extension project
- outlining how to progress an extension project through each stage of an extension process
- outlining the decision-making process for each stage of an extension project.

We consider our proposed amendments to provide certainty on the regulatory processes to be followed by Queensland Rail and access funders will facilitate successful access negotiations to promote the timely negotiation of an access agreement and efficient investment in the network.

⁶⁹⁸ Appendix C of this Draft Decision.

⁶⁹⁹ Appendix C (cl, 1.4, 2.7 and Schedule I) of this Draft Decision.

Access principles to underpin negotiations on an extension project

We consider clause 1.4 of the 2015 DAU inappropriately favours Queensland Rail's interests and does not give appropriate recognition to the rights and interests of parties seeking to access the network. Of particular concern, is that the network extension provisions provide Queensland Rail with excessive discretion to decide:

- the scope of rail infrastructure works to be included in an extension project
- how Queensland Rail will assess whether to approve an extension project
- the level of project information, assistance and services Queensland Rail will provide to an access seeker
- the access principles that will underpin a funding agreement between Queensland Rail and an access seeker.

We consider the application of Queensland Rail's discretion in these areas could, of itself, impede access to the network. By clarifying and making Queensland Rail's decisions, pursuant to clause 1.4, more reasonable and objective the recommended amendments will assist contracting parties to make informed decisions in a timely manner as they progress through the negotiation process.⁷⁰⁰

Scope of extension works

We acknowledge stakeholder concerns regarding Queensland Rail's discretion in identifying the rail infrastructure works to be included in the scope of works for a network project. We consider these concerns should be addressed in the 2015 DAU to avoid confusion on network project scope that could unnecessarily prolong negotiation.

Applying our assessment approach, we consider stakeholder concerns can be attributed to the lack of clarity on Queensland Rail's obligations to maintain the network in the 2015 SAA and lack of detail regarding the capacity information and capacity analysis Queensland Rail is to provide under clause 2.7(a) of the 2015 DAU. Accordingly, we have proposed amendments to:

- clarify Queensland Rail's network maintenance obligations in our Draft Decision on the 2015 SAA⁷⁰¹
- define the standard of information to be included in the capacity information and capacity analysis to be provided under clause 2.7(a)(ii) and (iii) when Queensland Rail advises that a network extension is required to accommodate the access rights sought by the access seeker⁷⁰²
- require Queensland Rail to provide clear reasoning for the proposed scope, standard and cost of a proposed extension project in the capacity information and/or capacity analysis.⁷⁰³

Our amendments, taken together, will provide transparency and accountability in relation to Queensland Rail's identification of the scope of works to be included in an extension project. In clarifying the scope of the extension works, the amendments will allow access seekers to make informed decisions, provide for more timely negotiations and achieve a better balance between the rights and responsibilities of Queensland Rail and access seekers.

⁷⁰⁰ Appendix C (cl, 1.4 and Schedule I) of this Draft Decision.

⁷⁰¹ Chapter 7 and Appendix D of this Draft Decision.

⁷⁰² Appendix C (cl, 2.7 and 1.4, Schedule A and Schedule I) of this Draft Decision.

⁷⁰³ Appendix C (cl, 2.7 and Schedule A) of this Draft Decision.

Queensland Rail discretions

The 2015 DAU provides Queensland Rail with excessive discretionary power in determining whether or not an extension project protects its legitimate business interests.⁷⁰⁴ The application of this discretion effectively gives Queensland Rail the power of veto⁷⁰⁵ when assessing any extension project under the clause 1.4 provisions. We consider this outcome:

- is inconsistent with an appropriate balancing of all matters outlined in section 138(2) of the QCA Act⁷⁰⁶
- infringes on the QCA's ability to undertake a balanced review of any access dispute lodged with us regarding decisions made by Queensland Rail in relation to an extension project.

Applying our assessment approach, we agree with stakeholders that Queensland Rail's decision-making process in clause 1.4 of the 2015 DAU could impede the ability of an access seeker to obtain access to the network, give rise to inconsistencies and ambiguities in the treatment of extension projects under the 2015 DAU and result in an extension process which is unworkable and inefficient.

We therefore require amendments to the provisions in clause 1.4 with a view to:⁷⁰⁷

- removing inappropriate discretions in Queensland Rail's favour
- including relevant, objective-based assessment criteria for Queensland Rail to apply when making decisions on an extension project
- ensuring all of Queensland Rail's decisions under clause 1.4 are transparent and accountable.

We consider our proposed amendments appropriately address the requirements of section 138(2) of the QCA Act and balance Queensland Rail's legitimate business interests with the interests of access seekers in obtaining access to the network and the public interest including having efficient competition in relevant markets

Extension project information

The 2015 DAU does not provide any detail on the nature, scope and form of the information that Queensland Rail will provide to an access seeker/funder who elects to fund the extension. For example, Queensland Rail:

- holds all the proprietary information which would be required by an access seeker to properly consider and assess an extension project and to comply with the extension conditions that Queensland Rail may⁷⁰⁸
 - rely on its absolute discretion to decide if and how much information and assistance it is willing to provide to an access seeker at each stage of the investment project cycle
 - delay and slow down the provision of information and assistance to the access seeker

⁷⁰⁴ Queensland Rail, 2015 DAU, cl. 1.4.1(iii), 1.4.2(b)(i),(ii), (vii), (viii)(F) and (x), cl. 1.4.2(e), cl. 1.4.3(b)(iii) and 1.4.3 (c).

⁷⁰⁵ Queensland Rail, 2015 DAU, cl. 1.4.1(c)(ii).

⁷⁰⁶ The 2015 DAU effectively elevates section 138(2)(b) to be sole determinant on whether an access seeker can access the network. This outcome is inconsistent with section 138(2) which requires us to consider all the factors listed in section 138(2) when deciding whether or not to approve the 2015 DAU.

⁷⁰⁷ Appendix C (cl. 1.4 and Schedule I) of this Draft Decision.

⁷⁰⁸ Queensland Rail, 2015 DAU, cl. 1.4.2(e) and Schedule A.

- has no obligations to develop an extension project, undertake any of the studies on an extension project and/or progress the extension project through each stage of its development if it considers the project not to be in its business interest⁷⁰⁹
- requires an access seeker to fund all costs incurred by Queensland Rail without any prudency qualification.⁷¹⁰

Applying our assessment criteria, we consider the lack of any service level obligations on Queensland Rail to provide information and assistance to an access seeker/funder throughout the negotiation of an extension project, pursuant to clause 1.4, could result in inconsistent and discriminatory regulatory outcomes between access seekers depending on whether Queensland Rail is willing to fund the extension project that is required to accommodate the access sought by an access seeker's access application. We are also concerned with the lack of detail as to the nature and scope of information and assistance that an access seeker can request or require from Queensland Rail during negotiations on an extension project pursuant to clause 1.4. We consider this lack of detail could, of itself, impede the negotiation of an extension project and as such is inconsistent with an appropriate balancing of the factors set out in section 138(2) of the QCA Act.

Applying our assessment approach, we have proposed amendments to the 2015 DAU (see Appendix C) to require Queensland Rail to provide an access seeker with:

- access to all reasonably necessary project information required by an access seeker to comply with the threshold approval criteria in clause 1.4
- project assistance to develop the scope, standard and cost of an extension project.

We consider that our proposed Queensland Rail service level obligations will enable all access seekers, regardless of funding source, to obtain access to the network consistent with the regulatory and prudency standards applied to all network assets in the 2015 DAU.⁷¹¹ We consider the strengthened service level obligations on Queensland Rail are appropriately balanced in the 2015 DAU given the access seeker's obligation to:

- fund the provision of any reasonably requested project assistance by Queensland Rail
- ensure the extension complies with Queensland Rail's threshold criteria in clause 1.4.⁷¹²

Extension access principles

We are concerned that the 2015 DAU does not provide any detail on the extension access principles that are to underpin the negotiation of an extension project between Queensland Rail and an access seeker/funder. For example, clause 1.4 of the 2015 DAU does not include detail on the access principles⁷¹³ that will apply to Queensland Rail and an access seeker when negotiating the terms and conditions of a funding agreement. This omission leaves risk and

⁷⁰⁹ Clause 1.4.2(e) only requires Queensland Rail to use reasonable endeavours to assist an access seeker undertake works required to satisfy cl. 1.4.2(b) and does not require Queensland Rail to, subject to a funding agreement, undertake the design and study works required so that an access seeker's extension complies with cl.1.4.2(b). In particular, Queensland Rail only guarantees that it will apply for any Authorisation and land tenure rights only if it is the party who is the most appropriate party to do so.

⁷¹⁰ Queensland Rail, 2015 DAU, cl. 1.4.1(c)(ii), cl. 1.4.1(b)(ii) and (iv), cl. 1.4.1(f), cl. 1.4.3(b)(iv) and (c), and cl. 1.4.8(a).

⁷¹¹ Aurizon, sub no. 6: 15.

⁷¹² Appendix C (cl 1.4, 2.7 and Appendix I) of this Draft Decision.

⁷¹³ Similar to the access principles that historically underpinned the negotiation of access agreements. See Chapter 7 of this Draft Decision.

liability allocations between Queensland Rail and the access seeker/funder unclear, and increases the risk for access seekers/funders that Queensland Rail will allocate all project risks and liabilities to the access seeker/funder. This directly contrasts with the treatment of an access seeker, if Queensland Rail agrees to fund an extension to accommodate the access seeker's access application. In this circumstance, the access seeker would benefit from the regulatory and prudency protections in the 2015 DAU which require Queensland Rail to:

- appropriately balance the risks and liabilities in the provisions of access between Queensland Rail and an access seeker⁷¹⁴
- recover its costs, subject to a prudency test on scope, standard and cost⁷¹⁵
- recover its efficient capital costs incurred in extending the network.⁷¹⁶

Applying our assessment approach, we consider the lack of detail on the standard extension access principles to apply to a network extension to be funded by an access seeker/funder is not consistent with section 138(2). This is because we consider clause 1.4 of the 2015 DAU does not:

- give due regard to the rights and interests of the access seekers/funders
- promote efficient investment in the network
- serve the public interest by facilitating competition in markets.

We also consider clause 1.4 creates a perverse regulatory outcome where Queensland Rail is incentivised to not fund an extension project as a means to improve its total revenue outcomes from an access agreement.⁷¹⁷

Our Draft Decision is to require amendments to clause 1.4 and the inclusion of a new schedule in the 2015 DAU.⁷¹⁸ This new schedule identifies the standard extension access principles that should apply to all negotiations on funding agreements to facilitate a network extension. In developing the extension access principles we have assessed how the risks and liabilities should be allocated between the contracting parties in a manner consistent with our approach to the 2015 SAA.⁷¹⁹ Accordingly, we have based the development of the new schedule on the general risk allocation principle—that contract risks should be allocated to the party best positioned to manage that risk (including to avoid or to minimise the risk).

The proposed extension access principles that are included in Appendix C of this Draft Decision are summarised below:

- undertaking premises—Queensland Rail cannot be forced to fund an extension other than in accordance with the undertaking or the provisions of the Act regarding determination of access disputes

⁷¹⁴ See Chapter 7 of this Draft Decision on the 2015 SAA.

⁷¹⁵ See Chapter 3 of this Draft Decision on Part 6 and Schedule E of the 2015 DAU.

⁷¹⁶ See Chapter 3 of this Draft Decision on Part 6 and Schedule E of the 2015 DAU.

⁷¹⁷ For example, Queensland Rail is entitled to recover all costs associated with an extension in clause 1.4 whereas Queensland Rail is only entitled to recover efficient costs associated with an extension in cl. 2 of the 2015 DAU.

⁷¹⁸ Appendix C (Schedule I) of this Draft Decision.

⁷¹⁹ See Chapter 7 of this Draft Decision.

- undertaking coverage—all extensions of the network are to be developed and constructed under the auspices of the undertaking and the QCA Act to deal in an even-handed manner with all access seekers and access holders
- extension funding condition—funding may be reasonably required to create additional capacity to accommodate a request for access if the additional capacity would not have been required had the access funder not requested access
- Queensland Rail rights and responsibilities—subject to the execution of a funding agreement, Queensland Rail must provide an access funder with all information and project assistance reasonably required by an access funder to consider the extension project
- extension studies—Queensland Rail must collaborate with access funders in relation to key matters affecting the cost and timing of an extension project, including, but not limited to, project scope, standard, approvals, procurement strategy, cost, construction and timing of the relevant study stage
- extension construction—Queensland Rail must expeditiously construct extension projects funded by access funders
- funding agreement terms and conditions—the identification, allocation and management of risks should be balanced and a contract risk should be allocated to the party best placed to manage that risk.

Draft Decision

- 9.1 After considering Queensland Rail's proposed network extension provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 9.2 The way in which we consider it appropriate that Queensland Rail amend its network extension provisions to facilitate the negotiation of access between Queensland Rail and an access seeker is to provide:**
- (a) a transparent and accountable network extension process to underpin the negotiation of each stage of an extension project concurrently with an access agreement, including clarifying the threshold criteria which an extension must meet and outlining rights and responsibilities of the parties in relation to the separate stages of an extension**
 - (b) sufficient detail, with clear reasoning, on the scope of an extension project**
 - (c) objective and reason-based assessment criteria to underpin the decision making process on an extension project**
 - (d) subject to a funding agreement, all necessary project information and project assistance reasonably required by an access seeker to develop an efficient scope, standard and cost of an extension**
 - (e) a balanced allocation of the rights and responsibilities between Queensland Rail and an access seeker as well as**
 - (f) standard principles to apply to extensions.**
- The required amendments are set out in clauses 1.4, 2.7 and Schedule I in Appendix C.**
- 9.3 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

9.3 Funding agreements

Consistent with section 137 of the QCA Act, we consider the 2015 DAU should outline the general funding principles that will apply to access seekers who agree to fund a network extension to accommodate their access application. In applying our assessment approach, we have considered whether there is sufficient detail on the funding principles and the form of contract that will underpin the negotiation of funding agreements between Queensland Rail and a relevant access seeker. We consider the funding principles and form of contract should be consistent with an appropriate balancing of all the factors listed in section 138(2) of the QCA Act.

Queensland Rail's 2015 DAU proposal

The 2015 DAU includes funding agreement provisions to allow an access seeker to develop and fund an extension project to obtain access to the network.⁷²⁰ The scope of works to be delivered by a funding agreement will differ depending on a number of factors, including the stage of the network project.⁷²¹ The 2015 DAU considers funding agreements may be required at different stages of a proposed extension to provide the ability for Queensland Rail to:⁷²²

⁷²⁰ Queensland Rail, 2015 DAU, cl. 1.4.

⁷²¹ Queensland Rail, 2015 DAU, cl. 1.4.3, 1.4.7.

⁷²² Queensland Rail, 2015 DAU, cl. 1.4.3(vi).

- consider, authorise, construct, commission and own an extension project (referred to generally as a project funding agreement)
- assist in the development of the scope, standard and cost of an extension project to comply with the network extension provisions at each stage of the investment cycle (referred to generally as a study funding agreement).

The 2015 DAU separately identifies the funding principles underpinning an extension project and an extension study agreement. These are outlined below.⁷²³

Project funding agreement

A project funding agreement must:⁷²⁴

- provide Queensland Rail with the ability to own, construct, operate and manage the network project consistent with its operation and management of the network
- be workable, bankable and credible for an access seeker to fund
- be consistent with the access undertaking.
- be reasonable for all parties
- be protective of Queensland Rail's legitimate business interests
- not result in Queensland Rail bearing any of the costs of the network project
- require Queensland Rail and an access seeker to use reasonable endeavours and assist each other to ensure the network project complies with the network extension process
- require Queensland Rail to use reasonable endeavours to efficiently construct the network project
- ensure that the access seeker will⁷²⁵
 - provide funding to Queensland Rail consistent with clause 1.4.3
 - satisfy Queensland Rail (acting reasonably) that it will provide funding
 - provide a bank guarantee in support of its funding commitments, unless agreed otherwise by Queensland Rail, acting reasonably
- require Queensland Rail to provide the access seeker with an investment return on the invested capital based on the following principles:⁷²⁶
 - the investment methodology is to be based on the access seeker recovering the return on, and of, the funding provided as a rental stream payable over the economic life of the network asset
 - in the calculation of the rental stream and the development of access charges, Queensland Rail will capitalise all efficient study funding costs incurred by the access seeker in identifying the total cost of the access seeker's contributed asset

⁷²³ Queensland Rail, 2015 DAU. Project funding agreement principles are dealt with in clauses 1.4.2 and 1.4.3. Study funding agreement principles are dealt with in clauses 1.4.8 and 1.4.8.9.

⁷²⁴ Queensland Rail, 2015 DAU, cl. 1.4.3.

⁷²⁵ Queensland Rail, 2015 DAU, Cl. 1.4.2(b)(iii).

⁷²⁶ Queensland Rail, 2015 DAU, cl. 1.4.3(vi)(A) and (C).

- the rental stream payable to the access seeker will be based on the component of access charges received by Queensland Rail from the access holders using the capacity created by the network project
- provide for an independent auditor to audit compliance with the investment methodology from time to time as reasonably required by the access seeker⁷²⁷
- ensure that if Queensland Rail receives a monetary tax benefit from the access seeker's funded extension, Queensland Rail will transfer the monetary tax benefit directly to the access seeker⁷²⁸
- allow the access seeker to require Queensland Rail to obtain regulatory pre-approval for inclusion of the project cost into the relevant regulatory asset base in accordance with Schedule E as a precondition to funding being provided⁷²⁹
- contain provisions in relation to procurement, project management, project delivery, variations, commissioning, completion, inspection, audit and dispute resolution.⁷³⁰

The project funding agreement may include funding requirements to pay additional fees or costs for additional risks or costs that will be assumed or incurred by Queensland Rail, which Queensland Rail would not have assumed or incurred but for the extension. Queensland Rail must act reasonably in determining or calculating the risks or costs and must provide justification for those risks or costs.⁷³¹

Study funding agreement

In addition to the funding principles identified for a project funding agreement, the 2015 DAU further identifies how the funding principles will be applied where Queensland Rail has agreed to provide project assistance to a proposed extension study phase (e.g. concept, prefeasibility or feasibility standard) required by an access seeker. Specifically, Queensland Rail has identified that:⁷³²

- a study funding agreement can be negotiated as a discrete agreement to allow both parties to make separate decisions about whether to progress an extension project to the next stage of the investment cycle
- Queensland Rail is not obliged to fund all or a part of any study comprised within an extension project study initiated under clause 1.4 of the 2015 DAU
- Queensland Rail may elect to fund the cost of the study for an extension project, subject to the access seeker entering into either an access agreement or a separate funding agreement to reimburse Queensland Rail for the costs incurred in the study
- if either Queensland Rail or the access seeker consider that the study process should be stopped then both parties will seek to agree to stop the project. If the parties cannot agree, then the study will continue, subject to the study continuing to be funded
- if an access seeker considers Queensland Rail is unnecessarily delaying a study, the access seeker may refer the matter to the QCA as an access dispute under part 6.1.4.

⁷²⁷ Queensland Rail, 2015 DAU, cl. 1.4.3(vi)(B) and(E).

⁷²⁸ Queensland Rail, 2015 DAU, cl. 1.4.3(vi)(C).

⁷²⁹ Queensland Rail, 2015 DAU, cl. 1.4.3(vi)(D) and cl. 1.4.9.

⁷³⁰ Queensland Rail, 2015 DAU, cl. 1.4.3(vi)(E).

⁷³¹ Queensland Rail, 2015 DAU, cl. 1.4.3(c).

⁷³² Queensland Rail, 2015 DAU, cl. 1.4.7.

Stakeholders' comments

Stakeholders have raised a number of concerns with the funding agreement provisions in the 2015 DAU. Each stakeholder has generally focused on the funding issues specific to their circumstances (see **Table 9.4**).

Table 9.4 Stakeholder concerns with the funding agreement provisions

<i>Issues</i>	<i>Stakeholders' comment</i>
Third party funding model ⁷³³	The 2015 DAU should allow parties other than access seekers to fund network extensions. Third party funding principles should be included in the 2015 DAU consistent with the QCA's 2014 Draft Decision 9.8.
Regulatory prudence test to apply to contributed capital ⁷³⁴	Aurizon accepts the 2015 DAU's proposed contributed asset funding methodology but wants to strengthen the regulatory protections for access seekers to ensure that Queensland Rail does not inefficiently extend the network to accommodate an access application in a way which could improve its return on assets or limit the access seeker's ability to compete in the relevant market.
Standard funding agreement ⁷³⁵	The 2015 DAU should provide a regulatory mechanism to require Queensland Rail to submit a standard funding agreement to the QCA for approval during the term of the undertaking. The QCA should also be empowered to prepare its own standard funding agreement if Queensland Rail fails to submit the agreement or fails to make appropriate changes to the agreement that were recommended by the QCA.

QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Queensland Rail's proposed funding agreement provisions in the 2015 DAU. After applying our assessment approach in accordance with sections 137 and 138(2) of the QCA Act, we consider the extension funding principles in the 2015 DAU inappropriately favour Queensland Rail. For example, we are of the view that clause 1.4 of the 2015 DAU:

- focuses only on requiring an access seeker to guarantee that Queensland Rail will not incur any cost in extending the network without Queensland Rail's costs being assessed on an efficiency or reasonableness basis and therefore does not incentivise Queensland Rail to reduce costs or otherwise improve productivity. This could result in Queensland Rail obtaining financial benefits from providing project services to access seekers to develop an extension project that are inconsistent with the pricing principles in the 2015 DAU
- provides investment principles for an access funder of an extension project but does not provide any certainty that an access funder will have appropriate project controls to mitigate its exposure to the cost and timing of an extension project
- does not provide an access seeker with any certainty that the access seeker will have suitable project controls to mitigate its exposure to unfavourable costs and timing of an extension project
- does not provide a standard funding agreement to form the basis of negotiations between Queensland Rail and an access seeker

⁷³³ Asciano, sub no. 5: 24, Glencore, sub no. 7: 49-50; New Hope, sub. no 3:4-7, 54-60

⁷³⁴ Aurizon, sub no. 6: 14-18

⁷³⁵ Glencore, sub no. 7: 10, 49; New Hope, sub. no 3:60

- could impede an access seeker from obtaining access to the network by unfairly allocating extension project risks to the access seeker that cannot be effectively managed or mitigated by the access seeker through contractual terms and conditions
- includes ex post dispute resolution provisions which will be ineffective if the access seeker's access rights are either time constrained or aligned to a larger investment in the business operations of an access seeker

Further, we agree with stakeholders' comments and consider the lack of clarity on the rights and obligations of the contracting parties in negotiating the terms and conditions of a funding agreement creates significant commercial uncertainty and jeopardises the ability for an access seeker to successfully negotiate an access agreement on a timely basis.

We have therefore proposed a number of amendments to the 2015 DAU that we consider are required to enable us to approve the 2015 DAU's funding agreement provisions consistent with our review in accordance with the QCA Act. Our amendments complement the streamlined negotiation process and add to the extension access principles we proposed in Section 9.3 of this Draft Decision.

Accordingly, we have included the following funding principles in the extension access principles to apply to network extensions:⁷³⁶

- A funding agreement is also a services agreement that obliges Queensland Rail to assist, develop, construct and own an extension project funded by an access seeker on a consistent basis with the obligations Queensland Rail bears when electing to fund an extension project for an access seeker.
- Regulatory service standards should be applied to so that Queensland Rail delivers an extension project consistent with its obligations to efficiently extend the network.
- Regulatory prudence tests should be applied to any costs incurred by Queensland Rail in providing extension services, with any costs not assessed to be reasonably incurred, to be refunded back to the access funder.
 - Project controls should be allocated to access funders to provide an ability for them to mitigate the cost and timing risks associated with funding an extension project that is approved, owned and constructed by Queensland Rail in accordance with the 2015 DAU and the QCA Act.
 - The negotiation of funding agreements should be based on the access and pricing principles provided in the 2015 DAU, 2015 SAA and the QCA Act.
- A funding agreement should deliver investment certainty so that the access funder can be assured it will be entitled to receive the full economic benefit (via access charges, tax or other benefit)⁷³⁷ derived by Queensland Rail as the legal owner of the funded infrastructure and as the provider of access services that use the infrastructure
- A funding agreement should identify the rental methodology which will guarantee the transfer of the full economic benefit to the access funder, with enforceable audit rights and backed up by arbitration to the courts or, if relevant, to the QCA.

⁷³⁶ Appendix C (cl. 1.4 and Appendix I) of this Draft Decision.

⁷³⁷ We have removed Queensland Rail's reference to only 'monetary' tax benefit and replaced it with a reference to the full benefit.

The detail of our proposed amendments to the funding agreement provisions are provided in Appendix C of this Draft Decision. We consider the amendments are consistent with our assessment approach and meet our assessment criteria under the QCA Act. We also acknowledge the extension access principles can be applied as a base negotiating position with contracting parties able to agree a different risk profile for commercial reasons.

Draft Decision

- 9.4 After considering Queensland Rail's proposed extension funding agreement provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 9.5 The QCA requires Queensland Rail to amend its extension funding agreement provisions to:**
- (a) provide more detail on the funding agreement provisions reasonably required to satisfy the access rights sought by an access seeker**
 - (b) identify the funding and access principles that will underpin the negotiation of a funding agreement in accordance with the proposed drafting of clause 1.4 and Schedule I in Appendix C.**
- 9.6 We consider it appropriate to come to these Draft Decisions having regard to each of the approval criteria for the reasons set out in our analysis above.**

9.4 Network planning

Consistent with section 137 of the QCA Act, we consider the 2015 DAU should outline the network planning processes that apply to key corridors on Queensland Rail's network. In applying our assessment approach, we will consider whether there is sufficient detail on the planning processes applied so that Queensland Rail efficiently operates, uses and invests in its network. We consider the master planning processes should be consistent with an appropriate balancing of all factors listed in section 138(2) of the QCA Act.

Queensland Rail's 2015 DAU proposal

Queensland Rail proposes to use reasonable endeavours to consult with access seekers and access holders in the planning for, and coordination of, network extensions. To the extent Queensland Rail has a plan or strategy that:

- identifies investment options for increasing capacity on its network and evaluates them from a cost, risk and timing perspective
- has been approved by its board or chief executive officer,

Queensland Rail will make that plan or strategy available to access holders and access seekers and consider any feedback or suggestions it receives on it.⁷³⁸

Queensland Rail's plan or strategy is non-binding and indicative only and does not affect Queensland Rail's compliance with the 2015 DAU.⁷³⁹

⁷³⁸ Queensland Rail, 2015 DAU, cl. 1.4.6 (a) and (b).

⁷³⁹ Queensland Rail, 2015 DAU, cl. 1.4.6(c).

Stakeholders' comments

Stakeholders have raised a number of concerns with the master planning provisions in the 2015 DAU.⁷⁴⁰ Each stakeholder has focused on the funding issues specific to their circumstances (see **Table 9.5**).

Table 9.5 Stakeholders' comments on the network planning provisions

<i>Issues</i>	<i>Stakeholders' comments</i>
Network planning and coordination ⁷⁴¹	The 2015 DAU should include access services to coordinate and optimise costs within supply chains to improve the efficiency of the access services delivered by Queensland Rail.
Rail corridor strategy ⁷⁴²	The 2015 DAU should impose a stronger commitment on Queensland Rail to prepare and publish corridor strategies that include corridor asset management plans, base service levels, corridor safety improvements, corridor capacity, and capability performance improvements.
Transparency on medium and long term network service costs ⁷⁴³	The 2015 DAU should provide more transparency and visibility in relation to major maintenance and capital expenditure plans, long-term access costs and demand scenarios to promote efficient utilisation of, and investment in, the network.
Market characteristics ⁷⁴⁴	Diversity in the market mix and train services of access holders and access seekers creates a disincentive for market competitors to participate in an open planning framework. Instead, the 2015 DAU should provide provisions that ensure only certain customers to have access to information held by Queensland Rail in order undertake their own assessment of the most efficient expansion options.
Mandatory consultation process ⁷⁴⁵	Past experience indicates a need to make planning and consultation with operators and major end users mandatory.
Regulatory trigger to develop a standard funding agreement	There should be a review mechanism to oblige Queensland Rail to submit a standard funding agreement or access funding regime to the QCA to be approved during the regulatory period.

QCA analysis and Draft Decision

Our interim position, as set out in this Draft Decision, is to reject Queensland Rail's proposed master planning provisions in clause 1.4. In applying our assessment approach in accordance with sections 137 and 138(2) of the QCA Act, we consider Queensland Rail's master planning principles in the 2015 DAU inappropriately favour Queensland Rail in deciding whether or not to develop a plan or strategy for planning a network extension.

⁷⁴⁰ Asciano, sub no. 5: 24, Glencore, sub no. 7: 1-2, 10, 50-51; New Hope, sub. no 3:4-5, 59-60; Aurizon, sub no. 6: 4-5,12-15.

⁷⁴¹ Asciano, sub. no. 5: 24, Glencore, sub. no. 7: 1-2, 10, 50-51; New Hope, sub. no. 3: 4-5, 59-60, sub. no. 8: 4-7; Aurizon, sub. no. 6: 4-5, 12-15.

⁷⁴² Asciano, sub. no. 5: 13-14, 22, 24, Glencore, sub no. 7: 10, 50-51; New Hope, sub. no 3:4-5, 59-60; Aurizon, sub no. 6: 4-5, 14-15.

⁷⁴³ Asciano, sub no. 5: 9-10, 13-14, 19, 22-23, Glencore, sub no. 7: 1, 7-10, 48, 49-51; New Hope, sub. no. 3: 4, 7; sub. no. 4: 4; Aurizon, sub. no. 6: 4-5, 14-15, 23-25.

⁷⁴⁴ Aurizon, sub. no. 6: 12, 14-15.

⁷⁴⁵ Glencore, sub. no. 7: 50-51.

We are of the view that system planning is a key component in Queensland Rail's provision of a regulated service. This requirement was specifically raised by Aurizon, Glencore and New Hope, who each identified the need for a stronger commitment from Queensland Rail to prepare and publish corridor strategies to provide information on the base service levels of, capacity of, operational performance of, safety performance of, and asset management plan for, each corridor.⁷⁴⁶

*Aurizon does not consider these [Rail Corridor Strategies] to be onerous requirements and they should be implicit to good railway management practices. Improving the efficiency and utilisation of rail infrastructure has the effect of improving the competitiveness of rail and increasing the scale of the market for rail transport in Queensland. Economies of scale are an essential factor in promoting competition in the downstream rail haulage market.*⁷⁴⁷

*Formal master planning [is required] as a mandatory requirement for the Mt Isa line - to provide transparency of major maintenance and capital expenditure projects and a better understanding of how different volumes of traffic impacts on such costs.*⁷⁴⁸

The object of the QCA Act provides that Queensland Rail should efficiently maintain, operate, use and, if required, extend the network over the long term. As the regulated network service provider, we consider Queensland Rail should be able to demonstrate it is managing the network consistent with its legislative obligation to promote the economically efficient operation of, use of and investment in the network by which access services are provided.

We acknowledge that Queensland Rail has published a master plan for the Mount Isa line (in 2012), but we are not aware of similar master plans being published (or prepared) by Queensland Rail for the West Moreton network or the North Coast line. Queensland Rail has been subject to the QCA Act since 1997, so we consider the lack of evidence that Queensland Rail is managing and maintaining its network within the context of a visible and transparent long-term strategic plan is concerning. Accordingly, we do not consider Queensland Rail's proposal to:

- use reasonable endeavours to consult with stakeholders in relation to the planning of an extension; or
- make available to stakeholders any plan or strategy that is approved by its board or chief executive,

is likely to mean Queensland Rail gives appropriate regard to all of the stated matters in section 138(2) of the QCA Act. Indeed, we are of the view that the 2015 DAU does not provide sufficient transparency or accountability on Queensland Rail's compliance with the object of the Act (s. 138(2)(a)) and is counterproductive to section 138(2)(d) and (e) of the QCA Act because it does not provide for access holders, access seekers, end customers and rail operators to receive sufficient information on Queensland Rail's management and operation of the network in relation to the:

- reliability and security of the operational integrity of each major rail corridor, including sustaining capital, by which access services are delivered during the regulatory period and beyond
- operating capacity of each corridor and measures to show capacity is being efficiently managed during the regulatory period and beyond

⁷⁴⁶ Aurizon, sub. no. 6: 15; New Hope, sub. no. 6: 5-6; Glencore, sub. no. 7: 10.

⁷⁴⁷ Aurizon, sub. no. 6: 15.

⁷⁴⁸ Glencore, sub. no. 7: 10.

- forecast demand for access services in each major rail corridor and potential extension options available to access seekers during the regulatory period and beyond.

In the absence of the information identified above, access seekers, access holders, rail operators and end customers will not have the confidence to make informed decisions on their own business operations (i.e. whether to expand operations or invest in aligned infrastructure). They will also lack certainty that Queensland Rail's management, control and operation of the network will support such business decisions. We consider that a lack of consumer confidence in the security and reliability of access services will adversely impact on the level of competition in upstream and downstream markets. This is because existing access holders and access seekers/funders require long-term investment security on the access services to be delivered by Queensland Rail to support their own long-term investment decisions in their respective markets.

We therefore consider the 2015 DAU should be amended to require Queensland Rail to develop separate system plans for the West Moreton network, Mt Isa line and the North Coast line within this regulatory period. Each system plan should provide a strategic overview of the relevant corridor, with respect to the:

- markets that require access to the declared service along that corridor and the forecast demand for access services over the next five- to ten-year horizon
- operational integrity of the corridor, including track condition and the asset management plan for that corridor for the next five years
- sustaining capital expenditure plan for the corridor in the next five- to ten-year horizon
- capital expenditure growth options to increase the operating capacity of the corridor.

We consider these system plans are the most efficient and effective information tool by which key system information can be disseminated to all access seekers, access holders, rail operators and end customers.

Our proposed amendments are detailed in clause 1.5 of Appendix C of this Draft Decision. We do not consider that our proposed amendment to require the development of system plans during the term of the 2015 DAU is an onerous obligation on Queensland Rail. Rather, we consider the inclusion of a requirement to develop system plans:

- aligns with Queensland Rail's obligation to manage its network consistent with the object of the QCA Act (s. 138(2)(a))
- appropriately balances the public interest, the interests of persons seeking access (s. 138(2)(d) and (e)), and Queensland Rail's legitimate business interests (s. 138(2)(b)).

Draft Decision

- 9.7 After considering Queensland Rail's proposed network planning provisions, our Draft Decision is to refuse to approve Queensland Rail's proposal.**
- 9.8 The QCA requires Queensland Rail to amend its network planning provisions to include a regulatory process to develop a master plan for each of its major rail corridors during the term of the 2015 DAU in accordance with clause 1.5 in Appendix C.**
- 9.9 We consider it appropriate to come to this Draft Decision having regard to each of the approval criteria for the reasons set out in our analysis above.**

10 LEGAL OVERVIEW

This chapter sets out how we have applied our legislated obligations in making our 2015 Draft Decision. For more specific analysis, please refer to the preceding chapters and our marked up version of the 2015 DAU.

10.1 Part 5 of the QCA Act

Part 5 of the QCA Act establishes a third party access regime to provide a legislated right for a third party to use significant infrastructure that is owned by a monopoly service provider.

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

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

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

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

The purpose of third party access is therefore to provide a legislated right to use another person's infrastructure. This should prevent owners of natural monopolies charging excessive prices. It should also encourage the entry of new firms into the potentially competitive upstream and downstream markets which rely on a natural monopoly infrastructure in the production process, and thereby enable greater competition in those markets. This in turn would promote more efficient production and lower prices to consumers.⁷⁴⁹

10.2 Assessment approach

Queensland Rail lodged the 2015 DAU for our consideration and approval under sections 137 and 138 of the QCA Act. The 2015 DAU was lodged in response to our initial undertaking notice issued under section 133 of the QCA Act.

Section 134 of the QCA Act requires us to consider the 2015 DAU given in response to the section 133 notice and either approve or refuse to approve, the 2015 DAU.

⁷⁴⁹ Explanatory notes for the *Queensland Competition Authority Bill 1997*: 3-4

We acknowledge that we are not permitted to refuse to approve the 2015 DAU simply because we consider a minor and inconsequential amendment should be made to the 2015 DAU.⁷⁵⁰

If Queensland Rail complies with the secondary undertaking notice, we may approve the amended 2015 DAU.⁷⁵¹ If Queensland Rail does not comply with secondary undertaking notice, we may prepare and approve an amended 2015 DAU to apply to Queensland Rail in relation to the provision of the declared service.⁷⁵²

We acknowledge the 2015 DAU is the culmination of a four-year regulatory process that has involved Queensland Rail submitting and then withdrawing three versions of a DAU. We also note that, in considering the 2015 Draft Decision, we have reviewed the 2015 DAU with 'a fresh set of eyes' and assessed it on its merits applying the legislative criteria and the steps outlined above taking into account:

- each part of the 2015 DAU
- 2015 DAU submissions provided by Queensland Rail and stakeholders
- relevant sections of our 2014 Draft Decision that were referenced by Queensland Rail and stakeholders in their submissions.

We have also had regard to relevant provisions in a range of approved access undertakings (including the 2008 access undertaking) which provide suitable guidance on an appropriate balance of risks and obligations.

The remainder of this chapter sets out our approach to criteria listed in s.138(2) of the QCA Act in relation to the 2015 DAU when coming to our Draft Decision outlined in the preceding chapters.

10.3 Section 138(2) of the QCA Act

Section 138(2) of the QCA Act states that we may approve the 2015 DAU only if we consider it appropriate to do so having regard to each of the matters set out in s.138(2) of the QCA Act. The statutory factors guiding our decision-making process are set out in **Box 10.1**.

⁷⁵⁰ Section 138(5) and (6) of the QCA Act.

⁷⁵¹ Section 134(3) of the QCA Act.

⁷⁵² Section 135 of the QCA Act.

Box 10.1: Section 138(2) of the QCA Act

The QCA may approve the 2015 DAU only if the QCA considers it appropriate to do so having regard to each of the matters set out in section 138(2) of the QCA Act:

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

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

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

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

The pricing principles set out under section 168A are:

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

- (a) *generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and*
- (b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (d) *provide incentives to reduce costs or otherwise improve productivity.*

The QCA Act gives us wide discretion in determining whether it is appropriate to approve a DAU having regard to the relevant matters listed in section 138(2). The use of the term 'appropriate' in the QCA Act is one of wide import. The range of matters stated in section 138(2) requires us to take into account matters that have a focus which is wider than the perspective of Queensland Rail.

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

For instance, tension may exist between the legitimate business interests of Queensland Rail and the interests of access seekers and access holders. Some examples of obvious tensions are:

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

10.3.1 The object of Part 5

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

Promoting economically efficient outcomes

The object of Part 5 of the QCA Act (s.69E) is to promote the economically efficient operation of, use of and investment in significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

These explicit references in section 69E to three aspects of efficiency in the operation of, use of and investment in Queensland Rail's network correspond, respectively, to the productive, allocative and dynamic dimensions of efficiency as used and understood by economists.

We consider these efficient outcomes include:

- efficient operation and use of the existing network—to promote economically efficient operation and use of existing infrastructure, we consider the 2015 DAU would need to adequately provide for non-discrimination and enhance the transparency of regulatory processes and customer engagement, including communicating how operational practices result in economically efficient outcomes
- efficient extension of the network—the 2015 DAU should enhance the transparency and processes associated with identifying and mitigating bottlenecks, identifying the need for network extension, and actioning those extensions
- encouraging upstream and downstream investment, including by ensuring regulatory certainty in decision-making.

Our role in the application of the object of Part 5 of the QCA Act

Our role as an access regulator includes the promotion of the efficiency objectives of Part 5 of the QCA Act and we are empowered by statute to set the appropriate arrangements that we consider necessary to achieve these objectives.

As mentioned above, we consider the need for access regulation of Queensland Rail arises due to its natural monopoly characteristics. These characteristics suggest that Queensland Rail does not face the competitive pressures which are generally required for firms to operate in an economically efficient manner. Therefore, we consider regulating Queensland Rail as a declared service will continue to provide benefits inherent in constraining market power and encouraging competition in dependent markets through:

- removing potential barriers to entry of new market participants
- promoting more competitive and efficient pricing
- encouraging greater efficiency and innovation in the provision of services.

The table below summarises the QCA's consideration of section 138(2)(a) in respect of each chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.1 Section 138(2)(a) of the QCA Act

<i>2015 DAU Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
Chapter 1 – Application and Scope	The proposal does not promote effective competition in above-rail operations as it does not contain clear non-discriminatory treatment and ring-fencing provisions, and is not consistent with the declared service under the QCA Act.	The undertaking applies to the full scope of access to which access seekers and access holders are entitled, and clearly outlines non-discriminatory treatment and ring-fencing requirements. This promotes effective competition in above-rail operations.
Chapter 2 – Negotiation and Capacity Management	The proposal creates significant information uncertainty, gives Queensland Rail considerable discretion in refusing access and in allocating limited available capacity, and does not allow a customer to deal with multiple train operators, which would not promote the efficient use of and investment in the network and would not promote above-rail competition.	The negotiation and capacity framework provides for negotiating parties to be well informed, the process and rules for allocating capacity to new access seekers and existing access holders to be certain, and for a customer to deal with multiple train operators, which would promote efficient operation of, use of and investment in Queensland Rail's network and promote above-rail competition.
Chapter 3 – Pricing Principles	The proposal does not promote effective competition in upstream and downstream markets as it gives Queensland Rail considerable discretion in setting access charges and applying price differentiation within the same market.	The pricing principles provide a framework for efficient provision of services with the effect of promoting competition in upstream and downstream markets.
Chapter 4 – Operating requirements	The proposed operating rules in the NMP and procedures and technical requirements in the ORM do not promote the efficient operation and use of Queensland Rail's network as they do not sufficiently recognise the contractual entitlements of access holders.	The NMP and ORM promote the efficient operation of, use of and investment in Queensland Rail's network.
Chapter 5 – Reporting	The proposed reporting and audit regime is not promoting economically efficient outcomes as it does not provide clear information on whether Queensland Rail is efficiently using and investing in the network.	The reporting and audit regime provides transparency about Queensland Rail's efficient operation of its network and supports the efficient use of and investment in the network.
Chapter 6 – Administrative Provisions	The proposed transitional reporting provisions do not provide stakeholders with sufficient information to understand whether Queensland Rail is efficiently operating, using and investing in the network. This does not promote	The administrative provisions, including the transitional reporting provisions, allow the access regime to operate effectively, promoting efficient operation of, use of and investment in Queensland Rail's network.

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
	economically efficient outcomes.	
Chapter 7 – Standard Access Agreements	The proposed SAA only allows a rail operator to be an access holder and provided a contractual risk position that unfairly favours Queensland Rail.	The SAA represents an appropriate allocation of the rights, obligations and risks of all parties, thereby promoting efficient operation of, use of and investment in Queensland Rail's network, and effective competition in above-rail markets.
Chapter 8 – West Moreton Network Tariff	The proposed West Moreton network tariffs do not efficiently allocate the cost of investment in rail infrastructure or provide pricing certainty for access holders, so they do not promote effective competition in downstream markets, including above-rail services.	<p>The West Moreton network tariff provides for efficient investment in and use of Queensland Rail's network and, by providing pricing certainty for access seekers and access holders, promotes effective competition in above-rail markets.</p> <p>The adjustment amount reflects regulatory expectations, thereby promoting regulatory certainty. This will encourage greater use of Queensland Rail's below-rail infrastructure as well as mine investment. This is consistent with promoting effective competition in upstream and downstream markets.</p>
Chapter 9 – Investment Framework.	The proposed investment framework provides too much discretion to Queensland Rail to decide whether to allow a network extension to proceed and whether to provide access services to an access seeker.	The investment framework provides for efficient investment in and use of Queensland Rail's infrastructure.

10.3.2 The legitimate business interests of Queensland Rail

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

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

When having regard to the Queensland Rail's 'legitimate business interests', we consider they should be assessed based on a market structure resembling a competitive market structure rather than that of a monopoly market structure.

Further, we consider the 'legitimate business interests' of an owner or operator of a facility is a reference to those commercial interests that would allow the owner or operator to recover its efficient costs in providing the relevant service and to earn a normal (regulated) return on its invested capital in supplying the relevant service.

We also consider the term 'legitimate business interests' connotes a reference to what is objectively regarded as allowable and appropriate in commercial or business terms in the context of providing access to the declared service, meaning that a concept of reasonableness and proportionality is implied by the use of the word 'legitimate'.

Indeed, 'legitimate business interests' has been considered in similar contexts by other jurisdictions. The ACCC considers 'legitimate business interests' covers:

*The access provider's interest in earning a normal commercial return...[and] will take into account the provider's obligation's to shareholders and other stakeholders, including the need to earn commercial returns on the facility.*⁷⁵³

While the Australian Competition Tribunal, in reference to the analogous section 152AH(1)(b) of the CCA (then the *Trade Practices Act 1974* (Cth)), stated in the context of access to telecommunications network infrastructure that:

*...the expression connotes something which is allowable and appropriate when negotiating access to the carrier's infrastructure. When looked at through the prism of a charge term and condition of access and its relationship to a carrier's cost structure, it is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.*⁷⁵⁴

We consider Queensland Rail will have a legitimate business interest as a below-rail operator across a range of areas. Some of these include:

- the commercial interest in recovering efficient costs in providing the relevant service⁷⁵⁵ and in earning normal commercial returns, but it is unlikely to extend to achieving a higher than normal commercial return through the use of market power
- a balanced risk position in the allocation of contractual risks and liabilities as between Queensland Rail and access holders
- appropriate incentives to maintain, improve and invest in the efficient provision of the facility
- incentives to improve commercial returns, where these returns are generated from, for example, innovative investments or cost-cutting measures
- operational processes and procedures within the undertaking.

The interest of Queensland Rail is one of the factors to be weighed up by the QCA pursuant to section 138(2).

The table below summarises the QCA's consideration of section 138(2)(b) and (c) in respect of each chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.2 Sections 138(2)(b) and (c) of the QCA Act

<i>2015 Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
Chapter 1 – Application and scope	The proposed application and scope of the 2015 DAU is not in Queensland Rail's legitimate business interests as it provides Queensland Rail with significant discretion on how it applies the undertaking and operates within the regulatory regime.	The application and scope provisions are consistent with Queensland Rail's legitimate business interests as they provide clear guidance to Queensland Rail on how it can operate within the regulatory regime in a way that is consistent with the QCA Act.

⁷⁵³ ACCC (2006), *Arbitrations— A Guide to Resolution of Access Disputes under Part IIIA of the TPA*: 27-28.

⁷⁵⁴ Re Telstra Corporation Ltd [2006] ACompT 4 at [89].

⁷⁵⁵ The 2015 DAU only seeks reference tariffs for coal services on the West Moreton and Metropolitan networks.

<i>2015 Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
Chapter 2 – Negotiation and capacity management	The proposal creates significant information uncertainty, and gives Queensland Rail considerable discretion in extending negotiation timeframes, in refusing access and in allocating limited available capacity, which would adversely affect access to Queensland Rail's network; therefore is not in Queensland Rail's legitimate business interests.	The negotiation framework is not against Queensland Rail's legitimate business interest as it enables Queensland Rail to seek additional information in accordance with the undertaking, provides for timely access negotiations, gives certainty about the process and rules for allocating capacity, and does not force Queensland Rail to negotiate with 'non-genuine' access seekers.
Chapter 3 – Pricing principles	The proposal creates significant pricing uncertainty and gives Queensland Rail considerable discretion in applying the pricing principles which would adversely affect access to Queensland Rail's network; therefore is not in Queensland Rail's legitimate business interests.	The pricing principles are not against Queensland Rail's legitimate business interest as they provide for Queensland Rail to receive at least its incremental cost of providing access and for take-or-pay to give Queensland Rail a degree of revenue certainty.
Chapter 4 – Operating requirements	The proposed operating rules in the NMP and procedures and technical requirements in the ORM reflect Queensland Rail's legitimate business interest in managing its network as it sees fit.	The NMP and ORM support Queensland Rail's legitimate business interest in managing its network as it sees fit, subject to reasonable constraints.
Chapter 5 – Reporting	The proposed reporting and audit regime is not in Queensland Rail's legitimate business interests as, although it does not provide an unreasonable burden on Queensland Rail, it does not indicate to stakeholders whether Queensland Rail is efficiently using and investing in the network.	The reporting and audit framework provides the information and assurance access seekers and holders need without imposing an unreasonable burden on Queensland Rail.
Chapter 6 – Administrative provisions	The proposed transitional arrangements included in the administrative provisions are not in Queensland Rail's legitimate business interest as they do not adequately balance the need for clear transitional arrangements against Queensland Rail's interest in reducing its administrative burden.	The administrative provisions provide processes to resolve disputes, clear transitional arrangements between undertakings and an assurance to Queensland Rail that QCA decision-making processes will take Queensland Rail's interests into account, all of which are in the legitimate business interest of Queensland Rail.
Chapter 7 – Standard Access Agreement	The proposed SAA weakens Queensland Rail's obligations to deliver contracted access services and leaves access holders responsible for risks they cannot control or mitigate.	The SAA supports Queensland Rail's legitimate business interest in providing access on terms that give Queensland Rail revenue certainty while appropriately managing its exposure to risks, damages and default in relation to the use of its network by third parties.
Chapter 8 – West Moreton network tariff	The West Moreton network tariff allows recovery of some inefficient	The West Moreton network tariff provides for the recovery of efficient costs as well as providing for an

2015 Draft Decision	2015 DAU proposal	Draft Decision approach
	costs.	adjustment amount consistent with Queensland Rail's previously stated intention.
Chapter 9 – Investment framework.	The proposed investment framework provides too much discretion to Queensland Rail to decide whether or not to permit an extension and does not provide clarity or certainty on how an access seeker may obtain access to the network when the access seeker is willing to fund the extension required to accommodate its access application.	The investment framework provides for efficient investment in Queensland Rail's network, but does not require Queensland Rail to fund that investment.

10.3.3 The public interest

Section 138(2)(d) requires the QCA to have regard to the public interest, including the public interest in having competition in markets (whether or not in Australia). The public interest may include a wide variety of matters and is a concept which imports a discretionary value judgement.

In this context, we consider the public interest in an efficient allocation of resources is best served by an access undertaking that facilitates the delivery of below-rail services at efficient prices and establishes a stable, certain regulatory framework.

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

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

In addition, we consider that an undertaking that delivers regulatory certainty provides a major stimulus to the Queensland economy and local employment which is an important public interest consideration.⁷⁵⁶ The development of new, or replacement, upstream producers may be at risk if there is material pricing uncertainty for rail access. This can have flow-on impacts on regional economic development.

Promoting effective competition in upstream and downstream markets

Recognising that section 138(2)(d) of the QCA Act includes 'the public interest in having competition in markets', we consider the notion of promoting competition involves the idea of creating an environment for improving competition from what would occur otherwise.

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

⁷⁵⁶ QCA, July 2001: 45.

- the market for above-rail services
- the market for certain products that are transported on Queensland Rail's network
- the market for resource tenements from which those products are produced.

Competition in the above mentioned markets can be affected by the operation of the contracting and operating requirements embodied in the 2015 DAU. While we accept the passenger services and freight markets are distinct markets, we have a statutory obligation under sections 137(1A) and 168A(c) to address the potential for Queensland Rail to favour its above-rail passenger operations to the detriment of above-rail freight business.

We therefore consider that an access undertaking should seek to:

- minimise any barriers for access to the declared service
- improve the conditions for competition in upstream and downstream markets by providing tangible evidence of the economically efficient provision of access to the declared service and by promoting regulatory certainty to enable confidence in decision-making
- improve the conditions for competition in upstream and downstream markets.

The table below summarises the QCA's consideration of section 138(2)(d) in respect of each chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.3 Section 138(2)(d) of the QCA Act

<i>2015 DAU Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
Chapter 1 – Application and scope	The proposed application and scope is not in the public interest as it does not apply to the full scope of access available under the QCA Act, and does not clearly provide that Queensland Rail will not unfairly differentiate between access seekers.	The undertaking is in the public interest as it applies to the full scope of access that access seekers and access holders are entitled to, promoting competition in above-rail markets.
Chapter 2 – Negotiation and capacity management	The material uncertainty created by the proposed information exchange requirements and the process and rules for allocating access rights to new access seekers and existing access holders would not promote the efficient use of and investment in Queensland Rail's network, which would adversely affect the development of related sectors of Queensland's, and would not serve the public interest in having competition in markets.	The negotiation and capacity framework serves the public interest (including the public interest in having competition in markets) as it means that negotiating parties are well informed and the process and rules for allocating capacity to new access seekers and existing access holders are certain.
Chapter 3 – Pricing principles	The proposed pricing principles are not in the public interest as they provide too much discretion for Queensland Rail when negotiating access charges. Investment and pricing uncertainty is not in the public interest, in particular if this	The pricing principles serve the public interest as they provide a framework for pricing certainty with the effect of promoting competition in upstream and downstream markets that promotes efficient investment.

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
	uncertainty reduced investment and employment opportunities in Queensland.	
Chapter 4 – Operating requirements	The proposed operating rules in the NMPs and procedures and technical requirements in the ORM are not in the public interest as they do not enable effective competition.	The NMP and ORM are in the public interest as they provide for safe and equitable operation of Queensland Rail's network and enable effective competition.
Chapter 5 – Reporting	The proposed reporting and audit framework is not in the public interest as it does not provide transparent information on Queensland Rail's operation of its network and compliance with the regulatory regime.	The reporting and audit regime is in the public interest as it provides transparent information to all competing access seekers and holders about Queensland Rail's operation of its network and compliance with the undertaking and QCA Act.
Chapter 6 – Administrative provisions	The proposed transitional arrangements are not in the public interest as they do not provide sufficient reporting requirements between undertakings to understand whether Queensland Rail operates efficiently.	The administrative provisions are in the public interest as they provide clear transitional arrangements on matters that extend across multiple undertakings and assurance that QCA decision-making and dispute resolution processes are robust.
Chapter 7 – Standard Access Agreement	The proposed SAA does not allow an end customer to be an access holder and does not appropriately allocate risks to the party best placed to manage the risk.	The SAA is in the public interest as it: <ul style="list-style-type: none"> • enables either a rail operator or an end customer to be the access holder • provides an appropriate allocation of the rights, obligations and risks of all parties, thereby promoting competition.
Chapter 8 – West Moreton network tariff	The proposed West Moreton network tariffs are not in the public interest as they create uncertainty about future prices, reducing competition in downstream markets and discouraging long-term growth in the mining industry served by the network.	The West Moreton network tariff is in the public interest as it provides pricing certainty for access seekers and access holders, promoting competition in above-rail markets and providing an environment that promotes long-term growth of the mining industry served by the network. The adjustment charge is in the public interest as it promotes regulatory certainty in the access regime. Pricing certainty also facilitate efficient resource allocation, which is in the public interest.
Chapter 9 – Investment framework.	The proposed investment framework does not provide clarity or certainty on how an access seeker may obtain access to the network when the access seeker is willing to fund the extension required to accommodate its access application	The investment framework serves the public interest in efficiently extending Queensland Rail's network, promoting the growth of the Queensland economy.

10.3.4 The interests of persons who may seek access

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

We consider that section 138(2)(e) encompasses the interests of train operators as access seekers or potential access seekers. We consider they are entitled to all the protections of Part 5 of the QCA Act. Indeed, we have received submissions from Aurizon and Asciano as train operators on the Queensland Rail network, and their views are considered throughout this Draft Decision.⁷⁵⁷

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

Finally, in having regard to the interests of persons who may seek access, our Draft Decision on the 2015 DAU primarily references the predominant use in each of the major systems. That is: coal in the West Moreton network, bulk freight on the Mt Isa line and containerised freight on the North Coast line. Although we acknowledge that these are not the only commodities on each system and we have had regard to interests of these access seekers.

The table below summarises the QCA's consideration of section 138(2)(e) in respect of each chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.4 Section 138(2)(e) of the QCA Act

<i>2015 DAU Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
Chapter 1 – Application and scope	The proposed application and scope provisions are not in the interests of access seekers as they do not provide clarity on whether the undertaking applies to the entire declared service. The undertaking also does not adequately outline how access seekers will be protected from being treated differently to any related party of Queensland Rail.	The application and scope provisions protect access seekers from being treated differently from any related party of Queensland Rail and provide access seekers with clarity that the undertaking applies to all Queensland Rail's declared infrastructure.
Chapter 2 – Negotiation and capacity management	The proposal is not in the interests of access seekers as it creates material information uncertainty, and gives Queensland Rail considerable discretion in extending timeframes, in allocating limited available capacity, in refusing access and in recovering costs when negotiations	The negotiation and capacity framework means that access seekers negotiating access are well-informed, negotiations for access are timely, there is a certain process for allocating capacity, and Queensland Rail is prevented from acting in an inappropriately discretionary manner.

⁷⁵⁷ Asciano, sub. no. 5; Aurizon, sub. no. 6.

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
	are unsuccessful.	
Chapter 3 – Pricing principles	The proposal is not in the interests of access seekers as it creates material pricing uncertainty, and gives Queensland Rail considerable discretion when negotiating access charges.	The pricing principles serve the interests of access seekers by, amongst other things, limiting price differentiation and ensuring that prices reflect the efficient costs of providing access.
Chapter 4 – Operating requirements	The proposed operating rules in the NMPs and procedures and technical requirements in the ORM are not in the interests of access seekers as they do not provide a reasonable balance between their interests and Queensland Rail's interests.	The NMP and ORM serve access seekers' interests in a transparent and safe operating regime.
Chapter 5 – Reporting	The proposed reporting and audit regime is not in the interests of access seekers as it does not provide access seekers with the information required to understand whether Queensland Rail is operating efficiently, and assurance that Queensland Rail is complying with the undertaking and QCA Act.	The reporting and audit regime requires Queensland Rail to provide information that access seekers need to understand whether Queensland Rail is operating efficiently, and assurance that the information will be accurate and that Queensland Rail complies with the undertaking and QCA Act.
Chapter 6 – Administrative provisions	The proposed transitional arrangements are not in the interests of access seekers as they do not provide adequate information for access seekers to understand whether Queensland Rail is operating efficiently in matters that extend across multiple undertakings.	Access seekers' interests are served by the effective dispute resolution and transitional arrangements in the administrative provisions.
Chapter 7 – Standard Access Agreement	The proposed SAA does not allow an end customer to be an access holder and does not appropriately allocate risks to the party best placed to manage the risk.	The SAA serves the interests of access seekers, access holders and end customers by providing: <ul style="list-style-type: none"> • for either a rail operator or an end customer to be the access holder • an appropriate allocation of the rights, obligations and risks across all parties • a safe harbour access agreement for the timely negotiation of an access agreement.
Chapter 8 – West Moreton network tariff	The proposed West Moreton network tariff does not provide certainty to access seekers as it gives Queensland Rail the ability to increase the reference tariffs beyond the proposed level. It also does not provide a fair and reasonable allocation of common network costs, which is against the interests of access seekers.	The West Moreton network tariff gives a degree of certainty about future access charges that allows access seekers to manage their businesses. An adjustment amount for over-payment of access charges is clearly in the interest access holders.

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
	Further, it does not preserve the expectation that there would be an adjustment amount.	
Chapter 9 – Investment framework.	The proposed investment framework provides too much discretion to Queensland Rail to decide whether or not to permit an extension. It does not provide clarity or certainty on how an access seeker may obtain access to the network when the access seeker is willing to fund the extension required to accommodate its access application.	The investment framework serves access seekers by giving them certainty about the terms under which they will be required to fund extensions to the network. It provides workable, bankable and credible standard study and funding mechanisms, to apply to extensions that are funded by an access seeker.

10.3.5 The effect of excluding existing assets for pricing purposes

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

This issue has been considered by the QCA in some detail as part of proposing a tariff for coal-carrying train services that operate on the West Moreton and Metropolitan networks.

The table below summarises the QCA's consideration of section 138(2)(f) in respect of each relevant chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.5 Section 138(2)(f) of the QCA Act

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
Chapter 3 – Pricing principles	The proposed determination of ceiling revenue limits based on a DORC approach in all circumstances could result in inefficient windfall gains to Queensland Rail.	The pricing principles include pricing limits that provide for Queensland Rail to receive at least the incremental cost of providing access for a service, and no more than the stand-alone cost, which includes considering the effect of excluding existing assets.
Chapter 8 – West Moreton network tariff	The proposed treatment of existing West Moreton network assets includes assets that have reached the end of their expected useful lives resulting in windfall gains and monopoly rents.	The assessment of the West Moreton network tariff has had regard to the effect of excluding existing assets for pricing purposes.
Chapter 9 – Investment framework	The proposed treatment of the investment framework envisages that an access seeker/funder is entitled to recover a return on a contributed asset.	<p>The investment framework provides greater clarity and certainty on the extension access funding principles that will apply to negotiations between Queensland Rail and access seeker.</p> <p>The extension funding principles protects:</p> <ul style="list-style-type: none"> Queensland Rail from the asset stranding risk that may be associated with an access funder's extension asset an access seeker/funder by requiring

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
		Queensland Rail to transfer the full economic benefit from the funded extension to the access funder over the economic life of the extension, regardless of whether or not the access funder remains an access holder over that time period.

Section 138(2)(f) is either not relevant or does not materially impact on our assessment in chapters 1, 2, 4, 5, 6 and 7 and accordingly it has been given comparatively little or no weight.

10.3.6 The pricing principles in section 168A

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

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

- (a) *generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and*
- (b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*
- (c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*
- (d) *provide incentives to reduce costs or otherwise improve productivity.*

The intent of the pricing principles is to provide a transparent framework for determining price limits, the structure of access charges and associated pricing matters. This framework should afford Queensland Rail, access seekers, access holders and the public reasonable certainty surrounding the processes for developing access charges for Queensland Rail's below-rail network.

Consistent with third-party access principles, the pricing principles state that regulated access prices should generate revenue for a regulated service that is at least enough to meet the efficient costs of providing access.⁷⁵⁸ This implies that prices should be set at short-run marginal costs.

However, most infrastructure services involve high fixed costs. Even successful infrastructure projects will not usually generate revenues in the early years sufficient to cover those costs. Therefore, early losses must be covered by above normal profits in later years as demand for the service increase. Setting a uniform price equal to short run marginal costs would result in a revenue shortfall, which may adversely impact new investment.

To address this concern, the pricing principles provide that regulated access prices should be set so as to generate expected revenue across a facility's regulated service that is sufficient to meet the efficient costs of providing access, and include a return on investment commensurate with the regulatory and commercial risks involved. While the entirety of Queensland Rail's intra-state network is subject to the declaration under the QCA Act, reference tariffs only apply to coal train services on the West Moreton and Metropolitan networks. For Queensland Rail's

⁷⁵⁸ Competition and Infrastructure Reform Agreement, 2006, clause 2.4

other train services and the remainder of the network, pricing is subject to the 'negotiate–arbitrate' framework and the pricing principles contained in Part 5 of the Act and undertaking.

We note that the motive for regulating access prices is that, in the absence of regulation, the use of monopoly power could result in inefficiently high prices.

It is open to the QCA to consider that a DAU which provides for a price that allows a service provider to recover at least the efficient costs of providing access to the service and a relevant return on investment is, including by reference to other factors such as the object of Part 5 of the QCA Act (section 138(2)(a)), the interests of access seekers and holders (sections 138(2)(e) and (h)) and the public interest (section 138(2)(d)), not one which it is appropriate to approve.

The pricing principles are one of a number of factors to be weighed up under section 138(2). Although section 168A(a) states that prices should generate revenue to at least meet the efficient costs of providing access, it is also true that prices above the efficient cost would not be in the interests of access seekers and holders, nor in the public interest.

The table below summarises the QCA's consideration of section 138(2)(g) in respect of each relevant chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.6 Section 138(2)(g) of the QCA Act

<i>2015 Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
Chapter 1 – Application and scope	The proposed application and scope provisions do not assure access seekers that Queensland Rail will not unfairly differentiate between access seekers and a related party of Queensland Rail.	The application and scope provisions prohibit Queensland Rail from unfairly differentiating between access seekers, including by providing access on terms that favour Queensland Rail's related party.
Chapter 3 – Pricing principles	The proposed 2015 DAU pricing principles are not balanced with respect to all of the s.168A factors. Queensland Rail has sought to impose s.168A(a) as having primacy above all others in terms of its proposed hierarchy.	The pricing principles provide for a balanced approach as they have been developed having regard to all of the s.168A factors, including price discrimination where it aids efficiency. Moreover, we have also required that prices cannot discriminate in favour of the downstream operations of Queensland Rail for the purposes of hindering or preventing access.
Chapter 5 – Reporting	The proposed reporting and audit regime does not adequately assist access seekers and access holders to identify whether Queensland Rail has set terms and conditions that favour its own downstream operations.	The reporting regime will help an access seeker or holder identify if Queensland Rail has set terms and conditions that favour its own downstream operations.
Chapter 7 – Standard Access Agreement	The proposed SAA does not appropriately allocate contract risks and liabilities to the party best placed to manage the risk and liabilities. It does not facilitate a balanced negotiating framework and may result in access charges that are not commensurate with the regulatory and commercial risks involved.	The SAA enables Queensland Rail, access seekers, rail operators, and customers to negotiate access agreements based on a balanced risk position applying to all parties. This means that reference tariffs and access charges contained within executed access agreements will be commensurate with the regulatory and commercial risks involved in the provision of the contracted access services.

2015 Draft Decision	2015 DAU proposal	Draft Decision approach
Chapter 8 – West Moreton network tariff	The proposed West Moreton network tariff will generate more than the expected revenue over the regulatory period that is necessary to recover Queensland Rail's efficient costs.	<p>The West Moreton network tariff will not generate expected revenue for Queensland Rail over the regulatory period that is at least enough to meet efficient costs and includes a return on investment commensurate with the regulatory and commercial risks of providing access (s.168A(a)). This is because of the adjustment amount to account for the over-recovery of access charges by Queensland Rail.</p> <p>However, for the reasons set out in Chapter 8, the QCA considers that the pricing principles are outweighed by other considerations under s.138(2), including s.138(2)(a) – the objects clause, s.138(2)(d) – the public interest, and s.138(2)(e) and (h) – the interests of access seekers/holders.</p>
Chapter 9 – Investment framework.	The proposed investment framework provides too much discretion to Queensland Rail to decide whether to extend the network to accommodate an access seeker's access application. It allows Queensland Rail to recover all its costs in an extension, regardless of whether such costs are efficient.	The investment framework helps Queensland Rail and access seekers/funders to efficiently invest in an extension and obtain a return on investment that is commensurate with the regulatory and commercial risks of providing access.

10.3.7 Any other matters the QCA thinks are relevant

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

This paragraph is expressed in broad terms. We consider the interests of access holders and end users are relevant under this paragraph. The interests of these stakeholders broadly coincide with the interests of access seekers, as all access seekers who sign contracts will become access holders. However, as discussed in various parts of Chapter 2, there are some issues of particular relevance to access holders and end users.

In addition to the above, we consider the following issues are relevant:

- the terms of the 2008 AU and the reasons for proposed changes to it
- certainty through maintenance and operational integrity
- the extent to which commercially negotiated outcomes should be recognised under the negotiate-arbitrate principle
- the extent to which a regulated entity earns windfall gains and monopoly profits.

Role of the 2008 AU

We consider the previously approved standard access principles in the 2008 undertaking and the 2008 SAA to be relevant in our consideration of the 2015 SAA (2008 regulatory precedents). We are of the view that the 2008 regulatory precedents have been effective in providing Queensland Rail, access seekers, access holders and end customers with:

- a considered and balanced approach to contract risk management approach

- a contracting framework that is well understood by all freight traffics operating on the network
- a level playing field in negotiating access rights with a monopoly service provider.

On this basis, we have considered afresh the 2008 regulatory precedents and are of the view that the balanced risk position underlying the 2008 regulatory precedents are relevant in considering each of the stated matters in section 138(2) of the QCA Act. In particular, we consider the symmetrical risk position combined with a clear assignment of accountabilities between the contracting parties facilitates access to the network and an efficient total cost of access.

Aurizon Network 2010 undertaking

We consider the previously approved split form access agreement in Aurizon Network's 2010 undertaking (2010 regulatory precedents)⁷⁵⁹ to also be relevant in our consideration of the 2015 SAA. We are of the view that the 2010 regulatory precedents provide Queensland Rail, access seekers, access holders and end customers with a:

- considered and balanced approach to contract risk management approach
- contracting framework that is well understood by all freight traffics operating on the network
- level playing field in negotiating access rights with a monopoly service provider.

On this basis, we have considered afresh the split form SAA and are of the view that the balanced risk position underlying the split form SAA is still current and provides for an appropriate balancing of each of the stated matters in section 138(2) of the QCA Act. In particular, we consider the symmetrical risk position combined with a clear assignment of accountabilities between the contracting parties will facilitate access to the network and an efficient total cost of access.

Certainty through maintenance and operational integrity

Within section 138(2)(h) we have also considered the role of certainty from regulatory arrangements. That is, the extent that stability and certainty promote confidence in the regulatory arrangements and therefore economic efficiency by reducing uncertainty associated with long term investment decisions.

This may be considered in the context of operational integrity of the network with regard to maintenance, as well as the performance of the network over the longer term. For example, further certainty may be provided through system master plans by providing for access rights to be renewed on expiry.

Negotiate–arbitrate model and primacy of commercial negotiations

The third party access regime in the QCA Act is underpinned by the 'negotiate–arbitrate' approach to regulation, with the regime incorporating the principle of primacy of contractual negotiations.

We consider that parties should endeavour to negotiate a mutually beneficial outcome before they resort to arbitration. When parties are unable to agree, arbitration is an appropriate means to resolving disputes. Indeed, if the dispute resolution process is not credible, the

⁷⁵⁹ Stakeholders have all identified the importance of ensuring the 2015 SAA contains the contractual flexibility provided by the split form SAA in the Aurizon Network's 2010 undertaking.

negotiation process can be unduly biased in favour of Queensland Rail by not sufficiently addressing the asymmetry in bargaining power.

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

We have therefore considered how the 2015 DAU affects the role of customer engagement, the balance of negotiation strength, barriers to participation, the flow of relevant and timely information and whether it provides for effective dispute mechanisms, accountability and transparency.

Windfall gains and monopoly profits

A return that is materially above that necessary for an entity to meet the efficient costs of providing access to the service, including a return on investment commensurate with the regulatory and commercial risks of providing access, will generate windfall gains and monopoly profits.

This would be inconsistent with economically efficient investment, operation and use of a regulated network and has the potential to have both upstream and downstream investment impacts.

The table below summarises the QCA's consideration of section 138(2)(h) in respect of each chapter of the Draft Decision. It is a summary only and the QCA's analysis is set out in more detail in the preceding chapters of the Draft Decision.

Table 10.7 Section 138(2)(h) of the QCA Act

2015 DAU Draft Decision	2015 DAU proposal	Draft Decision approach
Chapter 1 – Application and scope	The proposed application and scope provisions are not in the interests of access holders as they do not clarify whether the undertaking applies to the entire declared service. Furthermore, the undertaking does not clearly outline how access holders will be protected from being treated differently to any related party of Queensland Rail.	The application and scope provisions protect access holders from being treated differently from any related party of Queensland Rail and provide access holders with clarity that the undertaking applies to all Queensland Rail's declared infrastructure.
Chapter 2 – Negotiation and capacity management	The proposed access renewal rights provision creates considerable uncertainty for access holders (many with sunk investments) with respect to their ability to continue to access Queensland Rail's infrastructure over the life of their assets (i.e. the asset stranding risk).	The negotiation and capacity framework provides a certain process for allocating capacity between existing access holders and competing access seekers, and provides clarity regarding the renewal negotiation process when there is no competing access seeker.
Chapter 3 – Pricing principles	The proposed pricing principles are not in the interests of access holders as they provide too much uncertainty to Queensland Rail's increasing access charges.	The pricing principles serve the interests of access holders by, among other things, limiting price differentiation and ensuring that prices reflect efficient costs.
Chapter 4 – Operating	The proposed operating rules in the NMPs and procedures and technical	The NMP and ORM provide access holders with a transparent and safe operating

<i>2015 DAU Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
requirements	requirements in the ORM are not in the interests of access holders as they do not provide a reasonable balance between their interests and Queensland Rail's interests.	regime so that they receive the access for which they have contracted.
Chapter 5 – Reporting	The proposed reporting and audit regime does not provide access holders with the information required to understand whether Queensland Rail is operating efficiently, nor provide assurance that Queensland Rail is complying with the undertaking and the QCA Act.	The reporting and audit regime requires Queensland Rail to provide information that access holders need to confirm they are receiving the access on the terms for which they have contracted, and assurance that the information is accurate and that Queensland Rail complies with the undertaking and QCA Act.
Chapter 6 – Administrative provisions	The proposed transitional arrangements are not in the interests of access holders as they do not provide adequate information to access holders on matters that extend across multiple undertakings.	Access holders' interests are served by the effective dispute resolution and transitional arrangements in the administrative provisions in the 2015 DAU.
Chapter 7 – Standard Access Agreement	The risk position in the proposed SAA is inappropriately balanced in favour of Queensland Rail. It significantly weakens Queensland Rail's service level obligations (including its obligation to maintain the network) and creates an adverse asymmetry in the bargaining position of access seekers/holders. The proposed SAA does not provide for an end customer to an access holder.	The SAA serves the interests of access seekers/holders by establishing a balanced risk position, allowing either a rail operator or an end customer to be the access holder, provides a safe harbour access agreement and facilitates the timely negotiation of new or renewed access agreements.
Chapter 8 – West Moreton network tariff	The proposed West Moreton network tariff does not provide certainty to access holders as it gives Queensland Rail the ability to increase the reference tariffs beyond the proposed level. It also does not provide a fair and reasonable allocation of common network costs, which is against the interests of access holders and provides Queensland Rail with windfall gains. Queensland Rail's previously stated intention to include an adjustment amount in its DAU and the absence of such an adjustment amount in the 2015 DAU has also increased regulatory risk, impacting on forward looking investment.	The West Moreton network tariff serves the interests of access holders by ensuring Queensland Rail recovers sufficient costs to provide a safe and reliable network, while giving a degree of certainty about future access charges that allows access holders to manage their businesses. The QCA's approach of providing a forward looking adjustment amount addresses regulatory risk in respect of this matter.
Chapter 9 – Investment framework.	The risk position in the proposed investment framework is inappropriately balanced in favour of	The investment framework contains a balanced risk position between Queensland Rail and access

<i>2015 DAU Draft Decision</i>	<i>2015 DAU proposal</i>	<i>Draft Decision approach</i>
	<p>Queensland Rail.</p> <p>The proposed investment framework provides too much discretion to Queensland Rail to decide whether to extend the network to accommodate an access seeker's access application.</p>	<p>seekers/funders. It provides workable, bankable and credible extension access principles to apply in negotiations between Queensland Rail and access seekers/funders on the extension required to accommodate the access rights contained in the access application.</p>

GLOSSARY

A

AMP asset management plan

B

C

CAPM Capital Asset Pricing Model

D

DAAU Draft Amending Access Undertaking

DAU Draft Access Undertaking

DAC depreciated actual costs

DBCT Dalrymple Bay Coal Terminal

DORC depreciated optimised replacement cost

DTP daily train plan

E

EIRMR Environmental Impact and Risk Management Report

F

FCM Financial Capital Maintenance

G

H

I

IAP indicative access proposal

IRMP interface risk management plan

J

K

L

M

MTP	master train plan
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N

NMP	network management principles
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NPV	net present value
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O

ORM	operating requirements manual
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P**Q**

QCA	Queensland Competition Authority
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R

RAB	regulatory asset base
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RTI	Right to Information Act 2009
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S

SAA	Standard Access Agreement
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T

the 2015 DAU	the DAU submitted to the QCA by Queensland Rail in May 2015
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TI Act	Transport Infrastructure Act
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TRSA	Transport (Rail Safety) Act 2010 (Qld)
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TSC	transport service contract
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TSE	train service entitlement
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U**V****W**

WACC	weighted average cost of capital
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X**Y****Z**

APPENDIX A: SUMMARY OF QCA REVENUE/PRICING MODEL FOR QUEENSLAND RAIL 2015 DAU

Table 1 Summary: QCA model for coal reference tariff—west of Rosewood

<i>Asset values (West Moreton network)</i>		<i>2015-16</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>
Regulatory asset base (RAB) roll-forward						
opening asset value		190,021,890	206,611,473	226,466,739	246,169,771	263,903,332
plus capex		17,898,298	21,437,707	21,592,627	19,955,129	18,267,890
less depreciation		-6,281,610	-7,014,046	-7,819,504	-8,623,712	-9,348,397
plus inflationary gain		4,972,895	5,431,604	5,929,910	6,402,144	6,824,522
closing asset value		206,611,473	226,466,739	246,169,771	263,903,332	279,647,347
West Moreton network coal annual revenue requirement (Rosewood to Columboola)						
<i>Annual Revenue Requirement values</i>		<i>2015-16</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>
Return on capital	\$	13,793,767	15,066,534	16,448,380	17,757,542	18,928,446
Less Inflationary gain	\$	-4,972,895	-5,431,604	-5,929,910	-6,402,144	-6,824,522
Plus Return of capital	\$	6,281,610	7,014,046	7,819,504	8,623,712	9,348,397
Plus Maintenance	\$	26,411,431	16,184,581	16,340,578	15,772,232	16,052,261
Plus Operating costs	\$	5,433,829	5,569,675	5,708,917	5,851,640	5,997,931
Plus Taxation	\$	0	178,483	715,075	710,117	609,263
NPV						
Equals Building Blocks ARR (MAR + tax)	\$177,294,312	46,947,742	38,581,715	41,102,543	42,313,099	44,111,774
West of Rosewood indicative Ceiling Price (per '000 gtk)		\$18.88	\$19.35	\$19.83	\$20.33	\$20.84
NPV						
Revenue Stream (Pre-tax)	\$177,294,312	39,835,823	40,831,719	41,852,512	42,898,824	43,971,295
Coal Volumes (West Moreton network)	000 gtk	2,110,379	2,110,379	2,110,379	2,110,379	2,110,379
	Train paths	6,280	6,280	6,280	6,280	6,280
Adjustment amount	\$26,330,752					
West of Rosewood indicative Reference Tariff - one part (per '000 gtk)		\$15.88				
West of Rosewood indicative Reference Tariff - two part (at 1 July 2015)						
- gtk tariff (AT1 - WM)		\$7.94	/'000 gtk			
- Train Path tariff (AT2 - WM)		\$2,668	/train path			

Table 2 Summary: QCA model for coal reference tariff—east of Rosewood

<i>Asset values (West Moreton network only, excluding capex incurred since 2002)</i>		<i>2015-16</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>
Regulatory asset base (RAB) roll-forward						
opening asset value		74,804,644	74,536,912	74,209,039	73,839,245	73,440,435
plus capex		0	0	0	0	0
less depreciation		-2,137,849	-2,191,295	-2,225,020	-2,244,791	-2,284,050
plus inflationary gain		1,870,116	1,863,423	1,855,226	1,845,981	1,836,011
closing asset value		74,536,912	74,209,039	73,839,245	73,440,435	72,992,396
Metropolitan System annual revenue requirement (based on West Moreton network ARR from Rosewood to Columboola excluding capex since 2002)						
<i>Annual Revenue Requirement values</i>		<i>2015-16</i>	<i>2016-17</i>	<i>2017-18</i>	<i>2018-19</i>	<i>2019-20</i>
Return on capital	\$	5,185,869	5,167,309	5,144,579	5,118,943	5,091,295
Less Inflationary gain	\$	-1,870,116	-1,863,423	-1,855,226	-1,845,981	-1,836,011
Plus Return of capital	\$	2,137,849	2,191,295	2,225,020	2,244,791	2,284,050
Plus Maintenance	\$	26,411,431	16,184,581	16,340,578	15,772,232	16,052,261
Plus Operating costs	\$	5,398,625	5,533,590	5,671,930	5,813,728	5,959,072
Plus Taxation	\$	0	0	544,132	1,017,624	1,079,594
NPV						
Equals Building Blocks ARR (MAR + tax)	\$125,707,830	37,263,658	27,213,352	28,071,014	28,121,336	28,630,260
East of Rosewood indicative Ceiling Price (per '000 gtk)		\$13.38	\$13.72	\$14.06	\$14.41	\$14.77
NPV						
Revenue Stream (Pre-tax)	\$125,707,830	28,244,983	28,951,108	29,674,886	30,416,758	31,177,177
Coal Volumes						
West Moreton network	000 gtk	2,110,379	2,110,379	2,110,379	2,110,379	2,110,379
Metropolitan network	000 gtk ⁷⁶⁰					
Metropolitan network	Train paths ⁷⁶¹					
East of Rosewood indicative Ceiling Price - two part (at 1 July 2015)						
gtk price (AT1 - M)		\$6.69	/'000 gtk			
Train Path price (AT2 - M)		\$1,106	/train path			
- AT2 - M (Base)		\$926	/train path			
- AT2 - M (Incremental RAB)		\$180	/train path			

⁷⁶⁰ Data not reported due to confidentiality⁷⁶¹ Data not reported due to confidentiality

Table 3 QCA estimate of metropolitan RAB roll-forward

<i>Asset values (Metropolitan network)</i>	2015-16	2016-17	2017-18	2018-19	2019-20
RAB roll-forward					
opening asset value	16,946,277	16,843,022	16,724,012	16,588,525	16,435,812
plus capex	0	0	0	0	0
less depreciation	-526,912	-540,085	-553,587	-567,427	-581,613
plus inflationary gain	423,657	421,076	418,100	414,713	410,895
closing asset value	16,843,022	16,724,012	16,588,525	16,435,812	16,265,094

Table 4 Approved ceiling revenue limit for reference train services

<i>All in June 2015 dollar</i>	2015-16	2016-17	2017-18	2018-19	2019-20
Approved Ceiling Revenue Limit for Reference Train Services	47,169,313	47,169,313	47,169,313	47,169,313	47,169,313

APPENDIX B: QCA ANALYSIS OF THE RISK POSITION IN THE 2008 REGULATORY PRECEDENTS⁷⁶² COMPARED TO THE 2015 SAA

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Access Rights			
<p>Access Agreement is for a specified term and includes a good faith negotiation process for renewal.</p> <p>Cl. 1.4 of the 2008 Access Principles.</p> <p>Cl. 1.4 (Renewal) of 2008 SAA.</p>	<p>The proposed 2015 SAA is for a fixed term and provides that any right of renewal will be provided for in the 2015 DAU. It also includes an acknowledgement of any requirement to negotiate in good faith if required by the QCA Act and the 2015 DAU</p> <p>Cl.1.1 & 1.2(b) of the 2015 SAA</p>	<p>The 2015 SAA does not directly impose a good faith negotiation provision.</p>	<p>The 2015 SAA makes reference to the renewal rights in the relevant DAU and does not seek to restrict these renewal rights. The 2015 DAU, cl. 2.9.3, provides for an existing access holder (whose access agreement concerns coal or bulk mineral train services) to seek to negotiate a renewal of its existing access rights with priority over a competing access seeker.</p> <p>We consider the obligation to renew should be expressed more directly in the 2015 DAU. We also consider the 2015 DAU should contain an obligation to negotiate in good faith. The QCA Act does require an access provider and seeker to negotiate in good faith (see s 100(1)).</p>
<p>Access Agreement to provide for non-exclusive Train Service Entitlements for the operation of Train Services in terms of agreed service levels</p> <p>Cl. 1.1 of the 2008 Access Principles</p> <p>Cl. 2 (Nature and Scope of Access Rights) of the 2008 SAA</p> <p>Train Services may only commence after the relevant provisions of the Access Agreement</p>	<p>The 2015 SAA has reintroduced Queensland Rail's obligation to use reasonable endeavours to facilitate the Operator's completion and compliance (see Cl. 2 & 7.4(b)).</p>	<p>There are no material differences.</p>	<p>The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents.</p>

⁷⁶² Queensland Rail, 2008 undertaking, Schedule E (2008 Access Principles) and Schedule H (2008 SAA).

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
<p>are completed and complied with. Queensland Rail will use all reasonable endeavours to facilitate the Access Holder's completion or compliance with such requirements</p> <p>Cl. 3.1 of the 2008 Access Principles</p> <p>Cl. 3.1 of the 2008 SAA</p>			
Access Charges			
<p>Access charges are to be agreed between the parties and payable in accordance with reasonable payment terms set out in the Access Agreement</p> <p>Cl. 2 of the 2008 Access Principles</p> <p>Cl. 2.1 of the 2008 SAA</p>	<p>The 2015 SAA sets out the calculation of Access Charges for the relevant Coal Reference Tariff.</p> <p>If the Access Agreement is for a different Train Service then the Access Charges are to be agreed between the parties.</p> <p>The 2015 SAA also provides a mechanism whereby any changes in the Access Charges can be backdated (see Cl.5.1 to 5.7 and also Schedule 3).</p>	There are no material differences.	The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents.
<p>In appropriate cases Queensland Rail may require the lodgement of a bank guarantee to secure performance of its obligations and having regard to Queensland Rail's reasonable assessment of the creditworthiness of the Access Holder</p> <p>Cl.2 of the 2008 Access Principles</p> <p>Cl.2.4 of the 2008 SAA</p>	<p>The Operator must provide a security deposit such as a bank guarantee to Queensland Rail on terms acceptable to Queensland Rail. The amount of the security deposit may be increased or decreased by Queensland Rail in accordance with Queensland Rail's risk factors (Cl.17).</p>	Under the 2008 regulatory precedents, the obligation to provide a bank guarantee is not mandatory and is only required in 'appropriate cases'.	<p>The mandatory security deposit requirement potentially increases the financial burden on an Access Holder.</p> <p>We consider it is more reasonable that an Access Holder give security in 'appropriate cases'. This should also be read with clause 2.8.3 of the 2015 DAU whereby an Access Holder is required to demonstrate to Queensland Rail that it has the financial capability to perform its obligations under an Access Agreement.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Train Service Entitlements			
<p>Access Agreement will contain provisions about the resumption of capacity by Queensland Rail. There are two threshold requirements which must be met before Queensland Rail can trigger the resumption process, namely that Queensland Rail must demonstrate:</p> <ul style="list-style-type: none"> the extent of underutilisation of the relevant access rights equates to the objective criteria for underutilisation in the 2008 undertaking a reasonable expectation of a sustained alternative demand or there is a reasonable expectation of a commercial benefit for the provision and management of the infrastructure sufficient to justify the resumption. <p>A dispute resolution clause applies in relation to the resumption process.</p> <p>Cl.3.3 of the 2008 Access Principles</p> <p>Cl.3.2 of the 2008 SAA</p>	<p>The 2015 SAA provides that if an Operator fails to operate all Train Schedules for seven or more (not necessarily consecutive) weeks out of any 12 consecutive weeks, Queensland Rail may give a notice to the Operator deleting the relevant Train Path from the Train Service Description (Cl.21.1).</p>	<p>The 2015 SAA has no threshold requirements (no alternative demand or 'commercial benefit tests) to trigger a resumption. There is no express requirement for a dispute resolution provision in the event of a resumption.</p>	<p>The removal of threshold requirements, dispute resolution and reasonable notice periods adversely increases the risk position of an Access Holder.</p> <p>We consider it more reasonable and balanced if Queensland Rail can only trigger the resumption provisions if the 'alternative demand' and 'commercial benefit' threshold requirements are met. Any triggering of the resumption provisions should also be subject to the dispute resolution provisions in the 2015 SAA.</p>
Day to Day Train Movements			
<p>Queensland Rail is to have responsibility for Train Control and shall exercise Control having regard to the safe conduct of rail operations (Cl.4.1).</p> <p>The Network Management Principles and the Access Agreement will establish the procedures Queensland Rail Network must</p>	<p>Queensland Rail will provide and have exclusive responsibility for Network Control in respect of the Network. In exercising Network Control, Queensland Rail may delay, alter or otherwise re-schedule a Train Service. However, Queensland Rail must</p>	<p>Queensland Rail 2015 SAA contains fewer provisions regarding objective scheduling criteria.</p> <p>Queensland Rail 2015 SAA specifically allows Queensland Rail to give priority to passenger services in certain situations. This appears to</p>	<p>Generally, it appears that the 2015 SAA allows Queensland Rail a greater discretion and ability to affect train services.</p> <p>We consider there should be (a) a 'reasonable endeavours' requirement on Queensland Rail to consult with Access Holders and (b) that more clarification is required on the obligation to comply with the Network Management Principles in relation to Network Control Directions.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
<p>follow in varying the Daily Train Plan. The operation of Train Services can be varied in the situations outlined in the Access Agreement and/or the Network Management Principles (which normally include safety considerations, force majeure, incidents or emergencies, track possessions).</p> <p>Cl.4.3 of the 2008 Access Principles.</p> <p>Cl.4 of the 2008 SAA</p>	<p>comply with the Network Management Principles (see Cl.6.3(e)). The Operator must comply with Network Control Directions and the Network Management Principles. Queensland Rail must also comply with the IRMP including safety standards etc. Queensland Rail is entitled to give priority to other Train Services to ensure passenger Train Services are not delayed in certain situations (Cl.6.2 & 6.3).</p>	<p>reflect obligations relating to passenger services.</p> <p>The 2015 SAA does not state that the Network Management Principles are relevant to the procedures for varying a Daily Train Plan, nor that Long Term Train Service Entitlements can only be varied in accordance with agreed scheduling procedures.</p>	
<p>Queensland Rail and the Access Holder will ensure that the operation of Train Services is in accordance with entry and exit times in the relevant Daily Train Plan. The Daily Train Plan can be varied in accordance with the Network Management Principles or in the circumstances specified in the Access Agreement</p> <p>Cl.4 of the 2008 Access Principles</p> <p>Cl.4 of the 2008 SAA</p> <p>Long Term Train Service Entitlements can only be varied in accordance with agreed scheduling procedures specified in the Access Agreement (or as otherwise agreed between the parties).</p> <p>Network Management Principles should guide the performance of the scheduling function by Queensland Rail and be incorporated by reference in the Access Agreement</p>	<p>The Operator must only operate Train Services in accordance with the 2015 SAA unless permitted under the Access Agreement to do otherwise (including the Network Management Principles, the Train Service Description and any Network Control Directions) or has Queensland Rail's prior written permission. If an Operator is not able to operate a Train Service in accordance with its scheduled time it must notify Queensland Rail and Queensland Rail will use reasonable endeavours to provide an alternative schedule (Cl.7.1, 7.3 & 7.5).</p>	<p>The 2015 SAA does not expressly state that Long Term Train Service Entitlements can only be varied in accordance with agreed scheduling procedures.</p>	<p>These provisions must be read in conjunction with the Network Management Principles in the 2015 DAU. However, the general structure of the scheduling provisions does not appear to vary substantially from the 2008 Regulatory Precedents. However, Queensland Rail should also be made to act reasonably when invoking its discretion to agree to vary a Train Service.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
<p>Cl.1.2 of the 2008 Access Principles</p> <p>Cls. 4 and 5 of the 2008 SAA</p>			
Train Operations			
<p>Access Agreement will specify all reasonable operational, communication and procedural requirements for Train Services</p> <p>Cl.5.1 of the 2008 Access Principles</p> <p>Reference in 2008 SAA</p> <p>The Access Holder is responsible for the safe operation of its Rollingstock.</p> <p>Cl.5 of the 2008 Access Principles</p> <p>Cl.5 of the 2008 SAA</p> <p>Access Holder must obtain certification for its Rollingstock and Rollingstock Configurations. Queensland Rail has a right to view the certification to ensure that the configurations are as agreed. The Access Agreement will specify relevant Rollingstock Interface Standards which may be varied as agreed or for safety reasons.</p> <p>The parties should agree specific performance levels which may be enforced via financial incentives and sanctions</p> <p>Cl.5.2, 5.3 and 5.5 of the 2008 Access Principles</p> <p>Cls. 5.6 and 5.9 of the 2008 SAA</p>	<p>The Queensland Rail 2015 SAA provides a number of operational matters with which the Operator must comply (Cl.7.3). The Operator is also responsible for the operation of its Rollingstock (see Cl.7.3(b)(ix) & (x)).</p> <p>The Operator is required to provide a certification from a suitably qualified person that the Rollingstock comply with the IRMP (Cl.7.9).</p> <p>There are no specific performance levels or Key Performance Indicators in the 2015 SAA.</p>	<p>The Queensland Rail 2015 SAA covers the matters raised in the 2008 regulatory principles; however, some of the specific operational compliance clauses are unreasonably broad and may relate to matters outside of an Operator's control.</p> <p>There are no specific performance levels or KPIs in the Queensland Rail 2015 SAA.</p>	<p>Given the considerable investment that is involved in procuring Rollingstock, we consider that it is preferable to have some balance by requiring Queensland Rail to act reasonably. (recognising that Queensland Rail has legitimate concerns in relation to operational and safety issues).</p> <p>The 2008 regulatory principles contemplate (at least) that the parties will agree incentives for performance. Queensland Rail in its explanatory submission appeared to question the validity of KPIs. We consider the inclusion of a KPI performance reporting regime should improve the efficiency of network operations.</p> <p>A number of new operational compliance clauses have been included in the 2015 SAA which unreasonably adjust the balance of risk in Queensland Rail's favour. For example, the Operator is obliged not to cause Queensland Rail to fail to comply with any laws (see especially Cl.7.3(b)(vii) & (viii)).</p> <p>We consider a more reasonable approach is to have the 2015 SAA contain obligations to comply with the various agreed operational and safety documents (for example, the IRMP and the Emergency Plans).</p>
<p>Access to Private Infrastructure</p> <p>Cl. 5.11 of the 2008 SAA.</p>	<p>Access Holder is solely responsible for and bears the cost and risks of obtaining any rights to access</p>	<p>The 2015 SAA specifically places the risk on access to Private</p>	<p>We consider it is appropriate for the Access Seeker/Access Holder to bear the risk of access to Private Infrastructure as this is a matter for the Access Holder and generally outside</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
	Private Infrastructure. Access Agreements are not subject to an Access Holder obtaining any rights to Private Infrastructure (Cl.7.10).	Infrastructure on the Operator.	the control of Queensland Rail. However, we consider it appropriate to include a provision in the 2015 SAA to clarify that Queensland Rail will permit a network extension to connect Private Infrastructure to the declared rail infrastructure.
Infrastructure Management			
<p>Queensland Rail is responsible for the management and control of the Network. Queensland Rail may impose operational constraints for the protection of persons or property or to facilitate maintenance work. In carrying out such work Queensland Rail will use reasonable endeavours to minimise interruptions</p> <p>Cl.6 of the 2008 Access Principles</p> <p>Cl. 4.2 of the 2008 SAA</p> <p>The Access Holder may inspect the rail infrastructure prior to operations to satisfy itself as to risks. Queensland Rail is not liable for claims in relation to the infrastructure except where Queensland Rail have failed to maintain the infrastructure subject to agreed criteria (including in the Network management Principles) so that rail infrastructure is consistent with the agreed Rolling stock Interface Standards so that the Access Holder may operate the Train Services in accordance with its Train Service Entitlements</p> <p>Cl.6.6 of the 2008 Access Principles</p>	<p>Queensland Rail is responsible for the management and control of the Network. Queensland Rail will maintain the Network such that the Operator can operate the relevant Train Services in accordance with the 2015 SAA. Queensland Rail may, at any time (and without the Operator's consent) impose operational constraints (Cl.6.1, 6.2 & see also Schedule F, Cl.2.2(f)(C)).</p> <p>Under the proposed 2015 NMP (Schedule F to the 2015 DAU), Queensland Rail is required to use reasonable endeavours to minimise interruptions to Train Services caused by variations to the MTP or DTP (Schedule F, Cl.2.3).</p>	<p>The proposed 2015 SAA in conjunction with the current draft of the NMP allow Queensland Rail a potentially broad power to impose operational constraints. Operational constraints under the 2008 Regulatory Precedents are limited to safety, and maintenance or enhancement requirements as well as emergency situations.</p> <p>The 2008 Regulatory Precedents contain a specific statement that Queensland Rail will be liable for failure to maintain the rail infrastructure in certain circumstances. Whilst the 2015 SAA states that Queensland Rail will maintain the Network, we consider the use of the term 'standard of maintenance' to be vague and possibly ambiguous (see also comments below on Limitation of Liability).</p>	<p>The 2015 SAA increases the uncertainty and risk for the Access Holder as to when trains may run. This, in turn, may</p> <ul style="list-style-type: none"> • increase uncertainty in maintenance and infrastructure standards over the term of an access agreement • increase uncertainty in scheduling and planned cycle times • increase costs for the Access Holder in re-scheduling trains and rostering additional staff • adversely impact on the freight supply by resulting in increased wharfage and shipping costs • result in freight not being delivered to contractual delivery times. <p>The 2008 Regulatory Precedents reflect a more reasonable approach where there is more of a balance of the interests of Queensland Rail in maintaining the Network and the interests of the Access Holder in relation to reliability and certainty in the scheduling of train services.</p> <p>We consider the obligation of Queensland Rail to maintain the rail infrastructure is clearly a central and important issue. Clause 6.1 of the 2015 SAA is to be read with the limitations on Queensland Rail's liability (Cl.13). We consider the maintenance obligations in the 2008 Regulatory Precedents are more reasonable as they are clear and objectively identifiable.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Cl. 6.3 of the 2008 SAA			
<p>Access Agreement to contain provisions requiring the parties to provide advice to each other in relation to factors that could affect the operation of the Access Holder's Train Service or the integrity of the nominated network</p> <p>Cl.6.5 of the 2008 Access Principles</p> <p>Cls. 5.4 and 7.3 of the 2008 SAA</p>	<p>Under the 2015 SAA, the Operator must notify Queensland Rail of any damage or disrepair etc. of any part of the Network of which the Access Holder becomes aware (Cl.7.11). The Operator must also notify Queensland Rail of any failure, or likely failure, to comply with the SAA (Cl.7.3(d)). There are also requirements on the Operator to notify Queensland Rail of a number of "Notifiable Events" listed in Cl. 10.3(b).</p> <p>Queensland Rail is required to notify the Operator of any Network Incident that may reasonably be expected to materially adversely affect the Train Services (Cl.10.3).</p>	<p>The notification provisions placed on the Operator are quite onerous compared to the notification provisions placed on Queensland Rail.</p>	<p>We consider the notification provisions in the 2015 SAA should be reciprocal for Queensland Rail and the rail operator..</p>
Incident Management			
<p>Access Holder must develop an emergency response plan which must be compatible with Queensland Rail's emergency procedures</p> <p>Cl.7.1 of the 2008 Access Principles</p> <p>Cl. 7 of the 2008 SAA</p>	<p>The Operator must, prior to commencing Train Services, develop a suitable emergency management plan that is compatible with Queensland Rail's emergency management plan including matters outlined in the Operating Requirements Manual. The Operator must obtain a notice from Queensland Rail stating that Queensland Rail has no objection to the emergency management plan. Queensland Rail is also</p>	<p>The 2015 SAA requires notice from Queensland Rail that Queensland Rail has no objection to the emergency management plan. There is no requirement on Queensland Rail to act promptly or reasonably. Queensland Rail should be explicitly required to provide the Operator with a copy of its emergency management plan.</p>	<p>The 'no objection' requirement may be justified from a safety/operational perspective. However, this is an additional requirement which provides an additional discretion to Queensland Rail and could be applied to the detriment of an Access Holder.</p> <p>We consider that, to avoid unnecessary delays, and/or unreasonable exercise of this discretion, there should be obligations on Queensland Rail to act promptly and reasonably in not objecting to the emergency management plan. We also consider that Queensland Rail should provide the Operator with a copy of its environmental management plan so that the Operator's emergency management plan can</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
	under no obligation to ensure that the Operator's emergency management plan is consistent with Queensland Rail's or any other Network participant's emergency management plan (Cl.10.1)		be developed consistent with Queensland Rail's plan.
<p>Queensland Rail is responsible for the management of incident responses and may take any reasonable action to recommence services as soon as possible. Access Holder must assist with the restoration of the network in accordance with directions from Train Controllers. Access Holder should be adequately compensated for doing so. Queensland Rail has the right to pass through the cost of clearing a blockage to the party that caused the damage. Investigations into incidents must be carried out in accordance with the process specified in the Access agreement</p> <p>Cl.7.2, 7.3 and 7.4 of the 2008 Access Principles</p> <p>Cl. 7.4 of the 2008 SAA</p>	<p>The Operator must not cause or permit any obstruction of the Network. Queensland Rail may do anything it considers necessary to deal with obstructions. The Operator will be reimbursed its reasonable direct costs if given a Train Control Direction to assist with an obstruction by Queensland Rail (if caused or contributed to by another Rail Transport Operator) (Cl.10.2).</p> <p>There are also a number of clauses in the ORM relevant to removal of obstructions and incident response (see ORM Cl.4.2 & 4.3).</p>	<p>The 2015 SAA includes a specific provision for Queensland Rail to pass through costs if the Access Holder caused the obstruction.</p>	<p>The Queensland Rail 2015 SAA combined with the proposed 2015 ORM more clearly sets out Queensland Rail's rights to recovery of costs. We consider Queensland Rail's liability for obstructions which it causes will need to be considered in the context of the general liability and indemnity provisions, for example Cl.s 13.4 (Liability for Network) and 13.5 (Claims in respect of delays to Train Movements).</p> <p>We consider that an Operator's obligation to reimburse Queensland Rail for an obstruction the Operator has caused should only apply to the extent that Queensland Rail incurred costs in relation to that obstruction.</p>
No similar provision.	<p>In addition to any requirements under the IRMP, the Operator must pay a contribution, as reasonably determined by Queensland Rail for any measures which Queensland Rail considers necessary to comply with any noise levels or limits applicable under any relevant law. Queensland Rail must act</p>	No similar provisions.	We consider the noise mitigation provisions in the 2015 SAA are reasonable.

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
	reasonably and consult with the Operator first (Cl.10.7).		
Environment Protection and Other Issues			
<p>No specific provision relating to Dangerous Goods in 2008 Access Principles.</p> <p>Where Dangerous Goods are to be carried on a Train Service, the Operator must ensure that all requirements of the Dangerous Goods code are complied with and Queensland Rail is notified.</p> <p>Cl.8.3 of the 2008 SAA.</p>	<p>The Operator must not carry Dangerous Goods except as expressly provided in the Access Agreement and with Queensland Rail's written permission.</p> <p>Before Queensland Rail will permit Dangerous Goods the Access Holder must comply with all relevant Laws and Authorisations and give a specific accurate description of the goods as soon as practicable prior to operation of Train Service. (Cl.10.5).</p>	<p>The Queensland Rail 2015 SAA provides that Queensland Rail must act reasonably when exercising its discretion to provide consent to allow the carriage of Dangerous Goods.</p>	<p>The Dangerous Goods provisions need to be considered in the broader context of the liability and indemnity provisions and the specific Dangerous Goods indemnity in clause 12.3(b). Clause 12.3(b) provides that the operator will indemnify Queensland Rail against all claims and losses arising out of incidents involving dangerous goods in relation to Mixed Goods Train Services, whether or not caused or contributed to by Queensland Rail (including negligence). This indemnity cuts across any liability which Queensland Rail may have in relation to network maintenance when dangerous goods on a Mixed Goods Train Service are involved.</p> <p>We do not consider that Queensland Rail should benefit from an indemnity in relation to incidents involving dangerous goods if the incidents are caused by Queensland Rail's failure to maintain the network.</p> <p>We also consider that Queensland Rail should not be able to unreasonably withhold its consent to an Operator's request to carry Dangerous Goods.</p>
<p>All Environmental Laws must be complied with, failure to comply with obligations under the EP Act or directions from the EPA may be an event of default.</p> <p>Auditing requirements should be linked to the environmental risks posed by an Access Holder's Train Services and be established in that Access Holder's Environmental Investigation and Risk Management Report (EIRMR).</p>	<p>The Operator must comply with all applicable laws and Authorisations including the Operator's emergency management plan which includes consideration of possible Environmental Harm (see Cl.7.3(a)(i) and also Cl.4.2 of the 2015 ORM). Similarly, the Operator's IRMP must provide the management of risks which are</p>	<p>The 2015 SAA includes a requirement for the Access Holder to comply with directions to prevent, mitigate or remedy any environmental harm but is not limited to incidents caused by the Operator.</p>	<p>The Queensland Rail 2015 SAA is balanced unfairly in Queensland Rail's favour. This is because when read with the indemnity for Dangerous Goods and insurance provisions, liability for Environmental Harm appears to rest primarily with the Operator. It is not clear what responsibility or liability Queensland Rail accepts for Environmental Harm.</p> <p>We consider the 2008 Regulatory Precedents reflect a more reasonable risk position for Queensland Rail and the Operator.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
<p>An Access Holder must inform Queensland Rail of any non-compliance and must rectify non-compliance as soon as practicable. Queensland Rail reserves to the right to suspend the right of an Access Holder to operate on a nominated network if, in Queensland Rail's reasonable opinion, the Access Holder's Train Services cause or threaten Material or Serious Environmental Harm</p> <p>Cl.8 of the 2008 Access Principles</p> <p>Cls. 8.1 & 8.2 of the 2008 SAA</p>	<p>identified in the EIRMR (Cl.2.3 of the ORM) and if Queensland Rail suspects the Operator of a failure to comply with the IRMP, Queensland Rail may require an audit of the Operator's compliance (Cl.9.4).</p> <p>The Queensland Rail 2015 SAA contains provisions that oblige the Operator to notify Queensland Rail of anything that is likely to result in environmental harm; and, provide that Queensland Rail may notify of any requirements it, or any relevant Authority, considers necessary to prevent or mitigate environmental harm.</p> <p>The Operator must comply with those requirements as well as take proactive steps to prevent and mitigate environmental harm (Cl.10.6).</p>		
Accreditation			
<p>Operator of Train Services must maintain accreditation as a Railway Operator. Queensland Rail must also have and maintain accreditation as a Railway Manager</p> <p>Cl.1.3 and 9 of the 2008 Access Principles</p> <p>Cl. 9 of the 2008 SAA</p>	<p>In the 2015 SAA, both the Operator and Queensland Rail must comply with their respective accreditation (Cl.6.3(a) & 7.3(a)(i).</p>	<p>The 2015 SAA obligations on the Operator in relation to Accreditation are more onerous than Queensland Rail's obligations.</p>	<p>The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents. However, we consider that the Accreditation obligations under the 2015 SAA should be reciprocal.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Access Holder's Staff			
<p>The Access Holder is responsible for its staff and Queensland Rail has the right to suspend the Access Holders rights in the event of a breach or anticipated breach of laws relating to rail safety.</p> <p>Cl.10 of the 2008 Access Principles.</p> <p>Cls. 10.1 & 10.2 of the 2008 SAA.</p>	<p>The Operator is responsible for its "Associates". "Associates" includes staff etc. (Cl.12.6).</p>	<p>The Queensland Rail 2015 SAA does not make Queensland Rail responsible for Third Party Works and does not explicitly make Queensland Rail responsible for its Associates.</p>	<p>We consider Queensland Rail should have a reciprocal obligation of responsibility for its Associates, including any Third Party works.</p>
Safety Risk Management			
<p>Safety and risk management must be addressed by the formulation of an IRMP. The parties to comply with the IRMP</p> <p>Cl.11 of the 2008 Access Principles</p> <p>Cl. 11 of the 2008 SAA</p>	<p>The Operator and Queensland Rail must comply with the IRMP and the Operator must notify Queensland Rail of any non-compliance. The 2015 SAA provides for the regular review of the IRMP by the parties. Any disagreement regarding the IRMP review may be referred to dispute resolution (Cl.6.3(d), 7.3(a)(iv) & Cl.9).</p>	<p>No material difference.</p>	<p>The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents.</p>
Inspection and Audit Rights			
<p>Rights of inspection and audit in relation to each party's compliance with the Access Agreement and inspection of Trains and Rollingstock to be included in the Access Agreement. Each party will give the other reasonable notice and use reasonable endeavours to minimise disruption to the other party's operations.</p>	<p>If either the Operator or Queensland Rail has reasonable grounds to believe that the other has not complied, or is not complying, with any aspect of the IRMP or any obligation or duty under the TRSA, then that Party may conduct, or require the conduct of, an inspection or audit</p>	<p>No material difference.</p>	<p>The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Cl.12 of the 2008 Access Principles Cl. 12 of the 2008 SAA	in respect of that compliance (Cl.9.4). An Inspecting Party must use reasonable endeavours to minimise any disruption to the Party who is subject to the Inspection or Audit (Cl.9.6(d)(v)).		
Insurance			
Access Agreement will provide for appropriate insurances to be effected by the parties Cl.13 of the 2008 Access Principles Cl. 13 of the 2008 SAA	The Operator is required to effect insurance having regard to the Operator's activities, works, obligations and responsibilities under this agreement (including insurances covering all risks of an insurable nature in respect of which the Operator is obliged to indemnify Queensland Rail under this agreement). The insurance must include a public liability insurance for no less than \$350 Million (Cl.16.1)	The 2015 SAA only places insurance obligations on the Operator.	The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents.

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Indemnities and Liabilities			
<p>Each party indemnifies the other for loss (personal injury, death or property damage) caused by or to the extent contributed by the wilful default or negligence of that party.</p> <p>However, an Access Holder is solely liable for and must indemnify Queensland Rail for any damage to property or personal injury or death of any person being transported on Train Services (except to the extent that such harm is contributed to by Queensland Rail).</p> <p>Cl.14.2 of the 2008 Access Principles.</p> <p>Cl. 14 of the 2008 SAA.</p>	<p>Each party to the Queensland Rail 2015 SAA indemnifies each other party against all losses suffered or claims brought against that party in respect of any loss or damage, to the extent caused by the indemnifying party's breach of the agreement, or negligence (Cl.12.4).</p> <p>The Operator must ensure that Queensland Rail has the benefit of any limitation of liability under the Operator's conditions of carriage (Cl.12.4).</p>	No material differences.	The 2015 SAA provisions are generally consistent with the 2008 Regulatory Precedents.
<p>Dangerous Goods Indemnity</p> <p>No similar provision in 2008 SAA or 2008 Access Principles.</p>	The Operator is to indemnify Queensland Rail for loss arising from Dangerous Goods in relation to a Mixed Train Service whether or not caused or contributed to by Queensland Rail (Cl.12.3).	The Dangerous Goods indemnity cuts across any liability which Queensland Rail may have in relation to Network maintenance when Dangerous Goods or a mixed Goods Train are involved.	We do not consider Queensland Rail should benefit from an indemnity in relation to Dangerous Goods incidents which may be caused or contributed to by Queensland Rail's failure to maintain the Network.
<p>Each party is liable for the acts of its staff</p> <p>Cl.14 of the 2008 Access Principles</p> <p>Cl. 14 of the 2008 SAA</p>	<p>The Operator is specifically 'responsible' for its Associates (Cl.12.6).</p> <p>Each party's indemnity includes losses caused, or contributed to, by its Associates (staff etc) (Cl. 12.1).</p>	The Queensland Rail 2015 SAA is more specific in stating that the Operator is responsible. It is not clear if the new wording is intended to create some additional responsibility. The provisions are not mutual.	<p>The provision making the Operator responsible for its Associates should be mutual to appropriately balance the risk. Also, the requirement to give notice and requirement for Queensland Rail consent in clause 12.6(d) appears too onerous.</p> <p>We consider the 2008 Regulatory Precedents reflect a more reasonable risk position for Queensland Rail and the Operator.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Limitations of Liability			
<p>Except as otherwise provided in the Access Agreement, neither party has any liability for Consequential Loss. However, either party may be liable to the other for any damages (including Consequential Loss) arising from an audit or inspection or suspension of Train Services if no reasonable person could have formed the view that the stated grounds for such an audit or review existed ('Liability Trigger') and are subject to each party being under a specific duty to mitigate loss).</p> <p>Cl.15 of the 2008 Access Principles.</p> <p>Cl. 15 of the 2008 SAA.</p>	<p>The Queensland Rail 2015 SAA provides that no party is liable to the other for Consequential Loss except in relation to:</p> <ul style="list-style-type: none"> the Operator's Carriage indemnity when the Operator's Customer is not a party to the Access Agreement (Cl.12.2); the Dangerous Goods indemnity (Cl.12.3); a failure by an inspecting party to comply with its inspection obligations under clauses 9.4 to 9.10; and in relation to Land Tenure (Cl.27.18). <p>There is no specific duty to mitigate.</p>	<p>The circumstances in which the Operator may be liable for Consequential Loss are wider under the 2015 SAA compared to the 2008 regulatory precedents which limits the circumstances to audit and inspection and suspension and to the Liability Trigger.</p> <p>The specific obligation in the Access Principles to use reasonable endeavours to mitigate loss potentially reduces uncertainty for the party liable for the loss (that is, the Access Holder).</p> <p>Whilst there is a general duty at common law to mitigate damages, the inclusion of a specific obligation in the 2015 SAA may reduce the uncertainty of simply relying on the common law obligations.</p>	<p>The Queensland Rail 2015 SAA materially increase the liabilities of an Access Holder by expanding the matters for which the Access Holder must indemnify Queensland Rail for Consequential Losses. The removal of the specific obligation to mitigate loss also exposes the Access Holder to greater risk.</p> <p>The exclusions in clause 13.1(b) in the 2015 SAA are subject to drafting amendments to earlier clauses and the exclusions in 13.1(b)(ii)(B) appear unreasonable. See comments under paragraph 22 below.</p> <p>We consider the 2008 Regulatory Precedents reflect a more reasonable risk position for Queensland Rail and the Access Holder/Operator</p>
<p>Queensland Rail will not be liable for claims in relation to the standard of the infrastructure except where Queensland Rail fails to maintain so that the Access Holder cannot operate its relevant Train Services (Cl.6.6).</p> <p>Other than the above, there are no specific exclusions from liability in the Access Principles for either party. Accordingly each party's position is the same.</p> <p>Cl.6 of the 2008 Access Principles.</p>	<p>Another Party can only bring a claim against Queensland Rail to the extent that Queensland Rail has been negligent in maintaining the Network in a condition such that the Operator can operate Train Services in accordance with the Access Agreement (Cl.13.4).</p>	<p>The 2008 regulatory precedents refer to Operator's ability to operate its specific Train Services as the relevant standard of maintenance.</p>	<p>We consider any maintenance standard in the 2015 SAA should be precise and objective to provide a more balanced allocation of risk between Queensland Rail and the Operator. We also consider that there should not be any provisions in the 2015 SAA which allows Queensland Rail to derogate away from this obligation (see for example, below in relation to representations and warranties).</p> <p>We consider the 2008 Regulatory Precedents reflect a more reasonable risk position for Queensland Rail and the Access Holder/ Operator.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
Cl.14.4 of the 2008 SAA.			
<p>The Access Agreement will specify the circumstances in which an Access Holder has a claim against Queensland Rail for the non-provision of Access or the cancellation of a Train Service. The Access Agreement will specify the circumstances in which each party has a claim against the other party for delays.</p> <p>Cl.15 of the 2008 Access Principles.</p> <p>Cl. 15.3 of the 2008 SAA.</p>	<p>Generally, a Party will only have a claim for a delay to Train movement if the delay is a result of a breach of the Access Agreement (Cl.13.5)</p> <p>Queensland Rail is generally only liable for the non-provision of Access to the extent that the non-provision of Access is due to a breach of the Access Agreement by Queensland Rail or otherwise a result of Queensland Rail's negligence. There are exceptions to this if the non-provision is partly due to something other than Queensland Rail's breach or negligence (Cl.13.6).</p>	No material difference.	The Queensland Rail 2015 SAA is generally in accordance with the 2008 Regulatory Precedents.
<p>Claims must be made within 12 months.</p> <p>There is no value limit on claims under Access Principles or any cap on claims.</p> <p>Cl.15.5 of the 2008 Access Principles.</p> <p>Cl. 15.2 of the 2008 SAA</p>	<p>Claims by either party must be lodged within one year and only claims over \$100,000 may be lodged (Cl.13.2).</p> <p>There is a cap on claims of \$50 million.</p>	<p>No material difference in relation to the timeframe for claims to be lodged.</p> <p>The cap on claims over \$50 million is new.</p>	The provisions appear to be generally in accordance with the 2008 Regulatory Precedents. However, we do not consider there is a need to specify a maximum claims cap. We consider such a restriction will adversely impact on an Access Holder's contract rights.
Material Change			
Access Charges will be adjusted to reflect the net impact of any material change where such a change results in a variation to the net cost to Queensland Rail. The effects of any material change should be assessed in consultation with the Access Holder	The Queensland Rail 2015 SAA provides a mechanism for adjustments where there is a "Net Financial Effect" (annual net cost increase of 1% or more) on Queensland Rail. If there is a Material Change which causes a	The Queensland Rail 2015 SAA appears to limit the adjustment to an adverse financial effect on Queensland Rail whereas the 2008 Regulatory Precedents allow savings as well as costs to be adjusted.	<p>The Queensland Rail 2015 SAA only contemplates adjustments in favour of Queensland Rail.</p> <p>We consider the 2008 Regulatory Precedents reflect a more balanced and reasonable approach for Queensland Rail and the Operator.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
<p>Cl.16 of the 2008 Access Principles</p> <p>Cl. 16 of the 2008 SAA</p>	<p>Net Financial Effect which is not removed due the operation of the Reference Tariff or the variation of Access Charges otherwise under the Access Agreement, the parties are to meet and negotiate in good faith adjustments to the agreement in order to remove, as far as possible the Net Financial Effect. If the parties cannot agree the dispute may be referred to dispute resolution (Cl.18.2).</p> <p>A Material Change means:</p> <ul style="list-style-type: none"> • an Impost Change; • a Change in Law; or • a Change to Credit. 		
Disputes			
<p>Any dispute between the parties must follow the escalation process outlined in Cl.17 which results in determination by an expert, an arbitrator or the Courts.</p> <p>Cl.17 of the 2008 Access Principles.</p> <p>Cl.17 of the 2008 SAA</p>	<p>The Queensland Rail 2015 SAA provides a dispute resolution escalation process which includes the ability of the Rail Safety Regulator under the TRSA to resolve disputes. A referral to the Rail Safety Regulator overrides the dispute resolution provisions of the Access Agreement to the extent of any inconsistency (Cl.19).</p> <p>Queensland Rail will be able to determine disputes in relation to amendments to an IRMP, safety, environment and land (including</p>	<p>Queensland Rail has the final say in certain safety disputes.</p>	<p>Referral to the Rail Safety Regulator is appropriate in the 2015 SAA. However, we do not consider it appropriate to allow Queensland Rail to determine the outcome of the nominated safety disputes without reference to the Rail Safety Regulator.</p> <p>We consider the 2008 Regulatory Precedents reflect a more reasonable risk position for Queensland Rail and the Operator.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
	the use of the Network).		
Default, Suspension and Termination			
<p>Access Agreement will specify 'reasonable' events of default and mutual rights of suspension and termination</p> <p>Cl.18 of the 2008 Access Principles</p> <p>Cl.19 & 20 of the 2008 SAA</p> <p>Queensland Rail reserves the right to suspend an Access Holders right (with notice) to operate on a given network in the event of breach or (acting reasonably) anticipated breach of any laws relating to rail safety, Queensland Rail Network Train Control Directions, Safeworking Procedures or Safety Standards</p> <p>Cl.10 of the 2008 Access Principles</p> <p>Cl. 19.1 of the 2008 SAA</p>	<p>Queensland Rail 2015 SAA provides for a number of events (listed in Cl.15) which, if breached, allow Queensland Rail to suspend and/or terminate (after a remedy period expires in relation to a number of subclauses) (Cl.14.1 & 15).</p>	<p>The 2008 Regulatory Precedents required reasonable provisions to trigger suspension provisions.</p> <p>Queensland Rail can terminate (without a right to remedy) if Queensland Rail ceases to hold any Land Tenure which is required to maintain the Access Rights.</p>	<p>The 2015 SAA provisions favour Queensland Rail in that there is no requirement for the 'reasonable' application of provisions. Queensland Rail's ability to terminate an Access Agreement because it 'ceases to hold' any relevant land tenure is also not reasonable. This is because the loss of the relevant tenure could be due to the fault of Queensland Rail but it is the Access Holder who loses its rights. Queensland Rail also does not warrant that it will not surrender any land tenure (Cl. 27.18(f)).</p> <p>We consider the 2008 Regulatory Precedents reflect a more reasonable risk position for Queensland Rail and the Access Holder/Operator.</p>
Force Majeure Event			
<p>The Access Agreement will provide relief in respect of payment of Access Charges to the extent that Queensland Rail is unable to provide Access Rights due to a FME. Queensland Rail has no obligation to repair or replace specified lightly trafficked infrastructure damaged by a FME unless the parties agree as to the funding of the work</p> <p>Cl.19 of the 2008 Access Principles</p> <p>Cl. 18 of the 2008 SAA</p>	<p>The obligations of a party (other than monies payable) are suspended during a Force Majeure Event (FME) to the extent the obligations are affected by the FME. If part of the Network is damaged, Queensland Rail is not obliged to repair or replace FME affected infrastructure unless the parties agree as to funding the cost of that work (Cl.20).</p>	<p>The release from repair obligations applies more broadly in Queensland Rail 2015 SAA in that Queensland Rail is not obliged to repair any part of the Network which is damaged or destroyed by an FME. This non-repair right previously only applied to agreed, specified, lightly trafficked parts of the Network.</p> <p>The 2015 SAA also provides that an Access Agreement may be terminated due to a FME which</p>	<p>The limitation on Queensland Rail's obligation to repair materially alters the balance of risk in the favour of Queensland Rail. Queensland Rail could use its increased discretion to repair or not to its advantage in any subsequent negotiations between an affected Access Holder. Also, the survival of the Take or Pay provisions appears to be unreasonable.</p> <p>We consider the relief from paying Access charges in the 2008 Access Principles is reasonable considering the Access Holder will not be able to use the relevant parts of its Access Rights.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
		<p>continues for more than three months.</p> <p>The 2008 Regulatory Precedents provide specific relief to an Access Holder from paying Access Charges in relation to the extent that Queensland Rail is unable to provide Access Rights because of a FME. This is not provided for in the Queensland Rail 2015 SAA. Rather, clause 27.14 explicitly provides that Access Charges (including Take or Pay charges) survive any termination of the Access Agreement.</p>	<p>The definition of a FME also excludes circumstances in connection with Private Infrastructure. This could conceivably leave a Train Service stranded on private Infrastructure due to an FME with no recourse under the Access Agreement</p> <p>Again the 2008 Regulatory Precedents reflect a more balanced and reasonable approach.</p>
Assignment			
<p>An Access Holder may assign the whole of its rights/obligations under the Access Agreement to a related body corporate, provided that the assignor remains liable for the performance of the obligations. The Access Holder may assign its rights/obligations to a non-related body corporate, with the prior consent of Queensland Rail not to be unreasonably withheld.</p> <p>A change in control of a publicly listed Access Holder will be deemed to be an assignment</p> <p>Cl.20 of the 2008 Access Principles</p> <p>Cl. 21 of the 2008 SAA</p>	<p>Queensland Rail may Assign and novate its rights and obligations under the Queensland Rail 2015 SAA without the consent of the Access Holder. The Access Holder may Assign and novate its rights and obligations with the prior consent of Queensland Rail. The proposed assignee must agree to be bound by the terms of the Access Agreement (Cl.22).</p> <p>An Access Holder may only grant a security interest over its rights under the Access Agreement if, the holder of the security interest, the Access Holder, and Queensland Rail have entered into a deed where the chargee must only exercise rights under the</p>	<p>The 2015 SAA allows Queensland Rail to assign without any consent. There are also no provisions regarding permitted encumbrances in the Access Principles. There is no deemed change in control provisions in the Access Principles.</p>	<p>The proposed clauses are not unusual. However it would provide more certainty to an Access Holder if Queensland Rail could only assign without consent if the proposed Assignee is also able to provide the Access Rights required by the existing Access Holders.</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
	charge as though the charge was the Access Holder (Cl.22.3).		
Queensland Rail's Access Undertaking			
All parties must comply with all applicable laws. Cl.21 of the 2008 Access Principles. Cl.5.1 of the 2008 SAA	Both parties are required to comply with the Access Undertaking, to the extent that the Access Undertaking relates to that party's performance of its obligations or exercise of its rights under this agreement (Cl.6.3 & 7.3).	No material difference.	The Queensland Rail 2015 SAA is generally in accordance with the 2008 Regulatory Precedents.
Further provisions not included in the 2008 Regulatory Precedents			
Representation and Warranties	The Queensland Rail 2015 SAA sets out extensive representations and warranties to be given by the Operator and the Operator's Customer (see clauses 3.5 & 23).	The 2008 regulatory precedents did not contain any representations and warranties.	<p>We consider the general commercial warranties given by the Operator and the Operator's Customer in clause 3.5 and 23 (respectively) should be mutual.</p> <p>There are a number of specific warranties which unfairly reduces Queensland Rail's risk and liability position. For example, clause 23(a)(ix), whereby the Operator warrants that it has satisfied itself as to the standard of the Network. An Operator would have to undertake a complete engineering inspection of the Network and of all Queensland Rail records and reports. This appears unreasonable and not practical. This particular warranty would operate to reduce Queensland Rail's exposure to liability for maintenance of the Network.</p> <p>We consider the specific warranties in the 2015 SAA should be amended to represent a more reasonable balance. We also consider that the Operator should be given the right to</p>

Queensland Rail 2008 Regulatory Precedents	Application of the principle in the Queensland Rail 2015 SAA	Material difference(s)	QCA position
			inspect the Network for the purposes of creating its IRMP.
Confidentiality provisions. Cl.22.2 of the 2008 SAA.	The Queensland Rail 2015 SAA contains a confidentiality provision (Cl.24).	This particular issue is not contained in the 2008 Access Principles. However, the 2008 SAA provided for a confidentiality deed as a schedule to the SAA.	The inclusion of this clause does not appear to materially alter the risk profile of either Queensland Rail or an Access Holder.
Land tenure. Cl.22.18 of the 2008 SAA.	The Operator must comply with the requirements of Queensland Rail's land tenure. If there is any inconsistency between Queensland Rail's land tenure and the Access Agreement, the land tenure prevails. Queensland Rail is not liable to the Access Holder for any loss suffered due to changes of Queensland Rail's land tenure. The Operator is liable (including for Consequential Loss) for any breach of the Land Tenure Requirements. There is no obligation on Queensland Rail to provide a copy of any Land Tenure or notify the Operator of any Land Tenure Requirements (Cl.27.18).	Material limitations on Queensland Rail obligations/liabilities in relation to land access. Access Holders may potentially be liable for Consequential Loss in relation to Land tenure claims in the 2015 SAA	The 2015 SAA further limits Queensland Rail's risk, specifically in relation to land tenure. Queensland Rail is better placed to identify any risks in relation to relevant land. Queensland Rail should disclose any limitations. Queensland Rail may also be concerned as to its continuing rights to tenure. Accordingly, the 2015 SAA creates material risk and uncertainty for an Access Holder. It would be reasonable for Queensland Rail to notify the Access Holder of any requirements that the Access Holder must comply with in relation land tenure/ We consider that land tenure is critical to the access rights to be delivered. It is unlikely that an Access Holder or an Operator would be inclined to invest in Rollingstock when there is uncertainty as to Queensland Rail's land tenure.

APPENDIX C: PROPOSED ACCESS UNDERTAKING

[Published in separate document]

APPENDIX D: PROPOSED SAA

[Published in separate document]

APPENDIX E: LIST OF SUBMISSIONS

<i>Organisation/individual</i>	<i>Submission number</i>
Asciano	5
Aurizon	6
Glencore Queensland	7
New Hope	8, 9, 10, 11, 12, 19*
Port of Brisbane	13
Queensland Rail	1, 2*, 3, 4, 17, 18*
Queensland Resources Council	14
Sekitan Resources	15*
Yancoal	16

**Claims of confidentiality have been made for part or all of these submissions*

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