Queensland Competition Authority

Consolidated draft decision

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

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Level 27, 145 Ann Street, Brisbane Q 4000
GPO Box 2257, Brisbane Q 4001
Tel (07) 3222 0555
www.qca.org.au

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

Aurizon Network team

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SUBMISSIONS

Closing date for submissions: 26 February 2016

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 Aurizon Network's proposed draft access undertaking. The QCA will take account of all submissions received.

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

Queensland Competition Authority
GPO Box 2257
Brisbane Q 4001
Tel (07) 3222 0555
Fax (07) 3222 0599
www.qca.org.au/submissions

Confidentiality

In the interests of transparency and to promote informed discussion, the QCA would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another excising confidential information) could be provided. Where it is unclear why a submission has been marked 'confidential', the status of the submission will be discussed with the person making the submission.

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Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office, or on the website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact us on (07) 3222 0555.

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PREFACE

Aurizon Network Pty Ltd (Aurizon Network) owns and operates the rail network in central Queensland—the Central Queensland Coal Network (CQCN). The network is mainly used to carry coal to export ports near Gladstone, Mackay and Bowen.

The CQCN is a natural monopoly, which means it is uneconomic to duplicate the network's physical infrastructure. Businesses can compete to provide 'above-rail' services (i.e. coal and freight trains) but all parties must use the 'below-rail' infrastructure.

By virtue of being a natural monopoly provider, Aurizon Network has a privileged position which could be used to set unjustifiably high prices for access to the network or prevent or hinder access in above-rail services. To provide access seekers and holders with protection from these possibilities, the CQCN has been regulated as a declared service[1] under Queensland's access regime since 1998.

Under section 136 of the *Queensland Competition Authority Act 1997* (QCA Act), Aurizon Network can provide us with an undertaking setting out the terms and conditions of access to the network. We must either approve or reject this undertaking. If we do not approve the undertaking, we must explain how it should be amended to secure approval.

Since 2001, we have approved three undertakings for the CQCN. The latest undertaking, known as the 2010 AU, was approved on 1 October 2010 and was scheduled to expire on 30 June 2013. It has since been extended to 29 February 2016.

In April 2013, Aurizon Network submitted a draft access undertaking to replace the 2010 AU. The new draft access undertaking (the 2013 DAU) was proposed to apply from 1 July 2013 to 30 June 2017.

After extensive discussion with stakeholders, Aurizon Network withdrew the 2013 DAU on 11 August 2014, replacing it with another draft access undertaking (the 2014 DAU). Aurizon Network presented the 2014 DAU as its response to issues raised by stakeholders:

> *The 2014 DAU is the result of extensive consultation and negotiations with industry participants over a 15-month period in relation to positions reflected in the 2013 DAU. … [It] reflects Aurizon Network's position on the outcome of the negotiated changes to the 2013 DAU. In large parts, the 2014 DAU adopts the positions argued for by industry participants, whilst in other parts it reflects Aurizon Network's preferred position after consideration of the position proposed by industry.*[2]

Aurizon Network's 2014 DAU is split into three volumes:

- the access undertaking and schedules, including system allowable revenues and reference tariff inputs (Volume 1)
- a standard user funding agreement (SUFA) (Volume 2)
- other standard agreements (Volume 3).

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[1] The use of a coal system for providing transportation by rail is a service under Part 5 of the QCA Act and is referred as the 'declared service'. A 'coal system' means rail transport infrastructure (a 'facility' under section 70 of the QCA Act) that is part of the Blackwater system, Goonyella system, Moura system or Newlands system, which includes directly or indirectly connected rail transport infrastructure owned or operated by Aurizon Network; a coal system also includes particular extensions built on or after 30 July 2010 owned or operated by Aurizon Network, as defined in section 250 of the QCA Act. The declared rail transport infrastructure is collectively referred to as the 'Central Queensland Coal Network' (CQCN).

[2] Aurizon Network, 2014 DAU, sub. 1.

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

Under section 147A(2) of the QCA Act, we must use our best endeavours to approve, or refuse to approve, the 2014 DAU within set time limits. We gave notice of those time periods on 11 August 2014. We also gave a notice of investigation to Aurizon Network under section 146 of the QCA Act.

As the 2013 DAU and 2014 DAU have proposed fundamental changes to the regulation of the CQCN, we have encouraged regular discussions between Aurizon Network and its stakeholders to identify potential problematic issues and, wherever possible, to negotiate consensus solutions. An extended consultation period was provided in 2013 to ensure all parties had the opportunity to assess the proposed changes. We acknowledge the constructive approach of all parties to this process as well as the valuable assistance Aurizon Network staff and other stakeholders have provided to us through the investigation.

We must also consider the 2014 DAU in the light of the criteria in the QCA Act, and therefore must take into account the interests of all stakeholders, including stakeholders who may not be directly involved or included in industry discussions. We must also be satisfied the 2014 DAU meets the overarching objective of Part 5 of the QCA Act, to promote the economically efficient use of significant infrastructure, with the effect of promoting competition in upstream and downstream markets.

Other relevant processes—the 2013 SUFA DAAU

We have considered the 2014 DAU in parallel with Aurizon Network's proposed standard user funding agreement (the 2013 SUFA DAAU).

We released a draft decision on the 2013 SUFA DAAU on 31 October 2014. We subsequently released two SUFA working papers providing a stylised representation of how SUFA rents are determined and flow amongst parties under different hypothetical scenarios. Our stakeholder notice of 27 August 2015 advised the final decision on the SUFA will be released after the 2014 DAU final decision.

As the 2010 AU is due to expire on 29 February 2016, there is a need to recognise that a final decision on SUFA may occur under the new access undertaking (once approved). We have allowed for this possibility in the drafting of the amended access undertaking.

Our initial draft decision

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

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

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

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

Our initial draft decisions[4] refused to approve the 2014 DAU. We did not consider it appropriate, as an overall package, having regard to the relevant sections of the QCA Act. Our initial draft decisions provided reasons for this, along with the amendments we considered were required in order for it to be approved.

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

The consolidated draft decision

We received extensive submissions from Aurizon Network and other stakeholders throughout our investigation, including in response to our initial draft decision, and we continued to receive information and detailed data from stakeholders up until 25 September 2015. We have taken all of this information into account in considering Aurizon Network's 2014 DAU. Having done so, we now consider:

- there are a number of important matters that would benefit from further consultation with affected stakeholders. On weighing the disadvantages of further delay as against the benefits of further consultation, we consider that the balance favours a further round of consultation, particularly given two matters:
    - the first is that we have taken into account the submissions received and in some cases we have revised our draft decision in certain respects. It is therefore appropriate for Aurizon Network and stakeholders to have the opportunity to understand and comment on these changes
    - the high complexity of the 2014 DAU and its ramifications for all stakeholders indicated to us a further final round of consultation was appropriate to ensure our decision, when finally made, would have been well socialised with Aurizon Network and stakeholders
- additionally, as stakeholders will be aware, to date we have released a number of draft decisions (listed below) and consider there are real and practical benefits to consolidating those draft decisions into one consolidated draft decision. This will allow Aurizon Network and stakeholders to consider our draft decision overall.

This consolidated draft decision (CDD) encompasses all aspects of the 2014 DAU.

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

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

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

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

- against the 2014 DAU
- against the IDD amended DAU.

For convenience, we have used our IDD amended DAU as the baseline for the consolidated draft decision.

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

EXECUTIVE SUMMARY

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

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

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

Aurizon Network identified the new challenges it sees as a privatised entity and what this means for its legitimate business interests.

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

We consider that this changing market environment, and the challenges it presents for all parts of the supply chain, points to a need for a critical review of the way in which third-party access is considered for the CQCN.

The view that the CQCN is capacity constrained is a key issue throughout Aurizon Network's 2014 DAU, as is the view that new capacity will only be met by costly new expansions. We note that the CQCN delivered its highest number of tonnes in 2014–15, at 225.0 million net tonnes, but this falls well short of the potential approximate 274 million net tonnes[5] contracted in 2013–2014, and the 310 million net tonnes[6] by the end of UT4 when the first stage of the Wiggins Island Rail Project (WIRP) is completed.

A key theme of our consolidated draft decision is the need for the 2014 DAU to support the productive use of the existing CQCN capacity, and give stakeholders the confidence that infrastructure will be expanded in a timely, cost efficient way, where there is a case to do so. We consider this will require careful consideration of many aspects of the 2014 DAU, of everything from reporting to capacity management and pricing, to access agreements, to ensure all elements are working together to maximise the most productive use of the CQCN.

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

In other instances, while we consider change is warranted, we have formed the view this will require a more incremental approach. For example, we consider the complex tariff structure which has been

[5] Aurizon Network, 2013 DAU, sub. 3: 15.
[6] Aurizon Network, 2013 DAU, sub. 3: 19.

evolving since UT1 requires a full review, but we consider it appropriate to undertake this assessment after our assessment of the 2014 DAU has been completed. For this reason, we have not approved the tariff re-balancing changes proposed by Aurizon Network for the 2014 DAU.

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

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

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

Where we have proposed amendments in our consolidated draft decision, we have endeavoured to adopt a less intrusive and prescriptive approach as part of our preference for a more 'light-handed' approach. The approach we have taken is designed to:

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

The 2014 DAU provides an opportunity to put these arrangements into place, and with better informed stakeholders, we consider the longer-term direction of the access arrangements can move toward a lighter handed, but stronger evidence-based approach to the provision of access in the CQCN.

We consider our consolidated draft decision on the 2014 DAU to be consistent with all the criteria in section 138(2) of the QCA Act and to provide a solid basis to support the provision of access in the CQCN.

Consolidated draft decision

Our consolidated draft decision is to refuse to approve the 2014 DAU. In our consolidated draft decision, we have indicated the reasons we consider Aurizon Network's 2014 DAU was not appropriate, the ways in

which the 2014 DAU should be amended in order for us to approve it, and the reasons why our preferred positions meet the obligations under section 138(2) of the QCA Act.

Our consolidated draft decision is presented in seven volumes:

- Volume I—Governance and access
- Volume II—Capacity and expansions
- Volume III—Pricing and tariffs
- Volume IV—Maximum allowable revenue (MAR)
- Volume V—Definitions, interpretations, acronym list and reference list
- Volume VI—Clean and marked-up 2014 Draft Access Undertaking
- Volume VII—Clean and marked-up Agreements

A summary of our consolidated draft decision is provided below.

Volume 1: Governance and access

Intent and scope of the 2014 DAU

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

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

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

We have taken into account stakeholders' comments following our initial draft decision, and have consequently revised our proposed amendments. These revisions include:

- providing a simpler and clearer set of provisions regarding Aurizon Network's treatment of access seekers, users and related parties, including providing greater consistency with the concept of unfair differentiation established under the QCA Act
- no longer requiring the inclusion of a process for the development of an incentive mechanism. We remain of the view that this mechanism has benefit and that it should be developed by Aurizon Network in consultation with stakeholders, without us imposing a prescriptive process for its development. However, we consider the process proposed in our initial draft decision is unnecessary,

as a draft incentive mechanism may be proposed to us through the draft amending access undertaking (DAAU) process under the QCA Act.

Ring-fencing

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

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

While the compliance audit for 2013–14 showed no ring-fencing complaints and general compliance, we were not convinced that the 2010 AU regime is effective given stakeholders' views.

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

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

Compared to our initial draft decision, we have made a number of amendments to clarify the arrangements and to respond to Aurizon Network's concerns that we were acting beyond our power in some aspects of the regime. The amendments include:

- clarifying that the ring-fencing regime applies to declared services of the CQCN only
- allowing staff transfers to working groups across the Aurizon Group with movements recorded in the Confidential Information Register—which, as Aurizon Network suggested, would provide potential efficiency benefits to access seekers and users
- widening the definition of high-risk personnel, at Aurizon Network's suggestion, to include staff who negotiate access agreements and manage capacity
- clarifying that security measures would apply only to premises that are used to store confidential information
- requiring Aurizon Network to request, rather than procure, its holding company to execute an Ultimate Holding Company Support Deed (UHCSD). However, in the event the UHCSD is not executed, maintained in full force or complied with by the holding company, the undertaking will cease to permit the disclosure and use of confidential information within the Aurizon Group (outside of Aurizon Network), until this is rectified.

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

Reporting, compliance and audits

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

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed reporting, compliance and audit regime in Part 10 of the 2014 DAU. While we accept many aspects of Aurizon Network's proposed regime, we refuse to approve the regime overall. In our view, certain provisions do not appropriately balance the factors in section 138(2) of the QCA Act. Accordingly, we have proposed amendments requiring:

- a briefing on the planned scope of maintenance before the start of each year and for a consolidated annual maintenance report to be made available to all stakeholders
- a provision for Aurizon Network to develop a template for a quarterly maintenance report, following consultation with stakeholders
- Aurizon Network to maintain an issues register of breaches and written complaints
- expansion of the scope and frequency of audits based on the requirements in the 2010 AU
- Aurizon Network to provide a plan for the implementation of audit recommendations and evidence the recommendations are implemented.

We have reconsidered some of our initial draft decision positions. The key changes are to:

- revert to Aurizon Network's proposal to report network performance on a quarterly (rather than monthly) basis but proposing that information within the quarterly report is separated by month
- revert to Aurizon Network's proposal that it appoints the compliance auditor, rather than the QCA, but also to propose a requirement for the auditor to provide draft reports to the QCA, which we consider will improve our oversight of the audit process
- remove the proposed requirement for Aurizon Network to provide copies of signed non-standard access agreements, since we can request these agreements using our existing information gathering powers.

We consider our proposed amendments are in the interests of parties affected by Aurizon Network's decisions and will provide incentives for Aurizon Network to improve its efficiency and comply with its obligations in the undertaking.

Dispute resolution

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

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism in Part 11 of the 2014 DAU. In our view, the proposed mechanism does not provide an appropriate balance between the rights and interests of Aurizon Network and other parties. We have proposed amendments to:

- broaden the scope of the dispute resolution mechanism so that it can be accessed for a broader range of disputes by a broader range of parties

- refine the processes, procedures and obligations on parties to resolve disputes, including providing for disputes to be referred to the QCA when the parties cannot agree how to progress the dispute.

Our consolidated draft decision is consistent with our initial draft decision, although we have made further amendments to clarify the arrangements. The key changes are to:

- include prospective access seekers as potential parties to disputes about access negotiations, to cover disputes that could arise before an access application is lodged
- clarify arrangements when disputes are referred to the QCA, including a provision for the QCA to accommodate the advice of the rail safety regulator.

We consider that our amendments will result in a dispute resolution mechanism that more appropriately balances the rights and interests of the various parties. This will promote successful negotiations and increase stakeholder confidence and certainty, which in turn will promote the efficient use of the declared service.

Negotiation framework

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

A robust and effective negotiation framework can promote fair and balanced negotiations that deliver timely outcomes and respond to changing circumstances. It can also help to address concerns that Aurizon Network could use negotiations to 'pick winners', delay proceedings or extract higher charges or better terms and conditions for itself.

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed negotiation framework because we consider it: does not provide sufficient clarity and certainty, does not appropriately balance the rights and interests of stakeholders, and will constrain competition between above-rail operators. We have proposed amendments to:

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

Our consolidated draft decision is consistent with our initial draft decision, although we have made further amendments to clarify our intent.

Access agreements

Access agreements are essential for the provision of access to the CQCN. It is therefore important to have effective arrangements in place for the development and execution of these agreements. Having Standard Access Agreements (SAAs) available to parties can facilitate the timely development of access agreements by providing a 'safe harbour' access agreement parties may adopt without the need for further negotiation, as well as being used as a guide for parties when negotiating alternative terms of access.

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

Our consolidated draft decision proposes to move to a simpler approach involving a:

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

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

We also did not consider it appropriate for various matters, which had previously been included within the body of an undertaking, to be dealt with exclusively within the SAAs, as proposed by Aurizon Network. These included key capacity and operational matters in which we considered there is an interest in having greater transparency and consistency in these arrangements and how they will apply across access seekers/holders more broadly. To give effect to this, we proposed the use of 'incorporation clauses' to provide stronger links within the AA and TOD to particular matters in the undertaking.

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

- certainty and security over access arrangements—to provide parties with adequate specification over factors affecting the holding or use of access rights. This includes transparent and clearly defined processes around how access rights can vary over the life of the contract (e.g. resumptions, relinquishments and transfers) and alternating between train operators
- appropriate terms and conditions—to provide arrangements that represent a reasonable and commercially balanced allocation of rights, obligations and risks between parties and ensures risks are allocated to those best able to manage them
- workable arrangements that are not overly complex—where possible, simplifying and streamlining processes to promote ease of use, understanding and administration, including by clearly defining the rights and responsibilities associated with access rights from train operations.

Private connecting infrastructure

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

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

We have not accepted Aurizon Network's arrangements for connecting private infrastructure as we considered the process outlined by Aurizon Network was insufficiently clear and certain regarding the rights and obligations of the relevant parties. We have proposed amendments to Part 9 and the SRCA to address this, while taking proper account of Aurizon Network's, Private Infrastructure Owners' (PIOs') and

users' rights and interests. This includes further developing the terms and conditions of the SRCA, including by clarifying the treatment of coal loss mitigation.

In our initial draft decision we proposed amendments that require Aurizon Network to provide certainty regarding connection milestones. In our consolidated draft decision, we have decided to amend our IDD proposal to introduce greater flexibility by requiring relevant parties to negotiate connection milestones in the first instance.

We consider our proposed amendments will have the effect of simplifying and accelerating the negotiations.

Volume II: Capacity and expansions

Baseline capacity

A theme throughout this consolidated draft decision is that Aurizon Network has a significant role to play in encouraging CQCN supply chains to operate and expand in efficient ways.

Our consolidated draft decision reflects that it is appropriate for us to require Aurizon Network to participate in supply chain groups and network development plan processes to promote the efficiency objectives of Part 5 of the QCA Act, It also explains why we consider obliging Aurizon Network to do this is within our remit under the QCA Act.

Our consolidated draft decision includes a new section in the 2014 DAU (i.e. Part 7A) which will require Aurizon Network to undertake a baseline capacity assessment for each coal system, and to submit these to us for approval within six months of the UT4 commencement.

We have proposed Aurizon Network:

- seek to establish a common understanding of baseline capacity with access holders, access seekers and customers. This includes providing the option for an independent expert to review the baseline capacity assessments and any subsequent assessments, and for those findings to be binding on Aurizon Network and stakeholders
- seek to promptly resolve any capacity deficits revealed by Aurizon Network's baseline capacity assessments or subsequent capacity assessments
- consult actively and meaningfully with stakeholders when amending or reviewing its system operating parameters, as these parameters can adversely affect capacity
- prepare a comprehensive network development plan to provide all stakeholders with confidence that Aurizon Network is planning expansions efficiently.

Capacity allocation

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

Our consolidated draft decision proposes retaining the queuing mechanism in order to increase transparency of the capacity allocation process and ensure access holders are treated in a non-discriminatory manner.

This consolidated draft decision also proposes access holders be provided with certainty over use of contracted access rights by retaining relinquishment and resumption provisions, and ensuring renewing access holders retain priority treatment during renewals.

Short-term capacity trading

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

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

In this consolidated draft decision we are of the view that while cost socialisation is inappropriate on efficiency grounds, in the circumstances where access holders have already undertaken a number of short-term transfers on the basis of a zero transfer fee, we considered that it was inappropriate to retrospectively impose a transfer fee. We also consider that we need more information on the nature of short-term transfers. We have also updated our proposed criteria.

We are of the view that our proposed amendments will provide flexibility and certainty.

Expansion process

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

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

We propose a range of amendments to:

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

The main difference between the initial draft decision and this consolidated draft decision is in regard to the funding obligations for an expansion required to address a capacity shortfall. We agree with Aurizon Network that its obligation to fund a shortfall should be subject to certain conditions related to the cause and remedy of the shortfall. We have also made a number of clarifying amendments, including to the definitions of study scopes.

Network management principles

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

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

- increase transparency and availability of train plans and TSE-reconciliation reports, including requiring additional detail in the content of those documents

- set timelines for Aurizon Network to submit train plans, aggregate TSE-reconciliation reports and initial system rules
- subject all system rules to our approval and require that system rules be reviewed at least annually.

Regulated asset base and customer voting

The return on, and return of, capital relating to Aurizon Network's regulated asset base (RAB) is a significant component of the reference tariffs for each system in the CQCN. It is important for Aurizon Network (and investors) that it has confidence it will be able to recover the prudent and efficient costs of its investment in the CQCN. It is also important for access seekers and access holders to have confidence they will be paying no more than the prudent and efficient costs of capital expenditure projects.

We consider the arrangements for assessing the prudency of scope and efficiency of cost for capital expenditure projects in the 2014 DAU have become too complex and difficult to administer. We are proposing amendments to significantly simplify the capital expenditure approval process and include a clearer process for regulatory pre-approval of projects, which we consider will improve regulatory confidence for Aurizon Network, as well as future user funders and financiers.

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

For customer voting, we are proposing customers should vote on a package of measures (i.e. scope, standard and cost), not simply scope (as has been the case previously). This would enable the voters to make a more informed assessment of the project. We have also included requirements so there is a time limit on the vote remaining valid. Also, a new vote would be required if key project factors changed.

Volume III: Pricing and tariffs

Pricing principles

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

The 2014 DAU includes a specific process for setting new tariffs for expansion infrastructure, which is based on the principle that existing users should not be made materially worse off as the below-rail infrastructure is expanded to accommodate new users. While we accepted components of Aurizon Network's expansion pricing framework, we also had some concerns about Aurizon Network's proposed approach.

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

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

address information disclosure raised by stakeholders and to make this approach consistent with the expansion pricing framework for expanding users.

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

Reference tariffs and take-or-pay

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

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

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

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

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

Our consolidated draft decision also includes our assessment of Wiggins Island Rail Project (WIRP) pricing.

THE ROLE OF THE QCA—TASK, TIMING AND CONTACTS

The Queensland Competition Authority (QCA) is an independent statutory authority established to promote competition with the objective of enhancing efficiency and growth in the Queensland economy.

Our primary role is to ensure that monopoly businesses operating in Queensland, particularly in the provision of key infrastructure, do not abuse their market power through unfair pricing or restrictive access arrangements. Specifically, our functions are set out under section 10 of the QCA Act, which includes, amongst other things, to approve undertakings for services (s. 10(h)).

Task, timing and contacts

On 11 August 2014, Aurizon Network submitted a draft access undertaking (the 2014 DAU) for our approval. This followed extensive consultation between Aurizon Network and stakeholders on Aurizon Network's original UT4 proposal (the now-withdrawn 2013 DAU).

We commenced an investigation into the 2014 DAU in accordance with section 146 of the QCA Act.

Under section 136 of the QCA Act, we are required to either approve, or refuse to approve, the 2014 DAU and, in doing so, we are required to have regard to the factors set out in section 138(2) of the Act. Accordingly, we have assessed the 2014 DAU, in the context of the statutory access regime in the QCA Act and in accordance with the factors in section 138(2) of the QCA Act. These factors require that we take into account whether the 2014 DAU promotes the economically efficient operation of, use of and investment in the CQCN with the effect of promoting competition in other markets (e.g. the above-rail haulage market). They also encompass the legitimate business interests of Aurizon Network, as well as the interests of access seekers and, more broadly, the public interest. Further detail on the legal framework we applied is provided in Chapter 2.

In fulfilling our role and function under the QCA Act and in conducting an investigation we are required to consult with Aurizon Network and stakeholders. In this regard, we have conducted an extensive public consultation process, and relevantly:

- published on our website the 2014 DAU and Aurizon Network's supporting documentation
- published on our website our initial draft decision on the maximum allowable revenue (MAR) aspects of the 2014 DAU (September 2014) and the 2014 DAU itself (January 2015)
- published supplementary draft decisions on a short-term capacity transfer mechanism (April 2015) and reference tariffs for the Wiggins Island Rail Project (WIRP) (July 2015)
- sought submissions from interested parties.

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

In assessing the 2014 DAU, we weighed the arguments and information put forward by Aurizon Network supporting its proposal, considered stakeholders' comments and submissions, and undertook our own analysis of the issues raised by the 2014 DAU.

Key dates

In accordance with section 147A(2) of the QCA Act, we must use our best endeavours to decide whether to approve, or refuse to approve, the 2014 DAU within the specified time periods. In doing so, we must

comply with Part 6 of the QCA Act. However, we have a high degree of flexibility in the manner in which we conduct an investigation.

The Preface to this decision sets out the timing, relevant background and key dates for our current decision. In summary:

- We gave notice of our investigation and time periods on 11 August 2014.
- We considered it appropriate to sequence our initial draft decision on the 2014 DAU, and published:
  - first, on the MAR aspects of the 2014 DAU, in September 2014
  - second, on the remainder of the 2014 DAU, in January 2015.
- On 4 May 2015, we published the submissions received on the January 2015 initial draft decision and published a revised timetable for the consideration of the 2014 DAU. The revised timetable reflected an extension of the date for the final decision to 30 October 2015. The date was extended to allow time to consider the extensive submissions received, including responding to key questions raised by Aurizon Network.
- We further revised the date for our decision to 30 November 2015, to allow sufficient consultation to take place in respect of our supplementary draft decision on the WIRP, and to allow us time to integrate WIRP into our decision.
- Our consideration of the 2014 DAU also occurred in parallel with our consideration of Aurizon Network's proposed standard user funding agreement (the 2013 SUFA DAAU). We anticipate a final decision on the 2013 SUFA DAAU early in 2016.
- On 1 December 2015, we published a stakeholder notice advising that after careful consideration we will release on 16 December 2015 a further, but now consolidated draft decision, rather than our final decision. As already discussed, this will allow a period of consultation for stakeholders to process and respond to any issues contained in our consolidated draft decision.

Due to the significant complexity associated with the 2014 DAU and the volume of information we received from the parties, including the detailed WIRP pricing information provided to us on 25 September 2015, in order to ensure we have appropriately consulted with Aurizon Network and stakeholders on key issues related to the consolidation of our draft decisions, we determined it was appropriate and proper to extend the timeframe for our final decision to April 2016.

Contacts

Enquiries regarding this project should be directed to:

Queensland Competition Authority
GPO Box 2257
Brisbane QLD 4001

Tel (07) 3222 0555
www.qca.org.au/Contact-us

1 INTRODUCTION

1.1 The market context

Aurizon Network is part of the broader coal supply chain in central Queensland. The CQCN is the largest coal rail network in Australia, carrying coal from mines either for export or for domestic use including in power stations and industrial plants (Box 1). In 2013, coal exports accounted for 55 per cent of the total value of Queensland's overseas merchandise exports.[7]

Box 1 Central Queensland Coal Network

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

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

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

[7] Queensland Treasury and Trade, 2014(a): 1.

The Queensland coal industry is competing in increasingly competitive global markets. Declining coal prices have outpaced cost-cutting, thereby reducing margins and putting further pressure on the profitability and competitiveness of some CQCN mines. Despite cash margins being positive on average, the variations in competiveness between mines has meant around 30.7 million tonnes (Mt) of metallurgical coal (21 per cent of volumes) and 6.0 Mt of thermal coal (11% of volumes) had negative cash margins in 2013.[8]

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

> *… the current coal industry downturn is as severe as any in the country's history and its recovery is likely to be a three to five year process … mines have been forced to close and coal jobs have been lost … based on current prices, it would be hard to find a thermal coal mine in Queensland operating at a profit … For metallurgical coal miners, the situation is hardly better, noting that according to McCloskey's metallurgical coal on the spot market fell below 115 dollars a tonne last week – and that's for the highest quality coal.*[9]

While accepting the challenging conditions for many of its customers in the short term, Aurizon Network has indicated in its submission that it is cautiously confident about the outlook for the export coal industry in the medium to long term—noting the strong coal haulage volumes across 2013–14 for the CQCN (214.5 Mt, which is 27.1 Mt more than the previous best fiscal year of 2009–10), with a forecast volume of 204 Mt in 2014–15.[10]

1.2 Productivity, efficient costs and flexibility

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

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

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

1.3 Towards a more effective and simplified access regulation regime

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

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

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[8] Queensland Treasury and Trade, 2014(a): 2.
[9] Roche, 2014: 1, 6.
[10] Aurizon Network, 2013 DAU, sub. 2: 30; Aurizon Network, 2014(f): 2.

Governance framework

The governance framework surrounding Aurizon Network must be sufficiently robust to prevent Aurizon Network from using its vertical integration or confidential information, knowingly or unknowingly, in a manner that unfairly differentiates in favour of the Aurizon Group, to the detriment of competition in upstream and downstream markets.

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

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

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

Management of capacity

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

This requires:

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

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

Network expansion and funding

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

The Standard User Funding Agreement (SUFA) has been developed as a financing tool that provides an alternative to Aurizon Network's terms of financing for a particular expansion, where Aurizon Network is unwilling to fund the expansion at the regulated rate of return, and

instead proposes 'commercial terms'.[11] The SUFA, however, has yet to be practically tested and its use may only be cost effective for large expansions.

Trading and pricing

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

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

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

Where next with the regulatory framework?

How Aurizon Network responds in practice to the challenge of aligning its shareholders' interests with those of its customers and the public has a strong bearing on the future direction of the regulatory framework.

We would prefer a move to a light-handed framework over time but this depends largely on Aurizon Network. In our view, the undertaking remains excessively prescriptive, but this view largely reflects the information we receive and the perceived transparency of Aurizon Network's decision-making.

We consider that Aurizon Network needs to become comfortable with, and accepting of, its status as a regulated entity within a vertically integrated structure. When it reaches this point, we can consider a light-handed approach.

[11] The funding of expansions of the CQCN is complicated by the fact that although Aurizon Network can be obliged under the QCA Act to expand the CQCN, it does not have to bear the costs of the expansion (see s. 119 of the QCA Act)

2 LEGISLATIVE FRAMEWORK

This chapter sets out our application of the legislated framework in making this decision (referred to as our 'consolidated draft decision') and is comprised of two parts.

- *Part A sets out the legislated framework.*

  This part does not refer to specific definitions, clauses or approaches outlined in Aurizon Network's proposal. The application of the legislated framework to Aurizon Network's proposal is contained in the subsequent chapters and in our marked-up version of the 2014 DAU and associated documents.

- *Part B, responds to specific issues raised by Aurizon Network following the initial draft decision regarding the legislated framework.*

2.1 Introduction

Declared service

The use of a 'coal system' for providing transportation by rail is a declared service for the purposes of Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act) by operation of section 250(1)(a) of the QCA Act and is referred to in this consolidated draft decision as the 'declared service'.

A 'coal system' means rail transport infrastructure (a 'facility' under section 70 of the QCA Act) that is part of the Blackwater system, Goonyella system, Moura system or Newlands system, which is directly or indirectly connected to one of the aforementioned systems and is owned or leased by Aurizon Network (or one of its related bodies corporate), as defined in section 250(3) of the QCA Act.

A 'coal system' also includes an extension[12] of that coal system that:

- is built on or after 30 July 2010
- does not directly connect the coal system to a coal basin to which the coal system was not directly connected on 30 July 2010; and
- is owned or leased by Aurizon Network (or one of its related bodies corporate).[13]

The relevant rail transport infrastructure comprising the 'coal system' is collectively referred to in this consolidated draft decision as the 'central Queensland coal network' (CQCN).

The concept of 'rail transport infrastructure' adopts the extended meaning set out in schedule 6 of the *Transport Infrastructure Act 1994* (Qld), defined as all facilities necessary for operating a railway (including various specified things associated with a railway's operation, such as train operation control facilities and overhead electrical power supply systems).

As a result of the declaration of the use of the CQCN, Aurizon Network (as the access provider for the service) and access seekers are subject to various rights and obligations under Part 5 of

[12] Extension is defined broadly under schedule 2 of the QCA Act to include 'an enhancement, expansion, augmentation, duplication or replacement of all or part of a facility.'
[13] Section 250(4) of the QCA Act.

the QCA Act, including an obligation to negotiate access to the service in good faith (s. 100 of the QCA Act).

Access undertaking

Aurizon Network is the responsible person for the 2010 access undertaking (2010 AU) that we approved on 1 October 2010. The 2010 AU is an access undertaking previously given by QR Network[14] in relation to the declared service under section 136 of the QCA Act. The 2010 AU is set to expire on 29 February 2016.

On 11 August 2014, Aurizon Network voluntarily submitted a draft access undertaking under section 136 of the QCA Act (the 2014 DAU) in relation to the declared service for our approval. The 2014 DAU replaces an earlier draft access undertaking submitted by Aurizon Network that was withdrawn on the same date (the 2013 DAU).

In accordance with section 147A(2) of the QCA Act, we must use our best endeavours to decide whether to approve, or refuse to approve, the 2014 DAU within the time periods specified in that section.

If we approve the 2014 DAU, Aurizon Network must comply with the approved access undertaking in accordance with section 150A of the QCA Act. Accordingly, Aurizon Network would be required to offer third party access in accordance with the terms of the 2014 DAU. If we refuse to approve the 2014 DAU, we must give reasons for the refusal and state the way in which we consider it appropriate to amend the DAU. The QCA Act does not prescribe the level of detail we are required to articulate for any amendments we require.

The relevant legislated framework for a decision in respect of a decision whether to approve the 2014 DAU is set out in sections 136 and 138 of Division 7 of Part 5 of the QCA Act.

PART A: Legislative framework for access undertakings

2.2 Part 5 of the Queensland Competition Authority Act 1997

Part 5 of the QCA Act sets out the legislated framework for Queensland's third party access regime and facilitates access to services provided by means of significant infrastructure through:

- the declaration of a service and arbitration of access disputes
- the provision of access undertakings
- the ability to make access codes for declared services and to provide rulings.

Part 5 of the QCA Act broadly mirrors the national access regime set out in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA).

Division 7 of Part 5 deals with access undertakings for both declared and non-declared services.

The explanatory notes to the *Queensland Competition Authority Bill 1997* (QCA Bill) explained the rationale for Part 5 of the QCA Act in the following terms:

> *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*

[14] Aurizon Network was formerly known as QR Network until it was rebranded in December 2012.

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.

The Bill provides for a streamlined approach to access, and incorporates mechanisms to increase certainty for infrastructure owners and prospective users alike. [15]

2.3 Voluntary access undertakings (s. 136)

Division 7 (subdivision 1) of Part 5 of the QCA Act deals with the preparation and approval of draft access undertakings.

Section 136(1) of the QCA Act permits Aurizon Network, as the owner or operator of a declared service, to voluntarily submit a draft access undertaking to us. We must then consider the draft access undertaking and either approve it, or refuse to approve it (s. 136(4)).

We may only approve a DAU if, after having regard to the factors set out in section 138(2)(a)–(h), we consider it appropriate to do so.

If we refuse to approve the draft access undertaking, section 136(5) of the QCA Act requires that we give Aurizon Network a written notice stating the reasons for the refusal and the way in which we consider it is appropriate to amend the draft access undertaking.

2.4 Section 138(2) of the QCA Act

Section 138(2) of the QCA Act requires that we have regard to each of the factors listed at paragraphs (a) to (h) and ask whether we are satisfied the draft undertaking is appropriate in light of those factors, which is done by balancing the competing interests arising from those factors and making such value judgments as fall to be made by us as the decision-maker.

The factors guiding our decision-making process are set out in Box 2 below.

[15] Explanatory notes, *Queensland Competition Authority Bill 1997* (Qld): 3–4.

Box 2: The legal framework

The QCA may approve the 2014 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.*

Our approach to section 138(2) is as follows.

2.4.1 'Appropriate'

We must determine whether the 2014 DAU provided to us is 'appropriate'. This confers a broad discretion on us.

We accept the exercise of that discretion must be consistent with the factors set out in section 138(2)(a)–(h), the object of Part 5 of the QCA Act, and the purposes of the Act.

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

We are not assessing an undertaking against an optimal or preferred standard; rather, we are considering whether the undertaking is 'appropriate' by reference to all the statutory factors, including their application and relative weighting. For example, section 138(2)(h) enables us to consider as a relevant consideration other drafting formulations when determining whether the proposed undertaking overall meets the 'appropriate' standard.

2.4.2 'Have regard to'

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

The phrase 'have regard to' has been interpreted by Australian courts as requiring the decision-maker to take into account the matter to which regard is to be had and given weight, as an element in making the decision.[16] The language is intended to convey no more than the factor must be regarded.

Accordingly, we are to consider the identified factors, rather than treat them as fundamental elements in the decision-making process, provided that consideration of the factors is a 'jurisdictional prerequisite' to the making of the decision.[17]

This language does however direct us as to how this particular provision operates and the conclusion that we are not to substitute our own preferred criterion for those the statute specifically requires be taken into account.

2.4.3 'Weight'

In determining whether the 2014 DAU provided is appropriate by 'having regard' to each of the factors set out in section 138(2)(a)–(h) of the QCA Act, we note that neither the Act nor the explanatory material for the QCA Act prescribes the relative weight to be given to each factor.[18] The High Court of Australia has indicated that in the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard (as is the case in the QCA Act), it is generally for the decision-maker to determine the appropriate weight to be given to them.[19]

In the context of assessing the 2014 DAU, we have taken into consideration each of the factors listed in section 138(2)(a)–(h), with a relative weighting for each factor, as we consider appropriate. The weighting we assigned is not divorced from the particular context— but

[16] DC Pearce and RS Geddes, Statutory Interpretation in Australia (7th Ed, 2011) [12.15].
[17] *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248.
[18] Queensland, Legislative Assembly, 1997, Record of Proceedings (30 April 1997): 1130–1132; Queensland, Legislative Assembly, 2008, Record of Proceedings (13 February 2008): 150–151; Queensland, Legislative Assembly, 2010, Record of Proceedings (5 August 2010): 2517–2519; and see, for example: Explanatory notes, *Queensland Competition Authority Bill 1997* (Qld): 33; explanatory notes, *Queensland Competition Authority Amendment Bill 2008* (Qld): 12; explanatory notes, *Motor Accident and Other Legislation Amendment Bill 2010*: 21.
[19] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 (per Mason J).

rather was informed by the policy and purpose of Part 5 of the Act, and our weighting was set accordingly.

2.5 The object of Part 5 of the QCA Act (s. 138(2)(a))

The object of Part 5 of the QCA Act is one of the matters we must have regard to when deciding whether to approve, or refuse to approve, a draft access undertaking (s. 138(2)(a)).

The object of Part 5 of the QCA Act 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.*[20]

This provision was inserted by the Queensland Government to meet its commitment under the Council of Australian Governments (COAG) *Competition and Infrastructure Reform Agreement 2006* (CIRA) that all states and territories would introduce a nationally consistent object clause to support consistency in access regulation across Australia.

2.5.1 Economically efficient outcomes for the operation of, use of and investment in, the CQCN

We consider there are a number of interconnected aspects to promoting economically efficient outcomes for the operation of, use of and investment in, the CQCN. These include:

- efficient operation of the existing CQCN infrastructure, including the efficient allocation of existing capacity within the CQCN
- efficient expansion of the CQCN to provide new capacity at efficient cost
- ensuring that capacity is allocated within the CQCN as part of the broader mine-to-port supply chain to maximise the productivity of coal production in Queensland.

Efficient operation of the existing CQCN infrastructure

In order for the 2014 DAU to promote economically efficient operation and use of the CQCN infrastructure, we are of the view it would need to ensure there is no unfair differentiation[21] and enhance the transparency associated with:

- capacity measurement and assessment systems
- the efficient allocation of existing capacity within the CQCN
- network management principles
- system rules
- maintenance practices.

We also consider this is necessary to improve the technical processes and approach to customer engagement for communicating why operational practices result in economically efficient outcomes.

[20] Section 69E of the QCA Act.

[21] 'Unfair differentiation' is a concept that is used in several sections of the QCA Act. This concept is further discussed in Chapter 3.

Efficient expansion of the CQCN

We consider economically efficient operational practices on the existing network are a pre-requisite for efficient expansion. We are also of the view that efficient operational practice requires the use of potential operational solutions to mitigate relevant bottlenecks to reduce the need for expansions.

The 2014 DAU should therefore ensure there is no unfair differentiation where it has a material effect on the ability of users or access seekers to compete and should enhance the transparency and efficiency of processes associated with:

- identifying and mitigating bottlenecks
- identifying the need to expand the network
- actioning expansions to the network.

Again, we also consider this is necessary to improve the technical processes and approach to customer engagement underpinning the expansion process.

Supply chain coordination

Developing an effective long-term solution and improving alignment across central Queensland's coal supply chains has the potential to increase the economic efficiency of the CQCN in terms of current capacity and future expansion.

We are of the view that supply chain coordination is a key element of the object of Part 5 of the QCA Act. In the absence of instituting a regime for effective coordination, the 2014 DAU would fail to promote a critical aspect of the efficient operation of, use of and investment in, the CQCN.

In this respect, we consider the 2014 DAU should complement the development of supply chain coordination in the CQCN, including ensuring that participants have the information necessary to make informed coordination decisions.

2.5.2 Promoting effective competition in upstream and downstream markets

In assessing whether or not the 2014 DAU will promote competition, we must consider the relevant upstream and downstream markets affected by the provision of the declared service and the manner in which provision of that service will have the effect of promoting effective competition in those dependent markets.

In the context of the concept of 'promoting competition' in the declaration criteria in section 44H(4)(a) of the analogous national access regime in the CCA, the Australian Competition Tribunal has previously provided the following guidance, which is of some use in interpreting this term in the QCA Act:

> *The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise.*[22]

The Australian Competition Tribunal has also relevantly stated in a similar context:

[22] *Re Sydney International Airport* [2000] ACompT 1 at [106].

> *Before turning to the specific arguments raised in this matter, we must address the question of what is meant by the term "promote competition" in s 44H(4)(a) of the Act. The Tribunal has expressed a view in the past that the promotion of competition test does not require it to be satisfied that there would necessarily or immediately be a measurable increase in competition. Rather, consistent with the purpose of Pt IIIA being to unlock bottlenecks in the supply chain, declaration is concerned with improving the conditions for competition, by removing or reducing a significant barrier to entry. Other barriers to entry may remain and actual entry may still be difficult and take some time to occur, but as long as the Tribunal can be satisfied that declaration would remove a significant barrier to entry into at least one dependent market and that the probability of entry is thereby increased, competition will be promoted.*[23]

The object clause of Part 5 of the QCA Act was included in the QCA Act in 2008 in accordance with the Queensland Government's agreement to implement a nationally consistent object clause in third party access regimes, as set out in the CIRA.

Parliament's intention behind the object clause was to, amongst other things, emphasise the need for Part IIIA decisions to promote competition by promoting the economically efficient operation and use of investment in infrastructure.[24] Accordingly, part of the role of the QCA in making decisions about whether to approve, or to refuse to approve, a draft access undertaking is to consider the effect that that draft access undertaking may have on the object of the access regime.

We consider that Aurizon Network continues to have the ability and incentive to use its market power to adversely affect competition in a number of dependent markets, particularly as the Aurizon Group has its own above-rail operations in the CQCN.[25] Accordingly, in light of the object of Part 5 of the QCA Act, we consider the 2014 DAU should seek to:

- minimise impediments to access to the declared services, and hence minimise barriers to entry and participation in upstream and downstream markets.
- improve the conditions for competition in upstream and downstream markets by providing tangible evidence of the economically efficient provision of access within the CQCN.
- more specifically, improve the conditions for competition in upstream and downstream markets throughout Queensland's coal supply chain and other affected markets.

2.6 The legitimate business interests of Aurizon Network (s. 138(2)(b) and (c))

Section 138(2) of the QCA Act provides that we may approve a DAU only if we consider it appropriate to do so having regard to, among other things:

- the legitimate business interests of the owner or operator of the service (s. 138(2)(b))
- the protection of the legitimate business interests of the operator of the service, if the owner and operator of the service are different entities (s. 138(2)(c)).

The term 'legitimate business interests' is not a defined term under the QCA Act, but has been considered in other similar contexts as further discussed below.

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[23] *Re Services Sydney Pty Limited* [2005] ACompT 7 at [131].
[24] Commonwealth of Australia, House of Representatives, 2005, Parliamentary Debates, Volume 10: 3.
[25] For an assessment of the relevant dependent markets in relation to the declared service, see Queensland Government, 2010(a): 12–14.

2.6.1 Consideration of legitimate business interests by the ACCC

The CCA requires the consideration of an access undertaking by the ACCC to have regard to, among other things, the legitimate business interests of the provider (s. 44ZZA(3)(a) of the CCA). The ACCC has, in a number of arbitration determinations, and in its own publications, considered the meaning of the term 'legitimate business interests'. The ACCC has indicated that this term:

- refers to the commercial considerations of the service provider such as the provider's obligations to shareholders and other stakeholders, including the need to earn normal commercial returns on the facility
- includes ensuring that the access provider has appropriate incentives to maintain, improve and invest in the efficient provision of the facility
- is unlikely to extend to achieving for an access provider a higher than normal commercial return through the use of market power. However, access providers should not be precluded from earning higher than normal commercial returns, where these returns are generated from, for example, innovative investments or unique cost cutting measures rather than through the exercise of market power
- could include taking into account obligations imposed on the service provider by government (such as community service obligations) and binding contractual obligations of the service provider. [26]

2.6.2 Consideration by the Australian Competition Tribunal

In *Re Telstra Corporation Limited*, the Australian Competition Tribunal considered the 'legitimate business interests' criterion under the analogous section 152AH(1)(b) of the CCA (then the *Trade Practices Act 1974* (Cth) (TPA)) in the context of access to certain declared telecommunications services supplied over telecommunications network infrastructure owned and operated by Telstra. The Tribunal stated that the legitimate business interests of Telstra relate to Telstra having an interest in recovering the costs of supplying the relevant service and achieve a normal return on its invested capital used in supplying the relevant service. Specifically, the Tribunal stated:

> *The expression 'legitimate business interests' is a general expression and is somewhat open-textured. What is 'legitimate' conduct or a 'legitimate' interest in business may be open to a number of differing interpretations. We consider that a carrier's 'legitimate business interests' is a reference to what is regarded as allowable and appropriate in commercial or business terms. In the context of s152AH(1)(b), 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.*[27]

The Tribunal cited the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth) that introduced Part XIC into the Act as support for its view, which relevantly stated:

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[26] ACCC (2006) Arbitrations—A Guide to Resolution of Access Disputes under Part IIIA of the TPA: 27–28; ACCC (2006), Assessment of Telstra's ULLS Monthly Charge Undertaking—Final Decision: 23; ACCC (2007), Arbitration Report of Access Dispute between Services Sydney Pty Ltd and Sydney Water Corporation: 20.

[27] *Re Telstra Corporation Limited* [2006] ACompT 4 at [89].

> *Consistent with Part IIIA of the TPA, the references here to the 'legitimate' business interests of the carrier or carriage service provider and to the 'direct' costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.*[28]

In *Application by Telstra Corporation Limited*, the Tribunal, in reviewing a decision of the ACCC to reject an access undertaking in relation to the unconditioned local loop service (ULLS) that had been submitted to it by Telstra, held that a price to be charged by Telstra would be consistent with its legitimate business interests if it were charged as though Telstra faced competition in the provision of the ULLS. The Tribunal noted that:

> *no business has a right to revenues higher than those obtainable in a competitive market.*[29]

We consider the 'legitimate business interests' of an owner or operator of a facility are those commercial interests of the owner or operator that, if catered for, should allow the owner or operator to recover the costs in providing the relevant service and to earn a normal (regulated) return on its invested capital used in supplying the relevant service. As noted by the Tribunal, this is subject to the constraint that overall revenues obtained in providing the relevant service are not higher than those obtained in a competitive market.

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'.

2.6.3 Test against a competitive market

The relevant market structure against which an entity's 'legitimate business interests' should be assessed is a market resembling (as far as possible) a competitive market structure (rather than a monopoly market structure). This is the structure to which the Tribunal and the ACCC have had regard when considering the 'legitimate business interests' of service providers. Of course, a service provider is entitled to earn a return on its capital. However, as discussed above, a service provider's 'legitimate business interests' will be preserved where they earn a normal commercial return as opposed to a monopoly rent. Further, an outcome of a competitive market structure is that the operating and maintenance cost associated with providing a relevant service should be efficient.

2.6.4 Balance of legitimate business interests against other criterion

In our view, section 138(2) of the QCA Act does not require that, in circumstances where the interests of an access provider, access seeker and the public are not aligned, the interests of the access provider must be given priority. Rather, section 138(2) requires us to undertake a balancing exercise having regard to the matters in paragraphs (a)–(h) of section 138(2). We refer to our comments in relation to the phrase 'having regard to' in Section 2.4 above.

2.7 The public interest (s. 138(2)(d))

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

The DSDIP's submission in relation to the 2014 DAU noted that:

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[28] Explanatory memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth): 43.
[29] *Application by Telstra Corporation Limited* [2010] ACompT 1 at [192].

> *The coal industry is a key part of the Queensland economy, employing an estimated 28,000 people, and contributing $1.7 billion in royalties in 2012-13, with the majority of this impact from Central Queensland. In total, mining made up around 9 per cent of the Queensland economy in 2012-13, up from just under 6 per cent in 2002-03; coal represents more than two-thirds of this mining contribution.*[30]

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

The provision of effective access to the CQCN via an undertaking has the potential to enhance the efficiency of Queensland coal producers seeking to compete with rivals for the sale of coal to global customers. The undertaking ought to support the continued competitiveness of Queensland's coal mining sector, which we consider is within the public interest, as that term appears in section 138(2)(d).

Furthermore, effective supply chain coordination, the ability to trade access rights and cost reflective prices for access should all work together to ensure that resources are used for the most efficient provision of access. In this way, investment in potential surplus capacity or in assets which might ultimately be underutilised could be better avoided, and better use could be made of the State's land and other strategic resources. Again, these are matters that further the public interest.

2.8 Interests of access seekers and holders (s. 138(2)(e))

Section 138(2)(e) of the QCA Act requires us to have regard to the interests of persons who may seek access to the service. We also consider that the rights of existing access holders are relevant under section 138(2)(h), to the extent they are not already access seekers under section 138(2)(e).

To assess the interests of access seekers (and holders), we have consulted extensively, on both the 2013 DAU and the resubmitted 2014 DAU.[31] Consideration of submissions is important given section 138(2)(e) and our consultation requirements set out under section 138(3)(c) and (d) of the QCA Act. A wide range of considerations were raised by access seekers and access holders in the context of the public consultation process and are discussed in this consolidated draft decision.

2.8.1 Treatment of train operators as access seekers

For the avoidance of doubt, section 138(2)(e) of the QCA Act encompasses the interests of train operators, as access seekers or potential access seekers. They too ought to have the benefit of the protections of Part 5 of the QCA Act, as well as those within the undertaking. This is because the access arrangements in the CQCN provide for train operators to hold access rights in their own right, or provide train operations for access holders. We have received submissions from Aurizon Operations, Asciano and BMA (each train operators in the CQCN). The views of train operators (among those of other stakeholders) have been considered in coming to our consolidated draft decision.

[30] DSDIP, 2014 DAU, sub. 47: 1.
[31] Public submissions are available on the QCA website.

2.8.2 Coal and non-coal access seekers

The 2014 DAU is primarily drafted in the context of the movement of coal across the CQCN. The 2014 DAU is also applicable to non-coal access seekers, with the CQCN transporting grain and other bulk commodities. However, to the extent that the predominant use of the CQCN is access for haulage of coal, it is appropriate that the undertaking be predominantly focused on the provision of access for coal related activities.

2.9 The pricing principles in section 168A of the QCA Act (s. 138(2)(g))

Section 138(2)(g) requires us to have regard to the pricing principles in section 168A . The pricing principles provide a transparent framework for determining price limits, the structure of access charges and dealing with issues of price discrimination.

In having regard to the pricing principles, we have, as set out above, the discretion to weigh and balance each of the factors in section 138(2). This is discussed further below.

2.9.1 Application of section 168A

Section 168A provides that 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.*

The pricing principles set out in section 168A were inserted in the QCA Act in 2008, in accordance with the *Competition and Infrastructure Reform Agreement* (CIRA). The CIRA agreed that, amongst other things, all third party access regimes would include consistent regulatory principles, including consistent 'pricing principles'.[32]

The nationally consistent pricing principles included in the QCA Act reflect the pricing principles in section 44ZZCA of the TPA. In amending the TPA to include section 44ZZCA, the Revised Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2006* (NAR Bill) stated:

> *The Government's intention is that the Commission be required to have regard to the pricing principles, but the Commission need not require each and every principle to be satisfied. The weight to be given to each principle is to be a matter for the Commission.*[33]

While the QCA will have regard to each pricing principle, this direction to the Commission is relevant to the QCA—that is, we will exercise our discretion in considering the pricing principles.

2.9.2 Section 168A(a)—'efficient' costs

Prices and efficient costs

Section 44ZZCA(a)(i) provides that:

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[32] *Competition and Infrastructure Reform Agreement*, 2006: cl. 2.4.
[33] Revised explanatory memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth): 65.

> *The pricing principles relating to the price of access to a service are: (a) that regulated access prices should: (i) be set so as to generate revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services…*

The Revised Explanatory Memorandum to the NAR Bill explained the intention governing the introduction of the pricing principles as follows:

> *… To address this concern, this principle provides that regulated access prices should be set so as to generate expected revenue across a facility's regulated service or services that is at least sufficient to meet the efficient costs of providing access to these services, and include a return on investment commensurate with the regulatory and commercial risks involved. This sets a revenue floor without necessarily constraining individual prices.*
>
> *The motive for regulating access prices is that, in the absence of regulation, the exercise by infrastructure providers of monopoly power could result in prices that are inefficiently high. However, a pricing regime that sought to force prices continually down to costs would erode incentives for firms to drive costs down or to innovate. This principle aims to balance the setting of access prices to include a return reflecting the commercial and regulatory risks associated with the investment (and thus not deter investment), while addressing monopoly pricing concerns.*[34]

In July 2008, the ACCC in its 'Final Decision: Australian Rail Track Corporation Access Undertaking – Interstate Rail Network' in respect of section 44ZZCA(a)(i) stated that:

> *The ACCC's understanding of pricing principle (a) is that it is intended to set a 'revenue floor' for the revenue raised by the provider from access charges, being the 'efficient costs of providing access to the regulated service.*[35]

The National Competition Council's approach to the assessment of an application of the nationally consistent pricing principles, is set out below:[36]

> *3.220 Clause 6(5)(b)(i) reflects a desire that regulated prices should not give facility owners a free rein to extract large rents (this promotes allocative efficiency and 'fairness'), but that they also should not reduce a facility owner's profits to such an extent as to deter investment in such facilities (this promotes dynamic efficiency).*
>
> *3.221 The principle emphasises that prices should be set to reflect efficient costs, not actual costs. This provides an incentive for service providers to achieve cost efficiencies.*
>
> *3.222 In determining efficient costs the regulator is to take account of the risks the service provider faces. The risks include those that would arise in a normal commercial setting as well as those that derive from being subject to regulation. The above passages make clear that the intention was never to enable an access provider to recover more than its efficient costs (i.e. setting prices that are inefficiently high).*

QCA position

Section 168A(a) states that the price of access should be 'at least enough to meet the efficient cost of providing the service. The purpose of the words 'at least' is merely to qualify this requirement to ensure that the relevant measure of cost is not short-run marginal cost, but was a measure of cost that enables the access provider to recover its efficient costs.[37] As is made clear above, the intention was not to enable an access provider to set prices that are inefficiently high.

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[34] Revised explanatory memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth): 65.
[35] ACCC, 'Final Decision: Australian Rail Track Corporation Access Undertaking—Interstate Rail Network', July 2008: 26.
[36] National Competition Council, 'Certification of State and Territory Access Regimes: A guide to Certification under Part IIIA of the *Trade Practices Act 1974* (Cth)', October 2010: 67.
[37] Revised explanatory memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth): 65.

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

Measurement of efficient cost

Section 168A(a) of the QCA Act refers to the 'efficient costs' of providing a service but does not specify how those costs are to be measured. Identifying what makes an efficient cost is not a straightforward task and there are a number of ways efficient costs can be measured or estimated.

As we identified, for example, in the Statement of Regulatory Pricing Principles for the Water Sector in December 2000:

> *The most common means of estimating efficient costs is to benchmark the performance of a particular utility against other relevant businesses, or to establish performance indicators independently. Under these approaches, efficiency levels for inputs, unit costs and quality of service are set on the basis of lowest-cost, highest-service standards (van den Berg 1997). Key difficulties include the general lack of an appropriate set of businesses against which valid operational conclusions can be drawn, and the scarcity of relevant information available to the regulator. Also important is recognition of the trade-off between capital maintenance and capital costs that utilities may employ–where higher operating, maintenance and administration (OM&A) costs may be offset by lower immediate capital refurbishment expenses.*[38]

In that case, we indicated that given such difficulties, it was appropriate to evaluate the relevant costs on an individual basis, including by benchmarking against other relevant organisations (and particularly those subject to competitive disciplines on costs). We also indicated that it was appropriate to have regard to the historical costs of the relevant organisation in light of any time series of comparative data:

> *In at least one case, the relevant regulator has concluded that these difficulties are significant enough to warrant acceptance of the OM&A costs projected by the regulated organisations (at least until sufficient time has elapsed to enable a time series of comparative data to be collected). In general, the Authority considers that operating costs should reflect efficient service delivery given the scale and nature of the business activity, and that costs would be evaluated on an individual basis including benchmarking against other relevant organisations.*[39]

QCA position

The measurement of efficient costs as a practical matter, will depend on the evidence made available to the QCA, which given the information asymmetries between the QCA and the access provider, impacts our ability to assess whether its costs are 'at least enough to meet the efficient costs of providing access'. Accordingly, the quality of supporting evidence is a key consideration when considering whether the costs as submitted are 'at least efficient'.

2.9.3 Allocation of costs

When considering the pricing principles, section 168A(b) and (c) of the QCA Act deal with cost allocation.

Multi-part pricing

Relevantly, section 168(A)(b) refers to multi-part pricing 'when it aids efficiency'. In this regard, we note that the Revised Explanatory Memorandum for the NAR Bill states:

[38] QCA, Statement of Regulatory Pricing Principles for the Water Sector (December 2000): 46.
[39] QCA, Statement of Regulatory Pricing Principles for the Water Sector (December 2000): 46.

> *In order to prevent facility owners from using price discrimination in anti-competitive ways and thereby breaching Part IV of the TP Act, Pricing Principle (b)(i) makes it clear that such pricing structures are only allowed where they aid efficiency.*[40]

Section 168A(b) provides for a price to allow for multi-part pricing and price discrimination, when it aids efficiency. In this context, we must consider whether the proposed tariff arrangements for the 2014 DAU provide appropriate price signals to access seekers and holders for the efficient use of infrastructure in the CQCN and if there is a clear case for price discrimination.

Vertical integration

In respect of section 168A(c), the price for access services should not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its own downstream operations, except to the extent that the costs of providing access to other operators is higher. This ensures those who use the declared service compete on their relative merits.

We must also have regard to section 137(1A)(b) of the QCA Act when considering cost allocation. Section 137(1A)(b) applies to Aurizon Network as a 'related access provider', namely an access provider that not only owns or operates the declared service, but also provides, or proposes to provide, access to the service to itself or a related body corporate.

Section 137(1A) requires that Aurizon Network's access undertaking 'must' include provisions for

- preventing Aurizon Network from recovering, via the access price, costs that are not reasonably attributable to the provision of the service (s. 137(1A)(b))
- terms that do not discriminate in favour of the access provider's operations or a related party's operations (s. 137(1A)(a)).

Sections 137(1A)(b) and 168A(c) require that we approve an undertaking if it prevents Aurizon Network from recovering, via the access price, costs that are not reasonably attributable to the provision of the service or giving a competitive advantage to Aurizon Network's related parties.

2.9.4 Incentives to reduce costs or improve efficiency

Under section 168A(d), we are also required to consider whether the proposed access pricing contained in the undertaking will provide Aurizon Network with incentives to reduce costs or otherwise improve productivity. This clause seeks to replicate the discipline imposed in a competitive market, requiring an access price that provides incentives to reduce costs or otherwise improve productivity.

The QCA Act however does not prescribe the specific mechanisms by which this is to be achieved. In this regard, the ACCC has observed that:

> *…incentives to reduce costs and improve performance under any access pricing regime depends on how closely linked an access provider's general level of prices are to the access provider's actual costs associated with providing those services.*[41]

As discussed above, our ability to assess efficient costs of providing access and whether the price provides efficiency incentives will depend on evidence from the access provider.

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[40] Revised explanatory memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth): 67.
[41] ACCC, 'Final Decision: Australian Rail Track Corporation Access Undertaking—Interstate Rail Network': 28.

Evidence showing how closely linked an access provider's general level of prices are to the access provider's actual costs associated with providing those services is a consideration when considering whether the proposed access price delivers appropriate incentives of efficiency improvements.

2.9.5 The importance of section 138(2)

Our assessment of whether a price proposed in a draft access undertaking is appropriate is not purely determined by whether or not it is a price that is at least enough to meet the efficient costs.

The price of access to a service, which is derived from the application of the pricing principles in section 168A, is only one of the factors that we have regard to in considering whether it is appropriate to approve an undertaking.

As discussed at Section 2.9.1 above, in assigning a weight to the various factors in section 138(2) and balancing the various competing considerations, we are able to at our discretion conclude that other factors (e.g. the interests of access seekers and/or the public interest) deserve greater consideration than another factor (e.g. the pricing principles).

Accordingly, the output of the application of the pricing principles contained in section 168A is considered in light of, and in context with, the other factors in section 138(2) of the QCA Act.

2.10 Any other issues the QCA considers relevant (s. 138(2)(h))

Section 138(2)(h) of the QCA Act requires us to have regard to any other issues that we consider relevant. We are therefore permitted to exercise our judgment as to what other issues we consider to be relevant. In addition to the issues we have identified above, we consider the following issues are relevant:

- the extent to which the 2010 AU should be used as a benchmark in order to promote commercial certainty
- the extent to which sections 118 and 119 of the QCA Act are relevant in the context of extensions and enhancements to the CQCN
- the extent to which commercially negotiated outcomes should be recognised under the negotiate–arbitrate principle
- the extent to which the 2014 DAU promotes greater supply chain coordination
- the need for clarity and certainty

Each of these issues and their relevance are discussed in turn below.

2.10.1 Role of the 2010 AU as a benchmark

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

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

While we acknowledge the utility of having regard to the 2010 AU (and have ourselves taken it into account in considering some aspects of the 2014 DAU), it provides no more than a useful

starting point for a contextual assessment of the proposed undertaking. Where relevant, it is a factor we have regard to but this does not mean we take the approach that the 2014 DAU must have the same terms and conditions as the 2010 AU in order for us to consider it appropriate to approve. Equally, if the undertaking included a 2010 AU provision, this does not mean it is automatically 'appropriate'. The 2014 DAU, for example, reflects industry developments since 2010 and this must be taken into account. The exercise we must undertake in applying the statutory factors in the QCA Act needs to reflect today's considerations, not those that applied at the time the 2010 AU was accepted.

2.10.2 Sections 118 and 119 of the QCA Act

Section 118(1)(d) of the QCA Acts allows for an access determination to require an access provider to extend, or permit the extension of, the facility. However, section 119(2) imposes limitations on the making of an access determination. The limitations imposed on the making of an access determination include the QCA making an access determination that:

(a) reduces the amount of service able to be obtained by the service provider

(b) results in an access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement

(c) requires an access provider to pay some or all of the costs of extending the facility.

Although these sections of the QCA Act are not triggered unless an access dispute arises, they do provide some context for the SUFA and expanding the network. The SUFA is being considered separately.

2.10.3 Negotiate–arbitrate model and primacy of commercial negotiations

The third party access regime in the QCA Act is underpinned by a 'negotiate–arbitrate' approach to regulation, with the regime incorporating the principle of the 'primacy of contractual negotiations'.

In its Application to the National Competition Council for a Recommendation on the Effectiveness of an Access Regime (June 2010), the Queensland Government said:

> *The Regime incorporates the primacy of contractual negotiations through the adoption of a 'negotiate-arbitrate model' in the QCA Act. This operates so that once a service is declared the following process applies:*
>
> *(a) the service provider is obliged to negotiate with the access seekers in respect of an access agreement; and*
>
> *(b) if, and only if, commercial agreement cannot be reached then an access dispute may be raised and arbitration by the QCA is available.*[42]

The Queensland Government also said that:

> *The primacy of contractual negotiations is also recognised by the Access Undertaking which contains the following provisions:*
>
> *(a) a detailed negotiation framework to facilitate commercial negotiation;*
>
> *(b) a dispute resolution process where commercial agreement cannot be reached; and*
>
> *(c) an acknowledgement that the standard access agreement approved by the QCA (Standard Access Agreement) applies 'unless otherwise agreed between QR Network and the Access Seeker'. This acknowledges that the Standard Access Agreements only apply*

[42] Queensland Government, 2010(b): 30–31.

> *when commercial agreement has not been reached. This applies irrespective of whether the Access Undertaking has been submitted voluntarily under section 136 of the QCA Act or the QCA has required the owner or operator to submit the Access Undertaking under section 133 of the QCA Act.*[43]

Parties should endeavour to negotiate a mutually beneficial outcome before they resort to arbitration. However, arbitration is recognised as an appropriate means to resolve disputes in the absence of commercial agreement, given the inherent asymmetry in bargaining power between Aurizon Network and users of the CQCN. Importantly, if the dispute resolution process is not credible, the negotiation process can be unduly biased in favour of Aurizon Network because the dispute resolution process does not provide a viable mechanism to deal with asymmetry in bargaining power.

An access undertaking is a means to provide certainty by setting out the terms and conditions on which Aurizon Network will provide access, and avoid these arrangements being developed separately with each access seeker. It also provides certainty in the event there is an access dispute, as any access determination we make must not be inconsistent with an approved access undertaking (s. 119(1)(a) of the QCA Act). In considering the application of the negotiate–arbitrate model and the primacy of contractual negotiations, we have therefore considered how the 2014 DAU and the standard access agreements:

- affect the role of customer engagement
- affect the balance of negotiation strength
- impact on barriers to participation, whether real or perceived
- affect the flow of relevant and timely information
- provide for effective dispute mechanisms, accountability and transparency to the extent practicable.

Failure to achieve the correct balance of outcomes in these matters can impede our ability to achieve the objective of Part 5 of the QCA Act.

2.10.4 Supply chain coordination

While variously already contemplated by the other section 138(2) factors, we consider supply chain coordination has a significant role to play in achieving the desired regulatory outcomes by:

- facilitating economically efficient outcomes for the CQCN
- increasing transparency with respect to capacity availability
- improving end-to-end supply chain capacity alignment
- ensuring end-to-end supply chain costs are minimised and throughput maximised.

The way in which the 2014 DAU and the standard agreements approach the following issues could have implications for the efficiency of both the CQCN and Queensland's coal supply chain:

- supply chain coordination and developing long term co-operative solutions
- capacity measurement and management within the CQCN
- capacity measurement, management and alignment across the end-to-end supply chain

[43] Queensland Government, 2010(b): 31.

- the trade-off between expansions and operational solutions.

It could also impact on global perceptions of Queensland's coal sector with respect to its competitiveness and reliability. As noted above, these considerations are also relevant to section 138(2)(d) of the QCA Act.

2.10.5 The need for clarity, certainty and predictability

Section 138(2)(h) of the QCA Act directs us to consider other issues we consider relevant. We consider the need for an access undertaking to be clear and certain is a relevant factor when determining whether an undertaking is appropriate.

There is regulatory precedent for requiring simplification and clarification of an undertaking.

The ACCC took a similar position in its final decision on the 2011 Hunter Valley Access Undertaking (2011 HVAU), considering that clarity and certainty were necessary for the access arrangements to be consistent with the criteria in the CCA. In that decision, the ACCC identified 'clarity and certainty' as being a relevant 'other matter' for the purposes of section 44ZZA of the CCA, which is closely analogous to the wording of section 138(2)(h) of the QCA Act. Specifically, the final decision noted that:

> *The ACCC maintains the view that ensuring sufficient clarity and certainty is an important consideration in the context of the June 2011 HVAU. The access arrangements proposed by the HVAU are highly complex, in terms of the substantive issues involved, the interactions between the undertaking and the related documents, and the various processes by which the access arrangements are implemented. In some instances the arrangements propose features that are novel to access regulation. In its previous statements the ACCC was of the view that in many instances the failure of the drafting of the undertaking to clearly and logically set out the proposed approach contributed to a level of concern amongst stakeholders, and to a conclusion that while the underlying intent of the undertaking may have been appropriate, its implementation was not.*[44]

We consider that clarity and certainty assist to achieve the object of Part 5 of the QCA Act. Clarity and certainty for those parties relying on the undertaking reduces their costs by minimising the scope for interpretation issues, which assists to promote the economically efficient 'use' of the network (see ss. 138(2)(a) and 69E).

In our assessment of Aurizon Network's MAR proposal, we have taken into account predictability—that is, the regulatory arrangements should be as stable and predictable as possible given other objectives. Stability and predictability are likely to promote confidence in the regulatory arrangements and economic efficiency by reducing uncertainty associated with long term investment decisions.

2.10.6 Minor and inconsequential (s. 138(5))

We accept that in having regard to issues of 'clarity' and 'certainty' and in proposing amendments to an undertaking to achieve these objectives, we need to comply with section 138(5) of the QCA Act.

That is, we accept that we cannot refuse to approve a draft access undertaking only because we wish to propose amendments that would have no real effect or consequence. This is clear from section 138(5), which states that:

[44] ACCC Final Decision, Hunter Valley Access Undertaking June 2011: 18.

> *The authority may not refuse to approve a draft access undertaking only because the authority considers a minor and inconsequential amendment should be made to a particular part of the undertaking.*

The QCA Act further provides that:

> *minor and inconsequential amendment, in relation to part of a draft access undertaking, means an amendment that, if made, would have no real effect or consequence in relation to that part of the undertaking and the undertaking as a whole.*[45]

In this regard, we note the second reading speech for the *Queensland Competition Authority Amendment Bill 2008*, provides:

> *The bill requires that the authority should not reject a draft access undertaking on the basis of a minor and inconsequential matter. This provision signals a preferred regulatory approach whereby the authority does not question minor details that have no real effect on regulatory outcomes.*[46]

We also accept that simplification of individual clauses for inconsequential reasons, such as a simple drafting preference without any other purpose, would not be consistent with section 138(5) of the QCA Act.

Ultimately, the QCA is the judge of what it considers minor and inconsequential regulatory issues, subject to the guidance provided above.

2.10.7 Section 136(5) of the QCA Act

If we refuse to approve the DAU (by reference to section 138(2)), we must give notice stating the reasons for refusal, and the way in which we consider it is appropriate to amend the DAU (s.136(5)(a)–(b)).

In relation to the latter, once we have crossed the threshold of non-approval for the DAU (i.e. that we consider that the DAU is not appropriate having regard to the factors set out in section 138(2)(a)–(h)), we have a significant discretion as to what amendments we can propose, so long as those amendments are consistent with the policy and framework provided by the QCA Act.

Accordingly, we have the discretion to set out how we consider it is appropriate to amend the draft access undertaking and to give appropriate effect or weight, in aggregate, to each of the factors identified above.

We also consider that our obligation under section 136(5)(b) of the QCA Act to state the way in which we consider it appropriate to amend the 2014 DAU should be directed by the reasons that we identified for refusing to approve the undertaking. By doing so, we ensure that if our amendments were to be adopted, they would address our reasons for considering that the DAU was not appropriate, and thereby enable the access undertaking to be approved.

In proposing amendments, we are not required to propose 'perfect' drafting, rather we must provide drafting amendments that we consider are appropriate to address our concerns.

2.11 Conclusion

The QCA Act confers a broad discretion in considering whether a voluntarily proposed draft access undertaking is appropriate and, if not, what changes to the undertaking we consider ought to be made. The QCA Act provides us with the discretion to make the necessary value

[45] Section 138(6) of the QCA Act.
[46] Queensland, Legislative Assembly, 2008, Record of Proceedings (13 February 2008): 151.

judgments and exercise all the discretions of an expert regulator, provided we remain within the bounds of our administrative law requirements.

2.12 Subdivision 2, Division 7 of Part 5

Division 7 (subdivision 2) deals with amendments to approved access undertakings, but as the 2014 DAU replaces the existing approved access undertaking, these provisions are not relevant to the legislated framework engaged by Aurizon Network's voluntary access undertaking.

PART B: Response to Aurizon Network

In its submission on the initial draft decision, Aurizon Network questioned our interpretation of aspects of the legislative framework. In light of these comments, we consider it appropriate to provide further detail on our approach when deciding whether to approve, or to refuse to approve, the 2014 DAU.

2.13 Interpretation of 'appropriate'

2.13.1 Aurizon Network's comments on the initial draft decision

Aurizon Network has said that the word 'appropriate' in section 138(2) compels us to approve a draft access undertaking that is within range, and does not give us power to refuse to approve an access undertaking simply because we might prefer a different approach from that proposed.[47] Aurizon Network's view was that our role is to determine whether the proposed undertaking is 'appropriate', not to apply a different or higher standard.[48]

Aurizon Network also suggests that, in considering what is 'appropriate', we are obliged to make the least onerous and restrictive decision consistent with achievement of the relevant factors required by the legislation.[49] In forming this view, Aurizon Network relied upon a decision of the Canadian Supreme Court in *Penteanguishene Mental Health Centre v Ontario (Attorney-General)* (2003) 237 DLR (4th) 1 at 16–18.

Aurizon Network submits, for example:

> *Contrary to the judicially recognised standard applicable to the regulator's role in considering a proposed access arrangement, the QCA has rejected what is an 'appropriate' access undertaking from Aurizon Network in favour of a much more onerous and restrictive one, that in a number of respects, is beyond the QCA's power to compel.*[50]

2.13.2 QCA analysis

Appropriateness or a higher standard

We agree that the Act requires consideration of the submitted draft access undertaking and a decision to be made as to whether we consider it is appropriate to approve. No higher test is called for.

But the factors we are to have regard to involve value judgements. Those factors we are referred to, considered in light of the provisions of the draft access undertaking, often give rise to competing considerations (as to the impacts of the draft undertaking, if approved) that we

[47] Aurizon Network, 2014 DAU, sub. 83: 26–27.
[48] Aurizon Network, 2014 DAU, sub. 83: 26.
[49] Aurizon Network, 2014 DAU, sub. 83: 27.
[50] Aurizon Network, 2014 DAU, sub. 83: 27.

need to weigh in deciding if it is appropriate to approve the undertaking (as a whole). We are required to balance the interests of access seekers and an access provider, so a solution that is least onerous or restrictive for Aurizon Network may not necessarily be consistent with a solution that takes into account all of the statutory factors in section 138(2) of the QCA Act.

In assessing whether the submitted undertaking is appropriate to approve, we take the view that it is open to us to consider the size and nature of any adverse (or beneficial) impacts arising from the subject matter of the undertaking.

Accordingly, we are not assessing the draft undertaking against an optimal or preferred standard, rather we are considering whether the specific drafting as proposed by Aurizon Network is appropriate by reference to the specified statutory factors, including their application and relative weighting. These factors are discussed above, but include, for example, considerations such as predictability, certainty and clarity, which are matters that are informed by the drafting of the 2014 DAU.

Competing undertakings

We do not approach our task under the Act as if it invites a choice between competing drafting formulations, with one being preferable or 'more appropriate' to the other in some way.

The question we are required to address by the QCA Act is whether we are satisfied that the 2014 DAU is appropriate to approve. If that question is answered negatively, we have a large discretion to explain the way in which we consider it is appropriate to amend the draft 2014 DAU.

Canadian jurisprudence

We have considered the Canadian decision relied upon by Aurizon. That decision concerned dispositions by a Mental Health Board, which appear to have little in common with the nature of the discretions and statutory power of a competition/economic regulator such as the QCA. Canadian jurisprudence—in the field of administrative law—is also rarely, if ever, relied upon to inform the Australian approach, given, in particular, the Canadian Charter of Rights and Freedoms and the different approach of the Canadian courts to questions of, for example, proportionality.

Any principle that a regulator is bound to achieve the least onerous and restrictive result for a citizen or company, is not one that has, to date, achieved recognition in Australian administrative law. The High Court has warned against the danger of 'uncritical translation' of the Canadian concept of proportionality as a criterion of validity into Australian law, considering that it may lead to a 'constitutionally inappropriate standard of judicial review'.[51]

We do not consider that the Canadian decision identified by Aurizon Network provides meaningful guidance about how we should interpret and apply the term 'appropriate' when making a decision in respect of a draft access undertaking under the QCA Act.

Conclusions

We note Aurizon Network's concerns that we may not have provided sufficient explanation in our initial draft decision for some of our proposed drafting. We have taken this into account and

[51] Gleeson CJ in *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [17]. We note that even in England, proportionality has not been embraced as a ground of review in an unqualified way, and nor has its related doctrine of 'minimal impairment': *De Smith's Judicial Review* (7th edn, 2013) at [11-073]–[11-085].

have set out in this consolidated draft decision why we consider that certain drafting in the 2014 DAU is, or is not, 'appropriate'.

If we have reached the view that an aspect of the 2014 DAU is not appropriate, we have proposed alternative drafting, noting why that drafting is appropriate.

2.14 Scope of regulator discretion

2.14.1 Aurizon Network comments on the initial draft decision

Aurizon Network's submission refers to the decision of the Australian Competition Tribunal in *Re GasNet Australia (Operations) Pty Ltd* [2003] ACompT 6. Aurizon Network said that the Tribunal in this case confirmed that:

- *application of the principles involved 'issues of judgement and degree' and that '[d]ifferent minds, acting reasonably can be expected to make different choices within a range of possible choices which nonetheless remain consistent with the Reference Tariff Principles'; and*
- *that as the arrangement proposed by the access provider was within the range of choices reasonably open to it within the principles, it was beyond the power of the regulator to refuse the proposal 'simply because it prefers a different [access arrangement] which it believes would better achieve the relevant Regulators' understanding of the statutory objectives of the law'.*[52]

Aurizon Network submitted that our initial draft decision was not consistent with these observations.

2.14.2 QCA analysis

The GasNet decision recognises that the regulator has a wide discretion—there being, for example,

> *… no single correct figure involved in determining the values of the parameters to be applied in developing an applicable Reference Tariff'* .[53]

Reference in the GasNet decision was also made to a decision of the Western Australian Court of Appeal in *Re Michael Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 in which Parker J (with whom the other members of the Court agreed) observed that the:

> *necessarily discretionary power of the Regulator to determine how best to reconcile conflicting objectives, or which of them should prevail, is critical, in my view, to an understanding of the intended operation of [the relevant provision] with its potentially disparate objectives.*[54]

In the GasNet decision, the Full Federal Court recognised that the regulator necessarily makes discretionary decisions about the weight to be attached to various factors under the Code (at [168]). While section 138(2) of the QCA Act is not a Code (nor has one been made under Division 6 of Part 5 of the QCA Act), the Code in the GasNet decision contained statutory requirements against which access arrangements were to be assessed by the regulator. If the regulator rejected the access arrangement in light of those statutory requirements, the regulator was permitted by the Code to specify amendments it required to be made to the access arrangement. The regime under the Code in the GasNet decision is therefore analogous to the regime under the QCA Act.

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[52] Aurizon Network, 2014 DAU, sub. 83: 26.
[53] *Re GasNet Australia (Operations) Pty Ltd* [2003] ACompT 6 at [29].
[54] *Re GasNet Australia (Operations) Pty Ltd* [2003] ACompT 6 at [28].

Further, the decision of the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33—which refers to the GasNet decision (and upon which Aurizon Network also relies)[55] relevantly stands for two propositions (at [165], [168]):

- the regulator is not at large simply to substitute its own preferred access arrangements because it prefers a different arrangement which it thought could better achieve the statutory objectives (as we have already discussed above)
- once, however, the threshold of non-approval is crossed (i.e. in that case, non-compliance with the National Third Party Access Code for Natural Gas Pipeline Systems), the Regulator 'is at large in the content of its own Access Arrangement albeit it must be within the framework provided by the Code' .

The decisions referred to above suggest the need for a regulator to show the relevant statutory criteria were not met as a precursor to the exercise of the regulator's discretion. Once this is established, then the regulator has the discretion necessary to propose arrangements which it considers would meet the code (or, in this case, give appropriate effect or weight, in aggregate, to each of the section 138(2) factors).

There are some restrictions on us exercising that discretion. For example, it must be exercised bona fide, having regard to the policy and purpose of the QCA Act and our duties under the QCA Act; it may not be exercised for the promotion of some end foreign to that policy and purpose or those duties.

We do not accept that our initial draft decision rejected the 2014 DAU 'simply because we preferred a different access arrangement, which we believed would better achieve the statutory objectives. The 2014 DAU was refused after having regard to the statutory factors in section 138(2)(a)–(h), and applying our discretion to weigh and balance those factors. Given our draft conclusion, we then set out the way in which we considered it would be appropriate to amend the undertaking (s. 136(5)(b)) and, in doing so, enable the undertaking to be approved.

Conclusion

The Tribunal and Court decisions referred to by Aurizon Network do not support a conclusion that we have acted (or are proposing to act) 'contrary to the judicially recognised standard applicable to the regulator's role in considering a proposed access arrangement.'[56]

2.15 Simplification of the drafting of a draft access undertaking

2.15.1 Aurizon Network's comments on the initial draft decision

Aurizon Network's submission made comments about our approach in requiring amendments to simplify and clarify the terms of the 2014 DAU. The general concerns of Aurizon Network are summarised in the statements below:

- *It was never envisaged that the function of the QCA was to reformulate a Draft Undertaking offered by an access provider just because it prefers different drafting ...*

[55] Aurizon Network, 2014 DAU, sub. 83: 26.
[56] Aurizon Network, 2014 DAU, sub. 83: 27.

many drafting changes reflect the preferences of the QCA, rather than any substantiated errors on the part of Aurizon Network.[57]

- *the QCA cannot prefer its own drafting if the drafting submitted by the access provider achieves the required result.*[58]

2.15.2 QCA analysis

As set out above, we accept that we do not have the statutory power to make changes merely for the sake of change. However, we do consider that clarity and certainty are relevant issues in our consideration of the 2014 DAU (see s. 138(2)(h) of the QCA Act).

Our view is that, taken as a whole, the 2014 DAU submitted by Aurizon Network is highly complex with the potential to have a real and material effect on regulatory outcomes, as the undertaking's complexity may lead to higher transaction costs between parties and can create barriers to obtaining access to, or the efficient use of, the service, with consequential negative effects on competition in upstream and downstream markets. This is contrary to the object of Part 5 of the QCA Act (to which we must have regard by reason of s. 138(2)(a)).

We have provided detailed drafting guidance for our proposed amendments to the 2014 DAU with the intention of:

- reducing potential costs that could arise due to the misinterpretation of the undertaking by stakeholders and minimise the risk of consequential costly disputes
- providing greater clarity and certainty to parties by expressing the 2014 DAU in plain English and explaining concepts as clearly and simply as possible with the objective of reducing costs for access seekers in engaging experts to assist them to interpret and apply the undertaking.

These matters are not minor and inconsequential.

Examples of amendments to the 2014 DAU we require to assist comprehension and reduce ambiguity

The following are examples of the types of drafting amendments we have made in our CDD amended DAU to assist comprehension and reduce ambiguity:

- clarified which obligations are mandatory, by using 'must' rather than 'will'. We have made this change because of the inconsistent manner in which 2014 DAU managed mandatory obligations—where the obligation sat with any party (including the QCA) other than Aurizon Network, the obligation was described with a 'must' but where the obligation sat with Aurizon Network, it was described with a 'will'. We consider this difference in language can create uncertainty as it implies that obligations on Aurizon Network are not as mandatory as those on other parties. Our proposed change is not minor or inconsequential as it removes uncertainty and ensures clarity regarding obligations under 2014 DAU
- to the extent it made sense to do so, stated a concept once only rather than repeat the concept in a number of places within a Part. An example of this is clause 8.2.2 of our CDD amended DAU which draws all the references to dispute resolution in Part 8 together into one clause. Another example is clauses 8.3.4 and 8.4.4 of our CDD amended DAU which group together in one place common elements of undertaking and financing Concept, Pre-feasibility and Feasibility Studies. We have also substantially re-written Schedule E in our CDD amended DAU to consolidate concepts and remove repetition. In addition to reducing

[57] Aurizon Network, 2014 DAU, sub. 83: 6.
[58] Aurizon Network, 2014 DAU, sub. 83: 26.

the length of the undertaking, this consolidation is also aimed at ensuring there is no inadvertent difference in the drafting between sections which could result in different outcomes. This change is not minor or inconsequential as it removes the possibility of inadvertent differences appearing between sections that are aimed at doing the same thing

- re-ordered parts of the undertaking so that issues dealing with the same matters sit together. An example of this is Part 7A our CDD amended DAU which groups all elements of Capacity management together. However, this element of simplification cannot be sensibly applied to all matters if it means that a reader of the 2014 DAU is likely to miss an important issue because it has been moved away from its logical position. For example, it makes more sense to deal with records regarding compliance with Part 3 of the 2014 DAU in that part of the undertaking, rather than move it to Part 10. To the extent we have made these changes, the change is not minor or inconsequential as it ensures a reader of the 2014 DAU can find all issues dealing with one topic in the same place
- removed archaic legal drafting. While we consider there was little of this in the 2014 DAU, an example of a term we have proposed to change is 'pursuant to' (which we propose be changed to 'under'). The purpose of these changes is to enhance the clarity and useability of the 2014 DAU, which will assist a non-specialist to more readily understand the undertaking without the need for expert assistance, enhancing efficiency. For this reason, the change is not minor or inconsequential
- clarified the role of standard agreements by making it clear that the standard agreement will apply unless both parties agree to vary the document. This change was to remove any doubt as to the status of standard agreements and ensure that either party to the agreements is able to unilaterally insist on the standard agreement if they consider this appropriate. An example of this proposed change is in clause 5.1(c) and (d) of the CDD amended DAU. These changes are not minor or inconsequential as they aim to ensure negotiation power between either party to the agreement is as equal, which balances the public interest and legitimate business interests of Aurizon Network
- reduced words, where it was possible to do so without loss of meaning. The purpose of this was to enhance the useability of the undertaking allowing users of the undertaking to readily understand it without the need for expert assistance. For this reason, the change is not minor or inconsequential
- inserted an obligation in clause 12.3(a) of our CDD amended DAU that a notice, consent, approval, undertaking or other communication must be in writing, and delete references to 'in writing' throughout the undertaking. We propose this change to ensure consistency (as not all of the places in the 2014 DAU where the notice should be in writing were drafted in that manner) and to avoid confusion. For this reason, the change is not minor or inconsequential
- clarified in one clause in each relevant Part of the undertaking that a reference to an Access Holder is also a reference to its Customer or Train Operator, to avoid duplication across each clause. We have made this change to our CDD amended DAU as the application of obligations to access seekers, access holders and their Customer or Train Operator is inconsistent and that inconsistency introduces uncertainty. By having a catch all phrase at the commencement of the relevant Part, the inconsistency is removed. For this reason, the changes were not minor or inconsequential
- amended all defined terms to remove internal inconsistencies. For example, the definitions of Available Capacity and Committed Capacity in the 2014 DAU both referred to capacity

required to comply with the Passenger Priority Obligation which meant that particular capacity is counted twice in determining Available Capacity, resulting in less Available Capacity (as defined) than is likely to exist. Changes to remove internal inconsistencies such as these are not minor or inconsequential as they correct inconsistencies or mistakes in the defined terms.

Conclusion

The drafting of the 2014 DAU is an issue that we consider is relevant and have taken into account. As noted above, reducing complexity and improving clarity is in the interests of access seekers and holders (s. 138(2)(e) and (h)), is not contrary to the legitimate business interests of Aurizon Network (s. 138(2)(b)) and is in the public interest (s. 138(2)(d)).

Having concluded the 2014 DAU is not appropriate by reference to the factors set out in QCA Act (including those noted above), we have then set out how we consider it appropriate for the 2014 DAU to be amended.

In this consolidated draft decision, we are not refusing to approve any particular parts of the 2014 DAU only because of drafting concerns. Rather, we are indicating the manner in which we consider it appropriate for the 2014 DAU to be amended as a whole, in order to assist comprehension and reduce ambiguity. Our drafting, when aggregated, affects the 2014 DAU as a whole, namely to improve clarity and certainty and reduce transaction costs for the parties needing to use the undertaking. Accordingly, we do not accept the suggestion that drafting considerations are irrelevant or that we are refusing to approve particular parts of the 2014 DAU in favour of drafting changes that are minor and inconsequential.

2.16 Consideration of drafting agreed between an access provider and stakeholders

2.16.1 Aurizon Network's comment on the initial draft decision

Aurizon Network questioned changes we have proposed to parts of the 2014 DAU which had been negotiated and agreed between Aurizon Network and stakeholders.[59]

2.16.2 QCA analysis

We appreciate Aurizon Network's efforts to engage with stakeholders and seek to reach agreement on the principles and drafting of its draft access undertaking at all stages of the regulatory process. We always encourage parties to negotiate with each other as this can lead to the development of regulatory proposals that are well-balanced and better reflective of the interests of stakeholders.

However, our role in deciding whether to approve a draft access undertaking is different from our role in arbitrating disputes. The 'negotiate-arbitrate' principle underpins the approach for how parties may obtain access to the service. The process of reviewing and approving a draft access undertaking is not, however, the same as a 'negotiate-arbitrate' process.

Our role established under the QCA Act is to decide whether a draft access undertaking is appropriate to approve and, if not, what changes we consider appropriate to be made. As such, we would not be performing our statutory role if we accepted a draft access undertaking merely because it had been agreed with some or all existing stakeholders, and nor could we focus our

[59] Aurizon Network, sub. 83: 7.

assessment of an undertaking on only those parts that are in dispute between Aurizon Network and those stakeholders.

Nonetheless, section 138(2)(h) enables us to have regard to any other issue we consider relevant and we consider provisions that have been agreed with stakeholders to be a relevant factor in our assessment of a draft access undertaking. The significance of this factor will depend (amongst other things) on the number of stakeholders that were involved in negotiating the drafting, the level of support expressed by stakeholders and the subject-matter involved. Consequently, the more widespread and extensive the support from stakeholders, the more weight we will give the negotiated provision in our assessment.

However, we must also consider the effect of a draft access undertaking on all stakeholders, including future access seekers, who will not necessarily be represented by the stakeholders that have negotiated drafting of the undertaking. Accordingly, while the existence of stakeholder-negotiated drafting is persuasive, it is not decisive.

Where we have not accepted stakeholder-negotiated drafting, it is because we did not consider it appropriate to do so having regard to the section 138(2) factors. The changes to the 2014 DAU set out in our consolidated draft decision represent the way in which we consider it appropriate to amend the DAU.

2.17 Our role in the application of the object of Part 5 of the QCA Act

2.17.1 Aurizon Network's comments on the initial draft decision

Aurizon Network has expressed concerns about the manner in which we have interpreted and applied the object of Part 5 of the QCA Act as part of our assessment of the 2014 DAU in accordance with section 138(2) of the QCA Act.

In particular, Aurizon Network said that:

> *The QCA appears to interpret s.69E of the QCA Act as a statutory allocation to it of the responsibility for the '...economically efficient operation of, use of and investment in...' the CQCR. Rather, s.69E seeks the QCA to promote these principles in overseeing the Access regime for the network.*
>
> *The QCA is not being asked by its legislation to ensure that the rail network is run in an efficient manner. That is properly the responsibility of Aurizon Network as it seeks to meet its accountability to its customers and shareholders. The QCA is simply being asked to ensure that access agreements do not impede the achievement of efficiency in the Network or the achievement of a competitive environment in the markets Aurizon Network services.*[60]

2.17.2 QCA analysis

We have not approached the object of Part 5 of the QCA Act as if it imposes on us the responsibility for the economically efficient operation of, use of and investment in, the CQCN. However, the object of Part 5 of the QCA Act is to promote the economically efficient operation of, use of and investment in, significant infrastructure (such as the CQCN), with the effect of promoting effective competition in upstream and downstream markets, and we are required to have regard to this objective when deciding whether it is appropriate to approve, or refuse to approve, a draft access undertaking.

We consider the need for access regulation of the CQCN arises due to its natural monopoly characteristics, consistent with the statements in the explanatory notes to the QCA Bill that we

[60] Aurizon Network, 2014 DAU, sub. 83: 7.

quoted above in Section 2.2. We consider this natural monopoly position does not lend itself to Aurizon Network facing the competitive pressures which are generally required for firms to operate in an economically efficient manner.

This was one of the reasons given by the Queensland Government for the declaration of the CQCN under Part 5 of the QCA Act.

> *As the operator of the CQCN, QR Limited will continue to have significant market power within the Central Queensland coal supply chain as the rail network is 'bottleneck' infrastructure. That is, access to CQCN is essential to compete in dependent markets in the coal chain (such as the upstream market for mineral production or the downstream market for the transportation of minerals to export facilities), and there are no alternatives as the network cannot be duplicated or substituted. This gives QR Limited significant market power in the coal chain which, in the absence of access regulation under the QCA Act, could potentially be used to adversely affect competition within the dependent markets.*
>
> *...declaration of the service will continue to provide the benefits inherent in constraining market power and promoting competition in dependent markets, such as:*
>
> - *removing potential barriers or opportunities to restrict the entrance of new market participants;*
> - *promoting more competitive and efficient pricing; and*
> - *encouraging greater efficiency and innovation in the provision of services.*[61]

The need for access decisions to promote competition and efficiency has also been expressed by the National Competition Council (the Council) in these terms:

> *The Council considers that s 44AA(a) and clause 6(5)(a) of the Competition Principles Agreement together require that all state and territory access regimes should reflect that the goals of regulating access are the promotion of efficiency by removing barriers to effective competition. The combined effect of s 44AA(a) and clause 6(5)(a) is to reduce the scope for the interpretation of the operational provisions of an access regime to diverge from the efficiency goals of access regulation.*[62]

These statements emphasise access regulation, rather than access provision. They suggest that it is the role of the regulator to ensure that access regulation supports efficient provision of a declared service, by way of the efficient operation, use of and investment in, infrastructure. We do not consider this role can, from the perspective of legitimacy and objectivity, properly be assumed by the monopoly provider of the declared service.

In conclusion, we consider our role as an access regulator includes the promotion of the efficiency objectives of Part 5 of the QCA Act. In reviewing and considering whether the 2014 DAU is appropriate by reference to the statutory factors we did not accept that draft undertaking achieved the objectives of Part 5 of the QCA Act.

2.18 Application of section 168A(a)

2.18.1 Aurizon Network's comments on the initial draft decision

Aurizon Network has made comments about how we have applied section 168A(a) in our MAR initial draft decision and our initial draft decision on the remaining aspects of the 2014 DAU. In particular, it said that:

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[61] Queensland Government, 2010(a): 14, 17

[62] National Competition Council, 'Certification of State and Territory Access Regimes: A guide to Certification under Part IIIA of the Trade Practices Act 1974 (Cth)', October 2010: 18.

The QCA in its Draft Decision, commenced to apply different principles to determine the appropriate maximum allowable revenue through its idea of efficient costs. The QCA further amended its principles to outline that it will use the term 'reasonable costs in the absence of robust, evidence based benchmarks'. The QCA has applied their principle across both the operating and maintenance costs which equates to approximately 40% of Aurizon Networks allowable revenue.

Relying on s.138(2)(e) and s.138(2)(d) of the QCA Act, the QCA expressed its view that "Aurizon Network should be permitted to recover no more than efficient costs and return on investment as identified in s.168A(a)". This is far from what the QCA Act requires.

Section 168A(a) would not permit such an approach to the establishment of pricing principles. Principle (a) requires that the resulting price is "at least enough" to meet the efficient costs and will provide "a return on investment commensurate with regulatory and commercial risks involved".

The expression "at least enough to meet the efficient costs" is starkly different from "to recover no more than its efficient costs". This has consequently resulted in the QCA failing to demonstrate what an efficient cost for Aurizon Network is.

The application of a process designed to deliver "no more than" a particular level of costs is vastly different to one that is designed by the statute to deliver "at least" that level of costs. That process will obviously leave the access provider with material down-side risk and a lower number for its costs than the statute is designed to provide.[63]

2.18.2 QCA analysis

In responding to Aurizon Network's comments, we refer to our approach to section 168A at Section 2.9 above. However, we also note in particular:

- section 168A(a) of the QCA Act requires that prices should cover 'at least' efficient costs but that section 168A(a) is not applied in isolation. We are required to consider the other pricing principles, including section 168A(d), in relation to the price of access to a service.
- In our initial draft decision and consolidated draft decision, given the evidence made available to us, our methodology took into account whether the categories of costs and the magnitude of those costs claimed by Aurizon Network are 'reasonable'. This was done for the purpose of determining whether the proposed price of access is 'efficient'.

'At least' efficient costs

Aurizon Network's submission on the initial draft decision suggests that it considers that the terms of the QCA Act which refer to 'at least enough to meet the efficient costs' implies that Aurizon Network should be permitted to recover costs above this measure.

Adopting a view that section 168A(a) requires the QCA to accept a price higher than efficient costs implies that the QCA must give priority to section 168A(a) against the other pricing principles, and indeed against other matters set out in section 138(2). The QCA does not do this, and in fact has the discretion to balance the various pricing principles.

Furthermore, a cost allowance greater than efficient costs while possible, is inconsistent with the remaining pricing principles (s. 168A(b), (c) and (d)). The Revised Explanatory Memorandum which we referred to at Section 2.9 of this decision clearly contemplates pricing principle (a) permits an access seeker to achieve a return reflecting the commercial and regulatory risks associated with the investment (which price would be appropriate to approve), but it is also

[63] Aurizon Network, 2014 DAU, sub. 83: 31.

clear that a price which addresses monopoly pricing concerns does not 'result in prices that are inefficiently high.'[64]

Evidence of 'efficient' costs

In relation to the price of access, expected revenues should be at least enough to meet the efficient cost of providing the service and include a return on investment commensurate with the regulatory and commercial risks involved. The approach we applied follows the guidance provided in the QCA Act. This does not, however, mean that Aurizon Network has 'the benefit of the doubt' in circumstances where Aurizon Network has not provided sufficient evidence that its practices are 'efficient'.

Measuring 'efficient' costs

As set out in Part A of this chapter, identifying what makes an efficient cost is not a straightforward task and wherever possible we sought to measure the 'efficient' costs, taking into account all evidence available to us at the time.

Our methodology was to have regard to what could be considered to be 'reasonable' costs, based on the available evidence, to assist in our final determination of the efficient costs for the 2014 DAU period.

To the extent our initial draft decision or consolidated draft decision refers to 'reasonable costs,' this is not to be understood as suggesting we are doing or seeking to do anything other than measure or estimate 'efficient costs' to the extent practicable given the evidence available.

[64] Revised explanatory memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth): 65.

3 INTENT AND SCOPE

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

The key elements of our consolidated draft decision are to:

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

3.1 Introduction

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

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

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

3.2 Overview

3.2.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU proposed that:

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

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

3.2.2 Stakeholders' initial position

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

- lack of a clear and unambiguous statement supporting non-discriminatory treatment of all access seekers and access holders[65]
- inappropriate limitation of the scope of the undertaking[66]
- lack of an absolute obligation on Aurizon Network to supply electricity to access seekers and access holders[67] or to do so in a non-discriminatory manner[68]
- lack of a dispute resolution mechanism for disputes arising in respect of electricity supply[69]
- lack of a definition of, and obligations related to, 'associated services'[70]
- lack of requirements regarding an incentive mechanism[71]
- specific elements of the drafting, where stakeholders proposed changes to improve clarity, certainty and/or transparency.[72]

[65] Asciano, 2014 DAU, sub. 22: 28–29.
[66] QRC, 2014 DAU, sub. 42: 10.
[67] Anglo American, 2014 DAU, sub. 7: 17-19; QRC, 2014 DAU, sub. 42: 11.
[68] Asciano, 2014 DAU, sub. 22: 29.
[69] Anglo American, 2014 DAU, sub. 7: 20; Asciano, 2014 DAU, sub. 22: 65; QRC, 2014 DAU, sub. 42: 11
[70] QRC, 2014 DAU, sub. 42: 11–12.
[71] Asciano, 2014 DAU, sub. 22: 66.
[72] QRC, 2014 DAU, sub. 31.

3.2.3 Legislative framework and QCA assessment approach

Legislative framework

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

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

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

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

QCA assessment approach

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

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

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

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

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

Section 138(2)(g) requires us to have regard to the pricing principles mentioned in section 168A of the QCA Act (these are discussed above in section 2.9 of this decision). When coming to our consolidated draft decision on Part 2 of the 2014 DAU we have also had regard to these pricing principles.

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

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

3.3 Duration

3.3.1 Aurizon Network's proposal

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

3.3.2 Initial draft decision

This clause was not discussed in our initial draft decision.

3.3.3 QCA analysis and consolidated draft decision

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

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

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

> *A distinction is to be drawn between the point of time at which an undertaking comes into effect, that is to say the point of time at which it becomes operative and legally binding, and the*

> *operation of particular terms and conditions after that point of time is reached. The fact that a term or condition may operate in respect of a period of time prior to the undertaking becoming operative does not mean that the term or condition has been expressed to come into effect prior to the undertaking being accepted by the Commission. Put shortly, once an undertaking has been given legal effect and has become operative, it can contain provisions which apply to a point of time earlier than the point of time at which it comes into effect without offending s 152BS(10). Of course, the Commission (and on review the Tribunal) still has to be satisfied that such terms and conditions are reasonable for the purposes of s 152BV(2)(d).*[73]

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

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

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

Consolidated draft decision 3.1

(1) After considering Aurizon Network's proposed duration of the 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network amends the 2014 DAU is to amend clause 2.1 in the manner we have proposed in clause 2.1 of our CDD amended DAU.

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

3.4 The objective of the DAU and behavioural conduct

3.4.1 Aurizon Network's proposal

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

- 'ensure Aurizon Network acts in a manner that is consistent with the unfair differentiation obligations under sections 100(2) to (4) and section 168C of the Act' (cl. 2.2(e))

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

- 'ensure Aurizon Network applies the provisions of this Undertaking consistently to all Access Seekers, Access Holders, Train Operators, Access Applications and negotiations for Access, except where this Undertaking provides otherwise' (cl. 2.2(f)).

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

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

3.4.2 Summary of the initial draft decision

We considered all stakeholder submissions in reaching our initial draft decision.[74] Our initial draft decision was to not approve the relevant clauses of the 2014 DAU. We proposed the following amendments:

- clause 2.2—refer to the 'objective' rather than 'intent' of the undertaking
- clause 2.2(a)—facilitate the 'non-discriminatory' negotiation of access agreements, rather than just the negotiation of access agreements
- clause 2.2(f)—include the word 'expressly' to emphasise the need for the undertaking to expressly state when consistency in Aurizon Network's application of the provisions of the undertaking is not needed
- clause 2.2—to include the general principles of non-discrimination and independence (moved from clause 3.2 of the 2014 DAU) and additional matters
- the introduction of a new clause (cl. 2.3) to provide an interpretations clause for identifying how the undertaking should be interpreted
- the introduction of a new clause (cl. 2.4) to effectively re-instate the 2010 AU non-discriminatory treatment clause.

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

3.4.3 The QCA Act, behavioural conduct and unfair differentiation

The QCA Act sets out a regime governing non-discrimination by Aurizon Network, which is characterised by the concept of 'unfair differentiation'. That concept is unique to the QCA Act and is not defined, so is a matter of statutory interpretation. The legislative scheme relating to

[74] QCA, 2015(a): 26–27.

the application of the concept of 'unfair differentiation' in the context of a draft access undertaking can be broadly summarised as follows:

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

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

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

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

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

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

particular for Part 5 of the Act is set out under section 69E (this is analysed above in Section 2.5 of this decision).

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

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

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

Finally, section 153 of the QCA Act grants the court powers to make orders in relation to a person who has engaged or is proposing to engage in conduct contravening sections 100(2), 104, 125 and 168C of the Act. The court can impose its own remedies, including injunctions and compensation orders, if the court is satisfied that the conduct contravenes the Act.

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

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

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

- location of the general principles of non-discrimination and independence

- non-discriminatory treatment and unfair differentiation
- related parties of Aurizon Network
- intent versus objective
- interpretation.

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

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

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

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

Table 1 Approach to clause 3.2 of Aurizon Network's 2014 DAU

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

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

Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network had no concerns with moving its proposed general principles of non-discrimination and independence from Part 3 of the 2014 DAU to Part 2.[75] Aurizon Network, however, did object to a number of the proposed amendments made. These are considered in more detail in Section 3.4.5 below.

Other stakeholders

Stakeholders expressed support for moving these principles into Part 2 of the 2014 DAU, although there were comments about the appropriateness of including these principles within clause 2.2.[76]

The QRC expressed concern that including these principles in clause 2.2 would not achieve the intent of the drafting as they would be presented as 'objectives' rather than obligations on Aurizon Network. It proposed simplifying clause 2.2(g) of our IDD amended DAU by removing the more detailed principles and including these as obligations under clause 2.4 relating to non-discriminatory treatment.[77] Similarly, Anglo American considered that clause 2.2 (g),(h) and (i) should all be replicated in the substantive obligations in UT4, as it considered an objects clause can only be used to assist in interpretation of substantial clauses and these are important provisions which require enforceability.[78]

QCA analysis and consolidated draft decision

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

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

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

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

We are of the view that access holders, access seekers and train operators should be able to expect the underlying intent is that these principles are applied in a comprehensive manner across the scope of the 2014 DAU and not just as a ring-fencing measure. In our view this

[75] Aurizon Network, 2014 DAU, sub. 83: 47–48.
[76] QRC, 2014 DAU, sub. 84: 8–9; Vale, 2014 DAU, sub. 79: 2.
[77] QRC, 2014 DAU, sub. 84: 9.
[78] Anglo American, 2014 DAU, sub. 95: 8.

approach takes into account the section 138(2) factors overall. In particular, it provides access holders, access seekers and train operators with clarity and assurance of the behavioural conduct required in all dealings relating to the 2014 DAU, which is in their interests (s. 138(2)(e) and (h)), without inappropriately detracting from Aurizon Network's legitimate business interests (s. 138(2)(b)).

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

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

Consolidated draft decision 3.2

(1) After considering Aurizon Network's proposed location of the general principles of non-discrimination and independence in Part 3 of the 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to move clause 3.2 to become clause 2.4 of the undertaking, and amend clause 2.4 in the manner set out in our CDD amended DAU.

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

3.4.5 Non-discriminatory treatment and unfair differentiation

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

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

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

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

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

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

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

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

Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network submitted that we had introduced objects that are not consistent with the QCA Act, and that we were therefore acting beyond power.[79]

Aurizon Network said that:

> *The object of the QCA Act is not to achieve equality between competitors, it is to ensure there is no 'unfair differentiation' between them. Aurizon Network considers the QCA's proposed insertion of the broad principle of 'non-discrimination' is, again, not reflective of the QCA Act.* [80]

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

It considered any statement regarding non-discriminatory treatment should be consistent with the language used in sections 100 and 137(1A) of the QCA Act and focus on preventing unfair differentiation that has a material impact on competition and is not reasonably justified due to the different circumstances applicable to the relevant access seeker.[81] To do otherwise would mean that Aurizon Network would be exposed to a standard and liability that is not required by the Act.[82] In a similar vein, it also opposed the inclusion of an objective for Aurizon Network not to engage in conduct which could result in a substantial lessening of competition or a situation that is otherwise anti-competitive (cl. 2.2(i)(iv) of our IDD amended DAU), as it considered the regulation of general anti-competitive conduct is dealt with under the *Competition and Consumer Act 2010* (Cth).[83]

To this effect, Aurizon Network considered clauses 2.2(e) and (f) of the 2014 DAU already deal adequately with the issue of unfair differentiation by providing objectives of the undertaking for ensuring that Aurizon Network complies with its obligations under sections 100(2)–(4) and 168C of the QCA Act and that Aurizon Network applies the provisions of the undertaking consistently.[84] More generally, Aurizon Network considered that, rather than setting out each way that Aurizon Network could discriminate, it would be more efficient and appropriate to include a single formulation to capture the essence of section 137(1A) of the QCA Act.[85]

Similarly, Aurizon Network also opposed the non-discriminatory treatment clause included as part of our initial draft decision (cl. 2.4 of the IDD amended DAU). It considered the restriction on unfair differentiation in this clause should be limited to unfair differentiation that has a material impact on competition between users or access seekers, and should expressly exclude differentiation to the extent different treatment is reasonably justified because of different circumstances applicable to the relevant access provider, access seeker or user. It also queried whether it was necessary to include particular sub-clauses under clause 2.4 as it considered these were already addressed elsewhere in the clause.[86]

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[79] Aurizon Network, 2014 DAU, sub. 83: 37.
[80] Aurizon Network, 2014 DAU, sub. 83: 44.
[81] Aurizon Network, 2014 DAU, sub. 83: 44–46.
[82] Aurizon Network, 2014 DAU, sub. 83: 27.
[83] Aurizon Network, 2014 DAU, sub. 83: 48.
[84] Aurizon Network, 2014 DAU, sub. 83: 45–46.
[85] Aurizon Network, 2014 DAU, sub. 83: 48.
[86] Aurizon Network, 2014 DAU, sub. 83: 46–47.

Aurizon Network had no objection to inclusion of the word 'expressly' in clause 2.2(f).[87]

Other stakeholders

The QRC, Asciano, Vale and Anglo American expressed support for the initial draft decision in respect of the proposed changes to provisions related to non-discrimination.[88] Asciano considered the initial draft decision will limit the potential of Aurizon Network to engage in discriminatory behaviour and inappropriate use of market power.[89]

The QRC also said that clause 2.4(a) of our IDD amended DAU, which provides that the undertaking must be consistently applied to all access seekers, access applications and negotiations for access, should also extend to access holders,[90] while Anglo American said it should be extended to all access holders and train operators.[91] It considered it would be appropriate to make this obligation subject to either the QCA Act, the remainder of the undertaking or the relevant access agreement expressly providing for inconsistent treatment.[92]

Aurizon Operations considered that breach reporting and non-compliance for differentiation between access seekers should be limited to decisions or conduct which is contrary to the requirements of the QCA Act. It noted the difference in requirements between clause 2.4(b) of the IDD amended DAU and section 100(2) of the QCA Act and said that, in a similar context in the telecommunications access regime where there is an obligation of non-discrimination, the ACCC concluded that it should only concern itself with conduct which is inconsistent with the objects of the legislation. Aurizon Operations considered the problem with expanding the statutory obligation to include any differentiation is that decisions in favour of a third party operator are unreported. It said a practical consequence is that there will be an increased level of risk aversion in dealings with a related operator that is greater than dealings with third party operators.[93]

QCA analysis and consolidated draft decision

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

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

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

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[87] Aurizon Network, 2014 DAU, sub. 83: 46.
[88] QRC, 2014 DAU, sub. 84: 8; Asciano, 2014 DAU, sub. 76: 10–11; Vale, 2014 DAU, sub. 79: 2; Anglo American, 2014 DAU, sub. 95: 3.
[89] Asciano, 2014 DAU, sub. 76: 10.
[90] QRC, 2014 DAU, sub. 84: 9.
[91] Anglo American, 2014 DAU, sub. 95: 8.
[92] Anglo American, 2014 DAU, sub. 95: 8.
[93] Aurizon Operations, 2014 DAU, sub. 93: 26–27.

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

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

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

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

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

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

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

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

Clear separation between objectives and behavioural obligations

As discussed in Section 3.4.4 of this decision, we do not consider it appropriate for the general principles of non-discrimination and independence to be located in Part 3 of the 2014 DAU, and instead propose they be located in the Intent and Scope part of the undertaking so that they underpin the operations of the entire undertaking, not just the ring-fencing provisions. We incorporated these principles in both clause 2.2 (the objectives of the undertaking) and clause 2.4 (non-discriminatory treatment) of our IDD amended DAU.

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

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

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

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

Table 2 Summary of revisions to clauses 2.2 and 2.4 in the IDD amended DAU to clearly separate objectives and behavioural obligations

Clause	*Rationale*
Insertion of the following new objectives: • Clause 2.2(a) of our CDD amended DAU—to ensure the service taken to be declared under section 250(1)(a) of the Act is provided in a manner that does not unfairly differentiate in a material way (as that term is defined in section 137(3) of the Act) • Clause 2.2(b) of our CDD amended DAU—to prevent Aurizon Network recovering, through the price of access to the service taken to be declared under section 250(1)(a) of the Act, any costs that are not reasonably attributable to the provision of that service.	These are broad, overarching statements that we consider will appropriately set out the essence of the unfair differentiation concept established in the QCA Act. These statements reflect the requirements of access undertakings for a service owned or operated by a related access provider, such as Aurizon Network (as set out under section 137(1A) of the QCA Act). As such, we consider it appropriate for these principles to be used as an objective to aid interpretation of the undertaking.
Removal of the objectives listed as clauses 2.2(e), (f), (g), (h) and (i) of our IDD amended DAU.	We consider that each of these objectives are better characterised as a behavioural obligation of Aurizon Network and have incorporated these in clause 2.4 of our CDD amended DAU. These clauses have also been amended to provide greater consistency with the unfair differentiation concept established in the QCA Act, as discussed below.
Removal of cl. 2.2(j) of our IDD amended DAU	This objective is to achieve an appropriate balance between particular interests, which are broadly representative of several of the factors to which we must have regard when deciding whether it is appropriate to approve a DAU. We understand the intent for the inclusion of this objective. However, in the interests of promoting a clearer and simpler objectives clause, we consider this objective should not be included. We consider the terms of an approved undertaking, as a whole, will represent an appropriate balance between these interests and a further statement of this as an objective of the undertaking is unnecessary.

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

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

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

In using the term 'non-discriminatory' in our initial draft decision, our intent was not to prevent all forms of discrimination from occurring. The QCA Act does not require an access provider to

provide access on the same terms for each access agreement (s. 102 of the QCA Act) and, as noted by Aurizon Network, the concept of unfair differentiation established in the QCA Act expressly permits differentiation between access seekers (and users) in certain circumstances. We also note that price discrimination (when it aids efficiency) is also reflected in the pricing principles set out under section 168A of the Act.[94] 'Discrimination' is an economic term which is well-established and which we considered appropriate to use in the context of a broad objective of the undertaking, such as clause 2.2(a).

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

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

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

As discussed above, we consider the 2014 DAU needs to contain detailed provisions regarding how Aurizon Network will treat access seekers and holders in order to appropriately account for their interests, the public interest and the object of Part 5 of the Act, given the effect actual or perceived biased behaviour by Aurizon Network can have on the efficient provision of the service and competition in related markets. Indeed, section 137(1A) of the Act requires the 2014 DAU to include, among other things, provisions for identifying, preventing and remedying conduct that unfairly differentiates in a material way between access seekers and users.[95] This will not be achieved by simply replicating in the undertaking the unfair differentiation provisions expressed in the Act. Instead, we consider it requires the inclusion of additional provisions to govern the behaviour of Aurizon Network in its treatment of access seekers, users and related parties, which complement, rather than reiterate or displace, the unfair differentiation concept established in the Act. For example, clause 2.4(d) of our CDD amended DAU includes a requirement for Aurizon Network to ensure that all of its transactions with other parties in relation to access are conducted on an arms-length basis. This is intended to complement and enhance the effectiveness of the unfair differentiation provisions in the QCA Act.

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

Accordingly, we have revised clauses 2.2 and 2.4 of our IDD amended DAU to minimise potential inconsistencies with the unfair differentiation concept used in the QCA Act. The table below provides a summary of the changes we have made to the amendments proposed in the IDD

[94] Section 168A(a) of the QCA Act.

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

amended DAU to provide greater consistency with the unfair differentiation concept used in the QCA Act.

Table 3 Summary of changes made to clauses 2.2 and 2.4 of the IDD amended DAU to provide greater consistency with the unfair differentiation concept used in the QCA Act

Clause	*Rationale*
Clause 2.2(a) of the IDD amended DAU—facilitate the **non-discriminatory** negotiation of access agreements by Aurizon Network and Access Seekers	We have removed reference to 'non-discriminatory' in this clause (this clause is now clause 2.2(c) of our CDD amended DAU). We acknowledge use of non-discriminatory in this context could create uncertainty with respect to Aurizon Network's ability to differentiate between access seekers in the circumstances set out under section 100 of the QCA Act. We consider the inclusion of another descriptor in this objective, such as unfair differentiation, is not needed and will only add complexity given the new objectives we have proposed in clause 2.2(a) and (b) of our CDD amended DAU already reflect the unfair differentiation concept.
Clause 2.2(b) of the IDD amended DAU – apply the provisions of the Act through: (i) the establishment of processes for Access negotiations and the utilisation of Capacity that are expeditious, efficient, timely, flexible, commercial and **non-discriminatory**; …	We have retained the use of 'non-discriminatory' in this clause (this clause is now clause 2.2(d) of our CDD amended DAU), noting this was originally included in the 2014 DAU. We consider this usage is appropriate as its context is about the establishment of processes, rather than the actual treatment of access seekers or access holders. We consider processes should be established so that they are not, in themselves, discriminatory. It is in the decisions and conduct of Aurizon Network where differentiation may occur. As such, we do not consider there is any inconsistency with the unfair differentiation concept in this instance.
Clause 2.2(i) of the IDD amended DAU – ensure that Aurizon Network does not engage in any activity or conduct (or agree to engage in such activity or conduct), either independently or with Related Operators, which has the purpose of, results in or creates, or is likely to result in or create: … (iv) a substantial lessening of competition or a situation that is otherwise anti-competitive	We have removed clause 2.2(i)(iv) of the IDD amended DAU, as we acknowledge the use of this terminology could be considered to overlap with the jurisdiction of the Australian and Competition and Consumer Commission (ACCC) which is not intended.
Clause 2.4 of our IDD amended DAU	We have made a number of amendments to this clause (including those aspects of clause 2.2 of our IDD amended DAU moved into this clause, as discussed above) to ensure obligations regarding Aurizon Network's treatment of access seekers, users and related parties are not inconsistent with the unfair differentiation concept used in the QCA Act. These include: • changing the title of this clause from 'Non-discriminatory treatment' to 'Behavioural obligations', which we consider better encapsulates the substance of this clause. • ensuring these obligations reflect the circumstances in which the QCA Act permits Aurizon Network to differentiate between access seekers and users.

Clause	*Rationale*
	We have also revised this clause for the purposes of simplification by removing duplication between Aurizon Network's obligations, where appropriate.

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

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

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

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

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

Consolidated draft decision 3.3

(1) After considering Aurizon Network's proposed intent and scope provisions relating to the objectives of the undertaking and Aurizon Network's obligations regarding its treatment of access seekers and holders, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network amends the 2014 DAU is to amend the relevant clauses in the manner set out in clauses 2.2 and 2.4 of our CDD amended DAU, including to:

(a) provide a list of objectives of the undertaking as set out in clause 2.2 of our CDD amended DAU

(b) include a clause similar to the non-discriminatory treatment clause that was included in the 2010 AU, with some amendments for clarity and to ensure it is consistent with the QCA Act, as set out in clause 2.4 of our CDD amended DAU.

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

3.4.6 Unfair discrimination and related parties

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

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

- ports in Queensland in which the Aurizon Group holds an interest (rather than only those owned or operated by the Aurizon Group)
- coal mines in Queensland in which the Aurizon Group holds an interest
- a third party which has a commercial agreement with a related party.[96]

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

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

Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network said that it is prepared to volunteer a commitment that it would not unfairly differentiate in a way that materially impacts competition in respect of access related matters in

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

favour of ports or mines in the CQCR in which it holds an interest. However, it considered that the drafting in clause 2.2(g)(ii) of our IDD amended DAU is too broad, as the definition of a 'related competitor' could extend to any port or coal mine in Queensland. Aurizon Network considered this is beyond the legitimate scope of the undertaking as it could capture a port or mine which is not connected, or not proposed to be connected, to the declared service. Aurizon Network proposed amending the definition of a 'related competitor' so that it applies in respect of any port or coal mine connected, or proposed to be connected, to the CQCR.[97]

Aurizon Network also did not consider it appropriate that it be required to procure that its related parties do not engage in conduct which prevents or hinders an access seeker's or access holder's access (as per cl. 2.2(g)(i) of our IDD amended DAU). It considered it has no power to procure that its parent or related companies behave in a particular way, and considered that its related parties could be held liable themselves for a contravention of section 104 or 125 of the QCA Act.[98]

Other stakeholders

Anglo American said clause 2.2(h)(i) of our IDD amended DAU should refer to 'related operators, related competitors and third parties.'[99] Anglo American added that, in the light of the Aurizon Group's diversification of its interests, protections against the abuse of Aurizon Network's natural monopoly position in favour of related entities in upstream and downstream markets are essential to promote the public interest, including the public interest in having competition in markets, whether or not in Australia, as required by section 138(2)(d) of the QCA Act.[100]

QCA analysis and consolidated draft decision

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

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

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

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

[97] Aurizon Network, 2014 DAU, sub. 83: 47.
[98] Aurizon Network, 2014 DAU, sub. 83: 46
[99] Anglo American, 2014 DAU, sub. 95: 8.
[100] Anglo American, 2014 DAU, sub. 95: 3.

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

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

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

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

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

- a related operator
- a related competitor
- a third party that has commercial arrangements with a related competitor or related operator.[101]

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

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

[101] Clause 2.4(b)(ii)(F) of our CDD amended DAU

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

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

Consolidated draft decision 3.4

(1) After considering Aurizon Network's proposed intent and scope provisions regarding Aurizon Network's treatment of related parties, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network amends the 2014 DAU is to amend the relevant clauses in the manner set out in clause 2.4 of our CDD amended DAU, including to:

(a) provide that Aurizon Network must not unfairly differentiate in favour of a related competitor, related operator or third parties which have commercial arrangements with a related competitor or a related operator

(b) provide that Aurizon Network must ensure that all transactions between Aurizon Network and any other party in relation to access are conducted on an arms-length basis.

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

3.4.7 Intent vs objective

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

The objective of this Undertaking is, without limitation, to

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

Stakeholders' comments on the initial draft decision

Aurizon Network supported replacement of the term 'intent' with 'objective'.[102]

QCA analysis and consolidated draft decision

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

[102] Aurizon Network, 2014 DAU, sub. 83: 43.

3.4.8 Interpretation

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

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

Stakeholders' comments on the initial draft decision

Aurizon Network agreed with our initial draft decision regarding the insertion of an interpretation clause, subject to redrafting to ensure it is clear and does not add uncertainty to the application or operation of the undertaking. Aurizon Network considered it should be made clear that this clause is not intended to displace the plain meaning of the undertaking, and will only apply where there is ambiguity or uncertainty about its meaning.[103]

QCA analysis and consolidated draft decision

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

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

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

[103] Aurizon Network, 2014 DAU, sub. 83: 49.

Consolidated draft decision 3.5

(1) After considering Aurizon Network's proposed intent and scope provisions on the interpretation of the 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to:

(a) amend clause 2.2 to include a heading for clause 2.2 of 'Objective' and include the words 'The objective of this Undertaking is, without limitation, to' at the beginning of the clause, as in clause 2.2 of our CDD amended DAU

(b) include a new 'Interpretation' clause, as set out in clause 2.3 of our CDD amended DAU.

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

3.5 Scope of the undertaking

3.5.1 Aurizon Network's proposal

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

> *This Undertaking provides only for the negotiation and provision of Access and is not applicable to the negotiation or provision of services other than Access.*

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

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

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

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

- Provisions related to the supply and sale of electricity are included (clauses 2.4(a) and 2.4(b)).[104]

3.5.2 Summary of the initial draft decision

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

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

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

3.5.3 Stakeholders' comments on the initial draft decision

Aurizon Network disagreed with including the words 'Except where expressly stated to the contrary' in clause 2.5(a) of the IDD amended DAU, as it considered the access undertaking relates to the provision of access to the declared service and, if it volunteers to accept provisions unrelated to the provision of the declared service, these should be specifically identified rather than relying on a catchall statement.[105]

Aurizon Network noted a possible issue with respect to our drafting changes in clause 2.5(e) of our IDD amended DAU, where the clause refers to a standard access agreement instead of the Access Agreement and Trains Operations Agreement. Aurizon Network considered this would mean the access agreements between Aurizon Network and access holders that are negotiated will not be caught by this clause and therefore the undertaking would require Aurizon Network to vary the relevant access agreement or act in a way inconsistent with the access agreement.[106] Aurizon Network supported our amendment to clause 2.5(g) of our IDD amended DAU.

The QRC supported our drafting change to clause 2.5(a).[107] However, the QRC did not support clause 2.5(g) of the IDD amended DAU as it considered that, as the 2014 DAU is a voluntary undertaking, the undertaking should be able to modify the rights of Aurizon Network that are set out under the QCA Act.[108]

[104] Provisions related to the supply and sale of electricity are discussed in Section 3.6.
[105] Aurizon Network, 2014 DAU, sub. 83: 49.
[106] Aurizon Network, 2014 DAU, sub no 83: 49
[107] QRC, 2014 DAU, sub. 84: 9.
[108] QRC, 2014 DAU, sub. 84: 10.

3.5.4 QCA analysis and consolidated draft decision

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

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

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

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

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

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

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

undertaking, which we do not consider appropriate from a clarity and certainty perspective (section 138(2)(h)).

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

Consolidated draft decision 3.6

(1) After considering Aurizon Network's proposed 'Scope' clause of the 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.3 of the 2014 DAU in the manner set out in clause 2.5 of our CDD amended DAU, including to:

(a) provide that 'access', for the purposes of this clause, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act (cl. 2.5(a) of the CDD amended DAU).

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

3.6 Supply and sale of electricity

3.6.1 Aurizon Network's proposal

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

- to the extent Aurizon Network sells or supplies a related operator with electricity, it cannot refuse to sell or supply electricity to another access seeker or access holder. However, the sale or supply of electricity is not part of access and, except as expressly referred to in the undertaking, is not subject to the provisions of the undertaking (cl. 2.4(a) of the 2014 DAU)
- Aurizon Network will not be obliged to sell or supply electricity to an access seeker or access holder or to agree to do so if it is not lawfully entitled to; or on terms that would be unreasonable or uncommercial (cl. 2.4(b) of the 2014 DAU).

These clauses largely mirror clauses in the 2010 AU.

3.6.2 Summary of the initial draft decision

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

Terms and conditions for supply and sale of electricity

The 2014 DAU provides that, if Aurizon Network supplies or sells electricity to its related operator, it must agree to also supply or sell electricity to other access seekers or access holders (or a nominated railway operator). We considered the obligation to supply or sell electricity to third parties if it is supplied or sold to the related operator of Aurizon Network, combined with the unfair discrimination provisions in the 2014 DAU and the QCA Act, were sufficient to ensure discrimination in the supplying and selling of electricity cannot occur. We did not consider it

appropriate for the undertaking to include lengthy notice periods relating to any decision by Aurizon Network to cease supplying electricity to train operators (for example, if it considers the terms of supply have become unreasonable or uncommercial), noting that Aurizon Network must agree to supply electricity to other access seekers or holders if it supplies it to its related operator.

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

3.6.3 Stakeholders' comments on the initial draft decision

Aurizon Network agreed with the initial draft decision in respect of the supply and sale of electricity.[109]

The QRC reiterated its comments from its submission on the 2014 DAU that Aurizon Network should commit to supply electricity as an absolute obligation. The QRC noted that Aurizon Network has an incentive to provide electricity and that there is some protection provided under the initial draft decision, with provisions regarding unfair discrimination and the proposal to provide a dispute resolution procedure for electricity disputes (cl. 2.7(c) of the IDD amended DAU). The QRC suggested the issue be revisited in future undertakings.[110]

Anglo American said the supply of electricity should be covered by UT4, as there is no other way for users of the CQCN to procure electricity. It added that the declaration in section 250 of the QCA Act clearly includes electricity assets and Aurizon Network is entitled to recover the costs of those assets. Anglo American submitted that it is inconsistent with the declaration of the CQCN to require regulation of all aspects of the natural monopoly facility, and yet to permit Aurizon Network to charge monopoly prices for a service which is an essential component of that natural monopoly. It considered that, as a natural monopolist, Aurizon Network can control services associated to the provision of below rail access that are not contestable, or are weakly contestable, and it is important for the access undertaking to regulate those services. It considered Aurizon Network's legitimate business interests would not suffer if electricity services are provided on a cost pass-through basis.[111]

Vale supported the initial draft decision to include a dispute resolution mechanism for disputes arising in respect of electricity supply and stated that the lack of an absolute obligation for Aurizon Network to supply electricity presents a risk to train operators, customers and the coal system generally.[112]

3.6.4 QCA analysis and consolidated draft decision

We note the views expressed by stakeholders about whether or not the supply of electricity is part of the declared service. Our own view is that electricity supply does form part of the declared service, for the reasons set out below.

The 2014 DAU was submitted to us under section 136 of the QCA Act, which allows the inclusion of matters within the undertaking, regardless of whether or not those form part of the declared service. As such, we therefore are still required to approve or refuse to approve the terms

[109] Aurizon Network, 2014 DAU, sub. 83: 43.
[110] QRC, 2014 DAU, sub. 84: 10–11.
[111] Anglo American, 2014 DAU, sub. 95: 3–5.
[112] Vale, 2014 DAU, sub. 79: 2.

included in the 2014 DAU by Aurizon Network for the supply of electricity, having regard to section 138(2), irrespective of whether or not that supply is part of the declared service.

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

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

Coverage of supply of electricity in the declaration

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

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

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

Electricity network services

The term 'rail transport infrastructure' used in section 250(3) of the QCA Act is expressly defined among the list of defined terms set out in Schedule 2 to the QCA Act. Schedule 2 of the QCA Act defines that term by reference to the same definition used in the *Transport Infrastructure Act 1994* (Qld) (TIA). The TIA definition includes overhead electrical power supply systems associated with the railway's operation, as well as other facilities necessary for operating a railway.

It is clear that overhead electrical power cables and associated power supply infrastructure (such as substations) that support the conveyance of electricity that are associated with the railway's operation and owned and operated by Aurizon Network would fall within the definition of the rail transport infrastructure of the CQCN.[113] Therefore the use of that electricity network infrastructure is necessarily a use of the rail transport infrastructure. Accordingly, the supply of the use of electricity network services is part of the declared service under the QCA Act (namely the supply of the use of Aurizon Network's electricity network infrastructure to convey electrical energy through the relevant parts of the CQCN).

Supply of electrical energy

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

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

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

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

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

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

3.7 Electricity dispute resolution

3.7.1 Aurizon Network's proposal

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

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

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

3.7.2 Summary of the initial draft decision

Anglo American,[114] Asciano[115] and the QRC[116] submitted that a dispute resolution mechanism relating to the supply and sale of electricity should be included in the 2014 DAU. We agreed because we considered it important that any matter addressed in the undertaking should be subject to dispute resolution, and that the ability for supply and sale of electricity to be disputed be made clear. In particular, our view was that it is important that matters included in the undertaking, which are subject to Aurizon Network's discretion and negotiation with access seekers and/or access holders, should be subject to effective dispute resolution mechanisms.

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

[114] Anglo American, 2014 DAU, sub. 7: 20.
[115] Asciano, 2014 DAU, sub. 22: 65.
[116] QRC, 2014 DAU, sub. 42: 11.

3.7.3 Stakeholders' comments on the initial draft decision

Aurizon Network disagreed with our initial draft decision to provide for dispute resolution in respect of the supply and sale of electricity. It said this provision has the effect of investing the QCA with an arbitration power in respect of the supply of electricity, which it considered is beyond the scope of the QCA's powers under the QCA Act as it considered the supply of electricity is not part of the declared service.[117] Aurizon Network said that, while it made a voluntary commitment to supply electricity, it need not make any commitment for dispute resolution on electricity matters and proposed deleting this provision.[118]

Anglo American, Vale and QRC supported the initial draft decision,[119] with Vale noting that significant investments had been made by stakeholders within the electrified systems to enter long-term take-or-pay contracts for the operation of a specific train configuration (i.e. electric traction trains).

3.7.4 QCA analysis and consolidated draft decision

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

We note Aurizon Network's view that the supply and sale of electricity is not part of the declared service and, as such, it is beyond our power to require dispute resolution in respect of electricity matters (unless volunteered by Aurizon Network).

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

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

In our view, this means that it is within our power to propose the inclusion of a dispute resolution mechanism for the supply and sale of electricity. Indeed, we are obliged to do so if it is one of the ways that we consider it appropriate to amend the 2014 DAU, having regard for the factors set out in section 138(2) of the QCA Act.

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

We consider the terms and conditions of the supply and sale of electricity to be an integral part of an access seeker's/holder's use of the electrified sections of the CQCN. Given this

[117] Aurizon Network, 2014 DAU, sub. 83: 37
[118] Aurizon Network, 2014 DAU, sub. 83: 50.
[119] Anglo American, 2014 DAU, sub. 95: 5; Vale, 2014 DAU, sub. 79: 2; QRC, 2014 DAU, sub. 84: 10.

importance, we do not consider it appropriate for access seekers and holders to be unable to have access to a dispute resolution mechanism in relation to the supply and sale of electricity.

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

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

Consolidated draft decision 3.7

(1) After considering Aurizon Network's proposal for the supply and sale of electricity, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.4 of the 2014 DAU to include specific provision for dispute resolution in respect of the supply and sale of electricity, as set out in clause 2.7 of the CDD amended DAU.

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

3.8 Associated services

3.8.1 Aurizon Network's proposal

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

In its response to submissions on its 2013 DAU, Aurizon Network said it considers the undertaking only applies to negotiation and provision of access to the declared service, and is not applicable to negotiation or provision of services other than access (except for supply and sale of electricity, which it has elected to include). Aurizon Network said associated services were outside the scope of the regulatory regime.[120]

3.8.2 Summary of the initial draft decision

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

The QRC and Anglo American identified a list of, comprising:[121]

[120] Aurizon Network, 2013 DAU, sub. 77: 44.
[121] QRC, 2014 DAU, sub. 42: 12; Anglo American, 2014 DAU, sub. 7: 15.

- rail infrastructure management and train control services for rail spurs
- level and other crossings including maintenance and upgrades
- land leases to customers of corridor land and land owned by Aurizon Network
- design, scope and standard reviews of connecting infrastructure
- electricity supply and sale
- rail relocation and related construction and maintenance services (for private spurs and loops)
- transfer facilities licences regarding load-out interface requirements, load profiling, dust veneering and other matters Aurizon Network has sole authority over
- capacity modelling—specifically dynamic modelling services such as system capacity and private infrastructure interface.

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

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

3.8.3 Stakeholders' comments on the initial draft decision

Aurizon Network agreed with our initial draft decision.[122]

The QRC noted we had not accepted its original proposal that Aurizon Network should provide associated services on reasonable terms (i.e. ancillary services for which it is only practicable for access holders to engage Aurizon Network to perform). The QRC accepted our initial draft decision but submitted that, where another railway is connected to the regulated network, Aurizon Network should be under an obligation to agree an arrangement which provides for coordinated train control across the two networks (without obliging Aurizon Network to provide train control on the other railway).[123] Glencore supported the QRC's proposal, and added that if negotiations in such matters are unresolved, it should be referred to the QCA.[124]

Anglo American said that UT4 should include a definition or list of associated services and re-submitted its list of such services. Anglo American reiterated that the majority of its list were services that were not contestable, or at least weakly contestable.[125]

Anglo American cited the example of Aurizon Network's Projects team, where payment at set rates for their time and project management services is an Aurizon Network requirement. Anglo American considered these services to be non-contestable and should be regulated to ensure that Aurizon Network is not double-recovering 'Project' team fees that are billed for access-related services—for example, where team members are employees of Aurizon Network.[126]

[122] Aurizon Network, 2014 DAU, sub. 83: 43.
[123] QRC, 2014 DAU, sub. 84: 11–12.
[124] Glencore, 2014 DAU, sub. 96: 3.
[125] Anglo American, 2014 DAU, sub. 95: 5.
[126] Anglo American, 2014 DAU, sub. 95: 5–6.

Anglo American also:

- did not agree that rail relocation services could be subject to competition as no other party could remove or relocate mainline track without Aurizon Network's consent
- did not agree that private infrastructure falls outside of section 250 of the QCA Act. Anglo American stated that balloon loops and spur lines have always fallen within the scope of access undertakings and been subject to regulation
- had concerns around the cost and provision of rail grinding and track laying services. It considered there should be full transparency around how these services are contracted and conducted.[127]

3.8.4 QCA analysis and consolidated draft decision

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

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

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

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

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

[127] Anglo American, 2014 DAU, sub. 95: 6–7.

Consolidated draft decision 3.8

(1) After considering Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's overall proposal for 'associated services'.

(2) The way in which we consider it is appropriate for Aurizon Network to amend the 2014 DAU is to amend clause 2.3 of the 2014 DAU to:

(a) provide that 'access', for the purposes of the scope of the undertaking, includes all aspects of access to the service taken to be declared under section 250(1)(a) of the QCA Act (as set out in clause 2.5(a) of the CDD amended DAU).

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

3.9 Incentive mechanism

3.9.1 Aurizon Network's proposal

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

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

3.9.2 Summary of the initial draft decision

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

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

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

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

An incentive mechanism that meets these criteria will act to:

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

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

3.9.3 Stakeholders' comments on the initial draft decision

Aurizon Network

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

- the need to align metrics with TSEs—Aurizon Network noted that TSE delivery is influenced by parties other than Aurizon Network (ports, mines, and above rail operations), and that TSE delivery is asymmetric in distribution (actual delivery is skewed to less than 100%). Aurizon Network provided some suggestions to address these issues and indicated a willingness to discuss with stakeholders
- addressing the imbalance caused by Aurizon Network's membership of the Aurizon Group—Aurizon Network said that if the broad mix of contracts narrows so that a third party operator becomes the dominant operator, there may be incentives for Aurizon Network to favour one train operator over another. Aurizon Network was willing to recommence discussions with third party operators on how this concern could be addressed in the incentive mechanism.[128]

Other stakeholders

The QRC and Vale considered that clause 2.8 of the IDD amended DAU does not add anything to the undertaking as it only offers Aurizon Network a discretion to develop an incentive mechanism.[129] The QRC suggested abandoning clause 2.8 in favour of us providing guidance on the substance of a mechanism in our consolidated draft decision, noting that there is insufficient time to develop a mechanism as part of UT4. It suggested that Aurizon Network present a proposal supported by stakeholders as part of the UT5 submission.

Anglo American submitted that an incentive mechanism is not appropriate for the current form of regulation. It considered that price cap regulation is a truer and more appropriate form of incentive regulation, rather than an artificially created incentive mechanism, and should be considered for UT5.[130]

Asciano and BMA considered the development of an incentive mechanism should be mandatory. Asciano said it would broadly support an incentive mechanism that genuinely met the criteria set out in clause 2.8(b) of the IDD amended DAU. BMA had concerns about an incentive mechanism being based on metrics that are high-level and immeasurable. It also considered that a more targeted requirement for the development of an incentive mechanism be included, which is more likely to be achievable before the end of UT4 and could be revised at a later date.[131]

[128] Aurizon Network, 2014 DAU, sub. 83: 50–52.
[129] QRC, 2014 DAU, sub. 84: 11; Vale, 2014 DAU, sub. 79: 3.
[130] Anglo American, 2014 DAU, sub. 95: 7.
[131] Asciano, 2014 DAU, sub. 76: 12; BMA, 2014 DAU, sub. 78: 8–9.

3.9.4 QCA analysis and consolidated draft decision

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

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

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

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

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

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

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

Consolidated draft decision 3.9

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

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

3.10 Other specific drafting

3.10.1 Summary of the initial draft decision

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

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

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

3.10.2 Stakeholders' comments on the initial draft decision

Aurizon Network agreed with our initial draft decision on the above matters.[132] Aurizon Network noted that it had no objection to moving requirements relating to the Ultimate Holding Company Support Deed from Part 3 to Part 2, although it had objections to the content of the Deed itself (these views are discussed in Chapter 4 (Ring-fencing)).[133]

The QRC supported the inclusion of clause 2.5(c) in our IDD amended DAU, requiring Aurizon Network to notify an access holder if it does not own land on which rail assets are located. However, the QRC proposed a drafting change to improve clarity by specifically linking the obligation to the land on which rail infrastructure is situated referred to in clause 2.5(b)(ii) of IDD amended DAU.[134]

3.10.3 QCA analysis and consolidated draft decision

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

[132] Aurizon Network, 2014 DAU, sub. 83: 44.
[133] Aurizon Network, 2014 DAU, sub. 83: 52.
[134] QRC, 2014 DAU, sub. 84: 9.

(a) clause 2.2(b)(i), as it does not include a reference to flexibility in respect of the establishment of processes for access negotiations and use of capacity. The inclusion of flexibility will emphasise the importance of this attribute and enhance the potential for this clause to support effective negotiation and stakeholder engagement, which we consider to be an important consideration in the interests of access seekers and access holders (section 138(2)(e) and (h)).

(b) clause 2.3(b)(ii), as it did not require Aurizon Network to notify access holders if it is not the owner of or have a legal right of access to, land to which the access holder is seeking access. We propose that Aurizon Network be required to do so, as we consider it is in the interests of access holders and Aurizon Network for access holders to be provided with this assistance so they may be able to use the service (section 138(2)(b) and (h)). In response to the QRC's submission, we have clarified this requirement by specifying that it applies to the land upon which the rail infrastructure is situated (cl. 2.5(c) of our CDD amended DAU).

(c) the requirements related to the Ultimate Holding Company Support Deed being located in Part 3 of 2014 DAU (Ring-fencing) (we consider the substance of these requirements in Section 4.4.2 of this decision). We do not consider it appropriate for these requirements to be included in Part 3 of the 2014 DAU from a clarity and certainty perspective (section 138(2)(h)). The Ultimate Holding Company Support Deed is an important measure that underpins the Aurizon Group's commitment toward Aurizon Network's compliance with its obligations under the access undertaking, of which ring-fencing is one aspect (albeit a significant aspect in the context of Aurizon Network's position within a consolidated business structure). We consider its inclusion within Part 2 of the 2014 DAU reflects this commitment is more than just a ring-fencing matter, and should encompass the entire undertaking.

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

Consolidated draft decision 3.10

(1) After considering Aurizon Network's proposed clauses 2.2(b)(i), 2.3(b)(ii), 3.3 of the 2014 DAU, our consolidated draft decision is to refuse to approve these clauses of the 2014 DAU.

(2) The way in which we consider it is appropriate that these clauses are amended is set out in clauses 2.2, 2.5 and 2.6 of the CDD amended DAU, as follows:

- **(a) the word 'flexible' in the list of descriptors of the processes for access negotiations and utilisation of capacity (clause 2.2(d)(i) of the CDD amended DAU)**
- **(b) a requirement for Aurizon Network to notify access holders in writing if it is not the owner, or does not have a legal right to authorise access to, land upon which the rail infrastructure is situated to which the access holder is seeking access (clause 2.5(c) of the CDD amended DAU)**
- **(c) movement of the requirements relating to the Ultimate Holding Company Support Deed from Part 3 to Part 2 (clause 2.6 of the CDD amended DAU).**

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

4 RING-FENCING

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

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

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

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

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

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

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

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

In setting out the way in which we consider it appropriate to amend the 2014 DAU *we have considered Aurizon Network's submissions and proposed amendments.*

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

4.1 Introduction

Aurizon Network is part of a vertically integrated group of companies. This group also includes the dominant supplier of above-rail services in the CQCN. In this context, Aurizon Network's ring-fencing regime has to be sufficiently robust so that Aurizon Network cannot use its monopoly power or receive confidential information, knowingly or unknowingly, and use it in a manner that favours the Aurizon Group's strategic intent, to the detriment of competition in upstream and downstream markets.[135]

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

Table 4 Measures covered in the 2010 AU ring-fencing regime

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

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

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

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

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

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

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

4.2 Overview

Aurizon Network's proposal

Aurizon Network said its intent in the 2014 DAU was to streamline the ring-fencing regime so it is effective and widely understood, and contributes to a low-cost compliance culture.[136] Aurizon Network said the 2014 DAU contains, in substance, the same principal controls as existed in prior undertakings, with obligations clarified or strengthened.[137] In its view, the 2014 DAU creates a workable and balanced framework that addresses key competition risks and ensures a level playing field.[138]

Aurizon Network recognised ring-fencing is important to the way the Aurizon Group is structured, how it operates, and how it creates value for its shareholders and customers. Aurizon Network viewed its proposals as seeking to achieve a ring-fencing regime that is clear, readily understandable and workable for its large number of employees, contractors and other Aurizon parties.[139]

Aurizon Network said its core ring-fencing obligations had remained largely unchanged since UT1. Aurizon Network also noted that, at each regulatory review, new provisions have been added in response to concerns of a hypothetical nature, resulting in an unnecessarily complex and unwieldy regime.[140]

4.2.1 Legislative framework and QCA assessment approach

Factors affecting approval of an access undertaking

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

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

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

- section 138(2)(a), (b), (d), (e), (g) and (h) should be given more weight, as they raise important considerations from a ring-fencing perspective
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, of which we consider section 168A(a), (c) and (d) should be given more weight

[136] Aurizon Network, 2013 DAU, sub. 2:55.
[137] Aurizon Network, 2013 DAU, sub. 2:54.
[138] Aurizon Network, 2013 DAU, sub. 2:55.
[139] Aurizon Network, 2013 DAU, sub. 2:55.
[140] Aurizon Network, 2013 DAU, sub. 2:55.

- sections 138(2)(f) and 168A(b) should be given less weight, as they are not as practically relevant to our assessment of Aurizon Network's proposed ring-fencing regime and protections against anti-competitive behaviour or unfair differentiation of a material nature.

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

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

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

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

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

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

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

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

provider or a related entity. This is relevant to the extent that ring-fencing arrangements should ensure that such discrimination does not occur where Aurizon Network deals with related entities.

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

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

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

Contents of access undertakings

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

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

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

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

QCA assessment approach

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

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

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

Table 5 QCA approach to assessing effectiveness of the 2014 DAU ring-fencing regime

Assessment criterion	*Rationale*
Does the regime support the objective of promoting effective competition in upstream and downstream markets?	This involves assessing whether the: • commitments to avoid anti-competitive behaviour and unfair differentiation of a material nature • ultimate holding company support deed (UHCSD) have sufficiently strong provisions within them to be fit for purpose.
Are the management of confidential information and decision making principles credible and effective?	This involves assessing whether the ring-fencing regime: • protects confidential information from inappropriately flowing between the owner/operator of the declared service and upstream or downstream activities or related parties • provide suitable decision making principles.
Are the operational and functional separation provisions credible and effective?	This involves assessing whether the ring-fencing regime effectively separate: • Aurizon Network's operations from the remainder of the Aurizon Group • operations regarding the declared service from other operations.
Are the employee separation provisions credible and effective?	This involves assessing whether the ring-fencing regime place effective controls on staff movements between Aurizon Network and related parties.
Are the management separation provisions credible and effective?	This involves assessing whether the ring-fencing regime ensure the independence of management and Aurizon Network corporate decision making regarding the declared service, from other commercial activities.
Are the accounting separation provisions credible and effective?	This involves assessing whether the ring-fencing regime effectively separate: • Aurizon Network's accounts from the remainder of the Aurizon Group • the accounts, relating to operations associated with the declared service, from other operations.
Are the reporting, compliance and auditing provisions credible and effective?	This involves assessing whether the ring-fencing regime: • provides transparent, timely and meaningful information reporting • provides an effective compliance regime • includes a robust and transparent audit process.

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

4.3 The 2014 DAU ring-fencing regime

4.3.1 Aurizon Network's proposal

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

Table 6 Aurizon Network's approach to ring-fencing in the 2014 DAU

Issue	*Aurizon Network's rationale*
Legislative environment	• Prior to privatisation, the Queensland Government strengthened ring-fencing obligations through legislation in the *Transport Infrastructure Act 1994* (TIA). This required an independent board and arms-length dealings between Aurizon Network and its related operator. Aurizon Network said the ring-fencing obligations in the access undertaking should supplement enforcement of statute, not supplant it, and said the QCA should not, and cannot, require a regime stricter than the legislature intended through imposing additional requirements in the access undertaking.[141] • Aurizon Network said the relevance of section 137(2)(ea)[142] of the QCA Act has lessened due to legal separation of Aurizon Network from its parent company. It said the QCA's focus, when considering ring-fencing, resides in section 138(2) regarding the legitimate business interests of access providers, seekers, holders and users.[143] • Aurizon Network also said it is the service that is regulated, not all activities of the legal entity (Aurizon Network Pty Ltd). Aurizon Network challenged the legal basis for ring-fencing beyond declared services, and suggested limits on imposing obligations.[144]
Aurizon Network's legitimate business interests	• Aurizon Network said privatisation meant the Aurizon Group and Aurizon Network were no longer subject to mixed mandates of public ownership, having instead a predominant objective of advancing shareholders' interests. Aurizon Network said this had implications for a regulatory framework that had previously too readily assumed Aurizon Network's commercial interest could be subordinated to the larger purpose of promoting development of Queensland coal mines. It said the 2014 DAU was an opportunity to develop a regulatory framework that balanced Aurizon Network's commercial interests with the interests of access seekers, holders and the public.[145]
Vertical integration	• Aurizon Network said vertical integration produces tangible efficiency benefits that flow to and promote the interests of access providers, access seekers and users, as well as the public interest.[146] It said this creates powerful incentives for it to contribute to supply chain performance, compared with weak financial incentives for standalone network businesses.[147] Aurizon Network said efficiency benefits should be preserved by ring-fencing, with the focus instead on guarding against cross-subsidy and confidential information misuse undermining competition.[148]
Behavioural constraints	• Aurizon Network said access negotiations increasingly centre on producers rather than operators, and the ring-fencing regime should also change to reflect this. Aurizon Network said it does not compete in the same market as producer access seekers, so anti-competitive concerns are not prominent.[149] • Aurizon Network also said it is 'policed' by 20 of the largest Australian companies and users who are 'alive' to risks of Aurizon Network discriminating against third party operators. As a result, the level of regulatory ring-fencing intervention, to protect informed consumer interests, can be substantially less than in a retail context.[150]

[141] Aurizon Network, 2013 DAU, sub. 2: 60.
[142] Section 137(2)(ea) requires separating operations concerning a regulated service from another commercial activity.
[143] Aurizon Network, 2013 DAU, sub. 2: 59.
[144] Aurizon Network, 2013 DAU, sub. 77: 19–20.
[145] Aurizon Network, 2013 DAU, sub. 2: 25.
[146] Aurizon Network, 2013 DAU, sub. 2: 57.
[147] Aurizon Network, 2013 DAU, sub. 2: 57.
[148] Aurizon Network, 2013 DAU, sub. 2: 57.
[149] Aurizon Network, 2013 DAU, sub. 2: 57.
[150] Aurizon Network, 2013 DAU, sub. 2: 58.

4.3.2 Summary of the initial draft decision

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

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

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

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

Legislative environment

We agreed with the QRC's view,[151] that Aurizon Network adopted an overly narrow interpretation of the QCA Act and the ring-fencing requirements (see Part 5, s. 137(1A) and (2)(ea) and s. 138(2)).

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

Aurizon Network's legitimate business interests

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

Vertical integration

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

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

[151] QRC, 2013 DAU, sub. 84: 23; QRC, 2014 DAU, sub. 42: 14.

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

In submissions, the QRC also said the ring-fencing regime in the 2014 DAU was inadequate to regulate the activities of a privatised, integrated business whose stated goals are to leverage its integrated model.[152]

Behavioural constraints

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

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

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

Evidence and practice in the 2010 AU

Overall, stakeholders said they lacked confidence in the current ring-fencing regime (the 2010 AU regime) and even more so in Aurizon Network's proposed 2014 DAU ring-fencing regime.[153]

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

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

Initial draft decision conclusion and approach

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

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

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[152] QRC, 2013 DAU, sub. 84: 20–21; QRC, 2014 DAU, sub. 42: 14.
[153] QRC, 2013 DAU, sub. 84: 5, 7; QRC, 2014 DAU, sub. 42: 13.

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

4.3.3 Stakeholders' comments on the initial draft decision

Baseline comparison

Aurizon Network disagreed with our use of the 2010 AU as the baseline, arguing that each undertaking is specific to the requirements at the time and should not be a build upon a previous version.[154] Asciano agreed with using the 2010 AU as a base.[155]

QCA power to propose ring-fencing drafting

Aurizon Network said that:

(a) it disagreed with most of our amendments, saying we had gone beyond our statutory powers by substantially rewriting the ring-fencing provisions

(b) we had introduced greater complexity and inflexibility

(c) our approach should be to consider whether the undertaking is appropriate, not to substitute our own version merely because we prefer an alternative set of words

(d) our approach was inconsistent with the QCA Act. [156]

The QRC supported what it considers to be significant improvements proposed for the ring-fencing regime, noting it considers the 2014 DAU proposed by Aurizon Network to be defective in a large number of respects. It said the ring-fencing regime we proposed 'represents a step toward a meaningful and effective ring-fencing regime.'[157]

Anglo American and Vale supported our ring-fencing changes.[158]

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

Effectiveness of ring-fencing

Aurizon Network submitted that we have not demonstrated that its proposed ring-fencing provisions are inadequate and have no facts before us to justify our proposed amendments– that is, there is no evidence of failure and no complaints. Aurizon Network said this was an unusual approach to regulation.[159]

Vale submitted that it is difficult to assess the effectiveness of the ring-fencing regime on the basis of claims for breach.[160]

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

[154] Aurizon Network, 2014 DAU, sub. 83: 57.
[155] Asciano, 2014 DAU, sub. 76: 12.
[156] Aurizon Network, 2014 DAU, sub. 83: 57.
[157] QRC, 2014 DAU, sub. 84: 13.
[158] Anglo American, 2014 DAU, sub. 95: 8; Vale, 2014 DAU, sub.79: 3.
[159] Aurizon Network, 2014 DAU, sub. 83: 57.
[160] Vale, 2014 DAU, sub 79: 3.

there have been no breaches. Unless the breach is blatant, it is very difficult for the access holder to detect it or to obtain evidence.[161]

Aurizon Operations said that when considered in isolation, the ring-fencing measures do not appear unreasonable. However, in aggregate, there is a potential for an increased level of compliance risk in how Aurizon Network interfaces with its related operator.[162]

4.3.4 QCA analysis and consolidated draft decision

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

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

Overview

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

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

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

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

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

[161] QCoal, 2014 DAU, sub. 80: 2.
[162] Aurizon Operations, 2014 DAU, sub. 93: 27.

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

Each is addressed below.

The object of Part 5 of the QCA Act

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

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

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

Whether industry participants consider the ring-fencing regime effective

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

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

Whether the ring-fencing regime effectively balances competing interests

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

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

Baseline comparison

In assessing Aurizon Network's 2014 DAU ring-fencing regime, our view is that under section 138(2)(h) we can consider the effectiveness of Aurizon Network's new ring-fencing regime by comparing that regime with the 2010 AU ring-fencing regime.

This approach is in our view more transparent, and more easily evaluated in terms of cost-effectiveness, which we consider to provide an appropriate balance between the interests of access seekers, access holders, and Aurizon Network's legitimate business interests, in accordance with section 138(2) of the QCA Act.

The 2010 AU regime therefore provided a baseline for assessing the proposed regime's effectiveness and supported our assessment that Aurizon Network's 2014 DAU ring-fencing regime is not appropriate.

Consolidated draft decision 4.1

(1) After considering Aurizon Network's proposed 2014 DAU ring-fencing arrangements, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to adopt the ring-fencing provisions in the 2010 AU as the baseline for our proposed amendments.

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

4.4 Overarching provisions

We assessed Aurizon Network's 2014 DAU in the context of two overarching provisions:

- commitments to avoid anti-competitive and discriminatory behaviour (see Section 4.4.1 below)
- the ultimate holding company support deed (see Section 4.4.2 below).

These principles encompass the entire undertaking.

4.4.1 Aurizon Network's proposal

Aurizon Network's approach to the principle of avoiding anti-competitive and discriminatory behaviour in the 2010 AU, compared with its approach in the 2014 DAU, is shown in the table below. The table also shows a similar comparison in terms of the role of the ultimate holding company support deed (UHCSD).

In considering Aurizon Network's 2014 DAU, as indicated above, we consider the 2010 AU can assist us to determine whether the proposed provisions deliver an effective ring-fencing regime.

Table 7 Aurizon Network's approach to ring-fencing—in the 2010 AU and 2014 DAU

Ring-fencing element	*2010 AU approach*	*2014 DAU approach*
Commitments to avoid anti-competitive and discriminatory behaviour	Contained in Part 2 of the undertaking regarding the intent and scope of the entire undertaking. This can be applied to the Aurizon Group by virtue of the UHCSD provisions.	Includes a statement of general principles of non-discrimination in Part 3 of the 2014 DAU. The commitments are similar to the 2010 AU but are now no longer included in the 'Intent and Scope' part of the undertaking. These commitments can be applied to the Aurizon Group by virtue of the UHCSD provisions.[163]
UHCSD	The 2010 AU contains a commitment that Aurizon Network will procure Aurizon Holdings to enter into a deed which obliges the Aurizon Group to, among other things, take steps to ensure Aurizon Network can comply with its obligations in the undertaking (cl. 2.5.1 of the 2010 AU).	The 2014 DAU contains a commitment that Aurizon Network will request Aurizon Holdings to enter into a deed, which, among other things, obliges the Aurizon Group to not instruct Aurizon Network to contravene its obligations under Part 3 of the 2014 DAU. Aurizon Network considered that focusing on its obligations under Part 3 of the 2014 DAU is more appropriate, as it targets where competition risks are highest, namely in the handling of confidential information, separation of functions, potential conflicts of interest and the risk of discriminatory behaviour.[164]

4.4.2 Commitment to avoid anti-competitive and discriminatory behaviour

Summary of the initial draft decision

Aurizon Network moved the statement of commitment to general principles of non-discrimination from the Intent and Scope section of the 2010 AU to Part 3 of the 2014 DAU (Ring-fencing).[165] In our initial draft decision, we considered a commitment to avoid anti-competitive and discriminatory behaviour should be overarching and is not only a ring-fencing issue. We considered the ring-fencing provisions are intended to give effect to the underlying principle that Aurizon Network should not partake in anti-competitive and discriminatory behaviour in any of its actions. This principle encompasses the entire undertaking, consistent with the object of Part 5 of the QCA Act.

We also said that the commitments must be fit-for-purpose, given the evolution of Aurizon Network, the Aurizon Group and its strategic intent to leverage the benefits it obtains from vertical integration. Accordingly, we considered it is necessary to extend ring-fencing provisions to account for port and mine interests.

We also accepted that a potential impact of moving network functions, such as engineering, project delivery and specialised track services, out of Aurizon Network to a related party, is a potential increase in the risk of conflicts of interest.

As a result, in our initial draft decision we considered the following changes were appropriate:

[163] Aurizon Network, 2013 DAU, sub. 2: 64–65.
[164] Aurizon Network, 2013 DAU, sub. 2: 65.
[165] Aurizon Network, 2013 DAU, sub. 2: 63.

- Reinstate in Part 2 of the 2014 DAU an overarching principle-based set of statements similar to those in clause 2.2(a) of the 2010 AU, but updated to reflect the evolution of Aurizon Network (cl. 2.2 of the IDD amended DAU).
- Include a strengthened clause 3.2 from the 2010 AU in Part 2 of the DAU that covered issues surrounding port and mine ownership and clarified the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing (cl. 2.2(i) of the IDD amended DAU).

Stakeholders' comments on the initial draft decision

Non-discriminatory treatment and overarching principles

Aurizon Network said the ring-fencing regime proposed by the QCA is beyond power and unjustified. Aurizon Network considered the ring-fencing provisions proposed in the initial draft decision to be a more extreme version of those in the 2010 AU.[166]

Aurizon Network disagreed with the reference to discriminatory behaviour as not being consistent with the object of Part 5 of the QCA Act. Aurizon Network said we should focus on unfair differentiation—it said seeking to avoid discriminatory behaviour is too broad as it could capture differences in treatment of two access seekers which is not unfair or is objectively justified (as a result of different circumstances) or is not sufficiently material to have an impact on competition.[167]

Aurizon Operations submitted that, in aggregate, our proposed ring-fencing measures increase the compliance risk of how Aurizon Network interfaces with its related operator. Aurizon Operations said the problem with expanding the statutory obligation to include any differentiation is that there will be an increased level of risk aversion in dealings with a related operator, which will be greater than in dealings with third party operators.[168]

Ownership arrangements

Aurizon Network said we had assumed that Aurizon Network's stated intent to leverage the benefits of vertical integration is indicative of anti-competitive intent. Aurizon Network said this is illogical given there are many ways for leveraging benefits from vertical integration, such as provision of shared services. Aurizon Network indicated that, given the scope of an access undertaking as described in the QCA Act, there is nothing to prohibit it from owning a port or mine or undertaking above-rail services outside the CQCR. Aurizon Network said that industry did not express any objection to ownership or interest in a port by Aurizon Network or a related party.[169]

Aurizon Network did not accept that we could propose rigid constraints in the absence of any explanation or evidence that these provisions are necessary to facilitate the access of third parties. It said the access undertaking should not be a barrier for Aurizon Network to progress its legitimate business interests outside of the CQCR.[170]

Asciano, Vale and Anglo American agreed with our position in the initial draft decision.[171]

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[166] Aurizon Network, 2014 DAU, sub. 83: 37.
[167] Aurizon Network, 2014 DAU, sub. 83: 8, 44, 46.
[168] Aurizon Operations, 2014 DAU, sub. 93: 27.
[169] Aurizon Network, 2014 DAU, sub. 83: 59.
[170] Aurizon Network, 2014 DAU, sub. 83: 59.
[171] Asciano, 2014 DAU, sub. 76:12; Vale, 2014 DAU, sub. 79: 3; Anglo American, 2014 DAU, sub. 95: 8.

The QRC supported ownership restrictions and said clause 3.5(e) of the initial draft decision amended DAU should be expanded to restrict Aurizon Network from above- or below-rail activities in another railway, as it would be difficult to separate out costs.

The QRC also said that clause 3.5 should be expanded to include the development of an access undertaking, all standard documents and any future undertaking—this would restrict Aurizon Network from delegating that function to another Aurizon entity, and act to protect confidential information.[172] The QRC considered these activities to be essential roles in Aurizon Network's provision of below-rail services.

QCA analysis and consolidated draft decision

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

Non-discriminatory treatment and overarching principles/clause 3.5 of the 2014 DAU

We note Aurizon Network's comments that provisions related to 'non-discriminatory treatment', as proposed in our initial draft decision, should reflect the concept of 'unfair differentiation' that is expressed in the QCA Act. We discuss this issue in detail in Chapter 3 of this consolidated draft decision.

In response to Aurizon Operations, we accept that ring-fencing requirements result in compliance risk for Aurizon Network which could affect the costs associated with providing services to related parties as compared to other competitors. However, this is a consequence of establishing provisions to meet the section 168A(c) principle that the access provider is not to set terms and conditions that discriminate in favour of downstream operations of a related party.

For the consolidated draft decision, as outlined, we had regard to the criteria in section 138(2) including paragraph (g), and to the effectiveness of the 2014 DAU (which includes the extent to which the proposed provisions remedy or prevent conduct that unfairly differentiates in favour of related parties in a material way).

Ownership arrangements

We acknowledge that shared services can result in lower costs and more efficient service delivery for the benefit of all customers, and can therefore be in the interests of access seekers and access holders. At the same time, vertical integration necessitates an effective ring-fencing regime to allow these benefits to be realised, but without negatively impacting competition in upstream and downstream markets, as per the object of Part 5 of the QCA Act and the public interest (ss. 138(2)(a) and (d)).

The intent is not to prohibit Aurizon Network from owning a port or mine, or undertaking above-rail services, outside the CQCN. Rather, we consider that an effective ring-fencing regime requires that Aurizon Network should not undertake activities that would be in competition with other operators in the CQCN.

In response to the QRC, we consider:

- The ability to separate out costs is not sufficient reason to prohibit Aurizon Network from owning another railway, provided it is completely separate from the CQCN. We note that the

[172] QRC, 2014 DAU, sub. 84: 14.

cost allocation manual provides for a method for allocating Aurizon Holdings' overhead costs to Aurizon Network.

- The proposed inclusion (in cl. 3.5 of the IDD amended DAU) of the role of development of an undertaking and all standard documents is in our view not necessary and would effectively be regulatory over-reach. Development of an undertaking is not part of providing the declared service and to include it as such would be inconsistent with the statutory scheme of the QCA Act. However, the management of confidential information is relevant.

Conclusion

We consider Aurizon Network's approach to the principle of avoiding anti-competitive and discriminatory behaviour overly favours the business interests of Aurizon Network and its related entities. We do not consider the 2014 DAU provisions are strong enough given the changes in Aurizon Group's structure which, in our view, could facilitate, or be perceived to facilitate, anti-competitive and discriminatory behaviour. Further, the moving of network functions out of Aurizon Network to a related party could give rise to increased risk of conflicts of interest.

In our view, Aurizon Network's 2014 DAU ring-fencing regime was not consistent with the interests of access seekers and access holders (s. 138(2)(e) and (h)), or the public interest in having competition in markets (138(2)(d)). In reaching this view we had regard to Aurizon Network's legitimate business interests but considered this should be balanced against the other interests (s. 138(2) of the QCA Act).

Amending the 2014 DAU

The way we consider it appropriate to amend Aurizon Network 2014 DAU is set out in our CDD amended DAU.

We consider it is appropriate to include a clear and unambiguous overarching statement of principles for avoiding unfair differentiation with specific statements for Aurizon Network not to engage in anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing (cl. 2.4 of the CDD amended DAU). As discussed in Chapter 3 of this decision, we have, however, made drafting changes since our initial draft decision to ensure consistency with the wording of the QCA Act, while maintaining our decision to include an overarching statement of principles regarding Aurizon Network's treatment of access seekers, access holders and related parties.

Our amendments also provide an appropriate balance in provisions regarding its commitment to avoid anti-competitive and discriminatory behaviour. We note that, since the initial draft decision, we have clarified the scope of activities that Aurizon Network may engage in, as being those related to rail infrastructure as declared under section 250 of the QCA Act.

Our intention was that clause 3.5(e) of the IDD amended DAU (clause 3.4 of the CDD amended DAU) related to the declared service, that is, the access undertaking relates to the CQCN (and potential connections to or expansions of the CQCN) and cannot apply to external services. We have amended the drafting to apply only to rail infrastructure related to declared services. We note that clause 3.13(f) (CDD amended DAU) restricts Aurizon Network from providing confidential information to another Aurizon entity for the purpose of obtaining advice regarding this undertaking and standard documents.

Our changes do not deleteriously affect the legitimate business interests of Aurizon Network (s. 138(2)(b)) and in our view provide an appropriate balance between Aurizon Network's interests and those of access seekers and access holders.

Consolidated draft decision 4.2

(1) After considering Aurizon Network's 2014 DAU provisions regarding its commitment to avoid anti-competitive and discriminatory behaviour, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to:

- **(a) include an overarching principle-based set of statements (similar, but updated, to that in clause 2.2(a) of the 2010 AU) reinstated in Part 2 (clause 3.4)**
- **(b) replace clause 3.2 of the 2014 DAU with a strengthened version of clause 3.2 from the 2010 AU, clarifying the standard of competitive harm applicable with respect to the anti-competitive practices of cross-subsidisation, cost shifting and price/margin squeezing**
- **(c) move clause 3.2 of the 2014 DAU, dealing with principles of non-discrimination, to Part 2.**

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

4.4.3 Ultimate holding company support deed

Summary of initial draft decision

In our initial draft decision, we agreed with stakeholders about the need to strengthen Aurizon Network's obligations to obtain compliance of each member of the Aurizon Group with respect to Aurizon Network's ring-fencing obligations.

Given the significance of the UHCSD, we were of the view that Aurizon Network should procure, rather than request, its holding company to execute and maintain the UHCSD in full force at all times. We also provided for Aurizon Network to be held liable for any contraventions of the UHCSD by its holding company.

Our view reflected the increased potential for conflicts of interest and incentives for anti-competitive and discriminatory behaviour arising from the changes that have occurred to the Aurizon Group corporate structure and the Group's stated intent to leverage the benefits obtained from vertical integration.

We also proposed a stronger link between the contents of the UHCSD and the undertaking than in the 2014 DAU. Effectively, the undertaking (i.e. the IDD amended DAU) sets out the detailed obligations, requirements and implications that need to be included in the UHCSD. Thereafter, these requirements will be included within the UHCSD itself.

Although as a vertically integrated entity, it may be in Aurizon Network's interests to lessen its obligations associated with the UHCSD, we did not accept that this appropriately balances Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act) with other relevant considerations. We considered our initial draft decision appropriately balanced the interests of access seekers, access holders and train operators, with Aurizon Network's legitimate business interests (s. 138(2)(b), (d) and (e) of the QCA Act). We also considered it to be compatible with encouraging competition in upstream and downstream markets and the public interest (s.

138(2)(a) and (e) of the QCA Act). It also adopts an incremental, predictable approach to change with respect to the ring-fencing provisions (s. 138(2)(h) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network said the UHCSD was a voluntary commitment from Aurizon Network and not a legislative requirement.

Aurizon Network disagreed with our initial draft decision, and said the requirement for the UHCSD is punitive and seeks to bind the holding company, which is not the operator of the declared service. Aurizon Network said the QCA's decision substantially expands upon Aurizon Network's voluntary offer by imposing an obligation on Aurizon Network to procure that its parent company execute the UHCSD and significantly expands the scope, terms and effect of the UHCSD.

Aurizon Network submitted that it would be obliged to 'procure' the execution of a deed by a company over which it has no control. Aurizon Network is also obliged to ensure that Aurizon Holdings at all times complies with the requirements of the deed—under Australian law, Aurizon Network as a subsidiary company has no right to control its holding company. Aurizon Network also did not consider it reasonable for it to be held liable for contraventions of the UHCSD by its holding company.[173]

Aurizon Network said the QCA has no powers under the QCA Act to compel conduct of a third party, even if that party is a related operator. Aurizon Network was not willing to volunteer to establish the UHCSD, as redrafted by the QCA, and said we should accept Aurizon Network's volunteered draft.[174]

The QRC, Anglo American, Vale, and Asciano agreed with our initial draft decision in respect of the obligations surrounding the UHCSD.[175]

The QRC supported the proposal to include a positive obligation in the UHCSD to ensure rail infrastructure within the scope of the declared service is only ever owned by Aurizon Network.[176]

Asciano suggested the obligations on Aurizon Holdings under the UHCSD should apply to all previous undertakings to ensure all access seekers and holders are protected.[177]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refuse to approve Aurizon Network's 2014 DAU provisions regarding the UHCSD.

We note other stakeholders' broad support for the initial draft decision and Asciano's comments regarding application to previous undertakings. We do not believe it is appropriate to apply the changes to previous undertakings.

As discussed in Section 4.3 of this decision, we consider it important there is an effective ring-fencing regime in place for Aurizon Network, given there is potential for conflicts of interest and

[173] Aurizon Network, 2014 DAU, sub. 83: 59-60.
[174] Aurizon Network, 2014 DAU, sub. 83: 61.
[175] QRC, 2014 DAU, sub. 84: 18; Vale, 2014 DAU, sub. 79: 3; Asciano, 2014 DAU, sub. 76: 11.
[176] QRC, 2014 DAU, sub. 84: 18.
[177] Asciano, 2014 DAU, sub. 76: 11.

incentives for anti-competitive and discriminatory behaviour, particularly in light of Aurizon Network's stated intent to leverage benefits from its corporate structure.

We consider that an important component of an effective ring-fencing regime is that there is an UHCSD in place. This is necessary to support the effectiveness of the regime by ensuring that Aurizon Network's holding company (and other related parties within the Aurizon Group) do not prevent or hinder Aurizon Network from complying with its ring-fencing obligations. We consider this is consistent with the application of sections 137 and 138 of the QCA Act.

We acknowledge Aurizon Network's comments in relation to the requirements related to the UHCSD that we proposed in our initial draft decision. In particular, we acknowledge that it would not be reasonable to require Aurizon Network to 'procure' its holding company to execute and maintain the UHCSD or to hold Aurizon Network responsible for a contravention of the deed by its holding company, given Aurizon Network does not have the power to compel its parent company to act in a particular way. Accordingly, we have revised our drafting so that Aurizon Network is only required to 'request' its holding company to execute the UHCSD.

We note Aurizon Network's holding company and other entities within the Aurizon Group would be well aware that Aurizon Network is a regulated company earning a regulated return, and that, as a consequence, it has particular obligations that may require the cooperation of related entities. We consider this is particularly relevant in respect of the confidential information of access seekers and holders that Aurizon Network possesses, particularly given the undertaking will permit Aurizon Network to disclose this information outside of Aurizon Network in particular circumstances. As such, access seekers and holders should have confidence that their confidential information will be handled strictly in accordance with the requirements set out in the undertaking. Without a UHCSD in place, we do not consider access seekers and holders can have this confidence, as there is no assurance that Aurizon Network's holding company will observe Aurizon Network's ring-fencing obligations and not prevent or hinder Aurizon Network's compliance with these.

Accordingly, while we accept Aurizon Network should only be required to 'request', rather than 'procure', its holding company to execute a UHCSD, we consider that the undertaking should cease to permit the use and disclosure of confidential information within the Aurizon Group (outside of Aurizon Network) in the event a UHCSD is not executed or not maintained in full force. Likewise, the use and disclosure of confidential information outside of Aurizon Network should be similarly restricted if a procured UHCSD is not complied with.

Our approach is necessitated by Aurizon Network's position as part of a consolidated business structure and the need for it to comply with its obligations under the undertaking, particularly with respect to its obligations relating to confidential information. We consider this is necessary to appropriately account for the interests of access seekers and holders with respect to the handling of their confidential information.

Amending the 2014 DAU

The way we consider it appropriate to amend the undertaking is set out in our CDD amended DAU and Schedule D. We have made drafting changes to the CDD amended DAU in response to Aurizon Network's and other stakeholders' submissions.

Our amendments provide that Aurizon Network is required to 'request' that its holding company execute a UHCSD and include provisions setting out the intention of the UHCSD, including that Aurizon Network's holding company (and each Aurizon Party) does not engage in any conduct which may prevent or hinder Aurizon Network from complying with its ring-fencing obligations. However, the undertaking will cease to permit use or disclosure of confidential

information within the Aurizon Group (outside of Aurizon Network) if a UHCSD is not procured, maintained in full force or complied with.

We consider these amendments provide an appropriate balance of the interests of access seekers, access holders and train operators, with Aurizon Network's legitimate business interests (s. 138(2)(b), (d) and (e) of the QCA Act).

Consolidated draft decision 4.3

(1) After considering Aurizon Network's 2014 DAU provisions regarding the UHCSD, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:

- **(a) provide that Aurizon Network request that its ultimate holding company provides the ultimate holding company support deed in the form set out in schedule D of our CDD amended DAU**
- **(b) provide that, in the event the ultimate holding company does not execute the UHCSD, or the UHCSD is not maintained in full force or complied with, the undertaking will cease to permit the use and disclosure of confidential information to any person or entity within the Aurizon Group (outside of Aurizon Network), until rectified.**
- **(c) move clause 3.2 to Part 2 of the undertaking, and amend it to mirror the requirements of the UHCSD.**

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

4.5 Information management and decision-making principles

Aurizon Network's proposal

Aurizon Network said the information access control measures in the 2010 AU permitted full disclosure of access seeker confidential and protected information within Aurizon Network, but tightly restricted access beyond Aurizon Network.

Aurizon Network considered this unduly constrained its legitimate use of shared corporate services, even where no competition concerns would be raised by disclosure.[178] It said the redrafted Part 3 (in the 2014 DAU) contains the same principal controls as existed in the 2010 AU, but adopted a more targeted approach. The control applied only to disclosures by third-party access seekers that, if made available to a related operator, would provide a competitive advantage that it would not otherwise have.[179]

Aurizon Network's proposed approach to information management and decision-making records in the 2014 DAU, and how this compares with the 2010 AU, is summarised in the table below.

[178] Aurizon Network, 2013 DAU, sub. 2: 72.
[179] Aurizon Network, 2013 DAU, sub. 2: 71.

In considering Aurizon Network's 2014 DAU, as indicated above, we consider the 2010 AU is relevant, including in relation to whether the proposals deliver an effective ring-fencing regime.

Table 8 Aurizon Network's approach to information management and decision-making records in the 2010 AU and 2014 DAU

Ring-fencing element	*2010 AU approach*	*2014 DAU approach*
Management of confidential information	The regime is set up very broadly, to be a framework for all confidential information, rather than limiting coverage to information that could be used anti-competitively by an above-rail business group. The framework allows full disclosure of confidential information within Aurizon Network, and limited disclosure elsewhere in the Aurizon Group businesses. This approach was workable for the 'Network Access Unit', but is not consistent with a large stand-alone network business.[180]	The 2014 DAU introduces a concept of 'protected information', to distinguish regulated restrictions on information flow from those entered into voluntarily by Aurizon Network. The disclosure framework is based on 'need to know', with a cascading system of disclosures across various categories of recipients (both in and outside Aurizon Network) that require access to the information. Appropriate controls are retained.[181]
Decision making principles	The 2010 AU contained a set of decision-making principles that required: • the decision-maker to be identified • decisions to be consistent between access seekers/holders • decision to be in compliance with the undertaking, laws, lawful direction, access agreements, access code, Aurizon Network policies and procedures • decisions to be documented.	The 2014 DAU removes specific decision making principles on the basis they captured too many decisions and had no means of being audited if all decisions were made consistent with the principles. Aurizon Network questioned whether strict compliance with the provisions was proportional to the competition risks of many decisions captured. In accordance with the TIA, access agreements with related operators require board processes to document arms length arrangements, and are capable of being audited.[182]

In initial submissions, stakeholders said that due to the increasing conflicts of interest, such as potential interests in ports, the definition of confidential information should be expanded. The QRC said the definition of protected information is too narrow and unless rectified may lead to non-disclosure of information or claiming all information as confidential.[183] Stakeholders supported the recording of all access to confidential information within a register. Full details of stakeholder views are provided in our initial draft decision.[184]

Characteristics of an effective information management system

In the context of ring-fencing, an effective information management system must produce meaningful, comprehensive information that can be used to assess any material concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to confidential/protected information.

[180] Aurizon Network, 2013 DAU, sub. 2: 61–62.
[181] Aurizon Network, 2013 DAU, sub. 2: 61–62.
[182] Aurizon Network, 2013 DAU, sub. 2: 63.
[183] QRC, 2014 DAU, sub. 42: 17.
[184] QCA, 2015(a), Volume I: 55.

We considered an effective information management system also requires a robust and complete record keeping system, which records:

- to whom, when and for what reason confidential/protected information is being disclosed/accessed
- what decisions are being made with that information and how these are being made.

Overall, we were of the view that an information management system is needed that will produce robust and complete records, identify decisions that were made using certain information, as well as have regard to proportionality and the operational needs within Aurizon Network. Such a system would appropriately balance the interests of access seekers, access holders and train operators with Aurizon Network's legitimate business interests.

We also considered competition in upstream and downstream markets may be encouraged if there is confidence that the ring-fencing regime has adequate controls and produces appropriate records that can be accessed by the relevant parties.

4.5.1 Definition of confidential/protected information

Aurizon Network's 2014 DAU introduces the concept of protected information (cl. 3.11 of the 2014 DAU) which distinguishes regulated restrictions on information flow from those entered into voluntarily by Aurizon Network.

Summary of the initial draft decision

We considered that, compared to the 2010 AU, the approach adopted by Aurizon Network in the 2014 DAU:

- narrows the range of information to which the ring-fencing provisions apply
- increases the scope of information disclosure and the level of subjectivity associated with that disclosure
- widens the spectrum of exemptions/carve-outs.

Overall, we considered Aurizon Network's concept of protected information increases the potential for disputes about whether specific information should be categorised as protected. We did not consider such an outcome leads to the efficient operation of the CQCN or the supply chain. Nor does it encourage trust or collaborative engagement between Aurizon Network and its customer base.[185]

We noted the QRC's view[186] that the approach in the 2014 DAU may encourage access seekers, access holders and train operators to ensure excessive levels of information remain confidential.

As such, we considered Aurizon Network's proposal does not align sufficiently with the object of Part 5 of the QCA Act or the public interest (s. 138(2)(a) and (d)). While it may be in Aurizon Network's interest to broaden the opportunity for information disclosure across the vertically integrated corporate group, we did not consider this represents a legitimate business interest of Aurizon Network in the context of the object of Part 5 of the QCA Act (s. 138(2)(b) of the QCA Act).

[185] We were also of the view that the QRC's proposal to adopt a tighter definition of protected information and subsume it into a broader definition of confidential information suffers from similar concerns: it has the potential to constrain Aurizon Network's ability to use information for operating the CQCN.
[186] QRC, 2014 DAU, sub. 42: 17.

In reaching this view, we considered it appropriate to adopt the definition of confidential information used in the 2010 AU, and with minor modifications propose this as the appropriate way to amend the 2014 DAU. We considered this approach appropriately balances the interests of access seekers, access holders and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network disagreed with our initial draft decision on the definition of confidential information. While Aurizon Network agreed that a clear definition is important, it raised the following issues with the initial draft decision:

- Our redrafted definition will add confusion and inadvertently regulate the treatment of all confidential information held by Aurizon Network, rather than just that related to the declared service. Aurizon Network said this is contrary to the 2010 AU, which stated that the confidential information only related to that disclosed or obtained in the course of the negotiation or provision of access.
- The QCA is acting beyond the scope of the QCA Act by using a very broad definition of confidential information, not specific to access in the CQCN. Aurizon Network said our definition could apply irrespective of whether disclosure could lead to conduct in contravention of statutory prohibitions on unfair differentiation.
- The term 'confidential information' is possibly confusing, and could encompass various forms of confidential information that are not related to access seekers and access holders. Aurizon Network preferred the term 'protected information' to distinguish this information from the broader forms of confidential information held by Aurizon Network.[187]

Anglo American agreed with the QCA's proposed definition, but said there is an element of subjectivity to the definition of confidential information (in sub-paragraph (g) of the definition in Part 12 of the IDD amended DAU), which allows the holder of confidential information to make a judgement call as to when the disclosure of the information by the recipient would no longer be expected to affect the affairs of the owner of the information.

Anglo American was concerned about the use by Aurizon Network of disclaimer or confidentiality clauses on a broad range of documents, for example presentations, and said this information should be provided to the QCA to assist in its statutory obligations. Anglo American preferred that a clause be incorporated in the 2014 DAU allowing parties to provide information to the QCA, even where the information is subject to a confidentiality obligation.[188]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refuse to approve Aurizon Network's 2014 DAU provisions regarding the definition of confidential information.

Overall, we consider Aurizon Network's definition of protected information is not appropriate because it narrows the range of information that could be classified as confidential and increases the potential for disputes about whether specific information should be categorised as protected. This could affect cooperative engagement between Aurizon Network and its customer base.

[187] Aurizon Network, 2014 DAU, sub. 83: 61.
[188] Anglo American, 2014 DAU, sub. 95: 9.

Aurizon Network's definition of 'protected information' potentially reduces the types of information that would be subject to ring-fencing and increases the risk of unfair differentiation in the treatment of access seekers or users. For example, to define protected information to not include information that is independently developed by Aurizon Network or is aggregated with other information in a way that de-identifies the information, could be subject to interpretation and therefore dispute. We consider there is some risk that information that is regarded by an access seeker as commercial in nature could be assessed by Aurizon Network as being not confidential. We prefer for the definition to have a wider scope, to provide confidence to negotiating parties.

Aurizon Network's approach to this issue in the 2014 DAU could create a complex information management system and a blurring of when unrecorded disclosure of/access to confidential/protected information is acceptable. We consider the probable impact of this is to reduce the level of record taking to the extent that it renders the ring-fencing regime less than effective.

Amending the 2014 DAU

The ways to amend the 2014 DAU are set out in our CDD amended DAU.

We propose to replace the definition of protected information with an amended version of the definition of confidential information used in the 2010 AU. For the reasons outlined in the analysis above, we consider our approach appropriately aligns with the object of Part 5 of the QCA Act and balances the interests of relevant parties under section 138(2) of the QCA Act.

In proposing the drafting, we acknowledge the unintentional exclusion of information from disclosure may hamper effective negotiation outcomes and could be not in the legitimate business interests of Aurizon Network. We have adjusted the definition of confidential information used in the initial draft decision, and we consider the definition in this consolidated draft decision provides an appropriate balance between the legitimate business interests of Aurizon Network, the interests of access seekers, access holders and the public interest (s. 138(2)(b), (d), (e) and (h) of the QCA Act).

In particular, we have clarified that the confidential information recorded in the register would only relate to that information relevant to Aurizon Network's role in supplying the declared service associated with the CQCN, that is, the register is effectively self-selecting. Information not related to the declared service would therefore not be listed in the register. For the sake of clarity, we have made drafting changes to prevent the confidential information register from inadvertently capturing information that is not relevant to the declared service.

In response to other stakeholders:

- subjectivity of paragraph (g) of the definition of confidential information—we acknowledge this introduces an element of subjectivity on the part of a recipient as to whether confidential information remains confidential and should be treated as such, which could be subject to interpretation and dispute. We have therefore removed this from the definition.
- provision to the QCA of information that is subject to a confidentiality obligation—the QCA already has powers under the QCA Act to request confidential information in certain circumstances (e.g. as part of an investigation or arbitration under the Act). However, in accordance with sections 187, 207 and 239 of the QCA Act, the QCA can only disclose confidential information to a limited range of persons if disclosure would be likely to damage a person's commercial activities and would not be in the public interest.

Consolidated draft decision 4.4

(1) After considering clause 3.11 of the Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's definition of protected information.

(2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to:

(a) replace the definition of protected information with an amended version of the definition of confidential information used in the 2010 AU

(b) replace in all instances 'protected information' with 'confidential information'.

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

4.5.2 Disclosure process and information registers

Aurizon Network's 2014 DAU included a standard procedure for the disclosure of protected information (cl. 3.18 of 2014 DAU). Aurizon Network also set out a series of steps in the disclosure process in the 2014 DAU.[189]

Summary of the initial draft decision

Our view was that the inclusion of an explicit disclosure process within the ring-fencing provisions is beneficial, provided that the information recorded on the register is meaningful and sufficient, has a broad, clear and transparent list of exemptions and accurately reflects the incidence of disclosure.

We consider the production and availability of robust records to be the fundamental purpose of the information management system. This is particularly important given changes to the Aurizon Group's corporate structure and its stated intent to leverage the benefits obtained from vertical integration. We considered these factors strengthen the need to provide access seekers, access holders and train operators with confidence that robust and comprehensive records exist and that these can be used to assess concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to ring-fenced information, if that becomes necessary.

Against this background, we considered Aurizon Network's proposal—to include in the information register the name of the recipient and the defined category of information to which access is authorised (cl. 3.20 of the 2014 DAU)—was not appropriate in light of the statutory factors. We noted the view of stakeholders that information register entries should be more comprehensive, and considered the information register should capture:

- who required and/or gained access to the confidential information
- who approved access to the confidential information
- for which period access to the confidential information is granted
- what confidential information training the recipient has received and when

[189] See QCA, 2015(a), Volume 1: 59.

- what the confidential information is to be used for
- what decisions were made using the confidential information
- how those decisions were made.

We also considered a record of all confidentiality agreements should be maintained as part of the information register. Our initial draft decision was to refuse to approve clauses 3.18 and 3.20 of the 2014 DAU.

Stakeholders' comments on the initial draft decision

In response to our initial draft decision, Aurizon Network said it agreed to the inclusion of a confidential information register but considered only information related to provision or negotiation of access to the declared service should be subject to register requirements. Aurizon Network said that to apply it to a broader class of confidential information is beyond the scope of the undertaking and would have a cost impact requiring an operating cost adjustment to the MAR.[190]

Aurizon Network did not agree with much of the list of contents, arguing that the list was overly prescriptive and beyond good regulatory practice. Inclusions that Aurizon Network was concerned about were in clause 3.13(c) of the IDD amended DAU:

- the period during which the relevant person has access to confidential information (cl. 3.13(c)(ii)B))—this would involve more time and cost, disproportionate to the risk involved
- details of decisions made (cl. 3.13(c)(ii)(D))—Aurizon Network agreed that it is appropriate to detail what the information is used for, but said it may not be possible in every instance to determine what decisions are made using the information. It said the information could be combined with other information in such decisions, and also noted there will be a cost involved. It stressed that the register should be limited to purpose.
- the inclusion of any confidentiality agreement (cl. 3.13(c)(iii))—Aurizon Network considered that, coupled with the broad definition of confidential information, any confidentiality agreement to which Aurizon Network is a party to would be listed on the register. Aurizon Network considered this to be beyond the powers of the QCA.
- the range of people required to complete exit certificates (cl. 3.13(c)(v))—Aurizon Network disagreed with this list (see response to initial draft decision 4.9).[191]

Aurizon Network agreed with clause 3.13(c)(ii)(E) being included, but considered that it is duplicated with clause 3.13(c)(iv), as both appear to ensure that an employee or an external contractor are aware of their obligations.

Aurizon Network disagreed with all confidentiality agreements being maintained as part of the confidential information register.

The QRC supported the confidential information register and the proposed contents. It said the register would promote improved compliance and transparency.[192]

[190] Aurizon Network, 2014 DAU, sub. 83: 62.
[191] Aurizon Network, 2014 DAU, sub. 83: 63–64.
[192] QRC, 2014 DAU, sub. 84: 17.

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refuse to approve Aurizon Network's 2014 DAU provisions for the disclosure process and provisions regarding the protected information register.

Overall, we consider access seekers, access holders and train operators need to be confident that robust and comprehensive records exist, given Aurizon Network's changed corporate structure. We considered that Aurizon Network's 2014 DAU was not appropriate because its protected information register content was not sufficiently comprehensive to ensure that concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure of/access to ring-fenced information are addressed. Aurizon Network's 2014 DAU appeared to favour its own business interests and potentially those of its related entities.

Amending the 2014 DAU

The way to amend the 2014 DAU is set out in our CDD amended DAU.

Our amendments include a more comprehensive confidential information register, which records (amongst other things) the identity of those who request access to confidential information and the purpose for which the confidential information will be used. The register remains in our view not onerous to maintain and update. We also include an amended process for permitted disclosure of confidential information, described in more detail in the following sections. The amendments are appropriate because we consider that the disclosure process and provisions regarding the protected information register provide a balance between the interests of access holders, access seekers and train operators, and the legitimate business interests of Aurizon Network (s. 138(2)(b) (e) and (h) of the QCA Act).

We note that our initial draft decision proposals for the content of the confidential information register were not substantially more detailed than was the case in the 2010 AU. As noted, we consider that the undertaking and its intent, and therefore any provisions regarding the confidential information register, would relate only to the declared service in the CQCN.

In response to Aurizon Network's comments on our proposed amendments, we consider the following:

- The recording of the period for which a recipient has access to confidential information should not involve a substantial cost or time. It is appropriate from a risk perspective that the period of time is recorded in the register.
- The requirement for the purpose and decisions made using the confidential information to be recorded were already provisions in the 2010 AU. Any decisions made may well not be entirely in consequence of the confidential information, and in fact the decisions may not be influenced by the confidential information at all. However, we do not consider that recording of such decisions would be an onerous requirement, as the decision would be a consequence of the purpose of the information, and there should be no change in costs as the requirement existed in the 2010 AU. Aurizon Network has not quantified the additional costs that it claims would be incurred.
- The inclusion of confidentiality agreements in the confidential information register is not an onerous requirement and, as noted above, would only relate to information relevant to the negotiating parties.

Our response to Aurizon Network's concern about the range of staff required to complete exit certificates is addressed below.

We also note the difference in emphasis between clauses 3.13(c)(ii)(E) and 3.13(c)(iv) of the IDD amended DAU—the former refers to confirmation that the recipient has signed a declaration, whereas the latter provides for a record of persons and entities that have signed a declaration.

Consolidated draft decision 4.5

(1) After considering clauses 3.18 and 3.20 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's disclosure process and provisions regarding the protected information register.

(2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to:

- **(a) replace the protected information register with the confidential information register**
- **(b) include in the confidential information register entries as set out in clause 3.14 of the CDD amended DAU**
- **(c) require a record of all confidentiality agreements to be maintained as part of the confidential information register.**

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

4.5.3 Exemptions, consent and confidentiality, and the disclosure process

Aurizon Network's 2014 DAU identified a number of instances when access to ring-fenced information does not have to comply with or observe the disclosure process (cl. 3.17 of the 2014 DAU). In assessing the 2014 DAU proposals regarding exemptions from the disclosure process, we considered:

- whether the list of exemptions is appropriately broad, clear and transparent
- whether the confidential information register accurately reflects the incidence of disclosure
- the appropriateness of the proposed confidentiality and consent provisions.

Breadth, clarity and transparency of the list of exemptions

Disclosure process exemptions in the 2014 DAU can be broadly split into exemptions on an 'as needs' basis and exemptions within the Aurizon Group.

The 2014 DAU broadens the scope of the activities which require access to confidential information on an 'as needs' basis. It provides Aurizon Network employees with more freedom in obtaining ring-fenced information and more discretion on the disclosure of financial information to Aurizon Group bankers or other financial institutions. It allows disclosure on an

'as needs' basis to external third parties/advisors[193] and to an access seeker's customer in certain circumstances.[194]

Similarly, Aurizon Network's 2014 DAU broadens the scope of confidential information that can be disclosed across the Aurizon Group. The language describing the activities is less specific and more activities are exempt.

The 2014 DAU does not define precisely how, or who, makes the decision to exempt an individual or group of individuals from the disclosure process. There also appears to be no requirement to keep a record of individuals exempt from the disclosure process. Indeed, the protected information register in the 2014 DAU is only required for individuals who are not exempt.

Confidentiality and consent

Broadly there are three aspects to confidentiality and consent with respect to the disclosure of information, comprising:

- information flows across the Aurizon Group
- information flows on an 'as needs' basis
- overarching right to enter into a confidentiality agreement.

Information flows across the Aurizon Group

For information flows across the Aurizon Group, the proposed confidentiality and consent provisions are broadly:

- if exempt from the disclosure process, the recipient has a legitimate business purpose for requiring access to the relevant information and is informed by Aurizon Network of the need to keep protected information confidential and the prohibition of disclosure to the marketing division (cl. 3.17(d) of the 2014 DAU)
- if required to go through the disclosure process, the recipient has a legitimate business purpose requiring access to the relevant information and is required to sign a declaration that they are aware of and understand the Aurizon Group's obligations regarding protected information (cl. 3.18 of the 2014 DAU).

The disclosure of protected information to individuals within the Aurizon Group is not subject to explicit confidentiality agreements. There are also no explicit consent provisions that need to be complied with.

Information flows on an 'as needs' basis

Aurizon Network's proposed disclosure of protected information on an 'as needs' basis in the 2014 DAU has the following constraints:

[193] Aurizon Network may disclose information to external legal, accounting, financial, engineering, environmental or other advisors, consultants or service providers to Aurizon Network, whose role in advising or providing services to Aurizon Network requires disclosure to be made and who are under an obligation of confidentiality to Aurizon Network (cl. 3.17(b)(xiii) of the 2014 DAU).

[194] Aurizon Network may disclose information to a customer of an access seeker for the purpose of making assessments of, and decisions on, matters required or contemplated by the undertaking (cl. 3.17(b)(xiv) of the 2014 DAU).

- for all 'as needs' disclosures, the written prior approval of the owner of the protected information is required before disclosing the information, but the owner of the protected information may not withhold approval unreasonably (cl. 3.17(b)(xv) of the 2014 DAU)
- a consent process that deals with external third party/advisor conflicts of interest when a particular party is advising both Aurizon Network and a related operator on the same or a related matter (cl. 3.19 of the 2014 DAU)
- bespoke confidentiality agreements/duties for the disclosure of protected information when providing such information to other railway managers for the purposes of managing access across rail networks, to other infrastructure providers for the purposes of coordinating capacity allocation and when disclosing information to external third parties/advisors.

Overarching right to enter into a confidentiality agreement

The 2014 DAU allows an access seeker or train operator to enter into a confidentiality agreement with Aurizon Network during the negotiation period of an access agreement (cl. 3.14 of the 2014 DAU). The confidentiality agreement will, unless otherwise agreed, take the form of the standard confidentiality deed (Schedule I of the 2014 DAU).

Summary of the initial draft decision

The initial draft decision did not consider that Aurizon Network's 2014 DAU proposals on these issues were appropriate as the regime was, in our view, not effective.

As noted above, we considered the 2010 AU, was a useful baseline assisting us to assess whether 2014 DAU could be approved by reference to the statutory factors in section 138(2).

With respect to information flows across the Aurizon Group, the 2010 AU includes a number of provisions restricting the flow of confidential information across the corporate group. These include:

- requiring Aurizon parties who receive confidential information to enter into a legally enforceable agreement requiring them to keep confidential and not disclose, or permit any person employed or engaged by that Aurizon party to disclose, the confidential information (cl. 3.4.2(i) of the 2010 AU)
- restricting the provision of confidential information to a related operator unless approved by the third party access seeker or access holder (cl. 3.4.2(d) of the 2010 AU)
- in the majority of cases requiring Aurizon Network to seek the consent of an access seeker or access holder to disclose confidential information and to adopt the consent process (cl. 3.4.2(g) of the 2010 AU).

In our initial draft decision we considered that, under Aurizon Network's 2014 DAU proposals, it is possible for owners of protected information to have very little understanding of how protected information relating to them is being used throughout the Aurizon Group. We were of the view this raises legitimate concerns regarding the ability to detect discrimination, anti-competitive behaviour and the inappropriate disclosure of ring-fenced information. In our view, the 2014 DAU increases the scope of activities and potentially the pool of individuals exempt from the disclosure process, which is contrary to the balancing of the factors in section 138(2) of the QCA Act.

When compared to the 2010 AU, we considered Aurizon Network's proposals in the 2014 DAU regarding the interaction between the disclosure process, exemptions, consent and confidentiality provisions:

- provide greater scope for interpreting a particular activity as exempt from the disclosure process, thereby lowering the likelihood that the information management system will provide credible records
- in the context of the change in the organisational structure within the Aurizon Group, introduce complexity in gauging if the information captured through the disclosure process accurately reflects the incidence of disclosure and provides a meaningful benchmark for assessing the disclosure pattern of protected information through time
- adopt confidentiality and consent provisions that reduce the protections available to access seekers, access holders and train operators.

Accordingly, in our initial draft decision, we developed what we considered to be appropriate ring-fencing provisions given the new organisational structure of the Aurizon Group, rather than focusing on changes to organisational structure that may also ensure an effective ring-fencing regime.

We did not consider Aurizon Network's proposals to be in the interests of access seekers, access holders and train operators (s. 138(2)(e) of the QCA Act). Additionally, we were of the view an ineffective ring-fencing regime does not provide potential market entrants with any assurance they will be treated in a non-discriminatory manner or that credible mechanisms to investigate and redress potential cases of discrimination exist (as required by Part 5 of the QCA Act). An ineffective ring-fencing regime, could, in our view, assist to stifle upstream and downstream competition and impact negatively on the efficient operation of the CQCN and end-to-end coal supply chain (which is contrary to section 138(2)(a) and the object of Part 5 of the QCA Act).

Our approach in our initial draft decision placed considerable emphasis on the role of the confidential information register as a credible source of information and how this relates to the role of exemptions, confidentiality and consent.

Confidential information register as a credible source of information

We understood the change in the Aurizon Group's organisational structure has resulted in Aurizon Network subcontracting more services from the Aurizon Group than was previously the case.

In this context, if the confidential information register is to provide credible information we considered it has to:

- provide a sufficiently complete picture of the flow of confidential information
- be up-to-date and accurate
- be underpinned by fit-for-purpose processes and procedures that are consistently applied.

To ensure the confidential information register is seen as a credible and effective tool, we were of the view that an agreed structure and definition set for the confidential information register has to be developed.

Ideally, these should be developed by Aurizon Network in consultation with stakeholders to ensure inputs into the register are easily identifiable and commonly understood by all parties. Accordingly, we concluded that Aurizon Network should develop and submit these for our approval, within the first four months of commencement of the new access undertaking.

Further, we said that the confidential information register should be submitted to us for review every 12 months, or upon our request, with the QCA also able to undertake spot audits at its discretion.

Our view was that this provides incentives to maintain the confidential information register in an appropriate manner, so that the register provides a clear and transparent indicator of Aurizon Network's approach to its ring-fencing obligations that can be placed on public record. It provides all parties with a set of baseline information from which to consider how the ring-fencing regime is performing. We were of the view this appropriately balances the interests of access seekers, access holders and train operators, with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network supported the initial draft decision for it to consult with access holders and railway operators to inform the development and contents of the protected information register (cl. 3.13(b) of the IDD amended DAU).[195] However, Aurizon Network said the stakeholder input should not be binding on Aurizon Network.[196]

Aurizon Network accepted that appropriate oversight of the register is required, but questioned whether an additional administrative process needed to be completed every year. Aurizon Network suggested including this in the audit process in Part 10.[197]

Aurizon Network agreed that the QCA could undertake spot audits at its discretion.[198]

The QRC supported the initial draft decision proposals on the confidential information register.[199]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and reviewing submissions received on the initial draft decision, we refuse to approve Aurizon Network's 2014 DAU in respect of the protected information register.

Overall, we do not consider that there were appropriate processes for setting out the structure of the confidential information register, for keeping this up to date, or for regular auditing. We consider these necessary to address any concerns regarding discrimination, anti-competitive behaviour and inappropriate disclosure/access of ring-fenced information. Such measures ensure the ring-fencing regime is effective, which we consider to be a material issue (s. 138(2)(h)).

In our view, without 'effective' processes for setting out the structure of the confidential information register, Aurizon Network could be in a position to use its market power such that the interests of access seekers, access holders and train operators are not being treated in balance with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Overall, we considered the confidentiality and consent provisions in Aurizon Network's 2014 DAU inappropriately reduce the protections available to access seekers, access holders and train operators, compared to those included in the 2010 AU.

[195] Aurizon Network, 2014 DAU, sub. 83: 62.
[196] Aurizon Network, 2014 DAU, sub. 83: 54.
[197] Aurizon Network, 2014 DAU, sub. 83: 64–65.
[198] Aurizon Network, 2014 DAU, sub. 83: 54.
[199] QRC, 2014 DAU, sub. 84: 17.

Breadth, clarity and transparency of the list of exemptions

Given the change in organisational structure within the Aurizon Group and the vertically integrated nature of the organisation, we considered the lack of an effective disclosure process and protected information register relevant and material to our assessment of the 2014 DAU in light of considerations in section 138(2)(d), (e) and (h).

Information flows on an 'as needs' basis

In our view, the critical aspect of the authorisation process for all 'as needs' disclosures is a clear understanding of the grounds on which the owner of the protected information could legitimately refuse disclosure. The 2014 DAU does not provide any direction. Consequently, we do not consider the process provides sufficient rights and protections for access seekers, access holders and train operators (s. 138(2)(e) and (h)).

Further, the 2014 DAU does not provide a credible mechanism through which access seekers, access holders and train operators can either refuse the disclosure of protected information or have sufficient assurance about who has access to it or how it will be used when an external third party/advisor is advising both Aurizon Network and a related operator on the same or a related matter.

In addition, external third parties/advisors are only under an obligation of confidentiality to Aurizon Network, not the access seeker, access holder or train operator (cl. 3.17(b)(xiii) of the 2014 DAU).

We are of the view the 2010 AU provided a more robust approach to concerns regarding disclosure of confidential information to external third parties/advisors because it provides a prescriptive approach with respect to who will have access to the confidential information and specifies their obligations. For example, it includes a separate clause (cl. 3.4.1 of the 2010 AU) that explicitly deals with issues surrounding the provision of confidential information to third parties/advisors who are advising both Aurizon Network and a related operator on the same or related manner. Consent from the owner of the confidential information is required where an employee within the corporate group is advising a related operator in relation to the same or a related matter (cl. 3.4.2(f) of the 2010 AU). In our view, the effectiveness of the 2010 AU ring-fencing regime relative to the 2014 DAU, is a factor that we can take into account (s. 138(2)(h)).

Overarching right to enter into a confidentiality agreement

We consider that the effectiveness of this option is limited, because the confidentiality deed mirrors the exclusions and permitted disclosures of protected information discussed above.

In assessing the 2014 DAU, a relevant factor was the relative effectiveness of the existing regime compared to that proposed by Aurizon Network. Under the 2010 AU, at any time during the during the negotiation process, including prior to the submission of an access application, an access seeker can require Aurizon Network to enter into a standard confidentiality deed. Similarly, Aurizon Network can require this of the access seeker in the negotiation period (cl. 3.4(c) of the 2010 AU).

We are of the view the confidentiality deed in the 2010 AU (Schedule B1) is more transparent and robust than Aurizon Network's proposals in the 2014 DAU. Furthermore, Schedule B1 includes a suite of general obligations, as well as clauses regarding liquidated damages and compensation for breaches of the information flow obligations within the Aurizon corporate group (clauses 4 and 5 of Schedule B1 in the 2010 AU). These are excluded from the confidentiality deed included in the 2014 DAU.

Amending the 2014 DAU

In considering the way the 2014 DAU should be amended, as noted above, we had regard to the drafting of the equivalent provisions in the 2010 AU, and used those provisions as the base for proposing our amendments to the undertaking. The way to amend the 2014 DAU is set out in our CDD amended DAU.

We note general acceptance of our proposed drafting changes in our initial draft decision, with qualifications by Aurizon Network in respect of the development and contents of the protected information register (see clause 3.14 of the CDD amended DAU).

We do not consider that administrative processes proposed in our amended drafting would be significantly different whether or not the annual review of the register by the QCA is part of or separate to annual audit processes. For ring-fencing to be effective and credible, the process needs to be separate and identifiable.

By including those processes we have proposed in our CDD amended DAU, we consider that there is an appropriate balance between the interests of Aurizon Network and access seekers and access holders, consistent with the matters set out in section 138(2) of the QCA Act.

Consolidated draft decision 4.6

(1) After considering clause 3.17 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's protected information register in the 2014 DAU as a credible source of information.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is for:

- **(a) Aurizon Network, following consultation with access holders and train operators, to develop a proposed structure and definition set for inputs into the confidential information register. This must be submitted to the QCA for approval within the first four months of the operation of this undertaking**
- **(b) the confidential information register to be submitted to the QCA, every 12 months or upon request, for review**
- **(c) the QCA to undertake spot audits at its discretion, to ensure the processes and procedures underpinning the information collection are fit-for-purpose, being adhered to and used in a consistent manner.**

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

4.5.4 The role of exemptions, confidentiality and consent

Summary of the initial draft decision

In our initial draft decision, we acknowledged that not all disclosures of confidential information need to be recorded. However, we were of the view that exemptions from the disclosure process should be narrowly defined, with the majority of confidential information disclosures being included in the confidential information register.

We considered it was appropriate the consent of the owner of the confidential information was to be obtained in a number of circumstances. This provides a meaningful veto if there are

concerns with respect to how Aurizon Network and the Aurizon Group are using confidential information, and accordingly, in our view, balanced the interests of Aurizon Network and others (s. 138(2)(a) and (e) of the QCA Act). It also provides Aurizon Network and the Aurizon Group with an incentive to provide owners of confidential information with a requisite level of assurance about the reasons for the use of the confidential information and the checks in place to protect that information.

Our approach provided a pragmatic balance between allowing Aurizon Network to disclose confidential information, while providing an appropriate level of transparency and ensuring a robust, objective understanding of the flow of confidential information is developed. This is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) and aligns with Aurizon Network's legitimate business interests (s. 138(2)(b)).

Table 9 Summary of the QCA initial draft decision for disclosure process on an 'as needs' basis

Reason for disclosure	*Confidentiality, consultation and information register provisions*	*Consent provisions*
Required or compelled by any law, an order of a court, notice validly issued by any authority or the safety regulator.	• no confidentiality agreement • excluded from the confidential information register	• consent from the owner of the confidential information not required
Necessary for the conduct of any legal proceedings, any dispute resolution process or audit under the undertaking, QCA Act or standard agreement.	• no confidentiality agreement • excluded from the confidential information register	• consent from the owner of the confidential information not required
To any person involved in clearing an incident or emergency that is preventing the operating of train services on the rail infrastructure.	• no confidentiality agreement • excluded from the confidential information register	• consent from the owner of the confidential information not required
Required under any stock exchange listing requirement or rule.	• no confidentiality agreement • consultation with the owner of the confidential information is required, as any disclosure may impact on the owner's own listing • excluded from the confidential information register	• consent from the owner of the confidential information not required
For the purposes of train control in the usual course of undertaking train services.	• no confidentiality agreement • excluded from the confidential information register	• consent from the owner of the confidential information not required
To a railway manager to the extent required for the purpose of negotiating or providing access to that railway manager's rail transport infrastructure. To an infrastructure provider for infrastructure forming part of the supply chain for the purpose of facilitating the coordination of the capacity allocation process of the infrastructure provider and Aurizon Network.	• confidentiality agreement required • excluded from the confidential information register	• consent from the owner of the confidential information not required
To a subcontractor to the extent necessary to enable subcontractors to perform the relevant subcontract.	• confidentiality agreement is required • included in the confidential information register	• consent from the owner of the confidential information is required
To external legal, accounting or financial, advisors or consultants to Aurizon Network whose role in advising or providing services to Aurizon Network requires disclosure, are under an obligation of confidentiality to Aurizon Network and have been advised of the Aurizon Group's obligations regarding confidential information. These service providers do not include any member of the Aurizon Group or a service provider engaged by a member of the Aurizon Group for the benefit of Aurizon Network.	• confidentiality agreement is not required • included in the confidential information register	• consent from the owner of the confidential information is not required

Table 10 Summary of the QCA initial draft decision for disclosure process across the Aurizon Group

Parties	*Confidentiality and information register provisions*	*Consent provisions*
Aurizon Network employees and officers may access and use confidential information to the extent necessary to perform their duties.	• no confidentiality agreement • excluded from the confidential information register	• consent from the owner of the confidential information is not required
Directors of Aurizon Network and Aurizon Holdings; executives of the Aurizon Group, including the Chief Executive Officer of the Aurizon Group, the Chief Financial Officer of the Aurizon Group or the General Counsel of the Aurizon Group; any Company Secretary or Assistant Company Secretary of Aurizon Network or Aurizon Holdings; and any persons providing clerical or administrative assistance to any of the above.[200]	• confidentiality agreement is required • included in the confidential information register	• consent from the owner of the confidential information is not required
Subcontracted service provision from the Aurizon Group to Aurizon Network.[201]	• confidentiality agreement is required • included in the confidential information register	• consent of the owner of the confidential information is required
Subcontracting to an Aurizon Group entity anything associated with regulatory advice regarding the development/interpretation of the Undertaking .	• prohibited due to a direct conflict of interest	• not applicable
Related operators, rail-port entities and mine-rail entities.	• confidentiality agreement is required • included in the confidential information register	• consent of the owner of the confidential information is required
All other confidential information flow from Aurizon Network to an individual in the Aurizon Group.	• confidentiality agreement is required • included in the confidential information register	• consent of the owner of the confidential information is required

[200] The Aurizon Group's organisational structure allows for directors/executives to sit on more than one board across the Aurizon Group. By law, any director/executive on a board has a duty to act in the interests of that company. We consider this can create conflicts of interest. In such circumstances, a potential option would be to consider the merits of prohibiting directors/executives sitting on any board in the Aurizon Group if also sitting on the Aurizon Network board. We would prefer not to adopt such a position but allow Aurizon Network and the Aurizon Group to proactively manage confidential information and its ring-fencing obligations. We consider a critical aspect of this is a rigorous disclosure process across directors/executives and those providing them with clerical and administrative assistance.

[201] We consider that the change in the organisational structure of the Aurizon Group results in Aurizon Network effectively subcontracting more services from the Aurizon Group. In order to develop a robust understanding of the flow of confidential information associated with the delivery of these services, we are of the view that a rigorous disclosure process needs to be adopted.

Our initial draft decision also strengthened the confidentiality agreement(s) relative to the proposals in the 2014 DAU.

Our consolidated draft decision addresses issues raised in submissions relating to:

(a) process

(b) disclosure exemptions

(c) confidentiality agreements

(d) comments on Schedule I.

Process

Stakeholders' comments on the initial draft decision

Aurizon Network said the QCA's revised drafting is complex, and that it will slow processes and add to costs. Aurizon Network said there appeared little basis for the QCA to impose these measures. Its submission included a 'disclosure matrix', which responded to the QCA's initial draft decision.

Aurizon Network submitted that the need to make an entry every time confidential information is provided to shared support services (IT, legal and safety functions), will be unduly burdensome and will slow down processes where this is required. Aurizon Network said it was essential that the QCA, Aurizon Network and stakeholders agree on a list of exceptions to these requirements.[202]

QCA analysis and consolidated draft decision

In view of Aurizon Network's comments, we recognise there is a trade-off between the need for effective ring-fencing procedures and the efficiency and effectiveness of operations. However, we do not envisage that recording processes would slow down operational procedures in any material way. We note that many of the procedures are carried over from the 2010 AU, and presumably administrative processes are already in place.

Disclosure exemptions

In our initial draft decision, we considered that exemptions from the disclosure process should be narrowly defined, with the majority of confidential information disclosures being included in the confidential information register, and exemptions limited—that is, we did not allow an exemption for recording in the register for some items in clause 3.12(d). This was to ensure confidence in the process.

We have reviewed the disclosure matrix submitted by Aurizon Network and have concluded as set out in the table below.

[202] Aurizon Network, 2014 DAU, sub. 83: 69.

Table 11 Aurizon Network's comments on disclosure exemptions for certain parties[203]

Parties	*Aurizon Network's comments*	*QCA analysis*
Subcontractors	Aurizon Network submitted that the new requirements relating to subcontractors may create additional difficulties for certain projects, such as IT projects, where access could be required to significant volumes of confidential data. The need to obtain information-owners' consent could be administratively difficult and could delay projects.	Aurizon Network's concerns about the volume of confidential information that could require information-owners' consent is noted. However, an effective and credible ring-fencing regime will necessarily involve additional administrative processes, and the onus would be on Aurizon Network to manage these efficiently to minimise delays.
External professional advisers or consultants	Aurizon Network said that the requirement for all transfers of confidential information to external legal, accounting, engineering or financial advisers to be recorded in the register does not assist in management of the declared service. Aurizon Network thought the removal of the exemption for engineers and environmental advisers may be an oversight and sought our confirmation. Aurizon Network also queried the deletion of the 2010 AU provision which allowed disclosure to bankers and other financial institutions from the disclosure list, and requested it be reinstated.[204]	We note that disclosure to external legal, accounting or financial consultants would be exempt from certain processes under clause 3.13(c) of the CDD amended DAU, but information transfers would need to be recorded in the register. Again, we regard this as necessary for a credible ring-fencing process. We agree to reinstate the allowed disclosure to bankers and financial institutions for the purposes of raising funds or maintaining compliance with credit arrangements. Engineering and environmental consultants are likely to potentially be connected to other stakeholders. They typically have lower professional confidentiality obligations and therefore are not included in the exemptions.
Directors of Aurizon Network and Holdings, directors and executives of Aurizon Group, any company secretary and any administrative and clerical staff to directors	Aurizon Network submitted that the provisions for directors and executives should be targeted to specifically exclude those executives in the marketing and related operator functions, as these should not be able to access confidential information in any way. Aurizon Network further did not agree with the obligation that requires these employees to enter confidentiality deeds on top of their existing employment contracts.[205]	We agree with Aurizon Network that exemptions should not apply to those executive personnel such as marketing and related operator personnel as they should not have access to confidential information at all.
Subcontracted service provision from Aurizon Group to Aurizon Network	In regard to sub-contracted services from the Aurizon Group to Network, Aurizon Network considered that the initial draft decision places a huge administrative burden and negatively impacts any possibility of an efficient process. Aurizon Network said that the inclusion of clause 3.7(c) requiring compliance with	In our view, these services, including shared services and corporate functions, need to be subject to effective ring-fencing—and for this reason, should be subject to the necessary obligations for handling confidential information. These

[203] Aurizon Network, 2014 DAU, sub. 83: 67–68.
[204] Aurizon Network, 2014 DAU, sub. 83: 70.
[205] Aurizon Network, 2014 DAU, sub. 83: 71.

Parties	*Aurizon Network's comments*	*QCA analysis*
	obligations under Part 3 would include processes that are highly restrictive to efficient operations.[206] It would also involve additional costs that are not accounted for in the MAR initial draft decision.	obligations existed in the 2010 AU and no further administrative cost allowance would seem necessary.
Subcontracting to an Aurizon group entity anything associated with regulatory advice	Aurizon Network said the 'blanket prohibition on disclosure of confidential information to any other function for regulatory advice is an unnecessary and inefficient restriction'. It further said that it is entirely inappropriate for the QCA to seek to control from what source Aurizon Network receives regulatory advice or input. It said that it could lead to duplication of resources required for advice on such matters as tax, finance, company secretariat, and engineering.[207] Aurizon Network accepted the provision for a self-contained regulatory affairs advisor.	We consider that there should be effective and credible ring-fencing of confidential information related to regulatory affairs. Aurizon Network can transfer relevant staff from other parts of Aurizon Group to provide regulatory advice where necessary.
Involvement of related parties in development, application and implementation of an undertaking.	Aurizon Network disagreed with restrictions on the use of resources within the broader Aurizon group for the development, application and implementation of an undertaking. It considered the development of a new undertaking involves little confidential information and that any liaisons with other parts of the business are merely inputs into the process of developing a new undertaking.[208]	As noted above, to the extent that any confidential information is provided across the broader Aurizon Group, this needs to be recorded to maintain credibility and effectiveness of ring-fencing.
Related operators, rail/port entities and mine/rail entities.	Aurizon Network disagreed with the initial draft decision position.	As noted above, to the extent that any confidential information is provided across the broader Aurizon Group, this needs to be recorded to maintain credibility and effectiveness of ring-fencing.

Confidentiality agreement

Stakeholders'comments on the initial draft decision

Aurizon Network noted the QCA's initial draft decision to allow any relevant party, at any time during negotiations for access, to require Aurizon Network to enter into a standard form confidentiality agreement (Schedule I), which was substantially redrafted by the QCA.

While Aurizon Network agreed that access seekers should have the option of entering into a confidentiality agreement to protect information, it had concerns about how this would be implemented. Aurizon Network's and other stakeholders' comments, with our responses, are summarised in the table below.

[206] Aurizon Network, 2014 DAU, sub. 83: 71.
[207] Aurizon Network, 2014 DAU, sub. 83: 72.
[208] Aurizon Network, 2014 DAU, sub. 83: 73.

Table 12 Stakeholders' comments on the confidentiality agreement

Stakeholder	*Comment*	*QCA analysis*
Aurizon Network	The QCA's redrafted clause 3.10 (of the IDD amended DAU) does not give the option of entering into an alternative agreement that could allow for variations. Aurizon Network suggested reinstating the words 'unless otherwise agreed' in clause 3.10, as used in the 2010 AU.[209]	We consider that this clause does not prevent parties negotiating a confidentiality agreement on their own terms. However, for clarity, we propose to reinstate drafting as suggested by Aurizon Network.
Aurizon Network	The QCA sought to use the same agreement as applies when certain parties receive confidential information from Aurizon Network. There should be two separate agreements.	We consider that the same agreement can apply—there is no need to have two separate agreements.
QRC	The QRC supported the QCA's proposal to allow an access seeker or train operator the right to require Aurizon Network to enter into a confidentiality agreement in the form set out in the undertaking. However, the QRC said that clause 3.10 unduly restricts the application of confidentiality agreements—any party should be able to enter into a confidentiality agreement ahead of lodgement of an access application, not only access seekers (who have lodged an application) and train operators.[210]	We are concerned that widening the definition could be too ambiguous. We consider that in such cases, the onus is on third parties to manage their confidential information until they become an access seeker and the negotiation period commences. For clarity, in our revised drafting (cl. 3.9 of the CDD amended DAU) we consider that a third party access seeker as defined in Part 12 could enter into confidentiality agreements.
QRC	The QRC supported the disclosure of confidential information on as 'as needs' basis, but said the reference to 'legitimate business purpose' in clause 3.12(a)(ii) (of the IDD amended DAU) may be uncertain—it should be more closely linked to the purpose for which confidential information is disclosed. The QRC also said there may be an unintended consequence under clause 3.12(j) (actually cl. 3.12(i)(ii)(B)) where Aurizon Network has the right to cease negotiations even if prior consent to disclose confidential information is refused on reasonable grounds.[211]	We note that the content of the confidential information register includes the purpose for which information is to be used and the decisions made using the information (cl. 3.14(c)(ii)(D) of the CDD amended DAU). A legitimate business purpose in our view is narrow enough to ensure that information that is not relevant to decisions is excluded. We have also made drafting changes to address the potential for any unintended consequences in clause 3.12(i)(ii)(B) of the IDD amended DAU.
Anglo American	Anglo American suggested parties should be allowed to provide to the QCA information that is subject to confidentiality obligations, as long as the QCA treats the information confidentially. This could be similar to a waiver as contained in clauses 3.19(b) and (c) in the initial draft decision.[212]	We have such power under section 185 of the QCA Act once an investigation is commenced. Should confidential information be otherwise volunteered to the QCA, the QCA is obliged to assess whether it is in the public interest to retain its confidentiality.

Comments on Schedule I

[209] Aurizon Network, 2014 DAU, sub. 83: 73.
[210] QRC, 2014 DAU, sub. 84: 16.
[211] QRC, 2014 DAU, sub. 84: 17.
[212] Anglo American, 2014 DAU, sub. 95: 9.

Our responses to comments in relation to the standard form confidentiality agreement (Schedule I in the IDD amended DAU) are set out in the table below.

Table 13 Stakeholders' comments on confidentiality agreement (Schedule I)

Clause in IDD amended DAU	*Stakeholders' comments*	*QCA response*
General	Aurizon Network and the QRC both suggested that 'recipient' should be defined.	We have included a definition of recipient in Part 12 of the CDD amended DAU.
Clause 5	The QRC said it is unclear whether there may be mutual confidentiality obligations between Aurizon Network and a relevant counterparty. The QRC was concerned that the confidentiality agreement could be construed to restrict an access seeker's use of information disclosed to it by Aurizon Network during negotiations. The pro forma should clarify that for negotiations of an access agreement or TOD, the recipient is Aurizon Network only.	We have clarified the drafting of the CDD amended DAU in response to the QRC's comments.
Clause 6	Aurizon Network said that the obligation to procure the Aurizon Group's compliance should be deleted, as this is beyond the QCA's power.	We have removed the obligation to procure the Aurizon Group's compliance in the CDD amended DAU, consistent with Aurizon Network's comment.
Clause 7	Aurizon Network said it is not appropriate for the QCA to involve itself in an agreement between Aurizon Network and an access seeker—it said the QCA's intent with clause 7 is unclear.	We have removed this clause 7 in the CDD amended DAU, consistent with Aurizon Network's comment.
Clause 8(a)	Aurizon Network said this clause imposes a liability on Aurizon Network in respect of conduct of other Aurizon parties. The QCA does not have the power to impose such liability.	We have removed this drafting in the CDD amended DAU (now cl. 7(a)), consistent with Aurizon Network's comment.
Clause 8(c), (d)	Aurizon Network said it is not appropriate to have a mutual confidentiality agreement with two-way obligations but only a one-way liquidated damages provision.[213] The QRC did not agree with the clauses which seek to provide an entitlement to liquidated damages and compensation for breaches of a confidentiality agreement. It said this is unlikely to provide any incentive for Aurizon Network not to breach its confidentiality obligations.	In response to submissions, we have decided to delete these clauses from Schedule I in the CDD amended DAU.
Clause 9	The QRC did not agree with clause 9. It said a confidentiality agreement should only be terminated by mutual consent.[214]	We agree with the QRC view that a confidentiality agreement should only be terminated by mutual consent. In our view, the drafting of clause 8 of the CDD amended DAU reflects this position.

[213] Aurizon Network, 2014 DAU, sub. 83: 73–74.
[214] QRC, 2014 DAU, sub. 84: 19–20.

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions received on the initial draft decision, we refuse to approve Aurizon Network's exemptions process, confidentiality and consent provisions in the 2014 DAU.

Aurizon Network's 2014 DAU was not appropriate because it did not provide an acceptable balance between allowing Aurizon Network to disclose confidential information where necessary, and enabling an appropriate level of transparency—thereby ensuring a robust, objective understanding of the flow of confidential information is developed. Those factors are, Aurizon Network's legitimate business interests, the interests of access seekers and the issue of having an operationally effective ring-fencing regime in place (s. 138(2)(b), (e) and (h) of the QCA Act).

Amending the 2014 DAU

The way to amend the 2014 DAU is set out in our CDD amended DAU at Part 3 and Schedule I.

While we considered that Aurizon Network's 2014 DAU was not an appropriate alignment of the interests of access holders, access seekers and train operators, we have adopted a number of the suggested changes made in submissions by Aurizon Network and other stakeholders, as noted above.

Consolidated draft decision 4.7

(1) After considering relevant clauses of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's exemptions process, confidentiality and consent provisions.

(2) The way in which we consider it is appropriate that Aurizon Network amend the draft access undertaking is to:

- **(a) replace the obligations and processes for disclosure of confidential information in accordance with our marked drafting**
- **(b) allow any relevant party, including Aurizon Network, at any time during negotiations for access, to require the other party to enter into the standard form confidentiality agreement (Schedule I)**
- **(c) replace the standard form confidentiality agreement in accordance with our marked drafting.**

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

Decision-making principles

We considered Aurizon Network's 2014 DAU has the potential to constrain the ability of access seekers and access holders to understand the flow of ring-fenced information outside of Aurizon Network and to assess how the information has been used in the decision-making process—in circumstances where the rights of third parties may be affected.

Given the changes in the Aurizon Group's structure leading to Aurizon Network subcontracting more services from the Aurizon Group, as well as there being cross-board directorships within the Aurizon Group, we considered that the 2014 DAU, lacking any decision-making criteria, fails to appropriately balance the interest of access holders, access seekers and train operators (s.

138(2)(e) of the QCA Act), and aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Our initial draft decision was to refuse to approve the 2014 DAU, and to indicate that the way in which we consider it would be appropriate to amend the undertaking is to include decision-making principles. Given decision-making criteria were included in the 2010 AU, these provided a useful baseline for our proposed amendments. As decision-making criteria are part of the 2010 AU, we would assume Aurizon Network already complies with its obligations and that it would be relatively straightforward to continue to record the relevant information in the confidential information register.

Stakeholders' comments on the initial draft decision

Aurizon Network did not have significant concerns with the reinstatement of the decision-making process from the 2010 AU into the amended DAU.

However, Aurizon Network said that clause 3.18(a)(ii) (of the IDD amended DAU) should be redrafted to ensure that it does not require a greater homogeneity of treatment between access seekers and holders than that which would be required to comply with section 137(1A) of the QCA Act.[215]

QCA analysis and consolidated draft decision

In our consolidated draft decision, we continue to consider that Aurizon Network's 2014 DAU is not appropriate because in our view it fails to ensure a clear and transparent link between access to ring-fenced information and the process for Aurizon Network's decision-making. Without decision-making criteria, the 2014 DAU does not balance the interest of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act), with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

We have therefore indicated that the way to amend the 2014 DAU is to reinstate the decision-making principles.

In recognition of Aurizon Network's comment, we have included changes in the CDD amended DAU (clause 3.19(a)(ii)) to provide that a decision is made in a manner that does not unfairly differentiate between access seekers and access holders in a way that has a material adverse effect on them.

[215] Aurizon Network, 2014 DAU, sub. 83: 74.

Consolidated draft decision 4.8

(1) Our consolidated draft decision is to refuse to approve Aurizon Network's 2014 DAU in the absence of any decision-making principles.

(2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is to reinstate the decision-making principles included in the 2010 AU.

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

4.5.5 Supporting provisions

Aurizon Network's 2014 DAU also included a number of other provisions associated with the information management system, such as:

- training and exit certificates
- commitments to information security
- security measures
- waiver of the undertaking.

Training and exit certificates

Unlike the 2010 AU, the 2014 DAU included provisions for the mandatory training of various groups of employees, with respect to the Aurizon Group's obligations regarding protected information (cl. 3.21(a) of the 2014 DAU).

Aurizon Network also included an exit certificate process for the circumstances where an Aurizon Network employee that has had access to protected information is either employed by another Aurizon Group business or an employer outside the Aurizon Group. In such circumstances, the employee would undergo a debriefing session regarding Aurizon Network's and their own obligations, as applicable, regarding the management of protected information. Each employee would be asked to sign an exit certificate that includes an acknowledgement of having undergone the debriefing session. A record of the exit certificates would be kept in the protected information register (cls. 3.21(b) and (c) of the 2014 DAU).

Summary of initial draft decision

In our initial draft decision, we agreed with stakeholders' views that including explicit training and exit certificate provisions in the undertaking is beneficial. We also considered there is merit in the arguments for a tiered approach to training. Training should be undertaken periodically rather than just once and a 'reasonable endeavours' approach should be adopted by Aurizon Network when obtaining exit certificates.

We were of the view that tiered training, if adopted, needs to be appropriately targeted. We were not convinced this relates to just providing more detailed and frequent training to those employed by the Aurizon Group in the performance of access-related functions, as suggested by stakeholders. We considered the undertaking should involve targeting the more detailed training requirements to high-risk personnel. In our view, this encompasses individuals who may have access to confidential information and be in a position to:

- use that information to influence train scheduling
- use that information for purposes other than supplying core Aurizon Network services
- influence or control the decisions of any Aurizon Group company that is not Aurizon Network.

We considered Aurizon Network should maintain a register of high-risk personnel, which includes a detailed explanation of why individuals are on the register. We considered the directors and executive officers of the Aurizon Group are high-risk personnel because the organisational structure of the Aurizon Group allows for directors and executive officers to sit on more than one company board across the Aurizon Group. We also considered the register should be provided to the QCA periodically for audit. Finally, we decided that Aurizon Network should adopt a 'reasonable endeavours' approach to obtaining exit certificates.

Overall, our initial draft decision was to refuse to approve the training and exit certificate provisions in clause 3.21 of Aurizon Network's 2014 DAU. We considered a targeted, tiered approach to training can be adopted through the development of a high-risk personnel register. We considered this appropriately balances the interests of access holders, access seekers and train operators, with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Stakeholders' comments and the QCA's responses are detailed in the table below.

Table 14 Stakeholders' comments on training and exit certificates

Stakeholder	*Comments*	*QCA response*
Aurizon Network	Aurizon Network submitted that it has a risk-based approach to training in place. Aurizon Network said the requirement for training of employees on statutory obligations (cl. 3.14(b) of the IDD amended DAU) is logistically difficult and out of scope of QCA powers to mandate. Aurizon Network was concerned with potential over-reach and additional compliance costs given there are 7524 employees spread across most states of Australia. Aurizon Network suggested excluding broader Aurizon Group personnel who have no exposure to protected information or to Aurizon Network.[216]	The initial draft decision was not intended to require all of Aurizon Network's employees to undergo training on statutory obligations—we accept that this is logistically impractical. In our view, because the undertaking relates to access to the declared service in the CQCN, the provisions only apply to relevant personnel whose role requires access to confidential information. Our CDD amended drafting provides clarification of this.
Aurizon Network	Aurizon Network agreed with the QCA's 'best endeavours' approach for completing exit certificates, but said it should only apply to those not on the high-risk register, with a mandatory requirement to complete an exit certificate for those on the high-risk register (cl. 3.16 of the IDD amended DAU).[217]	We agree that a mandatory process for exit certificates (cl. 3.17 of the CDD amended DAU) should apply for personnel listed on the high-risk register, but that a best endeavours approach apply for other staff.
Aurizon Network	Aurizon Network submitted it is already in compliance with the requirement in relation to high-risk personnel and has a list of positions detailing how the high-risk register is currently constructed. However, Aurizon Network added that the requirement that the register be provided to the QCA on request is 'unnecessarily broad and open-ended' (cl. 3.15(d)).[218]	We do not consider provision of the high-risk register to the QCA on request would be an onerous task, and while this provision is 'open-ended', the intent is to ensure that the register is maintained and updated appropriately.
QRC	The QRC supported the QCA's amendments relating to confidential information training and exit certificates. The QRC suggested high-risk personnel may require a higher level of training.[219]	As noted above, we agree that a higher level of training is required for high-risk personnel.
Other	Anglo American said the list of high-risk personnel should include all executive managers of Aurizon Network, as well as anyone else involved in the executive or management teams of Aurizon Network.[220] Asciano said it should include personnel who manage the provision of below-rail services to third parties on a day-to-day basis, including personnel in Aurizon Network's commercial development area and network operations area.[221] Vale supported the training provisions.[222]	We consider there is no need for all executive and management personnel of Aurizon Network to be deemed to be listed in the high-risk register or for personnel who manage below-rail services on a day-to-day basis to be listed. Many such personnel may not be exposed to confidential information. Rather, high-risk personnel in these categories can be identified under clause 3.16(b) of the CDD amended DAU.

[216] Aurizon Network, 2014 DAU, sub. 83: 75.
[217] Aurizon Network, 2014 DAU, sub. 83: 76.
[218] Aurizon Network, 2014 DAU, sub. 83: 77.
[219] QRC, 2014 DAU, sub. 84: 17.
[220] Anglo American, 2014 DAU, sub. 95: 10.
[221] Asciano, 2014 DAU, sub. 76: 13.
[222] Vale, 2014 DAU, sub. 79: 3.

Aurizon Network said that it is already in compliance with the requirement for the high-risk register, and identified a range of positions that would be included on the register. These included positions responsible for negotiation of access rights to the CQCN, management of access agreements, capacity management and assessment, network control services, procuring and managing maintenance activities, among others.[223]

Conclusion

After having regard to the criteria listed in section 138(2) of the QCA Act and submissions received on the initial draft decision, we refuse to approve Aurizon Network's training and exit certificate provisions in the 2014 DAU. The reason for our consolidated draft decision is that we consider that processes need to ensure effective management of confidential information where it could be used by relevant personnel to provide an advantage for Aurizon Network, a related entity or a competitor. We consider that effective management of training and exit arrangements would benefit Aurizon Network's own legitimate business interests, particularly in regard to protecting intellectual property and operational information.

However, in taking account of submissions, we have made a number of clarifying drafting amendments to our CDD amended DAU. For example, we specifically include Aurizon Network personnel who manage the negotiation and maintenance of access agreements and train operations deeds, and staff assessing and allocating capacity.

Aurizon Network's 2014 DAU training and exit certificate proposals were in our view not appropriate for the reasons noted in our initial draft decision, primarily because they did not target the more detailed training requirements to high-risk personnel. This could weaken the effectiveness of ring-fencing and affect the confidence of access seekers and access holders to invest. Aurizon Network's proposal was not appropriate because it did not appropriately balance the interests of access holders, access seekers and train operators, with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

[223] Aurizon Network, 2014 DAU, sub. 83: 77.

Consolidated draft decision 4.9

(1) After considering section 3.21 of the 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's training and exit certificate provisions.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:

- **(a) require confidential information training for all Aurizon Network personnel, as well as employees of the Aurizon Group, whose role requires access to confidential information related to the declared services of the CQCN**
- **(b) require Aurizon Network to obtain exit certificates for Aurizon Network high-risk personnel, and to adopt a 'best endeavours' approach for other personnel, who have had access to confidential information related to the CQCN**
- **(c) include provisions that:**
  - **(i) require the development of a high-risk personnel register that can be used to target training requirements**
  - **(ii) provide for a copy of the high-risk personnel register to be given to the QCA, upon request, and to allow for the QCA to audit its development and update over time.**

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

Commitments to information security

Aurizon Network's 2014 DAU includes the following overarching commitments regarding the flow of ring-fenced information (cl. 3.15 of the 2014 DAU):

- to keep confidential and not to disclose protected information, unless in accordance with the undertaking
- to only use protected information for the purpose for which it is disclosed to Aurizon Network, and only to the extent necessary for that purpose
- not to use or disclose protected information for the purpose of a related operator obtaining an unfair commercial advantage.

Summary of the initial draft decision

In our initial draft decision, we considered the proposed undertaking was not appropriate as the provisions appeared likely to be ineffective in achieve the objectives of Part 5 of the QCA Act. Importantly, we considered the obligation not to use confidential information for the purpose of a related operator obtaining an unfair commercial advantage should also extend to the disclosure of confidential information to associated port/rail and mine/rail entities.

We considered this is in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) given Aurizon Network's strategic intent to leverage its vertically integrated structure. We were of the view this aligns with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act).

Stakeholders' comment on the initial draft decision

Aurizon Network agreed with the principles of the initial draft decision.[224]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and submissions received on the initial draft decision, we refuse to approve Aurizon Network's commitments to information security in the 2014 DAU. Aurizon Network's 2014 DAU was not appropriate because it did not extend to the disclosure of confidential information obligations to associated port/rail and mine/rail entities, which, if they obtained such information, could gain an unfair commercial advantage.

We considered that our amendments to address these concerns appropriately take account of the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act)—given Aurizon Network's changed corporate structure—and of the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Consolidated draft decision 4.10

(1) After considering clause 3.15 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's commitments to information security.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to propose that Aurizon Network must not use or disclose confidential information if doing so would unfairly advantage a related operator.

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

Security measures

In the 2014 DAU, Aurizon Network committed to providing adequate security, in its major office premises, to ensure employees working for a related operator cannot access Aurizon Network offices, unless access is authorised by an Aurizon Network employee. Further, it committed to ensuring that, while in the Aurizon Network offices, an employee of a related operator will be accompanied by an Aurizon Network employee, to the extent reasonably practicable. However, a related operator can be located in the same building as Aurizon Network (cl. 3.22(b) of the 2014 DAU).

Summary of the initial draft decision

In our initial draft decision, we indicated that we did not consider the provisions for the practical implementation of these measures to be effective. In particular, it was not appropriate that the measures focused solely on related operators, and there was ambiguity as to what 'adequate security' means and how such security can be enforced if any Aurizon Network employee can authorise access to Aurizon Network offices, and thereafter only be required to accompany the employee of the related operator 'when reasonably practicable'.

[224] Aurizon Network, 2014 DAU, sub. 83: 77.

In our initial draft decision, we considered that Aurizon Network's obligations to ensure the security in respect of the confidential information it holds was not sufficiently robust to be considered credible by access holders, access seekers and train operators. In this regard we considered the way in which amendments could be made and proposed the following amendments:

- security measures to apply to all persons other than directors/employees of Aurizon Network
- security measures to apply to all Aurizon Network premises
- any person visiting an Aurizon Network premises to be accompanied by an Aurizon Network employee
- with the exception of Aurizon Network directors/employees, a record be maintained of all persons who have accessed an Aurizon Network premises, who they are, who they are affiliated to, who they were meeting and when
- an employee of Aurizon Network on secondment with another Aurizon Group company to be considered to be staff of that other Aurizon Group company, and subject to the security measures for non-Aurizon Network employees.

We considered such measures to be in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act) and are compatible with the legitimate business interests of Aurizon Network (s. 138(2)(b)).

Stakeholders' comments on the initial draft decision

Aurizon Network submitted that the initial draft decision that security measures be applied across all premises is unreasonable, as it manages a confidential information risk that is not prevalent. Of Aurizon Network's 35 premises, only three would hold confidential information—and these already have security processes in place. Aurizon Network suggested the drafting be amended to reflect that only major premises housing personnel classed as high-risk, and which could affect access holders of the CQCR, should be included.

Aurizon Network agreed that accompaniment is an appropriate control—but said to fulfil the requirement at all times is impractical and unmanageable, particularly with the broader definition of premises. Aurizon Network said it engages contractors to undertake some tasks, and they are employed under commercial contractual arrangements that prohibit disclosure of confidential information. Aurizon Network considered the risk is already addressed in clause 3.22 of the 2014 DAU.[225]

Aurizon Network agreed that a record should be maintained of all persons who have accessed Aurizon Network premises, but suggested that amendments be made to what is included within the definition of premises and their relation to ring-fenced information.

Aurizon Network agreed with the initial draft decision that an employee of Aurizon Network on secondment with another Aurizon Group company would be considered as staff of that other company, and be subject to the security measures for non-Aurizon Network employees.

The QRC agreed with the QCA's proposed amendments. The QRC also said Aurizon Network's employees' business cards should identify them as such.[226]

[225] Aurizon Network, 2014 DAU, sub. 83: 77–78.
[226] QRC, 2014 DAU, sub. 84: 18.

QCA analysis and consolidated draft decision

After considering the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refuse to approve Aurizon Network's commitments regarding the security of premises in the 2014 DAU.

We consider Aurizon Network's 2014 DAU was not appropriate because the measures proposed were not sufficiently robust to:

- be considered credible by access holders, access seekers and train operators. In that regard, they did not appropriately take account of the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act);
- eliminate the opportunity for unfair differentiation of a material nature to occur between related parties and competitors (s. 137(1A) of the QCA Act).

Amending the 2014 DAU

Taking into account Aurizon Network's submissions, we have clarified the way in which the 2014 DAU should be amended.

Security measures should not be applied across all Aurizon Network premises. The undertaking relates to access to the declared service in the CQCN and therefore the security provisions apply to this service. This is clarified in our amended drafting by referring to Aurizon Network offices where confidential information is located or stored.

This change solves the requirement for accompaniment of personnel visiting premises, as this requirement would only apply to premises where access-related functions occur and where confidential information is located. In regard to contractors, we maintain a view that accompaniment by an Aurizon Network employee is a reasonable security measure for effective ring-fencing of confidential information. A contractor is an agent of the relevant visiting entity and will have access to confidential information that, if used inappropriately, could result in their principal unfairly differentiating between related parties and competitors.

The security measures set out in our CDD amended DAU are in our view measures that are consistent with the legitimate business interests of Aurizon Network balanced between the interests of access seekers and access holders (s. 138(2)(b), (e) and (h)) and protect against unfair differentiation of a material nature (s. 137(1A) of the QCA Act).

Consolidated draft decision 4.11

(1) After considering clause 3.22 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's commitments regarding the security of premises.

(2) The way in which we consider it is appropriate that Aurizon Network amend its draft access undertaking is as set out in clause 3.18 of our CDD amended DAU:

- **(a) security measures to apply to all Aurizon Network personnel and all Aurizon Network premises where confidential information is located or stored**
- **(b) any person visiting an Aurizon Network premises to be accompanied by an Aurizon Network employee**
- **(c) a record to be maintained of all persons who have accessed an Aurizon Network premises where confidential information is located or stored, with the exception of Aurizon Network directors/employees**
- **(d) an employee of Aurizon Network on secondment with another Aurizon Group company to be considered as staff of that other company and be subject to the security measures for non-Aurizon Network employees.**

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

Waiver of the undertaking

Aurizon Network's 2014 DAU provided for access holders and access seekers to voluntarily enter into a binding agreement, which excludes the operation of all, or some, of the ring-fencing provisions included in Part 3 of the 2014 DAU, with respect to protected information. It also provided for Aurizon Network and a third party access holder or access seeker to enter into a confidentiality agreement/deed or an access agreement containing confidentiality obligations in relation to the negotiation of access rights. Any such agreement would prevail over the provisions in Part 3 of the undertaking, to the extent of any inconsistency (cl. 3.13 of 2014 DAU).

Our view was that this clause could be used by Aurizon Network, as a monopoly provider, in its negotiations with an individual access holder, access seeker or train operator in order to reduce its ring-fencing obligations.

We considered, given Aurizon Network's position as the monopoly provider of access to the CQCN, the proposed clause did not appropriately balance the interests of access holders, access seekers and train operators with Aurizon Network's legitimate business interests (s. 138(2)(b) and (e) of the QCA Act).

For this reason, our initial draft decision proposed a clause prohibiting Aurizon Network requesting that an access holder, access seeker or train operator waive Aurizon Network's ring-fencing obligations, as set out in Part 3 of the undertaking. We proposed provisions to ensure the ring-fencing obligations and requirements in Part 3 of the undertaking were not superseded by a confidentiality agreement/deed or access agreement containing confidentiality provisions in relation to the negotiation or provision of access rights.

Stakeholders' comments on the initial draft decision

Aurizon Network did not agree with removal of drafting that allows for third party access seekers/holders to waive obligations to comply with ring-fencing provisions that apply to them. Aurizon Network thought this would not allow third parties to manage information as they see fit. Aurizon Network said that a waiver provision that requires an affected party's approval must be retained within the access undertaking as it would allow timely resolution of matters without involving other external parties. Aurizon Network suggested its 2014 DAU drafting be reinstated.[227]

The QRC supported our proposed clause 3.9(a) (of our IDD amended DAU) which provides that Aurizon Network must not request a waiver from an access seeker, access holder or train operator. The QRC considered that any ability for Aurizon Network to request a stakeholder provide a waiver would create an unfair balance of power and detract from the protections offered under the undertaking.

The QRC said it may be agreeable to Aurizon Network having a right to seek a waiver from the QCA. If the QCA considers there are no circumstances which would justify approval of a waiver, then the ability of Aurizon Network to request a waiver appears harmless. The QRC was confident that the QCA would only grant such a waiver if it was fair and reasonable. For this reason, the QRC said that clause 3.3 appears unnecessary and should be deleted.[228]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act, and considering submissions, we refuse to approve Aurizon Network's proposals allowing for Aurizon Network and third party access seekers or access holders to agree to waive the ring-fencing provisions in the 2014 DAU.

An effective ring-fencing regime minimises the risk of monopoly behaviour and provides a balance between the interests of Aurizon Network and access seekers, access holders and train operators. Additionally, section 137(1A) of the QCA Act requires ring-fencing provisions to prevent parties such as Aurizon Network being able to act in a way proscribed by the Act. In our view, enabling a request for a waiver from an access holder, access seeker or train operator reduces the level of protection afforded to access seekers under the Act. We therefore refuse to approve an undertaking that provides Aurizon Network with the ability to potentially use its position to negotiate waivers from access seekers, access holders and train operators thereby limiting the protections afforded to them.

Amending the 2014 DAU

In regard to the QRC's suggestion, we agree that clause 3.3 of the IDD amended DAU is not necessary, and we have removed this clause in the CDD amended DAU. The provisions of clause 3.9 of the CDD amended DAU provide sufficient protection to access seekers, access holders and train operators in respect of Aurizon Network requiring waivers from them.

We consider that confidentiality obligations in relation to the negotiation of access rights should not be allowed to be of lesser standard than in the confidentiality agreement or deed or access agreement. This does not prevent parties negotiating their own contractual arrangements, provided the contract applies obligations of equivalent or higher standard. Our position (see cl.

[227] Aurizon Network, 2014 DAU, sub. 83: 79.
[228] QRC, 2014 DAU, sub. 84: 13–14.

3.9(c) of the CDD amended DAU) provides an appropriate balance between the interests of Aurizon Network and access seekers.

We consider that by ensuring access holders, access seekers and train operators are afforded some protection from requests by Aurizon Network to grant waivers on ring-fencing arrangements, their interests are balanced with those of Aurizon Network's legitimate business interests (s. 138(2)(b) and (e) of the QCA Act).

We consider our amendments are appropriate because they remove the risk that Aurizon Network could exercise its monopoly power in any negotiation with an individual access holder, access seeker or train operator in order to reduce its ring-fencing obligations. Such behaviour could result in, for example, related parties benefiting commercially relative to competitors.

Consolidated draft decision 4.12

(1) After considering clause 3.13 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposals allowing for Aurizon Network and third party access seekers or access holders to agree to waive the ring-fencing provisions in 2014 DAU.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is set out in clause 3.9 of our CDD amended DAU, namely to:

- **(a) prohibit Aurizon Network from requesting an access holder, access seeker or train operator to waive Aurizon Network's ring-fencing obligations**
- **(b) ensure ring-fencing obligations and requirements are not superseded by:**
  - **(i) a confidentiality agreement/deed or**
  - **(ii) an access agreement**
  - **(iii) containing confidentiality provisions in relation to the negotiation or provision of access rights.**

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

4.6 Role of functional separation

4.6.1 Aurizon Network's proposal

Aurizon Network's view on its proposed approach to functional separation and how this compares with the 2010 AU is summarised in the following table (see also clauses 3.5 and 3.6 of the 2014 DAU).

Table 15 Aurizon Network's approach to functional separation in the 2010 AU and 2014 DAU

Ring-fencing element	*2010 AU approach*	*2014 DAU approach*
Functional separation	In the 2010 AU, separation is achieved by a specific clause containing a requirement for prior approval by the QCA for any proposal for a related operator 'to become responsible for matters integral to the provision of below-rail services'. This is combined with a list of examples of the 'responsibilities' of Aurizon Network.[229]	The 2014 DAU adopts a clear statement of core access-related functions performed by Aurizon Network (adapted from the 2010 AU), combined with an obligation that those functions will not be undertaken by, or contracted out to, a related operator—but nothing prevents Aurizon Network undertaking a non-core function or requires it to undertake a non-core function.[230]

Aurizon Network said it had undergone major structural change since the 2010 AU was approved—when it was structured by business units (i.e. coal, freight, network etc.)—and it is now structured along functional lines.[231] Aurizon Network said the restructure continues to separate management and operation of declared below-rail infrastructure from train services.[232]

Aurizon Network said the 2014 DAU provides for functional separation through clause 3.5(a). This requires that access-related functions will be performed by Aurizon Network and not transferred or delegated to, contracted out to, or otherwise undertaken, by a related operator.

According to Aurizon Network, this provides greater assurance than the 2010 AU obligation, which restricted 'matters integral to the provision of Below Rail Services' from becoming the 'responsibility' of a related operator, and required a draft amending access undertaking to be submitted to the QCA for prior approval of any functional change.[233] Aurizon Network noted the list of access-related functions outlined in clause 3.4 of the 2014 DAU does not contemplate change—rather, they ensure certainty throughout the life of the undertaking. Aurizon Network said its proposals retained the key functions and was substantially the same as the 2010 AU.[234]

Aurizon Network noted that nothing in the 2010 AU required it to perform a function that is not an access-related function; or prevented it from performing any function which is not an access-related function, apart from commercial above-rail services.[235]

Aurizon Network said that 2014 DAU contains a similar exception to the 2010 AU, whereby Aurizon Network may contract with related operators for provision of certain components of the train control service, being field incident management and yard control services at yards other than major yards.[236]

4.6.2 Summary of the initial draft decision

In our initial draft decision, we noted the general stakeholder view that Aurizon Network proposed a narrow interpretation of section 137 of the QCA Act, and overly relied on legal separation from its parent as a basis to reduce ring-fencing obligations. Stakeholders also

[229] Aurizon Network, 2013 DAU, sub. 2:61–62.
[230] Aurizon Network, 2013 DAU, sub. 2:61–62.
[231] Aurizon Network, 2013 DAU, sub. 2: 65–66.
[232] Aurizon Network, 2013 DAU, sub. 2: 66.
[233] Aurizon Network, 2013 DAU, sub. 2: 66.
[234] Aurizon Network, 2013 DAU, sub. 2: 66-67.
[235] Aurizon Network, 2013 DAU, sub. 2: 68.
[236] Aurizon Network, 2013 DAU, sub. 2:67.

suggested core access related functions concerning the declared service must be performed by Aurizon Network and separated from other commercial activities.[237]

We considered that the 2014 DAU adopted a narrow, overly prescriptive definition of Aurizon Network's functional responsibilities, while simultaneously allowing Aurizon Network to perform functions not related to those functional responsibilities. Changes to the Aurizon Group's organisational structure appeared to result in Aurizon Network subcontracting from the Aurizon Group more of the services/functions required to operate the CQCN.

In the context of our role to approve an undertaking that contains an effective ring-fencing regime, we consider the overall impact of Aurizon Network's approach was to render the concept of 'access-related functions' or 'below-rail services' less than effective. Consequently, we were of the view that Aurizon Network's functions should be defined in a manner that encapsulates the core service it provides. We considered Aurizon Network's functional responsibilities and obligations should relate to the provision of the declared service.

Overall, our initial draft decision was to refuse to approve Aurizon Network's proposals in the 2014 DAU regarding Aurizon Network's definition of access-related functions and its obligation to perform these (cls. 3.4 and 3.5 of 2014 DAU). For the purposes of ring-fencing, our initial draft decision was that this be replaced with an overarching statement that Aurizon Network's primary function is to supply the declared service. The initial draft decision also required that Aurizon Network will not:

- undertake any above-rail services
- undertake the operation or marketing of train services, unless for the purpose of providing a below-rail service or the provision of services in respect of private infrastructure
- undertake any port service (including providing access to a port service) or hold any direct or indirect (by way of a subsidiary or trust) interest in any port in Queensland
- hold any direct or indirect (by way of a subsidiary or trust) interest in any coal mine or project in Queensland.

In the context of the changes to the Aurizon Group's organisational structure and our view on the implications of this, we considered our approach appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.6.3 Stakeholders' comments on the initial draft decision

Aurizon Network questioned whether our role extended to considering what business activities Aurizon Network may undertake in addition to provision of the declared service, so long as:

- there are measures to ensure there is no unfair differentiation between operators that would have a material adverse effect on competition
- confidentiality of relevant information is respected and information is not passed to related operators
- potential conflicts of interest between related access provider and related operator are managed.

[237] QRC, 2013 DAU, sub. 46:33; QRC, 2014 DAU, sub. 42: 15–16; Anglo American, 2014 DAU, sub. 7: 13–17.

Aurizon Network rejected our proposal for an overarching statement that Aurizon Network's primary function was to supply the declared service.

Aurizon Network did not agree with the definitions of below-rail and above-rail services included in clause 3.5(d) of the IDD amended DAU. Aurizon Network said supply of electricity is not part of the declared service and its inclusion in the definition of below-rail services is inappropriate. The inclusion of provision of maintenance and renewal services (as opposed to procurement of such services) is inappropriate, as provision of services is not an integral function of an access provider, and could be sourced externally. The definition of above-rail services creates difficulties as it could prohibit Aurizon Network maintaining rollingstock used for maintenance services—Aurizon Network queried whether this was unintended.

Aurizon Network reiterated its position that restrictions on ownership of ports and mines are inappropriate and beyond power (cl. 3.5(e) of the IDD amended DAU).[238]

The QRC agreed with clause 3.6(a) of the IDD amended DAU in-principle, but considered it did not go far enough. The QRC and Anglo American submitted that the prohibition on Aurizon Network transferring or delegating below-rail activities to a 'related operator' should be extended to a 'related competitor' (i.e. a related operator that has an interest in a port or a coal mine). [239]

4.6.4 QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refuse to approve Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligation to perform these in the 2014 DAU. However, we have outlined the way in which the 2014 DAU should be amended, taking into account submissions received in respect of the initial draft decision.

The QCA Act does not prohibit vertical integration. However, if Aurizon Network were to engage in vertically integrated activities related to the declared service, this would require rigorous ring-fencing arrangements to manage the greater risk of unfair differentiation of a material nature and the risk of cost shifting from unregulated to regulated services. The 2014 DAU does not however propose rigorous ring-fencing arrangements, and instead takes a light-handed approach.

In our view, Aurizon Network's 2014 DAU ring-fencing regime was not appropriate because it would allow Aurizon Network to perform functions not related to the regulated functional responsibilities, potentially to the detriment of access seekers and access holders. Aurizon Network would be in a position to shift costs to regulated activities unless there are effective ring-fencing solutions to manage the effects of functional overlaps. The 2014 DAU therefore did not appropriately balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act.

Amending the 2014 DAU

As a result of the declaration of the use of the CQCN, Aurizon Network (as the access provider for the service's activities) should focus on the delivery of those services (s. 250(1)(a) of the Act). Other activities such as above-rail, port services or coal mining are not part of the declared service and would require functional separation, supplemented by a rigorous ring-fencing regime. Absent such a regime, we consider the way to amend the 2014 DAU, so that it can be

[238] Aurizon Network, 2014 DAU, sub. 83: 79–80.
[239] QRC, 2014 DAU, sub. 84: 15; Anglo American, 2014 DAU, sub. 95: 10.

approved, is to make clarifying amendments in our CDD amended DAU to restrict Aurizon Network in respect of the provision of the declared service (see cl. 3.5(a) of the CDD amended DAU).

In regard to the supply of electricity, we discuss this in detail in section 3.6 of this decision, noting that it is our view the supply of electricity falls within the declared service that is the subject of the 2014 DAU. Accordingly, we conclude that it is appropriate to include electricity transmission and managing supply of electricity in clause 3.4 of the CDD amended DAU.

We included in the definition of below rail services the provision or procurement of appropriate levels of maintenance services. This does not require the access provider to provide such services, it could choose to either provide them or procure them (from external suppliers). The option to procure remains in the drafting of clause 3.4(d)(v) of the CDD amended DAU.

There was no intent to exclude maintenance rollingstock from the functional definition of below-rail services. We consider that the procurement of maintenance services covers such activities, and they are not above-rail services. To clarify this, we have revised the drafting in clause 3.5 of the CDD amended DAU.

In response to QRC's comment on clause 3.6(a) of the initial draft decision amended DAU, we agree that it is reasonable to add 'Related Competitor' to this provision (see cl. 3.5(a) of the CDD amended DAU).

Our amendments to the undertaking are designed to restore a balance between the interests of the parties—to better control the flow of confidential information between Aurizon Network and its related entities. We therefore consider our approach to be appropriate in meeting the section 138(2) requirements of the QCA Act.

Consolidated draft decision 4.13

(1) After considering clauses 3.4 and 3.5 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposals regarding the definition of access-related functions and Aurizon Network's obligation to perform these.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:

- **(a) revise clauses 3.4 and 3.5 of the 2014 DAU**
- **(b) include an overarching statement that Aurizon Network's primary function is to supply the declared service and provide all relevant functions**
- **(c) require Aurizon Network not to:**
  - **(i) undertake any above-rail services in respect of the Rail Infrastructure**
  - **(ii) undertake the operating or marketing of train services, unless for the provision of the declared service**
  - **(iii) undertake any services associated with loading vessels at a port or hold any direct or indirect interest in any port connected to the rail infrastructure.**

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

4.7 Role of employee separation

4.7.1 Aurizon Network's proposal

Aurizon Network's view on its proposed approach to employee separation and how this compares with the 2010 AU is summarised in the following table.

Table 16 Aurizon Network's approach to employee separation in the 2010 AU and 2014 DAU

Ring-fencing element	*2010 AU approach*	*2014 DAU approach*
Employee separation	The 2010 AU includes a commitment to avoid conflicts of interest for Aurizon Network employees by preventing their participation in 'working groups' that may affect access. This approach creates substantial uncertainty in practice.[240]	2014 DAU has replaced the 'working group' clause with a clear commitment that access-related Aurizon Network employees work principally for Aurizon Network and do not work at the direction of a related operator, unless transferred or seconded (subject to requirements for handling protected information).[241]

Aurizon Network said it requires flexibility to avoid limiting employee career advancement, and to ensure the Aurizon Group can efficiently deploy staff where this does not cause a ring-fencing risk.[242]

[240] Aurizon Network, 2013 DAU, sub. 2: 61.
[241] Aurizon Network, 2013 DAU, sub. 2: 61.
[242] Aurizon Network, 2013 DAU, sub. 2: 68.

Aurizon Network also said the 2010 AU contained no practicable controls for employee separation, and attempted to prohibit involvement of employees in vaguely described 'working groups'.[243]

4.7.2 Summary of the initial draft decision

In our initial draft decision, we noted stakeholder suggestions that: stricter controls should be placed on duties Aurizon Network staff can undertake; and a prohibition should be placed on secondments to related parties.[244]

The 2014 DAU included a number of exceptions to the principle proposed by Aurizon Network that Aurizon Network employees primarily working in access-related functions will largely work in this area. The exceptions are outlined in the table below (cl. 3.6(b) of 2014 DAU).

Table 17 Exceptions allowing Aurizon Network employees to perform non-access-related functions and to move throughout the Aurizon Group

Aurizon Network employees primarily involved in access-related functions are not prevented or restricted from the following activities:

- performing functions required to negotiate for or provide access to a related operator in accordance with the undertaking
- being seconded subject to the requirements in the undertaking regarding the handling of protected information[245]
- ceasing to work for Aurizon Network and commencing work for a related operator subject to the requirements in the undertaking regarding the handling of protected information
- undertaking any function or activity:
  - required or compelled by any law
  - required or compelled by any order of a court
  - required or compelled by notice validly issued by any authority
  - necessary for the conduct of any dispute resolution process or audit under the undertaking, the QCA Act or a standard agreement
  - in the course of responding to an emergency or natural disaster
  - that does not relate, whether directly or indirectly, to the provision of below-rail services
- an employee engaged in:
  - asset construction, maintenance, renewal or repair
  - support services and/or corporate functions
- is not restricted from undertaking work for any Aurizon Group business unit or corporate functional areas, subject to the requirements in the undertaking regarding protected information.

We had concerns about the effectiveness of Aurizon Network's employee separation proposals. Further, we did not share Aurizon Network's view about our proposal for alleviating our concerns—that is, that the working group approach in the 2010 AU is vague and creates uncertainty in practice (cl. 3.4.3(c) of the 2010 AU).

[243] Aurizon Network, 2013 DAU, sub. 2: 68
[244] QRC, 2013 DAU, sub. 46: 36; QRC, 2014 DAU, sub. 42: 16; Anglo American, 2014 DAU, sub. 7: 24–25.
[245] This excludes temporary transfers/secondments to the marketing division. Temporary is defined as less than six months (cl. 3.6(c) of 2014 DAU).

While we understood the need for career advancement opportunities for Aurizon Network employees and Aurizon Network's objective to use its resources efficiently, we considered these goals need to be balanced against the credibility and effectiveness of the ring-fencing regime.

In our view, to achieve an appropriate level of credibility and effectiveness required a greater level of transparency over the secondment/transfer of employees to and from Aurizon Network and the Aurizon Group. The organisational changes implemented across the Aurizon Group and its strategic intent to leverage the benefits of vertical integration heightened our concerns that 2014 DAU ring-fencing proposals could not effectively restrict the flow of confidential information between Aurizon Network, the Aurizon Group and third parties.

Our initial draft decision was to refuse to approve Aurizon Network's 2014 DAU proposals regarding employee separation (cl. 3.6 of 2014 DAU) and to:

- reinstate the working group concept and extend its application to associated rail/port and rail/mine entities
- introduce measures requiring secondments/transfers of employees between Aurizon Network and an Aurizon party to be notified to the QCA prior to the secondment/transfer being undertaken
- include in the undertaking a requirement for Aurizon Network employees to have a separate email address that identifies them as Aurizon Network employees.

We considered these measures underpin a credible and effective ring-fencing regime, and balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

4.7.3 Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network submitted that the concept of a working group was contained within the 2010 AU, but presented Aurizon Network with unclear guidelines on employees within broader working groups and was deleted from the 2014 DAU as being unnecessary and unworkable.

Aurizon Network had issues with the working group drafting, and provided an example where an employee that manages a train control team would not be able to participate in a working group dealing with the renewal of enterprise agreements, which could reduce the likelihood of an outcome being achieved. Aurizon Network said that the drafting does not address discrimination issues that it is trying to protect against—all it does is limits Aurizon Network's legitimate business interests. It said the terminology 'affect or could affect the access of third party access holders' is too broad and could limit Aurizon Network's ability to operate.

Aurizon Network agreed to notify the QCA of secondments/transfers of employees to another Aurizon party prior to these being made. Aurizon Network advised that in the last two years, only four secondments have occurred. Secondments have been included in QCA's audit scope and no material issues have been identified.

Aurizon Network agreed that Aurizon Network employees should have a separate email address, on the proviso there is an appropriate adjustment to the MAR to allow for unaccounted costs.[246]

[246] Aurizon Network, 2014 DAU, sub. 83: 81–82.

Other stakeholders

The QRC and Asciano supported the QCA's proposed changes in relation to controls on Aurizon Network staffing and secondments, and transfers between Aurizon Network and another Aurizon entity. However, Asciano said it did not appear the QCA has the power to prevent breaches of the secondment requirements.[247]

The QRC agreed with the QCA's proposal that below-rail services must only be performed by Aurizon Network employees, and that these employees be restricted from working for related entities. However, the QRC suggested that, while it had no objection to assistance from the Aurizon Group in relation to shared services such as accounting and finance, clause 3.7(c) of the IDD amended DAU should clarify a defined list of services approved by the QCA, to avoid ambiguity. For example, it is not clear whether this clause would allow for shared services or corporate functions in regard to regulatory affairs to assist in the development of a replacement undertaking.

The QRC supported the requirement for separate email addresses, and suggested that it be extended to business cards.[248]

4.7.4 QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and assessing stakeholder comments, we refuse to approve Aurizon Network's proposals regarding employee separation in the 2014 DAU. However, we have outlined the way in which the 2014 DAU should be amended, taking into accounts submissions received in respect of our initial draft decision.

We consider that the 2014 DAU did not appropriately manage employee separation. Working group provisions are a necessary and appropriate means for managing employee separation.

We consider that Aurizon Network's 2014 DAU did not provide appropriate separation given the confidential information employees have access to and the potential conflicts of interest that can arise when secondments/transfers take place. The 2014 DAU, in our view, did not incorporate sufficient measures to record transfers and involvement in working groups and for this reason the 2014 DAU ring-fencing regime was not credible or effective (section 138(2)(h) of the QCA Act).

Amending the 2014 DAU

The initial draft decision provided an option for potential Aurizon Network members of working groups that also incorporated members from a related operator or related competitor to be seconded or temporarily transferred as an advisor to the related operator or related competitor. This would enable the benefits of the working group to be realised, in examples such as that raised by Aurizon Network, while still providing credible ring-fencing arrangements.

However, given the potential problems identified by Aurizon Network in regard to negotiations of enterprise agreements, and similar circumstances, we have revised our proposed amendments to ensure that the arrangements do not inhibit the effectiveness of working groups—we propose that such involvement of Aurizon Network staff be entered into the confidential information register, rather than prohibited altogether.

We acknowledge that the phrase 'affect or could affect the access of third party access holders' (as proposed in our initial draft decision) is broad. This is intentional. We consider it is

[247] QRC, 2014 DAU, sub. 84: 15; Asciano, 2014 DAU, sub. 76: 12.
[248] QRC, 2014 DAU, sub. 84: 15.

appropriate that this be used to determine whether the obligations set out in this clause apply to a particular working group (cl. 3.6(c) of the CDD amended DAU).

We do not consider that QRC's suggestion to include a defined list of exceptions for services that could be obtained from the Aurizon Group is necessary.

We also propose that, rather than specifically require email addresses for Aurizon Network employees, Aurizon Network should ensure that all personnel are identified as Aurizon Network personnel.

We consider that the amendments in our CDD amended DAU are appropriate because they address the above issues, and restore a balance in the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

Consolidated draft decision 4.14

(1) After considering clause 3.6 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposals regarding employee separation.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:

- **(a) include a 'working group concept' that extends to application to related entities**
- **(b) require the details of any Aurizon Network employee's involvement in a working group to be entered into the confidential information register, if the employee has had access to confidential information**
- **(c) require Aurizon Network to notify the QCA of secondments/transfers of employees to another Aurizon party prior to them being made**
- **(d) require Aurizon Network employees to be identified as Aurizon Network employees.**

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

4.8 Role of management separation

4.8.1 Aurizon Network's proposal

Aurizon Network's proposed approach to management separation in the 2014 DAU compared to the 2010 AU approach is summarised in the table below.

Table 18 Aurizon Network's approach to management separation in the 2010 AU and 2014 DAU

Ring-fencing element	*2010 AU approach*	*2014 DAU approach*
Management separation	The 2010 AU includes a general obligation for Aurizon Network to be managed independently from related operators, and for related operators not to participate in the supervision or appointment of the executive management of Aurizon Network.[249]	The 2014 DAU replaces the general obligation of independent management with a formalisation of the current, independent management structure of Aurizon Network. It provides for the creation and maintenance of an independent network executive management team that: (a) does not manage a related operator (b) has independent management reporting and supervision lines that do not include any person with direct management responsibility for a related operator (c) has an executive manager of equivalent or greater seniority to the executive manager of a related operator.[250]

Aurizon Network said that independence of upstream from downstream interests in the 2010 AU was addressed by a high-level commitment to independence of network business senior management. It said ensuring independent management of Aurizon Network continues to be a feature of the 2014 DAU. However, Aurizon Network said the 2010 AU provisions lacked clarity, and it had developed new provisions that are simple and clear by defining the key elements of independence.[251]

4.8.2 Summary of the initial draft decision

In our view, an effective ring-fencing regime required that Aurizon Network is managed independently of related operators and also that related operators do not participate in the appointment or supervision of the executive management of Aurizon Network. Having regard to the 2010 AU (cl. 3.1.2 of the 2010 AU), we noted the 2014 DAU did not explicitly exclude related operators from directly supervising Aurizon Network's executive management team. We considered that Aurizon Network's proposal did not provide sufficient protection to access holders, access seekers and train operators.

Our concerns with the 2014 DAU approach to management separation of Aurizon Network from related operators were that it may result in unnecessary complexity, lessen clarity and increase the likelihood of disputes. For instance:

- if conflicts of interest arise, it is not clear what will be achieved in practice by having Aurizon Network's Executive Officer at equivalent or greater seniority than the most senior executive manager with direct management responsibility for a related operator
- because they are excluded from the definition of direct management responsibility, it appears possible for the Aurizon Group to give direct management responsibility for a related operator to a director/managing director of Aurizon Holdings or Aurizon Operations; but not precluding them from being nominated to the Aurizon Network executive

[249] Aurizon Network, 2013 DAU, sub. 2: 61.
[250] Aurizon Network, 2013 DAU, sub2: 1.
[251] Aurizon Network, 2013 DAU, sub. no. 2:69-70

management team. This would not achieve the required management separation of Aurizon Network.

We considered Aurizon Network's 2014 DAU proposal for the independent management of access rights could allow too much flexibility in interpreting or including clauses in a related operator's access agreements. This is because the commitment to 'not act upon directions from a related operator in respect of the granting or exercise of access rights' has the caveat that:

> *nothing prevents a direction from a related operator, provided it is in accordance with the terms of the related operator's access agreement.*

In summary, we were not convinced that Aurizon Network's 2014 DAU could be approved by reference to the factors listed in section 138(2) of the QCA Act. We considered that it results in less transparency and a potential narrowing of Aurizon Network's obligations which is not in the public interest and does not result in an effective regime.

We also noted the stakeholder view that a focus on concerns regarding related operators is unlikely to be sufficient to cover conflicts of interest between Aurizon Network and associated rail/port and rail/mine entities within the Aurizon Group.

However, we did not consider the board of Aurizon Network should exclude directors of related parties within the Aurizon Group. This could be dealt with through a focus on the flow of confidential information, and there being appropriate recognition that any individual who holds cross-directorships should be categorised as high-risk for the purposes of ring-fencing. If these efforts prove unsatisfactory, a prohibition on cross-directorships may be considered.

For these reasons, our initial draft decision was to refuse to accept Aurizon Network's proposals in the 2014 DAU regarding the management separation of Aurizon Network. We considered that the way to amend the proposed 2014 DAU was to include updated version of clause 3.1.2 of the 2010 AU (accounting for associated rail/port and rail/mine entities, as well as related operators). We considered this appropriately balances the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

4.8.3 Stakeholders' comments on the initial draft decision

Aurizon Network did not have any material issue with the alternative clauses proposed by us in the IDD amended DAU. However, Aurizon Network submitted that the 2014 DAU adequately dealt with these issues and should be accepted. Aurizon Network proposed to work with the QCA on developing clearer drafting of the issues relating to:

- related operators directly supervising Aurizon Network's executive management team
- the level of the Aurizon Network Executive Officer relative to the equivalent related operator executive
- the QCA's comments about a director/managing director being appointed to the Aurizon Network management team. Aurizon Network does not have Executive Directors (excluding the CEO) on either the Network or Holdings Boards.

Aurizon Network submitted that the QCA's view on protections in relation to access rights, and Aurizon Network not acting at the direction of the related operator to grant these access rights,

is incorrect. Aurizon Network submitted that the QCA misinterpreted the drafting of the 2014 DAU.[252]

The QRC was willing to accept the drafting of clause 3.8 of the IDD amended DAU for the term of UT4, but wished to reassess in the future in regard to the: extent of cross-directorships; extent of conflict involved in cross-directorships; extent of independent directors on the Aurizon Network Board; and effectiveness of the ring-fencing arrangements. The QRC said Aurizon Network should have at least two true independent directors (i.e. directors who hold no other role within the Aurizon Group).[253]

4.8.4 QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refuse to approve Aurizon Network's proposals regarding management separation in the 2014 DAU.

However, we have outlined the way in which the 2014 DAU should be amended, taking into accounts submissions received in respect of our initial draft decision DAU.

In regard to our view on protections in relation to access rights, we do not consider that we have misinterpreted the drafting of the 2014 DAU. We consider the clause does not provide any assurance to third party stakeholders that Aurizon Network does not act at the direction of a related operator.

In response to QRC, we consider that the independence of directors is not a matter that falls within the QCA Act but should be subject to relevant corporate governance requirements.

In conclusion, we considered that Aurizon Network's 2014 DAU narrows Aurizon Network's obligations relative to the management separation provisions in the 2010 AU and would result in unnecessary complexity, less clarity and increased the likelihood of disputes. Additionally, we consider that the 2014 was weighted in favour of the Aurizon Network's business interests and whereas we are required to balance its interests against those of access seekers and holders. For these reasons, we do not believe the 2014 DAU is appropriate.

Amending the 2014 DAU

We note we have taken into account Aurizon Network's response to our proposed initial draft decision DAU amendments. Relevant changes to drafting are incorporated into the undertaking for Aurizon Network to take reasonable steps to ensure that related operators or related competitors do not take part in appointment of senior management of Aurizon Network.

We consider our amendments in the CDD amended DAU provide an appropriate balance of the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

[252] Aurizon Network, 2014 DAU, sub. 83: 82–83.
[253] QRC, 2014 DAU, sub. 84: 16.

Consolidated draft decision 4.15

(1) After considering clauses 3.8, 3.9 and 3.10 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposals regarding management separation.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to:

(a) remove clauses 3.8, 3.9 and 3.10

(b) reinstate an updated version of clause 3.1.2 of the 2010 AU (cl. 3.8 of the CDD amended DAU), to account for related operators and related competitors, and to prevent Aurizon Network acting on direction from a related operator.

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

4.9 Accounting separation and financial reports

4.9.1 Aurizon Network's proposal

Aurizon Network said the 2014 DAU retained the 2010 AU accounting separation provisions, including providing annual financial accounts. It said drafting was amended to remove references to 'general purpose' statements as Aurizon Network prepares statements for the specific purpose of demonstrating costing manual compliance, and the statements exclude information relating to non-regulated activities conducted by Aurizon Network.[254]

4.9.2 Summary of our initial draft decision

The 2010 AU allows the creation of a hierarchical system of financial statements. Aurizon Network's general financial accounts represent the top tier. These financial statements are then split into two sub-sets relating to Aurizon Network's regulated and unregulated businesses. The costing manual is intended to set out the methodology for this process.

The 2010 AU creates a fully reconcilable system of financial statements that have a direct link back to a set of financial accounts that comply with relevant legislation and accounting standards. In our view, this approach allowed:

- a robust and transparent understanding of the costs allocated to the regulated business
- a robust and transparent audit to be undertaken with respect to the application of the methodology and rules in the costing manual
- the holistic impact of any proposed changes to the costing manual to be fully understood and objectively assessed.

We considered Aurizon Network's 2014 DAU proposal reduces robustness and transparency because it removes the link with Aurizon Network's general financial statements. Stakeholders did not support Aurizon Network's proposals for the provision of separated financial accounts, stating that Aurizon Network's regulated and non-regulated activities share common costs, and

[254] Aurizon Network, 2013 DAU, sub. 2: 69.

disclosure was essential to ensure transparency and no cross-subsidisation between regulated and non-regulated activities.[255]

For stakeholders to have confidence that there is no cross-subsidisation, this requires a full reconciliation of the financial statements associated with the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. In our view, this represents best practice from an accounting separation perspective and therefore best balances the respective interests set out in section 138(2) of the QCA Act.

We also considered it appropriate to include amendments to require that Aurizon Network's Executive Officer should certify that the relevant financial statements have been prepared in accordance with the costing manual, rather than certifying that the financial statements are 'accurate'.

To address stakeholders' concerns that there was a lack of transparency about Aurizon Network's self-insurance arrangements, we also proposed a requirement for the financial statements to include information on self-insurance.

Overall, our initial draft decision was to refuse to approve Aurizon Network's proposals with respect to accounting separation and financial reporting. We indicated that the way we consider it appropriate to amend the 2014 DAU was to:

- delete clause 3.7 of 2014 DAU, as this will not be relevant because it primarily relates to stating that the financial statements prepared as part of the accounting separation process will not include information relating to any other business conducted by Aurizon Network
- include an accounting separation and financial reporting process similar to the process in the 2010 AU (cl. 10.1.1 of the IDD amended DAU)
- include a requirement for Aurizon Network to report on self-insurance in its financial statements, including the number of self-insurance events by type and value each year (cl. 10.1.1(c) of the IDD amended DAU)
- include a requirement for the statements to be published within four months of the end of the year.

We were of the view this will ensure relevant parties have to provide a robust and transparent understanding of the costs allocated to the regulated business and, as such, appropriately balance the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (ss. 138(2)(b) and (e) of the QCA Act).

4.9.3 Stakeholders' comments on our initial draft decision

QRC[256] generally agreed with our initial draft decision on the financial reporting requirements. Aurizon Network disagreed with proposals to include a reconciliation between the regulated and non-regulated businesses of Aurizon Network back to a set of fully audited financial accounts for Aurizon Network. Aurizon Network said it is only required to report on regulated services.[257]

[255] Asciano, 2014 DAU, sub. 22: 18–19.
[256] QRC, 2014 DAU, sub. 84: 105.
[257] Aurizon Network, 2014 DAU, sub. 83: 87.

Aurizon Network agreed that its Executive Officer should certify that the relevant financial statements have been prepared in accordance with the costing manual, rather than certifying that the financial statements are 'accurate', but said this was not reflected in the drafting.[258]

QRC,[259] Anglo American[260] and Aurizon Network[261] agreed with the initial draft decision to propose a requirement to report on self-insurance arrangements. However, Aurizon Network proposed the aggregation of events under $50,000, to minimise administrative requirements, while Anglo American suggested that more detailed information should be reported.

4.9.4 QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and considering submissions, we refuse to approve Aurizon Network's proposals regarding accounting separation and financial reporting in the 2014 DAU. However, we have outlined the way in which the 2014 DAU should be amended, taking into accounts submissions received in respect of our initial draft decision.

As discussed in Chapter 5, we have proposed to move the requirements relating to accounting separation and financial reporting to Part 3, which is consistent with the 2010 AU. However, we have proposed to retain the requirements for the certification and publishing of the statements in Part 10 (see cl. 10.4.1 of the CDD amended DAU).

We are of the view that the 2014 DAU ring-fencing proposals reduced transparency and increased the risk of cost-shifting to regulated activities. Cost-shifting behaviour has the potential to affect the efficiency of the CQCN, and would therefore be counter to the object of Part 5 of the QCA Act—and would inappropriately favour the interests of Aurizon Network over the interests of access seekers, access holders and the public. To validate the efficient costs of the regulated business, thereby satisfying the object of Part 5 of the QCA Act, we need to be able to validate how costs are allocated between regulated and unregulated parts of the business.

To this end, section 159(3) of the QCA Act requires the QCA to take into account, as far as practicable, Aurizon Network's existing accounting system. We consider this permits us to use the costing manual to require Aurizon Network to explain how the itemised costs are reconciled against the accounts of Aurizon Network, subject to relevance to the declared service. If there are costs that are common to other parts of the Aurizon Group business, a necessary part of allocating the costs to the declared service would include identifying the common costs and their appropriate allocation. We accept that costs that do not relate to the declared service (and are not common costs) cannot be addressed by the costing manual. It is not our intent to require non-declared service costs to be itemised and reconciled.

Further, we consider that maintaining the 2010 AU accounting separation arrangements is necessary to satisfy our consideration of section 168A(c) of the QCA Act (which indicates that the pricing principles should 'not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher'). Without detailed information on both regulated and non-regulated revenues, the QCA cannot be confident that cost-shifting is not taking place.

[258] Aurizon Network, 2014 DAU, sub. 83: 87.
[259] QRC, 2014 DAU, sub. 84: 105.
[260] Anglo American, 2014 DAU, sub. 95: 36.
[261] Aurizon Network, 2014 DAU, sub. 83: 87-88

In our view, the ring-fencing regime and associated reporting requirements in the 2014 DAU were not appropriate to address the above cost-shifting concerns, which we are entitled to take into account under section 138(2)(g) and (h) of the QCA Act.

We also maintain our initial draft decision that it is appropriate for Aurizon to report on self insurance, including details of the number of self-insurance events by type and value each year and the level of self-insurance at the end of each year. At this stage we do not consider there is sufficient justification to require more detailed reporting (as proposed by Anglo American), although Aurizon Network could voluntarily provide more information. We also accept Aurizon Network's proposal to aggregate claims that are less than $50,000 for administrative simplicity.

In conclusion, Aurizon Network's 2014 DAU is not appropriate because it reduces robustness and transparency by removing the link with Aurizon Network's general financial statements and not providing a full reconciliation of the financial statements associated with the regulated and non-regulated businesses of Aurizon Network in order for cost allocations to be transparent and justifiable.

Amending the 2014 DAU

We have maintained our initial draft decision, but have proposed further drafting changes to better reflect our intention to reinstate the accounting separation and financial reporting provisions from the 2010 AU.

We have proposed amendments to separately identify Aurizon Network's business in respect of the supply of the declared service from any other business conducted by the Aurizon Group and to identify how costs that are common to both Aurizon Network and Aurizon Group have been allocated. We have also proposed to re-insert the audit requirements from the 2010 AU and to require the financial statements to be certified as being in accordance with the undertaking, not just the costing manual, because the statements must meet other requirements.

We also propose to revert to Aurizon Network's proposal to publish the financial statements within six months of the end of the year, rather than four months proposed in our initial draft decision (cl. 3.7.3 of the CDD amended DAU). We consider this is appropriate to allow sufficient time for the statements to be audited and certified.

We also note that Aurizon Network has submitted a revised costing manual to us for approval, which we are reviewing under a separate consultation process.[262] The financial statements for 2013–14, 2014–15 and 2015–16 will then reflect the final approved costing manual. Therefore, we have proposed to introduce a requirement for these statements to be audited and published within six months of the costing manual being approved (cl. 10.4.1(c) of the CDD amended DAU).

We consider that the amendments we have included in our CDD amended DAU are appropriate as they enable a balance between the interests of access holders, access seekers and train operators and those of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

[262] For more information, see our website at: www.qca.org.au.

Consolidated draft decision 4.16

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the accounting separation and financial reporting arrangements.

(2) The way in which we consider it is appropriate that Aurizon Network amends the draft access undertaking is to:

- **(a) delete clause 3.7 of the 2014 DAU**
- **(b) include accounting separation, financial reporting and audit arrangements, which are based on the 2010 AU arrangements (cls. 3.7 and 10.4.1 of the CDD amended DAU), which include requirements on Aurizon Network to:**
  - **(i) separately identify Aurizon Network's business in respect of the supply of the declared service from any other business conducted by the Aurizon Group**
  - **(ii) identify costs common to both Aurizon Network and the Aurizon Group and the way in which such costs are allocated**
- **(c) include a requirement to report on self-insurance arrangements (cl. 3.7.2 of the CDD amended DAU)**
- **(d) make other amendments as reflected in our CDD amended DAU.**

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

4.10 Role of complaint handling and compliance

Aurizon Network said the 2014 DAU retained the 2010 AU complaint handling, reporting and audit mechanisms in a single broad mechanism encompassing all Part 3 obligations, including the prohibition of unfair differentiation between access seekers.[263]

Our assessment considered complaint handling, audit and compliance separately. Financial audit issues are dealt with above in Section 4.9 of this decision and other audit issues are discussed in Chapter 5 of this decision.

4.10.1 Complaint handling

Aurizon Network's proposal

Aurizon Network's 2014 DAU proposes a broad complaints handling mechanism aimed at encompassing all its obligations with respect to ring-fencing.

Summary of the initial draft decision

In our initial draft decision, we noted that despite the 2014 DAU broadening the scope of the complaints handling process with respect to Aurizon Network, it does not apply to complaints with respect to other Aurizon parties who may have access to confidential information. We considered this responsibility extends to dealing with complaints regarding potential ring-fencing breaches by any Aurizon party, associated port/rail and mine/rail entities, as well as breaches of the UHCSD by the ultimate holding company.

[263] Aurizon Network, 2013 DAU, sub. 2: 62.

Additionally, we were unconvinced that:

- it is credible for Aurizon Network to undertake an audit of its own investigation into a complaint, when the complainant is not satisfied with that investigation. We proposed amendments to the audit process that ensure an auditor is independent of Aurizon Network and all other Aurizon parties.
- it is appropriate that a complaint (and any related information) is automatically deemed confidential. We did not want this to be a deterrent to an access seeker or holder making complaints.

Overall, our initial draft decision was to refuse to approve Aurizon Network's complaints handling process in the 2014 DAU. We considered that the way to amend the 2014 DAU was to require it to be replaced by the process outlined in the table below.

Table 19 Initial draft decision approach to complaint handling

Stage 1	If an access holder or train operator considers that: • Aurizon Network has breached one or more of its ring-fencing obligations • the ultimate holding company has breached the UHCSD • an Aurizon party or associated port/rail or mine/rail entity has breached a confidentiality deed or confidentiality provisions contained in another agreement with Aurizon Network, in accordance to which the confidential information was disclosed to it, then the complainant may lodge a written complaint with Aurizon Network. Any accompanying information will not be considered confidential information unless objective grounds for confidentiality are provided in writing.
Stage 2	Aurizon Network will advise the QCA of any complaints it receives in accordance with stage 1.
Stage 3	Aurizon Network will investigate complaints received in accordance with stage 1 and advise the complainant and the QCA in writing of the outcome of that investigation and Aurizon Network's proposed response, if any, and use best endeavours to do so within 20 business days after receiving the complaint.
Stage 4	Where the complainant is not satisfied with the outcome of Aurizon Network's investigation, the complainant can apply to the QCA seeking an audit of the relevant subject of the complaint—and that audit must be conducted in accordance with the 'compliance audit requested by the QCA' process.

We considered this approach allows the complaints handling process to be suitably inclusive, and transparent, and means the response time for dealing with complaints can be assessed. We considered this to be in the interests of access holders, access seekers and train operators (s. 138(2)(e) of the QCA Act). We also noted that, while it may be in Aurizon Network's interests to limit its responsibility for complaints handling to itself, we did not consider this a legitimate business interest of Aurizon Network (s. 138(2)(b) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network agreed with the complaints handling process outlined by the QCA, but suggested that clause 3.19(g) of the IDD amended DAU is better included within clause 10.1.2.[264]

[264] Aurizon Network, 2014 DAU, sub. 83: 83.

The QRC supported the complaints process proposed by the QCA in clause 3.19, but submitted that it should be extended to third parties seeking access or increased access. It had concerns that:

- limiting the right to lodge a complaint to access seekers, holders and train operators restricts the operation of the complaints process. For example, mining companies may wish to lodge a complaint.
- the reference to 'access seeker' is also restricting. An access seeker whose application does not comply, would not be able to lodge a complaint.[265]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act, and assessing stakeholders' submissions, we refuse to approve Aurizon Network's proposals regarding complaints handling in the 2014 DAU. However, we have outlined the way in which the 2014 DAU should be amended, taking into accounts submissions received in respect of our initial draft decision DAU.

Aurizon Network's 2014 DAU proposal to limit its responsibility for complaints handling to itself was not appropriate because it did not provide coverage of related entities. We considered that this could have the result that access seekers and access holders could not reasonably have confidence in the efficacy of the complaints handling process, and therefore we could not approve the 2014 DAU.

Amending the 2014 DAU

We consider that clause 3.19(g) of the IDD amended DAU (3.20(g) of the CDD amended DAU) is better located in Part 3, as it specifically relates to compliance requirements for ring-fencing.

In regard to the extension of the complaints handling process to other parties, our view is that such rights should not be extended to parties who are not defined as bona fide access seekers. We retain our view on the definition of access seekers, but have amended the drafting to also include third party access seekers (as defined in Part 12).

We proposed amendments to the 2014 DAU to provide an appropriate balance between the interests of access holders, access seekers and train operators and the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

[265] QRC, 2014 DAU, sub. 84: 18.

Consolidated draft decision 4.17

(1) After considering clause 3.23 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposals regarding the complaints handling process.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to reflect the complaints handling process in clause 3.20 of our CDD amended DAU.

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

4.10.2 Compliance

Aurizon Network's proposal

Aurizon Network's 2014 DAU does not include any obligation to proactively monitor compliance with its ring-fencing obligations. Instead, the 2014 DAU includes provisions whereby Aurizon Network can apply to us to waive some, or all, of its ring-fencing obligations on either a temporary or permanent basis (cl. 3.24 of the 2014 DAU).

Summary of the initial draft decision

Given the Aurizon Group's organisational restructure, we did not consider there to be an adequate level of accurate, transparent baseline data from which to assess how confidential information flows out from Aurizon Network and across the Aurizon Group and third parties are appropriately managed.

We concluded it would not be reasonable for us to waive any of Aurizon Network's ring-fencing obligations. We also considered that, as part of the process of developing a credible baseline data set for the flow of confidential information, Aurizon Network should provide a six-monthly compliance declaration to the QCA. We considered such measures are aligned with Aurizon Network's legitimate business interests and are in the interests of access holders, access seekers and train operators (s. 138(b) and (e) of the QCA Act).

Stakeholders' comments on the initial draft decision

Aurizon Network submitted that the purpose of the waiver provisions was to provide flexibility to Aurizon Network, with appropriate oversight, if the circumstances of the organisation change. Waivers would enable third parties to manage their confidential information in a way they see fit. Aurizon Network considered that the QCA decision to reject the waiver will force Aurizon Network to adopt a more formal regulatory process, which could result in multiple DAAUs for minor matters.

Aurizon Network considered that an obligation for Aurizon Network to provide a six-monthly compliance declaration to the QCA duplicates the reporting requirements from clause 10.2 of 2014 DAU, that have been retained by the QCA. The addition of clause 3.4 of the IDD DAU will not add any controls to the compliance framework. Aurizon Network suggested removing clause 3.4, and strengthening clause 10.2, to include: the nature and circumstance of the breach; actions taken to mitigate the breach; whether the breach is under investigation; any

remedial actions to be implemented; and confirmation that affected parties have been advised.[266]

QCA analysis and consolidated draft decision

After having regard to the criteria listed in section 138(2) of the QCA Act and stakeholders' submissions, we refuse to approve Aurizon Network's 2014 DAU proposals regarding compliance with ring-fencing obligations.

We are concerned that the availability of waivers could allow Aurizon Network to exert its monopoly power over access seekers/holders by requiring them to unwillingly trade-off management of their confidential information against expeditious negotiated outcomes.

In relation to Aurizon Group's obligation to proactively monitor compliance with its ring-fencing obligations:

- Given the Aurizon Group's organisational restructure, we do not consider there to be an adequate level of accurate, transparent baseline data from which to assess how confidential information flows out from Aurizon Network and across the Aurizon Group and third parties.
- We also conclude it would not be reasonable for us to waive any of Aurizon Network's ring-fencing obligations. Further, it is unclear why a waiver would, in any circumstance, be in the interests of access holders, access seekers or train operators (s. 138(2)(e) of the QCA Act).

We consider the 2014 DAU requires a degree of transparency and assurance that Aurizon Network is proactively managing its ring-fencing obligations. This requirement is aligned with Aurizon Network's legitimate business interests and is in the interests of access holders, access seekers and train operators (s. 138(b) and (e) of the QCA Act).

Amending the 2014 DAU

In response to Aurizon Network, we note that requests to the QCA for waivers of ring-fencing provisions would be not be dissimilar to formal regulatory processes using multiple minor DAAUs. However, in recognition that waiver arrangements are adequately covered in clause 3.9 of the CDD amended DAU, we propose to remove clause 3.3 of the IDD amended DAU. We do not consider this change weakens the protections available to access seekers and access holders.

In regard to compliance reporting, we do not consider that clause 3.4 (clause 3.3 of the CDD amended DAU), which relates to compliance reporting on ring-fencing on a regular basis, is duplicated by clause 10.2, which deals with reporting on breaches of the access undertaking generally.

We also considered that, as part of the process of developing a credible baseline data set for the flow of confidential information, Aurizon Network should provide a six-monthly compliance declaration to the QCA. This will complement the submission of the confidential information register and provide some confidence that Aurizon Network is maintaining accurate records.

We consider our amendments provide an appropriate balance between the interests of access holders, access seekers and train operators with the legitimate business interests of Aurizon Network (s. 138(2)(b) and (e) of the QCA Act).

[266] Aurizon Network, 2014 DAU, sub. 83: 83–84.

Consolidated draft decision 4.18

(1) After considering clauses 3.23 and 3.24 of Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's proposals regarding compliance with its ring-fencing obligations.

(2) The way in which we consider it is appropriate that Aurizon Network's DAU be amended is to include an obligation for Aurizon Network to provide a six-monthly compliance declaration to the QCA.

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

4.11 Rail infrastructure and the declared service

The 2010 AU included the following provisions related to Aurizon Network's ring-fencing responsibilities for rail infrastructure relating to the provision of the declared service:

- a clause outlining Aurizon Network's responsibility for updating and maintaining the line diagrams—which outline those parts of the rail network that form part of the declared service (cl. 3.8.1 of the 2010 AU) (cl. 3.20 of the IDD amended DAU)
- a clause requiring the transfer of rail infrastructure that constitutes part of the declared service to Aurizon Network from an Aurizon party (cl. 3.8.2 of the 2010 AU).

These were excluded from the ring-fencing provisions in the 2014 DAU.

Aurizon Network said line diagrams would be provided in preliminary information and are publicly available on its website. Aurizon Network also said we had no power to require divestiture of assets from one entity to another.[267]

Stakeholders said the requirements to maintain and update line diagrams should be retained, as incorporation of rail diagrams in previous undertakings has been a transparent and clear process—with the QCA retaining oversight of corrections to the diagrams and ensuring consistency with the TIA.[268]

Our initial draft decision was to reinstate these provisions. We were of the view the line diagrams represent a valuable, transparent depiction of the boundaries of the CQCN; while the requirement to transfer rail infrastructure that constitutes part of the declared service to Aurizon Network from an Aurizon party represents a continuing commitment.

Stakeholders' comments on the initial draft decision

Aurizon Network had no objection to the initial draft decision to reinstate the provisions.[269]

The QRC supported the proposal with respect to rail infrastructure responsibility and ownership. Anglo American supported the reinstatement of provisions relating to line diagrams showing above- and below-rail division of assets within the Aurizon Group. It said this is

[267] Aurizon Network, 2013 DAU, sub. 77: 48–49.
[268] Anglo American, 2014 DAU, sub. 7: 23-24; Asciano, 2013 DAU, sub. 44: 10–11.
[269] Aurizon Network, 2014 DAU, sub. 83: 84.

essential to ensure the correct assets are accounted for, and line up with Aurizon Network's RAB.[270]

QCA analysis and consolidated draft decision

We refuse to approve Aurizon Network's 2014 DAU proposals to remove ring-fencing obligations regarding the rail infrastructure associated with the declared service. In doing so, we note general support for the initial draft decision, including the reinstatement of provisions relating to line diagrams.

Consolidated draft decision 4.19

(1) After considering Aurizon Network's 2014 DAU proposals to remove Aurizon Network's ring-fencing obligations regarding the rail infrastructure associated with the declared service, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) The way in which we consider it is appropriate that Aurizon Network's draft access undertaking be amended is to reinstate appropriately updated versions of clauses 3.8.1 and 3.8.2 of the 2010 AU (cls. 3.21 and 3.22 of the CDD amended DAU).

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

[270] QRC, 2014 DAU, sub. 84: 18; Anglo American, 2014 DAU, sub. 95: 10.

5 REPORTING, COMPLIANCE AND AUDITS

Aurizon Network's performance and compliance with the 2014 DAU can be understood and assessed through an effective reporting, compliance and audit regime. An effective reporting regime underpins the integrity of the access regime and is an essential element to provide transparency and accountability of Aurizon Network's operations.

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed reporting, compliance and audit regime in Part 10 of the 2014 DAU. While we accept many aspects of Aurizon Network's proposed regime, we refuse to approve the regime overall. In our view, the provisions we consider should be amended do not appropriately balance the factors in section 138(2) of the QCA Act. In particular, we have proposed amendments to:

- *include a requirement for a briefing on the planned scope of maintenance before the start of each year and for a consolidated annual maintenance report to be made available to all stakeholders*
- *include a provision for Aurizon Network to develop a template for a quarterly maintenance report, following consultation with stakeholders*
- *include a requirement for Aurizon Network to maintain an issues register of breaches and written complaints*
- *expand the scope and frequency of audits based on the requirements in the 2010 AU*
- *include a requirement for Aurizon Network to provide a plan for the implementation of audit recommendations and evidence that the recommendations have been implemented.*

Since the initial draft decision, we have reconsidered some of our positions. The key changes are to:

- *revert to Aurizon Network's proposal to report network performance on a quarterly (rather than monthly) basis but propose that information in this report is separated by month*
- *revert to Aurizon Network's proposal that it appoints the compliance auditor, rather than the QCA, but propose a requirement for the auditor to provide draft reports to the QCA, which we consider will improve our oversight of the audit process*
- *remove the proposed requirement for Aurizon Network to provide copies of signed non-standard access agreements, since we can request these agreements using our existing information gathering powers.*

We consider that our proposed amendments are in the interests of parties affected by Aurizon Network's decisions and will provide incentives for Aurizon Network to improve its efficiency and comply with its obligations in the undertaking.

5.1 Introduction

An effective reporting, compliance and audit regime (hereafter referred to as the reporting regime) underpins the integrity of the access regime and provides transparency and accountability of Aurizon Network's below-rail operations, while recognising Aurizon Network's legitimate business interests.

An effective regime is achieved when an undertaking makes available meaningful and relevant information on Aurizon Network's performance and compliance with the undertaking in a

timely manner. This allows stakeholders and the QCA to make more informed assessments and decisions on aspects of Aurizon Network's performance. It also allows Aurizon Network to demonstrate network performance, compliance with the undertaking and its commitment to non-discriminatory behaviour.

5.2 Overview

5.2.1 Aurizon Network's proposal

Aurizon Network's proposal broadly retains the 2010 AU reporting arrangements in the 2014 DAU[271], with Aurizon Network required to report on a broad range of matters including maintenance costs and activities, regulatory asset base updates and general performance indicators for the CQCN coal systems (i.e. volumes hauled, availability and reliability of the network and track utilisation).

Aurizon Network said its reporting arrangements are part of an overall approach aimed at addressing 'risks to competition' that arise out of vertical integration[272], promoting transparency and compliance with its access obligations, and providing relevant information to access seekers, access holders and the QCA.[273]

Aurizon Network's proposal expands on the types of matters included in the reporting arrangements. Now arrangements previously covered under different parts of the undertaking are contained in Part 10, including arrangements for assessing and reporting the condition of the network (e.g. condition based assessments, audit processes and disclosure of access agreement provisions).

The table below provides an overview of the key components of Aurizon Network's proposed reporting framework under Part 10.

[271] Aurizon Network, 2013 DAU, sub. 2: 62.
[272] Aurizon Network, 2013 DAU, sub. 2: 58.
[273] Aurizon Network, 2013 DAU, sub. 2: 306.

Table 20 Summary of Aurizon Network's proposed reporting obligations

Performance Reporting	*Asset Reporting*	*Compliance and Information Provision*	*Auditing*
Annual Financial Report (cl. 10.1.1)	Annual RAB Roll-forward Report (cl. 10.1.6)	Role of Compliance Officer (cl. 10.5)	QCA Requested Reporting Audits (cl. 10.7)
Annual Maintenance Cost Report (cl. 10.1.3 and 10.1.4)	Condition Based Assessment (cl. 10.4)	Annual Compliance Report (cl. 10.1.2)	QCA Requested Compliance Audits (cl. 10.8)
Quarterly Network Performance Report (cl. 10.1.5)		Breach Reports to the QCA (cl. 10.2)	Audit Process (cl. 10.9)
		Disclosure of Access Agreements (cl. 10.3.1)	
		QCA Requested Information (cl. 10.3.2)	
Certifications required from Aurizon Network's Executive Officer (cl. 10.6)			

Note: All clause references in this table are to Aurizon Network's 2014 DAU.

5.2.2 QCA assessment approach

The legislative framework guiding our decisions is discussed in detail in Chapter 2. Consistent with the framework, we have assessed Aurizon Network's proposed reporting regime by having regard to the factors in section 138(2) of the QCA Act.

Taking the section 138(2) factors into account, we consider that an appropriate reporting regime should provide sufficient information about Aurizon Network's operations to allow stakeholders to make informed decisions and have confidence in the regulatory regime. It should also provide sufficient transparency and oversight of network performance and Aurizon Network's compliance with the undertaking. However, it should not impose an excessive cost or burden on Aurizon Network or the QCA or require the disclosure of sensitive commercial information of Aurizon Network or its stakeholders.

A regime with these attributes is in the interests of parties affected by Aurizon Network's decisions, including access seekers, access holders and end customers (s. 138(2)(e) and (h) of the QCA Act). It is consistent with the object of Part 5 of the QCA Act and the public interest (s. 138(2)(a) and (d)) because it provides incentives for Aurizon Network to improve its efficiency and comply with its obligations in the undertaking, and promotes competition in related markets, such as the above rail market. It also recognises Aurizon Network's legitimate business interests (s. 138(2)(b)) by enhancing its public relations and allowing it to demonstrate compliance with the undertaking, while not imposing an unnecessary burden or harming its commercial position.

We assessed Aurizon Network's proposed regime to determine whether it meets these objectives, by providing comprehensive and accurate information in a timely manner. Overall,

for the reasons below, we refuse to approve the 2014 DAU in respect of the reporting regime and have proposed amendments. Not every amendment we have proposed is discussed in detail in this chapter, but we consider our amendments reflect changes required through the application of our assessment approach.

5.3 Structure of Part 10

For the purpose of this chapter, we first explain the way we propose to amend the structure of the reporting regime contained in the 2014 DAU, as our analysis below adopts our new proposed structure.

Given our consolidated draft decision to refuse to approve Aurizon Network's reporting regime in Part 10, which has now expanded beyond pure reporting requirements, we have proposed amendments to the structure of Part 10. In particular, we propose to:

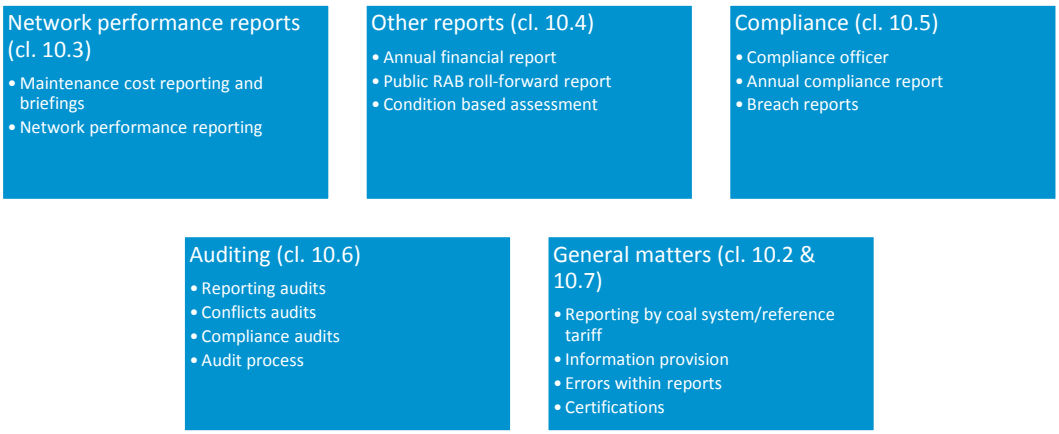
- rename Part 10 as reporting, compliance and audits
- group like matters together under these broad headings, including separating network performance reporting from other more ongoing reporting requirements.

We also consider the requirements relating to accounting separation and financial reporting should be moved to Part 3 (ring-fencing). Given the nature of these requirements – i.e. the actual preparation of financial reports, we consider they are best placed in the relevant part of the undertaking that deals with such matters. However, we propose to retain the requirements for certifying and publishing the statements in Part 10 (see clause 10.4.1 of the CDD amended DAU). We discuss our position on financial reporting arrangements (including financial audit arrangements) in Chapter 4.

We consider it appropriate to amend the undertaking in this way because it improves the functionality and readability of Part 10 and better aligns it to its purpose, i.e. to provide information on the content, timing and ongoing provision of reports and information under the undertaking, including the audits of them

The figure below shows how the 2014 DAU reporting regime should be amended to reflect our proposed new structure.

Figure 1 Proposed new Structure of Part 10



Note: All clause references are to our CDD amended DAU.

Items in the 'General' categories (cl. 10.2 and 10.7) relate to matters that arise across a number of the reporting requirements. Clause 10.7 also includes the general information gathering

provisions that allow us to request information from Aurizon Network, including access agreements. We have dealt with comments in relation to these aspects in section 5.8 below.

We did not mark-up the structural amendments to Part 10 in our drafting. This would not allow stakeholders to assess the actual drafting amendments we made to the content. However, for completeness, we have included a diagram explaining the structural changes in Appendix A.

The discussion below reflects the new structure and topic groupings presented in the figure above.

5.4 Network performance reporting

5.4.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU proposed to provide the following information on the performance of the network:[274]

- Maintenance costs—via an annual maintenance cost report. This shows information on actual maintenance cost and scope compared with the forecast, along with other network service and quality indicators. Aurizon Network prepares one report to publish on its website (cl. 10.1.3) and another, including a more comprehensive level of information, to provide to the QCA (cl. 10.1.4).
- Network performance—via a quarterly network performance report. This contains various key performance indicators including the reliability of train services, availability of the network and railing information (cl. 10.1.5).

These reporting arrangements largely replicate the requirements of the 2010 AU. Aurizon Network made some amendments to cost categories within the maintenance cost report and also shifted some indicators between reports (for example, it proposed to report safety incidents and the track quality index annually within the maintenance cost report, rather than quarterly in the network performance report).

Aurizon Network also included a new obligation for it to provide a briefing to stakeholders on maintenance costs. Under these arrangements, within one month of providing the maintenance cost report to the QCA, it will brief relevant stakeholders on the contents of the maintenance cost report, including providing details on the scope of maintenance for the forthcoming year (cl. 10.1.4).

In terms of timing, Aurizon Network proposed to provide the maintenance cost report within 6 months of the end of the year (cl. 10.1.4(a)) and the quarterly network performance report within 20 days of the end of each quarter, or later if required by its ASX obligations (cl. 10.1.5(a)).

5.4.2 Summary of our initial draft decision

We considered stakeholder comments in forming our initial draft decision.[275] We supported Aurizon Network's general aim of maintaining the current level of information provision and including additional arrangements to provide more information on maintenance activities to stakeholders in a briefing.

[274] Clause references in this section are to Aurizon Network's 2014 DAU.
[275] QCA, 2015(a): 105–109.

However, for the reasons outlined in our initial draft decision, we refused to approve the network performance reporting regime overall. We proposed the following amendments to consolidate reporting requirements and promote the timely flow of relevant information to stakeholders:

- the preparation of one consolidated annual maintenance cost report, rather than two, to provide efficiencies for Aurizon Network in terms of producing reports, and provide all relevant parties with access to the same level of information, providing greater transparency
- provision of network performance reports on a monthly basis to provide stakeholders with regular information to make informed decisions, which may lead to improved performance in the above-rail market. We proposed that the monthly report would be provided in conjunction with the quarterly report, which contains comparative information on track performance over time.

We largely accepted the content of the reports but considered, overall, the proposed regime could not be approved. We proposed to re-instate some aspects of 2010 AU arrangements where Aurizon Network had not provided sufficient evidence as to why reporting such information was no longer necessary when considered in light of the factors in section 138(2) of the QCA Act.

In addition, we considered it was appropriate for Aurizon Network to report on renewal expenditure as part of its annual maintenance reporting requirements. We considered this would provide a greater level of transparency around the trade-offs between asset renewals and maintenance.

While we accepted Aurizon Network's proposal to introduce a stakeholder briefing into its maintenance reporting obligations, we considered amendments to specific provisions were appropriate to improve the timeliness and effectiveness of information flows. We proposed a requirement for Aurizon Network to brief stakeholders on the planned scope of maintenance three months prior to the start of the year.

We also considered it appropriate to include provisions from the 2010 AU to allow us to agree with Aurizon Network to vary the content of the maintenance cost reports from time to time, but failing agreement, as determined by us. We considered this would provide flexibility for Aurizon Network to incorporate any changes in reporting arrangements arising from consultations with relevant stakeholders.

In terms of the timing of reports, we proposed requiring Aurizon Network to provide the maintenance cost report within 4 months of the end of the year (rather than 6 months) and the monthly/quarterly network performance reports within 10 business days of the end of each month/quarter (rather than 20 business days).

We also took into account comments on drafting amendments from stakeholders and, where we considered they clarified the 2014 DAU, proposed to incorporate them.

5.4.3 Stakeholders' comments on our initial draft decision

Stakeholders broadly supported the amendments we proposed to the reporting arrangements in the 2014 DAU.[276] Comments on particular aspects of the arrangements are summarised in the table below.

[276] Anglo American, 2014 DAU, sub. 95: 36; Asciano, 2014 DAU, sub. 76: 21; BMA, 2014 DAU, sub. 78: 1.

Table 21 Summary of comments on performance reporting

Report	*Stakeholder comments*
Maintenance reporting	• Stakeholders agreed with consolidating the maintenance reports into a single report and the timeframe for providing it (within 4 months of the end of the year).[277] • Aurizon Network and stakeholders largely agreed with the proposed maintenance reporting, including the level of detail and arrangements for briefing stakeholders (prior to, and after the end of year maintenance report is provided).[278] – QRC suggested the briefing should provide information on the impact, if any, of the maintenance plan on coal system capacity.[279] • Stakeholders agreed with including asset renewal information in the report.[280] However, Aurizon Network said it could not report this in the level of detail we proposed because its systems could not distinguish whether asset renewal expenditure had been incurred in place of planned maintenance.[281] • Stakeholders proposed some drafting amendments. Also, amendments to refine some of the indicators were suggested, such as reporting the overall track condition index (OTCI) by relevant segments within each coal system (not just by coal system).[282]
Network performance reporting	• Subject to some suggested drafting changes, QRC agreed with the initial draft decision, including monthly reporting.[283] • Aurizon Network disagreed with reporting monthly. It said: – customers should make operational decisions based on information from the operational reporting process, not reports designed to inform the regulator and the broader public – the obligation to report monthly and provide the report within 10 days after the end of each month is not practical from a production and data integrity perspective. This information is scrutinised by external financial analysts, and must be accurate to ensure compliance with ASX obligations – it would be more reasonable for a monthly report to be provided within 20 days and proposed a quarterly report with data segregated by month.[284] • Aurizon Network also disagreed with the timeframe for providing the quarterly report, saying it was not possible to produce it within 10 days after the end of each quarter.

We have also noted a number of comments made by stakeholders in relation to drafting, including the QRC and Aurizon Network.

5.4.4 QCA analysis and consolidated draft decision

After having regard to the section 138(2) factors in the QCA Act and stakeholder submissions, we do not consider it appropriate to approve the 2014 DAU in respect of network performance reporting as a whole. The reasons for our refusal, along with the amendments we consider are appropriate for us to approve the arrangements, are set out below.

[277] Aurizon Network, 2014 DAU, sub. 83: 88; QRC, 2014 DAU, sub. 84: 106–107.
[278] Aurizon Network, 2014 DAU, sub. 83: 88; QRC, 2014 DAU, sub. 84: 106–107; Anglo American, 2014 DAU, sub. 95:36-37; Vale, 2014 DAU, sub. 79:7–8.
[279] QRC, 2014 DAU, sub. 84: 106–107.
[280] QRC, 2014 DAU, sub. 84: 106–107; Aurizon Network, 2014 DAU, sub. 83: 88.
[281] Aurizon Network, 2014 DAU, sub. 83: 88–89.
[282] QRC, 2014 DAU, sub. 84: 106–107.
[283] QRC, 2014 DAU, sub. 84: 107.
[284] Aurizon Network, 2014 DAU, sub. 83: 90-92.

Maintenance cost reporting

We remain of the view the maintenance reporting arrangements in the 2014 DAU are not appropriate. While we accept some aspects of the arrangements, we do not consider they provide, as a whole, information on Aurizon Network's maintenance costs throughout the regulatory period in a way that is efficient, sufficiently comprehensive and timely.

We note performance of maintenance activities has been a matter of interest and concern for us and stakeholders for some time. Under the 2010 AU, Aurizon Network reports information on its activities throughout the regulatory period (both publicly and to us). However, how Aurizon Network is performing against its targets is not fully evident until the next regulatory re-set – i.e. when we assess Aurizon Network's proposed maintenance costs for the coming regulatory period looking at, amongst other things, how it has performed in the past. This has been a particular issue in relation to key activities such as ballast undercutting (discussed in Chapter 23, Volume 4).

We consider that Aurizon Network's proposed arrangements do not sufficiently address these concerns because they do not provide parties affected by its decisions, including access seekers and access holders, with sufficient information about maintenance costs throughout the regulatory period in a way that allows this type of assessment to be made. This is inconsistent with their interests (s. 138(2)(e) and (h) of the QCA Act). A lack of transparency also affects the ability of stakeholders to hold Aurizon Network accountable for its decisions, which may lead to inefficient investment in rail infrastructure (s. 138(2)(a)).

To address this, we consider the maintenance reporting regime should:

- enhance and promote genuine stakeholder engagement and information sharing
- provide stakeholders with access to relevant information in an efficient and timely manner.

We consider our proposed amendments are required to enhance transparency and improve the timeliness of information for stakeholders. This is in the interests of access seekers and access holders (s. 138(2)(e) and (h)), while recognising Aurizon Network's legitimate business interests by not imposing an excessive regulatory burden (s. 138(2)(b)). The amendments proposed will also improve Aurizon Network's accountability to stakeholders, promoting efficient investment in rail infrastructure (s. 138(2)(a)).

In many instances we have retained our initial draft decision position. Our reasons for this, as well as where we have refined or changed our position, are discussed below.

Stakeholder briefings

Having considered stakeholders' comments, we have maintained our position in the initial draft decision and refuse to approve Aurizon Network's reporting obligations around stakeholder briefings.

We have accepted Aurizon Network's proposal to brief stakeholders on the contents of its maintenance cost report one month after the report is submitted. However, we continue to consider the proposed briefing on the scope of maintenance is not sufficiently timely, which is not in the interests of access seekers, access holders, the QCA and other relevant parties. We propose the briefing on the scope of maintenance for the forthcoming year takes place three months before the start of each year. We also propose an additional requirement for Aurizon Network to provide a report as part of the briefing.

We consider our proposed amendments will mean briefings are more timely and efficient because they will have maximum relevance to stakeholders and allow Aurizon Network to

provide the most relevant and up to date information on maintenance activities on the network. This has the additional benefit of keeping stakeholders informed throughout the regulatory period and providing Aurizon Network with an opportunity to update stakeholders on any key issues affecting maintenance, such as changes in plans compared to the forecast.

While we have not proposed amendments to the 2014 DAU to prescribe the content of the briefings and reports on the planned scope of maintenance, the following provides some guidance as to what we consider appropriate.

We consider it would be beneficial for all parties if the briefings and reports were closely aligned to the information ultimately required to be provided under the maintenance cost report. For instance, in its annual maintenance cost report, Aurizon Network reports information on the forecast scope and cost of particular maintenance activities (included for the purpose of calculating reference tariffs). It then tracks and reports on actual maintenance spend against this forecast.

As such, it would be beneficial to include information on the planned scope of maintenance activities, particularly if this differs from the forecast used for determining reference tariffs. This will maximise the effectiveness of this information sharing through:

- efficient information provision—by minimising the administrative requirements on Aurizon Network by combining the efforts of preparing information in the briefing that will later feed into its maintenance report
- efficient stakeholder engagement and information sharing—by making it more likely that stakeholders are informed on key aspects of maintenance performance throughout the regulatory period because they have received relevant information that complements the information publicly available in the maintenance cost report.

We also note Aurizon Network's suggestion of providing information on the location of maintenance activities planned.[285] We consider this would be beneficial to parties and may be a matter Aurizon Network decides to include in its end of year briefing after publishing the maintenance cost report. This, and other items for the briefing and report, are matters for Aurizon Network and we encourage these matters to be finalised in consultation with stakeholders as part of Aurizon Network's plans to further develop the maintenance reporting arrangements.

This link is vital as the regulatory period goes on. It will assist in preventing some of the concern among stakeholders when, at the end of the regulatory period, it is not clear why actual scope (and cost) for maintenance activities is different from the forecast; how much of any variation reflects updates in the maintenance plans; and what this means as a whole for the condition of the network. It also means administratively that Aurizon Network has, by virtue of preparing the briefing information, already completed aspects to be reported in the maintenance cost report.

Annual maintenance report

Having considered stakeholders comments, we largely maintain our initial draft decision to refuse to approve Aurizon Network's proposed maintenance cost report arrangements.

Stakeholders largely supported our initial draft decision to propose amendments to consolidate the maintenance reporting arrangements so that one report is published and available to all

[285] Aurizon Network, 2014 DAU, sub. 59: 116–117.

stakeholders. Stakeholders also supported the timing arrangements so that the report is published four months after the end of each year.[286]

Providing one consolidated report will reduce the administrative burden on Aurizon Network in preparing both a public and regulatory report (s. 138(2)(b)) and provide all parties with access to a consistent level of information on maintenance performance. It will also provide stakeholders with more comprehensive information on maintenance costs than they have received before, which we consider appropriate to address their concerns about insufficient transparency (s. 138(2)(e) and (h)).

In terms of content, we note Aurizon Network's concern regarding reporting asset renewals. In particular, that its systems are unable to distinguish, and therefore report on, asset renewal expenditure that took place instead of maintenance.

While we acknowledge Aurizon Network's view, we consider that the factors in section 138(2) of the QCA Act require transparency around asset renewals, particularly given Aurizon network is proposing a significant amount of renewals expenditure over the term of the undertaking (around $0.5 billion). Over time, it will be important for Aurizon Network to track the impact this has on maintenance activities and future capital expenditure and, at the same time, provide transparency around this to stakeholders given the potential impact on access charges.

With respect to the content of the report, we have set out the way in which the provisions should be amended including by reference to provisions contained in the 2010 AU. In relation to our proposed amendments, Aurizon Network has not provided sufficient evidence as to why reporting such information is no longer relevant.

Quarterly maintenance report

In response to our initial draft decision on MAR, Aurizon Network indicated it was willing to work with stakeholders and us to develop an alternative framework for maintenance reporting, potentially including quarterly reporting of maintenance activities tied with financial adjustments as performance incentives.

We consider the 2014 DAU reporting regime should be amended to include arrangements for Aurizon Network to develop a template for a quarterly maintenance report following consultation with stakeholders. Given stakeholders' preference for increased maintenance performance information, we consider that these amendments are appropriate and consistent with their interests (s. 138(2)(e) and (h)).

Accordingly, we have included proposed amendments for a process within the 2014 DAU to provide for Aurizon Network to develop, within six months after the 2014 DAU is approved (or longer as agreed with us), a template for a quarterly maintenance report. The template will then be subject to our approval.[287]

Drafting amendments to the 2014 DAU

Overall, we consider our proposed amendments to Aurizon Network's proposed network performance reporting regime will provide timely information and a process for interactive engagement. This is in the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act). The proposed reporting requirements do not affect the legitimate business interests of Aurizon Network, as any appropriate administration costs are accounted for in the

[286] Cl. 10.1.4(a) of the IDD amended DAU.
[287] Cl. 10.3.2 of the CDD amended DAU.

MAR. Therefore, the proposed reporting requirements provide an appropriate balance between the interests of the industry participants.

Consolidated draft decision 5.1

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the maintenance cost reporting arrangements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

- **(a) provide for a stakeholder briefing and report on the planned scope of maintenance three months before the start of each year (cl. 10.3.1 of the CDD amended DAU)**
- **(b) provide for one consolidated annual maintenance cost report to be prepared and published within four months of the end of each year, including the content set out in our attached drafting (cl. 10.3.3 of the CDD amended DAU)**
- **(c) provide for the preparation and approval of a quarterly maintenance cost report template upon commencement of the approved undertaking (cl. 10.3.2 of the CDD amended DAU)**
- **(d) make any other amendments as proposed in our CDD amended DAU.**

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

Network performance reports

In response to comments received by stakeholders, particularly Aurizon Network, we have re-considered our initial draft decision on the provision and timing of monthly network performance reports.

In view of the time taken to prepare information for the quarterly report, we consider that reporting on a monthly basis would impose a significant administrative burden on Aurizon Network. As such, we consider that Aurizon Network's proposal to provide the report on a quarterly basis is appropriate. However, we agree with Aurizon Network's submission that information in the quarterly report should be segregated by month and have proposed amendments to achieve this outcome. This means the information is still provided by month, which is in the interests of access seekers and access holders, but grouping the information so that it is provided on a quarterly basis will result in a lower administrative burden on Aurizon Network (s. 138(2)(b), (e) and (h) of the QCA Act).

In terms of timing, we consider the Aurizon Network's proposal to provide the report within 20 business days of the end of each quarter is reasonable. This is consistent with the 2010 AU arrangements and will provide Aurizon Network with time to prepare the report (which includes the new proposed requirement to segregate information by month), improve data integrity and reduce the chance of errors.

However, we maintain our position in the initial draft decision to refuse to approve Aurizon Network's proposed network performance reporting arrangements overall. We consider Aurizon Network's proposed arrangements do not require it to provide sufficiently comprehensive information on certain aspects of network performance, including safety, network service quality and speed restrictions. Therefore, we do not consider the proposed

arrangements appropriately balance the interests of access holders (s. 138(2)(e) and (h)) against the legitimate business interests of Aurizon Network (s. 138(2)(b)).

We reaffirm our initial draft decision to propose amendments to improve the reporting of safety and network service quality issues, including those changes that are drawn from the current arrangements in the 2010 AU. Aurizon Network has not since provided evidence about why reporting such information is no longer relevant.

Consistent with our views in the position paper on Aurizon Network's Northern Bowen Basin system rules[288], we also consider the report should also provide information about the outcome of the Contested Train Path Decision Making Process (CTPDMP). Therefore, we propose amendments to include a requirement to report on the number of CTPDMPs run each month and the stage of the process that the contested paths were allocated. The addition of this requirement will improve transparency (which is in the interests of stakeholders), while not imposing an excessive administrative burden on Aurizon Network (because the information should be readily available).

Our position paper also proposed improvements to the process for allocating delays and cancellations to the party(s) that cause them to reduce the incidence of 'unallocated' delays and cancellations.[289] Our view was that this would increase transparency and ultimately improve supply chain coordination. To support this process, we considered that it may be useful for Aurizon Network to include more detailed information on the cause of delays and cancellations in its network performance report. However, we recognise that this would be a significant change and we welcome stakeholder submissions on whether these changes should be made.

We consider our proposed amendments will improve the comprehensiveness of the information provided, which is in the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act). We also acknowledge Aurizon Network's legitimate business interests and consider that the adjustments we have made since the initial draft decision appropriately address its concerns about the increased administrative burden of more regular reporting (s. 138(2)(b)).

[288] QCA, *Position Paper: Aurizon Network's Northern Bowen Basin system rules*, 17 September 2015, pp. 73–75.
[289] Ibid. pp. 85–92.

Consolidated draft decision 5.2

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the network performance reporting arrangements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to require:

(a) key performance information to be displayed by month (cl. 10.3.4 of the CDD amended DAU)

(b) amendments to content of the report as provided for in our marked-up drafting and described above, including a new indicator that details the number of CTPDMPs run each month and the stage of the process the contested paths were allocated (cl. 10.3.4(i) of the CDD amended DAU)

(c) other amendments as proposed in our CDD amended DAU.

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

5.5 Asset reporting

5.5.1 Aurizon Network's proposal

Aurizon Network's 2014 DAU proposed requirements for:[290]

- an annual report on the roll-forward of the regulatory asset base (RAB) to be published within one month of the QCA accepting the prudency of capital expenditure (cl. 10.1.6)
- a condition based assessment of rail infrastructure to be conducted towards the end of the undertaking term (cl. 10.4).

5.5.2 Summary of our initial draft decision

Our initial draft decision was to accept most aspects of Aurizon Network's proposals in relation to asset reporting. We considered this information was crucial to understand network asset performance and promote prudent asset management, which is in the interests of access seekers and access holders. However, consistent with our overall approach, we applied our discretion to propose amendments to simplify and clarify the arrangements more broadly (s. 136(5)(b) of the QCA Act).

5.5.3 Stakeholders' comments on our initial draft decision

Aurizon Network argued that it cannot provide a separate RAB roll-forward report for the NAPE system (which it would be required to do if the QCA's proposed definition of 'coal system' was expanded to add NAPE as a separate system).[291] We have addressed the general issue about providing reports by coal system in section 5.8 below.

[290] Clause references that follow are to Aurizon Network's 2014 DAU.
[291] Aurizon Network, 2014 DAU, sub. 83: 94.

Aurizon Network[292], QRC[293] and Anglo American[294] generally supported our initial draft decision regarding the requirements for condition based assessments.

However, Anglo American was concerned that Aurizon Network had previously failed to comply with a similar provision and noted that the final condition-based assessment under the 2010 AU is yet to be completed. Anglo American considered Aurizon Network should be required to complete assessments at the beginning and end of the undertaking term to determine whether it has been complying with asset maintenance standards and is effectively utilising the maintenance funds provided by users. Anglo American also considered the assessments should be made public.[295]

QRC suggested Aurizon Network should be required to procure a condition based assessment for each coal system.[296]

5.5.4 QCA analysis and consolidated draft decision

After having regard to the section 138(2) factors in the QCA Act and stakeholder submissions, we do not consider it appropriate to approve the 2014 DAU in respect of asset reporting. While we acknowledge key aspects of Aurizon Network's proposals, the 2014 DAU does not provide sufficiently useful information for stakeholders and is not sufficiently transparent.

We consider the proposed amendments to the 2014 DAU discussed below are required to enhance transparency and improve the usefulness of information for stakeholders. This is in the interests of access seekers and access holders (s. 138(2)(e) and (h)), while recognising Aurizon Network's legitimate business interests by not imposing an excessive regulatory burden (s. 138(2)(b)). The amendments proposed will also improve Aurizon Network's accountability to stakeholders, promoting efficient investment in rail infrastructure (s. 138(2)(a)).

Public RAB roll-forward report

We have reassessed our initial draft decision to accept Aurizon Network's proposal to publish the roll-forward report after we accept the prudency of capital expenditure. We now consider the report should be amended to include the provision in the 2010 AU that required the QCA's acceptance of Aurizon Network's proposed roll-forward of the RAB prior to that report being published. This means the report provides stakeholders with information about the *approved* roll-forward, rather than the *proposed* roll-forward.

Condition based assessment

We acknowledge Anglo American's concerns about compliance and the suggestion a condition based assessment should be completed twice during an undertaking. However, these assessments take time and are costly and, in the interests of efficiency, should not need to be performed more than once during an undertaking term. Assessments at both the beginning and end of the regulatory period would mean that two assessments are occurring in a relatively short period of time. We consider one assessment per period is sufficient to identify any neglect, but the frequency should be subject to review if the undertaking period extends beyond four years.

[292] Aurizon Network, 2014 DAU, sub. 83: 85.
[293] QRC, 2014 DAU, sub. 84: 108.
[294] Anglo American, 2014 DAU, sub. 95: 37–38.
[295] Anglo American, 2014 DAU, sub. 95: 37–38.
[296] QRC, 2014 DAU, sub. 84:108.

Subject to redactions of confidential information, we agree with Anglo American that assessments should be made public.[297] We also agree with QRC's suggestion that a condition based assessment should be conducted for each coal system.[298] We further consider the assessment of each coal system should be split to cover Aurizon Network funded assets and user funded assets as we consider that this will provide useful information to stakeholders, including highlighting any discriminatory treatment.

Consolidated draft decision 5.3

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the asset reporting arrangements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

(a) include a requirement for the RAB roll-forward report to be published after the QCA accepts Aurizon Network's proposed roll-forward (cl. 10.4.2 of the CDD amended DAU)

(b) include requirements to publish condition based assessment reports, provide assessments of Aurizon Network funded assets and user funded assets for each coal system, and allow for more than one assessment per undertaking term if the term extends beyond four years (cl. 10.2(c) and 10.4.3 of the CDD amended DAU)

(c) make other amendments as proposed in the CDD amended DAU.

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

5.6 Compliance

5.6.1 Aurizon Network's proposal

Under the 2014 DAU, Aurizon Network proposed to:[299]

- Appoint a compliance officer responsible for managing the systems and practices reasonably required to oversee Aurizon Network's compliance with its obligations in the undertaking, including notifying the Executive Officer of material breaches and advising remedial action proposed or taken (cl. 10.5).
- Prepare and publish a compliance report annually, detailing its compliance with obligations in the undertaking and the outcomes of negotiations with access seekers. It will provide a supplementary report to the QCA with information separately reported for third party and Aurizon party access holders (cl. 10.1.2).
- Report breaches of the undertaking to the QCA and any remedial action proposed or undertaken (cl. 10.2):
  - with respect to timeframes, within 10 business days after the end of each month

[297] Anglo American, 2014 DAU, sub. 95:37–38.
[298] QRC, 2014 DAU, sub. 84: 108.
[299] Clause references that follow are to Aurizon Network's 2014 DAU.

- with respect to other breaches, as soon as Aurizon Network becomes aware of the breach.

Aurizon Network will also provide the party directly affected with information in respect of the breach.

5.6.2 Summary of our initial draft decision

While we accepted many aspects of Aurizon Network's proposal, overall, our initial draft decision was to refuse to approve the 2014 DAU in respect of the compliance framework. The 2014 DAU did not appear to include an obligation for Aurizon Network to proactively monitor compliance with the undertaking, including the ring-fencing obligations.

We considered the 2014 DAU compliance framework should be amended by requiring Aurizon Network to keep an issues register to record:

- any known breaches of the undertaking
- any alleged breaches of the undertaking that Aurizon Network is aware of
- any written complaints by access seekers or access holders about Aurizon Network's performance in relation to the undertaking
- the steps Aurizon Network has taken to remediate or otherwise address these issues.

We also considered the issues register should be available for audit, and would become a tool for monitoring Aurizon Network's compliance with its ring-fencing obligations.

In addition, we proposed that Aurizon Network provide its compliance report within four months of the end of the year, not six months as it had proposed. We did not consider Aurizon Network had sufficiently justified with evidence why increasing the timeframe (compared to current arrangements) provided for an effective regime, particularly given the content of the report has largely remained unchanged.

5.6.3 Stakeholders' comments on our initial draft decision

Stakeholders supported our proposal to introduce an issues register and to reduce the time for Aurizon Network to publish its annual compliance report.[300]

However, the QRC said the compliance obligations should be strengthened, particularly in relation to ring-fencing obligations. On this, the compliance report should be expanded to require Aurizon Network to disclose complaints relating to breaching confidentiality agreements or the ultimate holding company support deed. Information on the average complaint handling time should also be reported, including instances where the breach was found to be committed.[301]

5.6.4 QCA analysis and consolidated draft decision

We have accepted many aspects of the proposed compliance requirements. However, after having regard to the section 138(2) factors and stakeholder submissions, overall we maintain our initial draft decision that it is not appropriate to approve the 2014 DAU in respect of the compliance requirements.

[300] Aurizon Network, 2014 DAU, sub. 83: 87; QRC, 2014 DAU, sub. 84: 108.
[301] QRC, 2014 DAU, sub. 84: 105–106.

We consider that amendments are required to achieve a sufficient level of stakeholder confidence that Aurizon Network is monitoring its compliance with the undertaking. This is in the interests of parties affected by Aurizon Network's decisions, including access seekers, access holders and end customers (s. 138(2)(e) and (h) of the QCA Act). It is also consistent with the object of Part 5 of the QCA Act (s. 138(2)(a)) by providing incentives for Aurizon Network to improve its compliance with the undertaking.

We have maintained our initial draft decision position with respect to Aurizon Network's compliance arrangements and we note that stakeholders also largely accepted these arrangements.

We have considered the QRC's views, but have decided not to propose amendments to further strengthen the compliance reporting arrangements. We consider the other mechanisms we have proposed are sufficient to highlight Aurizon Network's compliance with the obligations in the undertaking, including ring-fencing obligations. For instance, we have not limited the matters an auditor can consider when undertaking its annual audit (so ring-fencing matters, including any brought to our attention by stakeholders can be reviewed via that process). There is also a requirement in the 2014 DAU for Aurizon Network to report on the number of complaints received about its compliance with the ring-fencing provisions. The issues register can also be audited, but will nonetheless maintain a record of the type and extent of breaches that occur.

Consolidated draft decision 5.4

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the compliance requirements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

- **(a) include a requirement for Aurizon Network to maintain an issues register of breaches and written complaints (cl. 10.5.3 of the CDD amended DAU)**
- **(b) include a requirement for the annual compliance report to be published within four months of the end of the year (cl. 10.5.2 of the CDD amended DAU)**
- **(c) make other amendments as proposed in our CDD amended DAU.**

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

5.7 Audit requirements

5.7.1 Aurizon Network's proposal

Aurizon Network considers that auditing is an appropriate mechanism to assess systematic compliance with access obligations, particularly where the impact of non-compliance is significant. It considers that individual complaints or issues are best addressed through the dispute resolution and complaints handling mechanisms.[302]

[302] Aurizon Network, 2013 DAU, sub. 2:306.

Scope and frequency of audits

Aurizon Network proposed arrangements that allow the QCA to request audits of:[303]

- reporting obligations to determine compliance with reporting obligations, which will be conducted on request, but no more than once a year (cl. 10.7)
- general compliance to determine whether any specific conduct or decisions of Aurizon Network comply with the undertaking, which will be conducted on request (cl. 10.8).

The 2010 AU included the following audit requirements in the ring-fencing section (Part 3), which Aurizon Network decided against including in the 2014 DAU as it considered that the general audit provisions in Part 10 were sufficient:[304]

- audits of Aurizon Network's annual financial statements to assess whether they have been developed in accordance with the costing manual (cl. 3.3.2 of the 2010 AU)
- annual audits of Aurizon Network's compliance with its ring-fencing and other undertaking obligations (cl. 3.7 of the 2010 AU).[305]

We discuss our position on audits of financial statements in Chapter 4 (ring-fencing).

Audit process

Aurizon Network's proposed arrangements for the appointment of the auditor and the audit process included:[306]

- Appointing an auditor—Aurizon Network will appoint an auditor after receiving QCA approval and that auditor will remain responsible for conducting audits for the term of the undertaking (cl. 10.9(a) and (b)).
- Preparing audit plans—The auditor will agree an audit plan with Aurizon Network and obtain the QCA's approval. The audit plan will include a proposed work program and a process for consultation with the QCA during the audit to ensure particular matters are addressed (cl. 10.9(e) and (f)).
- Releasing audit findings—On completion of the audit, the auditor will provide a report to the QCA, who may provide it to appropriate parties having regard to the scope and findings of the audit (cl. 10.9(i)).

Implementation of audit recommendations

Aurizon Network proposed to include a requirement for it to use reasonable endeavours to implement the recommendations of the auditor as soon as reasonably practicable, unless non-implementation is approved by the QCA (cl. 10.9(j) of the 2014 DAU).

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[303] Clause references that follow are to Aurizon Network's 2014 DAU.
[304] Aurizon Network, 2013 DAU, sub. 2: 62.
[305] This included auditing whether Aurizon Network was: engaging in cost shifting or margin squeezing; discriminating in the provision of associated facilities; discriminating between train operators with respect to live run variations from train plans; complying with the capacity allocation process/negotiation process/investment obligations in the undertaking. It could also include auditing: Aurizon Network's conduct if we received a complaint or a breach report in relation to the undertaking; or any other issue for which the QCA reasonably believes that an audit is necessary.
[306] Clause references that follow are to Aurizon Network's 2014 DAU.

5.7.2 Summary of our initial draft decision

Stakeholders were concerned that Aurizon Network had weakened the audit requirements relative to the 2010 AU and argued that the requirements should be strengthened[307] to improve transparency, identify discrimination and increase stakeholder confidence.[308]

We shared stakeholder concerns that Aurizon Network's 2014 DAU audit requirements did not appropriately take into account stakeholder interests. Our initial draft decision therefore concluded that it was not appropriate to approve the audit requirements proposed by Aurizon Network. We considered the way that the 2014 DAU audit provisions should be amended was to strengthen the audit requirements by:

- re-introducing the 2010 AU requirements for:
  - annual audits of Aurizon Network's financial statements and compliance with ring-fencing and other obligations
  - audits (at least annually) of Aurizon Network's compliance with its reporting obligations
- including a requirement that the QCA would be responsible for appointing the compliance auditor, rather than Aurizon Network
- requiring Aurizon Network to provide a plan for the implementation of audit recommendations and to provide evidence that the recommendations have been implemented.

We address stakeholder submissions on our initial draft decision in the QCA analysis section below.

5.7.3 QCA analysis and consolidated draft decision

After having regard to the section 138(2) factors in the QCA Act and stakeholder submissions, we do not consider it appropriate to approve the 2014 DAU in respect of audit requirements.

We do not consider that the audit requirements proposed by Aurizon Network are appropriate because they will not provide sufficient oversight of Aurizon Network's compliance with its obligations. Insufficient oversight could lead to the undertaking not functioning as intended, which is detrimental to the interests of access seekers, access holders and other stakeholders (s. 138(2)(e) and (h) of the QCA Act) and inconsistent with the object of Part 5 of the QCA Act (s. 138(2)(a)).

To address this issue, we consider the audit arrangements proposed in the 2014 DAU should be amended to provide improved oversight. The amendments we consider appropriate to approve the 2014 DAU are explained below.

Scope and frequency of audits

QRC and Aurizon Network[309] supported our initial draft decision to propose amendments to include similar conflicts audit provisions to the 2010 AU, including the requirement for audits to be conducted annually.[310]

[307] Asciano, 2013 DAU, sub. 43: 25; Anglo American, 2013 DAU, sub. 78: 40; QRC, 2014 DAU, sub. 42: 51.
[308] Asciano, 2013 DAU, sub. 43: 25, 80; QRC, 2014 DAU, sub. 42: 51.
[309] QRC, 2014 DAU, sub. 84:109; Aurizon Network, 2014 DAU, sub. 83: 93.
[310] Cl. 10.9 of the IDD amended DAU.

Aurizon Network said the proposed requirement for the auditor to take into account its compliance with relevant internal procedures was outside the audit scope and should not be a factor in an audit of its compliance.[311] We disagree with Aurizon Network and consider compliance with internal procedures is directly relevant to an assessment of Aurizon Network's compliance with its obligations in the undertaking.

As set out in our initial draft decision, we consider the appropriate way to amend the proposed audit requirements is to include audit provisions that are based on those in the 2010 AU. This includes requirements for an annual audit of Aurizon Network's compliance with ring fencing and other obligations; and an audit (at least annually) of compliance with its reporting obligations. Regular audits will provide appropriate oversight of Aurizon Network's compliance with its obligations. This promotes stakeholder confidence and means access seekers and access holders have transparency on Aurizon Network's operations and compliance with its undertaking (taking into account the factors in section 138(2) of the QCA Act).

However, we have proposed to simplify the conflicts audit provisions (cl. 10.6.2 of the CDD amended DAU) by removing the list of items that may be audited. We consider the provision allowing an audit of any issues we reasonably consider necessary is sufficient.

As discussed above and in Chapter 4, we consider the requirements relating to the preparation of the annual financial report (including the audit requirements) should be moved to Part 3, because they are directly relevant to Aurizon Network's ring fencing obligations.

Audit process

Our initial draft decision proposed for us to be responsible for appointing the compliance auditor. QRC largely agreed with the initial draft decision, but considered we should also pay for the auditor to provide increased independence and avoid conflicts of interest.[312] On the other hand, Aurizon Network disagreed with our position, because it would not be able to plan for costs, nor is it clear who would be liable should the auditor be negligent or incompetent.[313]

After further consideration, we agree that it should not be our responsibility to appoint the compliance auditor. This will increase the regulatory burden, which is inconsistent with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act), while not significantly improving our oversight of the audit process. As such, we accept Aurizon Network's proposal that it will appoint the auditor, subject to our approval.

However, we consider the audit process in clause 10.9 of the 2014 DAU is not appropriate to approve overall. To promote stakeholder confidence and Aurizon Network's accountability, our oversight of the audit process should be improved, including requiring the auditor to provide any draft reports to us at the same time they are provided to Aurizon Network.

Implementation of audit recommendations

Aurizon Network agreed we should be able to request a plan for the implementation of audit recommendations. However, it proposed amendments to enable Aurizon Network and the QCA to agree to relax the 3-month period for requesting evidence that recommendations have been implemented.[314]

[311] Aurizon Network, 2014 DAU, sub. 83: 93.
[312] QRC, 2014 DAU, sub. 84: 109.
[313] Aurizon Network, 2014 DAU, sub. 83: 93.
[314] Aurizon Network, 2014 DAU, sub. 83: 94.

QRC supported allowing the QCA to obtain evidence regarding the implementation of audit recommendations and to direct Aurizon Network to take any necessary actions.[315]

We refer to our initial draft decision that Aurizon Network should be required to provide a plan for the implementation of audit recommendations and to provide evidence that the recommendations have been implemented. However, as this position was not accurately reflected in our IDD amended DAU, we propose further amendments to ensure our position is properly reflected in the CDD amended DAU (see clause 10.10(k) to (m) of the CDD amended DAU).

We also propose to remove the 3 month period for requesting evidence that recommendations have been implemented and leave it to QCA discretion. The timeframe for requesting evidence is likely to depend on the implementation plan.

Consolidated draft decision 5.5

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the audit arrangements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

- **(a) include requirements for annual audits of Aurizon Network's compliance with its ring-fencing and other obligations, and audits (at least annually) of its reporting obligations (cl. 10.6.1 and 10.6.2 of the CDD amended DAU)**
- **(b) include a requirement for the auditor to provide draft reports to the QCA (cl. 10.6.4(i) of the CDD amended DAU)**
- **(c) include a requirement for Aurizon Network to prepare a plan for the implementation of audit recommendations and to provide evidence that the recommendations have been implemented (cl. 10.6.4(k)-(m) of the CDD amended DAU)**
- **(d) make other amendments as proposed in our CDD amended DAU.**

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

5.8 General matters and information provision

Issues dealt with in this section relate to general requirements, namely correcting errors in public reports; how performance information will be provided in the reports (i.e. by coal system or disaggregated further); and certifications provided with some reports from Aurizon Network's Executive Officer to verify the information.

Also dealt with are requirements allowing the QCA to request information from Aurizon Network throughout the regulatory period if reasonably required, including signed access agreements.

[315] QRC, 2014 DAU, sub. 84: 110.

5.8.1 Aurizon Network's proposal

Under the 2014 DAU, Aurizon Network proposed the following general requirements relating to reporting to:[316]

- correct material errors in its annual compliance, maintenance and quarterly reports within three months of identifying the error. This relates to numerical errors of more than 2%, or otherwise errors determined as material by the QCA (cl. 10.1.2(b), 10.1.3(d), 10.1.5(k))[317]
- provide information in the reports separately for each coal system for the maintenance and quarterly network performance reports and the RAB roll-forward report, with the exception of GAPE[318] for reporting maintenance (e.g. cl. 10.1.3(c) and 10.1.4(c)) and most of the quarterly performance indicators (cl. 10.1.5)
- provide certifications of accuracy with the financial report and the maintenance cost report to the QCA (cl. 10.11 and 10.1.4(b)), noting that in providing certification, the Executive Officer relies on information prepared by others and this reliance is deemed reasonable unless proved otherwise.

The 2014 DAU also contains information gathering powers for the QCA. These arrangements allow us to request information from Aurizon Network reasonably required to perform our functions (cl. 10.3.2), including signed access agreements (cl. 10.3.1). On this, the QCA must not publish (or disclose) information provided, except where the undertaking already provides for that information to be public.

5.8.2 Summary of our initial draft decision

Our initial draft decision accepted many aspects of Aurizon Network's proposals. In particular we accepted:

- there would be some exclusions to the separate reporting of the GAPE (and NAPE) coal systems in the maintenance cost and network performance reports
- it was appropriate for Aurizon Network's Executive Officer to certify relevant reports as accurate, including reasonably relying on information or advice provided by others.

Notwithstanding our acceptance of most of Aurizon Network's proposals, our initial draft decision refused to approve specific provisions (taking into account the factors in section 138(2) of the QCA Act), which we considered did not sufficiently achieve the objectives outlined above. We considered the 2014 DAU should be amended to:

- Streamline the error provisions by removing them from multiple reporting requirements and including one general error provision to apply to all reporting.
- Further disaggregate information. For instance, while we accepted the GAPE information reporting requirements, we proposed a requirement so that, unless agreed between Aurizon Network and QCA, it would report maintenance information separately for rail infrastructure where scope and cost estimates have been accepted for the purpose of determining reference tariffs.

[316] Clause references in this section refer to Aurizon Network's 2014 DAU.
[317] These clauses refer to the annual compliance report, annual maintenance cost report and quarterly network performance report respectively.
[318] The Newlands to Abbot Point System (NAPE) was not included as a separate system in Aurizon Network's definition of 'Coal System'.

With regard to information gathering requirements, we proposed amendments to require Aurizon Network to disclose non-standard access agreements to us within five days of signing them. We also proposed amendments to require Aurizon Network to provide an explanation of substantial differences between the non-standard and standard agreements. We considered this would give confidence to access holders and their customers that information is available to allow an assessment of non-discrimination obligations in the undertaking.

5.8.3 Stakeholders' comments on our initial draft decision

Stakeholders' comments largely focussed on information gathering powers and, in particular, the disclosure of access agreements.

Aurizon Network disagreed with the proposed requirements on non-standard access agreements. It said our role is to ensure there is no unfair differentiation between access holders that has a material impact on their ability to compete, not to review every access agreement to ensure no discriminatory treatment between access holders, particularly where the provisions have been negotiated and agreed between the parties. In addition, it noted section 103 of the QCA Act could be used by the QCA to request copies of an access agreement.[319]

Stakeholders supported the arrangements, but raised concerns around the broader restrictions of disclosing access agreements and what actions were available to us in the event we found discriminatory treatment.

The QRC said our right to publish the 'below rail' aspects of access agreements that existed under the 2010 AU should be reinstated. It also said that the proposed provisions could result in unreasonable withholding of information and loss of transparency because the QCA cannot publish access agreements without the consent of Aurizon Network and the access holder. This gives stakeholders no confidence about the non-discriminatory treatment by Aurizon Network.[320]

Asciano said we should explain the consequences of obtaining a non-standard agreement showing Aurizon Network to be in breach of obligations relating to non-discriminatory treatment. It also queried whether parties to non-standard access agreements would be obliged to re-negotiate terms to reflect the standard access agreement, or whether Aurizon Network would be required to offer the same non-standard terms to other parties.[321]

On other matters, QRC said it agreed with our changes to consolidate the error provisions, but Aurizon Network should be given one month (not three), to rectify material errors in reports and should notify the QCA of errors promptly.[322] QRC also said that the QCA should be able to request advice relied upon by the Executive Officer when providing certification.[323]

5.8.4 QCA analysis and consolidated draft decision

We have largely accepted Aurizon Network's proposed arrangements. In reaching our consolidated draft decision, we considered the QRC's comments about reducing the time to rectify material errors, but have maintained our view that the requirement for Aurizon Network to correct material errors in reports within three months is reasonable. It is less than the six

[319] Aurizon Network, 2014 DAU, sub. 83: 92–93.
[320] QRC, 2014 DAU, sub. 84: 108.
[321] Asciano, 2014 DAU, sub. 76: 21.
[322] QRC, 2014 DAU, sub. 84: 108.
[323] QRC, 2014 DAU, sub. 84: 109.

month time frame that currently applies, and means corrected information is made public in a timelier manner. We also do not consider it appropriate to include a provision for the QCA to request advice relied upon by the Executive Officer, as suggested by QRC, because there are already information gathering powers in the 2014 DAU (see cl. 10.7.1 of the CDD amended DAU).

With respect to non-standard access agreements, we no longer consider our initial draft decision amendments appropriately balance the interests we are required to take into account under section 138(2) of the QCA Act. We can request information, including agreements, from Aurizon Network at any time under our general information gathering powers and, as such, this is all that is required to meet the interests of all parties, including Aurizon Network's legitimate interests and our interests in an effective regime.

However, having taken into account stakeholder comments, and having regard to the factors in section 138(2) of the QCA Act, we maintain our initial draft decision to not approve certain provisions, being those marked-up in the CDD amended DAU. In reaching our view, an issue we considered relevant is the degree to which the 2014 DAU was effective, transparent and promoted confidence in the regime (s. 138(2)(h) of the QCA Act). We further consider and agree with stakeholders that transparency is important and assists in providing confidence that access holders and access seekers are being treated equally. We consider the provisions identified fail to achieve a sufficient degree of confidence and transparency.

Drafting changes to the 2014 DAU

The way in which we consider it appropriate to amend Aurizon Network's 2014 DAU is as follows.

Consistent with our initial draft decision, the 2014 DAU should be amended to include consolidated error provisions. This provides consistency and avoids unnecessary duplication.

In our consolidated draft decision, we have proposed consolidating all provisions relating to how information in reports is presented, by removing the requirements from each of the individual reports (where relevant) and having one provision in this 'general matters' section. This provision sets out a default position that information will be reported by coal system and separately for rail infrastructure for which one or more reference tariffs apply, unless otherwise agreed between Aurizon Network and the QCA.

This default position does two things. It acts as a minimum level of information to be provided to stakeholders over time and provides us and Aurizon Network with flexibility to change if needed. This provides greater clarity and avoids unnecessary duplication of drafting.

We also consider there is merit in amending the current 2014 DAU provisions, by adopting provisions from the 2010 AU to:

- Allow the below-rail aspects of signed access agreements to be published. As such, we propose amending the information gathering provisions to allow for this.
- Allow for parties to request certain information is not disclosed because it would be likely to damage their commercial interests.

We consider the amendments proposed appropriately balance the interests of the various parties and protect the legitimate business interests of Aurizon Network and access holders.

Consolidated draft decision 5.6

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the general reporting arrangements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

(a) consolidate provisions relating to:

(i) errors in reports – one provision applies to all reports in Part 10, that requires Aurizon Network to rectify material errors found in reports within 3 months (cl. 10.7.2 of the CDD amended DAU)

(ii) reporting by coal system – all reports require Aurizon Network to provide information by coal system, and separately for rail infrastructure where one or more reference tariff applies, unless agreed otherwise between Aurizon Network and the QCA (cl. 10.2 of the CDD amended DAU)

(iii) information gathering – general information gathering powers and disclosing access agreements is provided for. At the same time, include requirements that allow us to publish below-rail aspects of the access agreements, subject to certain conditions as discussed above and set out in our drafting (cl. 10.7.1(c)-(d) of the CDD amended DAU)

(b) make other amendments as proposed in our CDD amended DAU.

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

6 DISPUTE RESOLUTION AND DECISION MAKING

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

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed dispute resolution mechanism in Part 11 of the 2014 DAU. In our view, the proposed mechanism does not provide an appropriate balance between the rights and interests of Aurizon Network and other parties. We have proposed amendments to:

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

Our consolidated draft decision is consistent with our initial draft decision, although we have made further amendments to clarify the arrangements. The key changes are to:

- *include prospective access seekers as potential parties to disputes about access negotiations, to cover disputes that could arise before an access application is lodged*
- *clarify arrangements when disputes are referred to the QCA, including a provision for the QCA to accommodate the advice of the rail safety regulator.*

We consider that our amendments will result in a dispute resolution mechanism that more appropriately balances the rights and interests of the various parties. This will promote successful negotiations and increase stakeholder confidence, which will in turn promote the efficient use of the declared service.

The detailed drafting of Part 11 in the CDD amended DAU is consistent with our approach and shows all the amendments required for us to consider the drafting appropriate in accordance with section 138(2) of the QCA Act.

6.1 Introduction

The third party access regime in the QCA Act is underpinned by a negotiate–arbitrate approach to regulation, which acknowledges the 'primacy of contractual negotiations'. Parties negotiate with Aurizon Network to, among other things, access and operate on the CQCN, develop funding arrangements for network expansions, and connect private infrastructure.

The dispute resolution mechanism in the access undertaking plays two critical roles:

- supporting the 'negotiate–arbitrate' framework by providing a formal process for the resolution of disputes
- maintaining Aurizon Network's accountability by providing parties with a means to instigate formal investigations on potential breaches of the undertaking.

A robust and cost-effective process, which stakeholders can rely on to achieve timely resolution of disputes, is consistent with the overarching objective of providing access to the relevant services efficiently.

6.2 Overview

6.2.1 Aurizon Network's proposal

Aurizon Network sought to move away from the 2010 AU approach of providing 'umbrella' provisions to deal with all disputes under the undertaking.[324] Aurizon Network proposed a framework to provide for the resolution of disputes:

- between Aurizon Network, access seekers and train operators about the negotiation of access and train operations agreements, and Aurizon Network's obligations in the undertaking
- between Aurizon Network and other parties in relation to matters that are required by the undertaking to be resolved in accordance with Part 11.

Aurizon Network proposed that the dispute resolution framework would not apply to disputes about Aurizon Network's compliance with ring-fencing and reporting obligations. It instead proposed to rely on the complaint and audit mechanisms in the ring-fencing and reporting parts of the 2014 DAU (Parts 3 and 10).

It also proposed that the dispute resolution framework would not apply to disputes under executed agreements, such as access agreements, which would be dealt with in accordance with the provisions in those agreements.[325]

For most disputes, Aurizon Network proposed a staged resolution process. This would begin with the parties attempting to resolve the dispute between themselves (chief executive resolution), followed by mediation and then external determination (by an expert or the QCA).[326] Aurizon Network considered that this approach was cost-effective and maximised the likelihood that parties would resolve the issue between themselves for mutual benefit rather than escalating disputes to third parties for resolution.[327]

Part 11 of the 2014 DAU also sets out procedures where a dispute is referred to an expert or the QCA for determination (cl. 11.1.4, 11.1.5 and 11.1.6). These include obligations intended to replicate the *Judicial Review Act 1991 (Qld)*, which the QCA is required to follow when making any decision under the access undertaking (cl. 11.2). Aurizon Network said that replicating these obligations is necessary because decisions in relation to the undertaking are not made 'under an enactment'.[328]

6.2.2 Legislative framework

We are required to assess Aurizon Network's dispute resolution proposals having regard to the factors in section 138(2) of the QCA Act, as set out in Chapter 2.

[324] Aurizon Network, 2014 DAU, sub. 3: 271–272.
[325] This could include access agreements, TOAs, rail connection agreements and agreements for user-funded expansions.
[326] Some disputes under the 2014 DAU can be fast-tracked to the QCA or expert.
[327] Aurizon Network, 2013 DAU, sub. 2: 311.
[328] Aurizon Network, 2014 DAU, sub. 4: 284.

Section 138(2)(a) of the QCA Act requires the QCA to have regard to the object of Part 5 of the QCA Act. We consider this means the dispute resolution mechanism should be sufficiently transparent, timely and effective to provide confidence and certainty to Aurizon Network and other parties, to promote efficient use of and investment in the declared service and effective competition in related markets. This is also consistent with section 138(2)(d) of the QCA Act, which requires the QCA to have regard to the public interest, including the public interest in having competition in markets.

Section 138(2)(b) of the QCA Act requires the QCA to have regard to the legitimate business interests of Aurizon Network. Aurizon Network's legitimate business interests include resolving disputes in a timely and cost-effective way and dealing only with genuine disputes, but do not extend to delaying negotiations to extract higher access charges or better terms and conditions.

Section 138(2)(e) of the QCA Act requires that we have regard to the interests of access seekers. We also consider the interests of other parties are relevant under section 138(2)(h). Access seekers and other affected parties need to be confident that the dispute resolution mechanism will operate transparently and effectively, including resolving disputes in a timely manner. Among other things, it provides greater certainty in negotiations and outcomes, saves additional time and cost and promotes a more even bargaining position. Section 138(2)(h) is also relevant because we consider that clarity and certainty are important considerations in our assessment of the dispute resolution mechanism.

We consider these various interests are appropriately balanced when the dispute resolution mechanism:

- clearly identifies the matters that can be disputed, and those who can be party to a dispute
- provides a simple and timely process for resolving disputes, which is cost-effective and available to all relevant parties
- clearly defines processes, procedures and obligations, so that they are readily understood by parties and relatively simple to administer
- enhances the balance of information between parties and provides transparency and accountability of Aurizon Network's decision–making
- encourages effective negotiation and customer engagement, maximising the opportunity for a negotiated outcome—while resolving remaining disputed matters in an expedient and balanced way
- discourages frivolous or vexatious disputes.

6.2.3 QCA's approach

We assessed Aurizon Network's proposed dispute resolution process against the matters outlined above. This was necessary for us to consider that the process is appropriate under section 138(2) of the QCA Act.

Having considered the section 138(2) factors, as applied in the manner set out above, our consolidated draft decision is not to approve Aurizon Network's proposed dispute resolution mechanism. We have proposed amendments in the CDD amended DAU, which address the reasons why we do not consider it appropriate to approve Aurizon Network's proposal. These include:

- broadening the Part 11 dispute resolution provisions to apply generally to Aurizon Network's obligations in the access undertaking and ensuring dispute resolution is available to all relevant parties
- amending the processes, procedures and obligations on parties to resolve disputes, to provide certainty should the matter come to dispute, without being unnecessarily prescriptive or onerous.

We have also proposed drafting amendments to simplify the access undertaking and improve clarity and certainty.

Further detail of the reasons for our consolidated draft decision is set out in this chapter. Our more detailed consideration is reflected in the marked-up drafting of Part 11 of the CDD amended DAU.

6.3 Scope of the dispute resolution process

6.3.1 Aurizon Network's proposal

Part 11 of the 2014 DAU provides a dispute resolution mechanism that applies to disputes between Aurizon Network, access seekers and train operators about Aurizon Network's obligations under the undertaking. However, disputes about ring-fencing and reporting obligations are dealt with by the accountability mechanisms in Parts 3 and 10.[329]

Disputes with other parties (including access holders) are dealt with under the Part 11 provisions to the extent they are related to matters the 2014 DAU expressly requires to be resolved in accordance with Part 11.[330]

The 2014 DAU also provides that the dispute provisions in an executed access agreement or a TOA (Train Operations Agreement) take precedence over Part 11 provisions, unless the disputing parties agree otherwise.[331]

The Part 11 provisions in the 2014 DAU have moved away from the 2010 AU 'umbrella' approach to disputes (where any party could dispute a matter) to primarily addressing concerns of access seekers and train operators.

6.3.2 Summary of our initial draft decision

Our initial draft decision was to refuse to approve the scope of Aurizon Network's proposed dispute resolution mechanism, because we did not consider it appropriate to do so having regard to the factors in section 138(2) of the QCA Act.

While we considered that Part 11 of the 2014 DAU was comprehensive from the perspective of access seekers and train operators, we considered it did not adequately accommodate other parties, such as access holders. To address this, we proposed amendments to the 2014 DAU (having regard to these factors and the views of stakeholders)[332] to:

- broaden the scope of the dispute resolution mechanism to allow any party to refer any dispute about the operation of the undertaking[333]

[329] Clause 11.1.1(a) of the 2014 DAU.
[330] Clause 11.1.1(a) of the 2014 DAU.
[331] Clause 11.1.1(b) of the 2014 DAU.
[332] Anglo American, 2013 DAU, sub. 78: 42; Asciano, 2014 DAU, sub. 22: 43, 130; QRC, 2014 DAU, sub. 42: 55–6.
[333] Clause 11.1.1(a) of the IDD amended DAU.

- consolidate dispute resolution arrangements in the undertaking and streamline the approach in other parts of the 2014 DAU.

Our proposed amendments largely reinstated the 2010 AU approach to dispute resolution. We also proposed amendments to address Aurizon Network's concerns that a broader scope would result in frivolous or vexatious disputes. For disputes that are unresolved at the chief executive resolution stage and directly escalated to us for determination, we can order full costs to the referring party if we consider the dispute is vexatious.[334] We considered that this approach was consistent with the rights and interests of Aurizon Network and other parties.

We also proposed drafting amendments to related provisions in the 2014 DAU[335] to improve clarity and certainty.

6.3.3 Stakeholders' comments on our initial draft decision

Aurizon Network considered that the scope of the dispute resolution mechanism set out in the IDD amended DAU was too broad. In particular, it considered that the only parties that should have the right to dispute are users.[336]

Anglo American supported the QCA's proposed amendments[337], but QRC and Vale considered the QCA's proposed approach did not accommodate a sufficiently broad range of disputes.[338]

Specific issues raised by stakeholders are addressed below. Issues raised by Aurizon Network regarding the application of Part 11 to disputes about the sale and supply of electricity and SUFA are addressed in Chapters 3 and 12.

6.3.4 QCA analysis and consolidated draft decision

Having regard to the criteria in section 138(2) of the QCA Act and stakeholder submissions, we do not consider it appropriate to approve the scope of Aurizon Network's 2014 DAU dispute resolution mechanism. However, we have proposed some amendments in response to submissions. The reasons for our consolidated draft decision are set out below, along with the amendments we consider appropriate to approve it.

Scope of disputes

Vale suggested there should be no restriction on the matters that may be referred for resolution.[339] We do not consider it appropriate to expand the scope of disputes to matters beyond access negotiations and obligations in the undertaking because it would be inconsistent with the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act). We consider that there should be an appropriate restriction on the types of matters the mechanism can resolve. Expanding the scope would also potentially exceed our powers under the QCA Act.

QRC contended that a dispute will not accommodate anything required 'not to be done' in the undertaking.[340] We disagree with this contention. However, we have amended clause 11.1.1(a)(ii) of the CDD amended DAU to avoid doubt.

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[334] QCA Act, section 208.
[335] Parts 2, 3, 8, 11 and Schedule G.
[336] Aurizon Network, 2014 DAU, sub. 83:97.
[337] Anglo American, 2014 DAU, sub. 95:38–39.
[338] QRC, 2014 DAU, sub. 84: 111-112; Vale, 2014 DAU, sub. 79:8.
[339] Vale, 2014 DAU, sub. 79: 8.
[340] QRC, 2014 DAU, sub. 84: 112.

Parties that have the right to dispute

Aurizon Network considered that allowing any party to raise a dispute would increase the risk of frivolous and vexatious claims. Aurizon Network raised the possibility that a party could make a claim with the aim of delaying a competitor's development because the commercial benefits may outweigh the costs.[341]

While we acknowledge this possibility, identifying all parties that may have legitimate grounds to raise a dispute about matters in the undertaking risks excluding parties that have a legitimate claim. The requirement to keep the QCA informed about disputes, starting from when they are first notified,[342] will help us to quickly identify disputes of a frivolous or vexatious nature if they are referred to us.

In contrast to Aurizon Network, QRC and Vale argued that dispute rights should be further expanded to other parties.[343] After reconsidering our position, we are of the view that prospective access seekers may also have legitimate disputes in relation to the negotiation of access and have proposed amendments to accommodate them.

QRC also considered that the clause allowing train operators and access seekers to become parties to a dispute by election does not go far enough.[344] We consider that customers may have legitimate reasons to join a dispute and have proposed the amendments we consider necessary, but do not consider there is justification to expand dispute resolution rights further.

Having regard to the factors in section 138(2) of the QCA Act, we consider that the scope of the dispute resolution mechanism in terms of the parties that have the right to access the process needs to be broader than that proposed by Aurizon Network. The dispute resolution mechanism should allow any party to refer any dispute about the operation of the undertaking in accordance with the dispute resolution provision. This would adequately balance Aurizon Network's legitimate business interests (s. 138(2)(b)) and the interests of access seekers and other relevant parties (s. 138(2)(e) and (h)) since it allows equal access to a formal dispute resolution mechanism.

Disputes about Access Agreements and Train Operations Deeds

Aurizon Network considered the proposed approach of incorporating certain provisions in the AA and TOD by reference to the undertaking duplicates dispute resolution provisions, making it unclear which procedure would apply in the event of a dispute. Aurizon Network argued that this ambiguity should be resolved so that it is clear that disputes about an executed AA or TOD are to be resolved in accordance with the provisions in the executed agreement. To address this ambiguity Aurizon Network supported retaining the position under the 2010 AU.[345]

On the other hand, Asciano considered that there should be an option to resolve disputes about a Standard Access Agreement (SAA) or Standard Train Operations Deed (STOD) in accordance with the undertaking because they are instruments under the access undertaking.[346]

We maintain our view that disputes about access agreements should be resolved in accordance with the provisions in the agreement, unless otherwise agreed by the disputing parties. Having

[341] Aurizon Network, 2014 DAU, sub. 83: 97.
[342] See clause 11.1.1(g) of the CDD amended DAU.
[343] QRC, 2014 DAU, sub. 84: 111; Vale, 2014 DAU, sub. 79: 8.
[344] QRC, 2014 DAU, sub. 84: 111.
[345] Aurizon Network, 2014 DAU, sub. 83: 96–97.
[346] Asciano, 2014 DAU, sub. 76: 21-22.

regard to the factors in section 138(2) of the QCA Act, we consider this is appropriate as it adequately balances Aurizon Network's legitimate business interests under section 138(2)(b) and the interests of access seekers, access holders and train operators (under s. 138(2)(e) and (h)), since it provides greater certainty in contractual negotiations. This also supports the public interest (s. 138(2)(d)) since it allows parties to negotiate contracts freely and with certainty, without causing unnecessary regulatory intervention. We have amended clause 11.1.1(c) and (d) of the CDD amended DAU to make this clearer, particularly in response to Aurizon Network's concerns.

Conclusion

Overall, for the reasons set out above, we do not consider it appropriate to approve the 2014 DAU in respect of the scope of the proposed dispute resolution mechanism. We consider that the scope of the mechanism is not appropriate as it is too narrow. The proposed mechanism only accommodates disputes about Aurizon Network's obligations in the undertaking that are referred by access seekers and train operators and excludes other relevant parties such as access holders, prospective access seekers and customers. This would potentially enable Aurizon Network to exercise market power by limiting the scope for dispute resolution.

As a result, we consider the mechanism does not adequately balance the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act) with the interests of other parties (s. 138(2)(e) and (h)). We also consider that the mechanism was insufficiently clear and certain (s. 138(2)(h)).

Therefore, we maintain our initial draft decision that an appropriate mechanism would have a wider scope than proposed by Aurizon Network, and have also proposed some amendments in response to submissions to clarify the process.

Consolidated draft decision 6.1

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the scope of the dispute resolution mechanism.

(2) The way in which we consider it appropriate that Aurizon Network amends its draft access undertaking is to:

(a) expand the scope of the dispute resolution mechanism so that it accommodates disputes about:

(i) the operation of the undertaking by any party

(ii) the negotiation of access to prospective access seekers, not just access seekers and train operators

(b) make any other amendments as proposed in our CDD amended DAU.

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

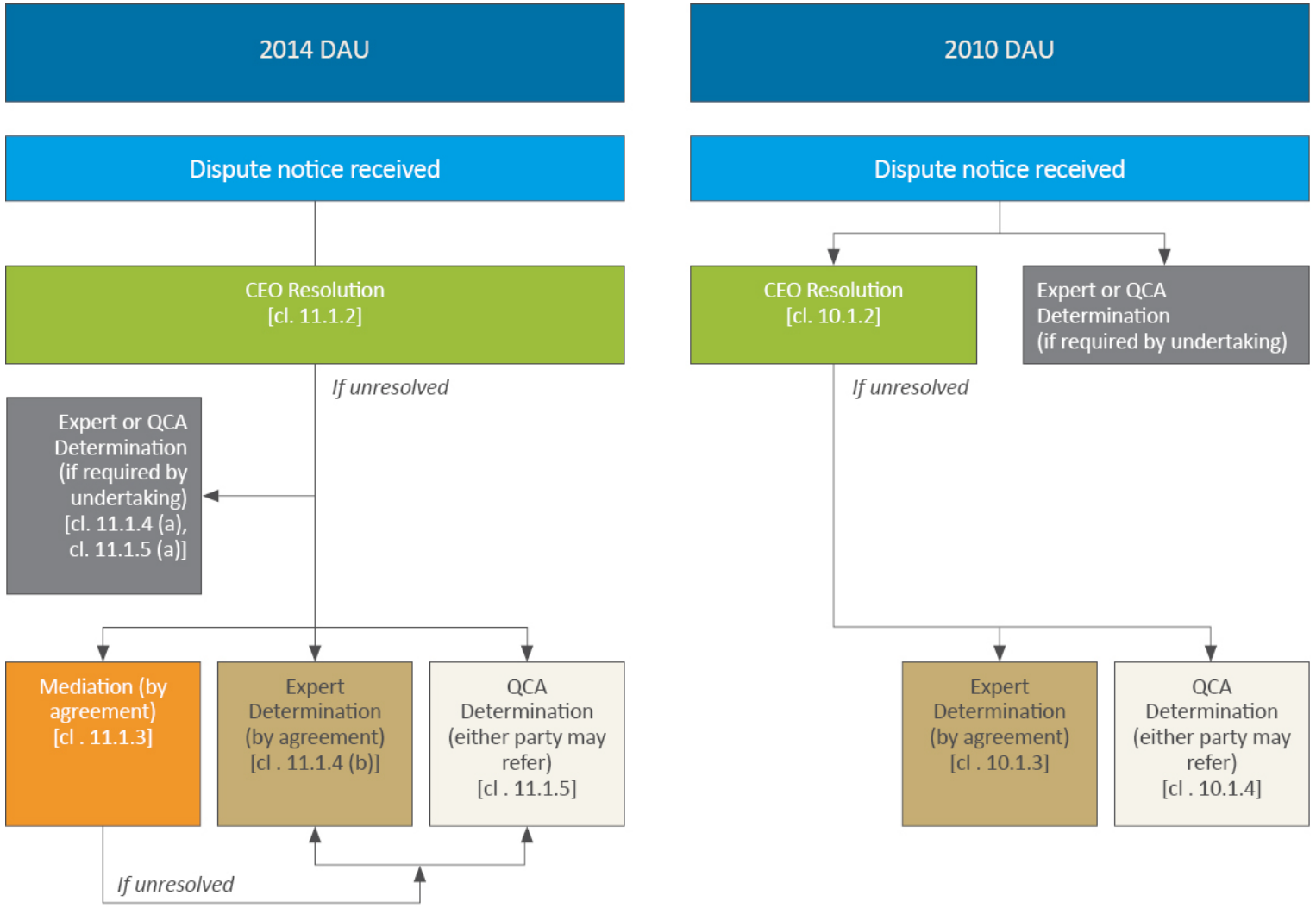
6.4 Refining processes, procedures and obligations

6.4.1 Aurizon Network's proposal

Aurizon Network's proposed dispute resolution mechanism provides a staged process for the resolution of disputes (Figure 2), timeframes for each stage of the process and guidance on allocating the costs of resolving disputes between the parties.[347]

[347] Clauses 11.1.3(a), 11.1.4, 11.1.5 and 11.1.6 of the 2014 DAU.

Figure 2 Aurizon Network's proposed dispute resolution processes compared to the 2010 AU



6.4.2 Summary of our initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposed processes, procedures and obligations in the dispute resolution mechanism, because we did not consider it appropriate to approve them, having regard to the factors in section 138(2) of the QCA Act.

As discussed in more detail in section 6.4.3 of the initial draft decision, we proposed the following amendments to address this:[348]

- limiting delays by providing for disputes to be referred to the QCA for resolution if parties cannot agree how to proceed (cl. 11.1.2(d), 11.1.3(d)(iv), 11.1.4(g), 11.1.5)
- improving transparency about the operation of the undertaking and incentivising the timely resolution of disputes by requiring Aurizon Network to keep the QCA informed about the progress of a dispute, including its outcome (cl. 11.1.1(g))
- avoiding duplication by simplifying processes and procedures for QCA determinations (cl. 11.1.5, 11.1.6)
- improving certainty and the meaningful resolution of disputes by clarifying that disputes resolved by an expert or the QCA are binding (cl. 11.1.6(b)).

These amendments also sought to address the key issues raised by stakeholders concerning the need to increase the effectiveness and efficiency of the dispute resolution mechanism. We considered these amendments were required to make the 2014 DAU appropriate for our approval under section 138(2) of the QCA Act, particularly with regard to the need to appropriately balance the rights and interests of Aurizon Network and other parties.

6.4.3 Stakeholders' comments on the initial draft decision

The QRC and Asciano[349] were generally supportive of the QCA's proposed amendments. Aurizon Network supported the rationale for making dispute resolution processes more robust and cost effective, but did not consider this would be achieved by the proposed amendments.[350] We set out the specific issues raised by stakeholders, and our response to those issues, in our analysis below.

6.4.4 QCA analysis and consolidated draft decision

Staged dispute process

As discussed in section 6.4.3 of the initial draft decision, we consider a staged resolution process, with an emphasis on commercial negotiation and appropriate timeframes, is appropriate, cost effective and consistent with the timely resolution of disputes. We therefore consider a staged approach appropriate, as it is consistent with Aurizon Network's legitimate business interests (s. 138(2)(b) of the QCA Act), the interests of access seekers and access holders (s. 138(2)(e) and (h)), and the public interest (s. 138(2)(d)).

However, we maintain our initial draft decision that it is not appropriate to approve Aurizon Network's proposed dispute resolution process overall on the basis that it does not:

- Include a provision for either party to refer a dispute to the QCA if the parties cannot reach a resolution and cannot agree how to proceed. This provision is required for the timely and

[348] Clause references that follow refer to the IDD amended DAU.
[349] QRC, 2014 DAU, sub. 42: 111-117; Asciano, 2014 DAU, sub. 76: 7, 21-22.
[350] Aurizon Network, 2014 DAU, sub. 83: 95.

effective resolution of disputes. This will be achieved by providing confidence and certainty to both Aurizon Network and other parties, which is in their interests (s. 138(2)(b), (e) and (h) of the QCA Act) and promotes efficient use of and investment in the declared service (s. 138(2)(a)).

- Provide an option for the QCA to refer a matter to an expert if requested by the parties, to recognise that some matters are best determined by experts.[351] This serves the interests of Aurizon Network and other parties (s. 138(2)(b), (e) and (h)) as it provides for a dispute to ultimately be resolved by the independent party they consider is most qualified to resolve it.

The amendments we proposed in the IDD amended DAU addressed these issues, and we consider these amendments remain appropriate in the context of our consolidated draft decision.

Keeping the QCA informed about the progress and outcome of disputes

Aurizon Network disagreed with our initial draft decision not to approve its proposed dispute resolution process because it did not include a requirement to keep the QCA informed about the progress of a dispute. Aurizon Network also disagreed with the amendments we proposed to address this issue, which require Aurizon Network to provide any notices and formal correspondence about the dispute to the QCA, including its outcome (cl. 11.1.1(g) of the IDD amended DAU). Aurizon Network argued that this requirement is impractical, time consuming and increases its administrative burden.[352]

We reiterate our view in the initial draft decision that we do not consider it is appropriate to approve a dispute resolution process that provides for insufficient transparency and oversight. An appropriate level of transparency and oversight will encourage the timely resolution of disputes and provide insights into the operation of the undertaking, which is in the interests of Aurizon Network and other parties (s. 138(2)(b), (e) and (h) of the QCA Act), as well as the public interest (s. 138(2)(d)). We consider that the benefit of increased transparency will outweigh the administration costs.

However, we agree with Aurizon Network that the inclusion of 'question' in the definition of 'dispute' could mean that the QCA must be advised of any questions formally raised by a party on Aurizon Network's obligations.[353] This was not our intention. We only consider it necessary for the QCA to be informed about disputes, not questions. Therefore, we propose to revert to Aurizon Network's proposed definition of 'dispute', which doesn't include questions.[354]

QRC preferred clear timeframes for providing information to ensure certainty of process.[355] We agree that, to overcome the issue of insufficient transparency and oversight, notices and correspondence need to be provided in a timely manner and have proposed amendments to require the information to be provided promptly.

Procedures for QCA determinations

As we did in our initial draft decision, we have not approved the proposed procedures for QCA determinations (cl. 11.1.5 and 11.1.6 of the 2014 DAU). Having regard to section 138(2)(h) of the QCA Act, we do not consider it appropriate or necessary for the undertaking to set out the

[351] Cl. 11.1.5(b) of the CDD amended DAU. As suggested by the QRC, we proposed a change to clarify that the parties must 'jointly request' the QCA to refer a matter to an expert.
[352] Aurizon Network, 2014 DAU, sub. 83: 98.
[353] Aurizon Network, 2014 DAU, sub. 83: 98.
[354] Cl. 11.1.1(a) of the CDD amended DAU.
[355] QRC, 2014 DAU, sub. 84: 112.

procedures we will follow to make a determination, as any discrepancies between these procedures and the procedures in Division 5 of Part 5 of the QCA Act will mean there is a lack of certainty and clarity about the applicable procedures. Instead, we propose that the procedures in the QCA Act will apply when disputes are referred to the QCA (cl. 11.1.5(c) of the CDD amended DAU). We also propose to reinstate clause 11.1.5(c) to (e) from Aurizon Network's 2014 DAU, with amendments.[356] While these amendments do not change the rights or obligations of any party, they help to clarify the determination process.

Section 208 of the QCA Act allows the QCA to make an order about the payment of costs associated with a determination. Accordingly, we have not set out how we would allocate costs arising from our determination. However, we generally support the equal sharing of costs, including Aurizon Network's proposal that costs of mediation and expert determinations are borne by the parties in equal shares, with each party bearing its own participation costs. We consider this is appropriate, having regard to the factors in section 138(2) of the QCA Act. In particular, this approach balances the legitimate business interests of Aurizon Network (s. 138(2)(b)) with the interests of other parties, including access seekers, access holders and train operators (s. 138(2)(e) and (h)).

Resolutions should be binding

Having regard to the factors in section 138(2) of the QCA Act, for us to consider a dispute resolution process is appropriate, we consider it must provide for a binding resolution. This will improve confidence and the certainty of outcomes for the parties involved, while reducing costs and delays. This promotes the efficient use of, and investment in, the declared service (s. 138(2)(a) of the QCA Act) and meets the interests of Aurizon Network and other parties (s. 138(2)(b), (e) and (h)). Therefore, we maintain our proposal set out in the IDD amended DAU that disputes resolved by an expert[357] or the QCA are binding.

Aurizon Network argued that the binding nature of determinations should be subject to exclusions for fraud (in addition to the exclusion for manifest error already proposed).[358] We consider this is appropriate and have amended clause 11.1.4 and 11.1.6 of the CDD amended DAU accordingly.

Other issues raised in submissions

We have addressed other issues raised in submissions to our initial draft decision in the table below. We have also proposed amendments to improve clarity and correct errors, which are not discussed here.

[356] See cl. 11.1.5(d) to (f) of the CDD amended DAU.
[357] We acknowledge Aurizon Network's submission that it had already proposed that expert determinations should be binding (in the absence of manifest error). See Aurizon Network, 2014 DAU, sub. 83: 99.
[358] Aurizon Network, 2014 DAU, sub. 83: 99.

Table 22 Various issues raised by stakeholders about dispute resolution

Issue	*Stakeholder*	*Stakeholder's comment*	*QCA response*
Chief executive resolutions (cl. 11.1.2)			
Documenting agreement cl. 11.1.2(c)	Aurizon Network	Aurizon Network said that our proposed requirement to document chief executive resolutions is inconsistent with the purpose of the process, which is to facilitate a timely and cost-effective resolution of disputes. It would be inefficient and lead to protracted negotiations on the terms of the agreement.[359]	The purpose of this requirement is to establish a history of the resolution of disputes so that we can understand whether the mechanism is working effectively. It is not our intention to include a requirement that could disrupt or frustrate negotiations. Therefore, we have proposed to remove the requirement for a signed agreement. However, we propose that Aurizon Network would still be required to provide evidence of the resolution (cl. 11.1.1(g) and 11.1.2(c)). We do not consider this requirement would be onerous because we expect that Aurizon Network would document the resolution for internal purposes. **Amendment to initial draft decision position** We maintain our initial draft decision that Aurizon Network should be required to provide evidence that agreement has been reached. However, we consider it appropriate to amend clause 11.1.2(c) to clarify that this does not need to be a signed settlement agreement.
Timeframe for providing agreement cl. 11.1.2(c)	QRC	QRC submitted that Aurizon Network should be required to provide a copy of the signed agreement to the QCA no later than 3 days after it has been signed by all parties.[360]	We agree that Aurizon Network should be required to advise the QCA in a timely manner, but not necessarily within 3 days. **Amendment to initial draft decision position** We consider it appropriate to amend this clause to require Aurizon Network to provide the information promptly.
Mediation (cl. 11.1.3)			
Timeframe cl. 11.1.3(d)	Asciano	Asciano said that the four-month timeframe for mediation is excessive. A party should be able to progress to the next stage if mediation fails earlier.[361]	We do not consider this is necessary. There is already a provision to move to the next stage earlier if the mediator considers the parties cannot achieve a mediated outcome or a party failed to participate in the process in good faith. **Amendment to initial draft decision**

[359] Aurizon Network, 2014 DAU, sub. 83: 98-99.
[360] QRC, 2014 DAU, sub. 84: 112.
[361] Asciano, 2014 DAU, sub. 76: 22.

Issue	*Stakeholder*	*Stakeholder's comment*	*QCA response*
			position None. We do not accept consider it appropriate to amend our CDD amended DAU to include Asciano's proposal.
Expert determination (cl. 11.1.4)			
Expert appointment and requirements cl. 11.1.4(b)	QRC	QRC submitted that clause 11.1.4(b)(ii) to (iv) of the IDD amended DAU should be deleted for clarity and cohesion and to simplify the expert selection process. This is consistent with the QCA-proposed simplification of the expert selection process.[362]	We agree that the clause unnecessarily complicates the expert selection process. **Amendment to initial draft decision position** We consider it appropriate to delete clause 11.1.4(b)(ii) to (iv) of the IDD amended DAU.
Written notice cl. 11.1.4(b)(vi) of the IDD amended DAU	QRC	QRC said that cl. 11.1.4(b)(vi)(B) and (D) of the IDD amended DAU should be amended to require written notice for record-keeping purposes.[363]	Amendments are not necessary because notices must be in writing to have legal effect–see clause 12.3(a). **Amendment to initial draft decision position** None. We do not consider it appropriate to make the changes proposed by QRC.
Expert appointment cl. 11.1.4(b)(vi) of the IDD amended DAU	QRC	QRC suggested reinstating the requirement that the appointed expert cannot have provided services to any party to the dispute within the previous 12 months (to ensure the impartiality of the expert).[364]	This would be too restrictive as it would limit the pool of experts available. There is already a requirement for experts to disclose conflicts of interest and to be appointed by agreement between the parties. We consider that these requirements sufficiently address concerns about impartiality. **Amendment to initial draft decision position** None. We do not consider it appropriate to make the changes proposed by QRC.
Information and materials required cl. 11.1.4(e)	QRC	QRC submitted that the obligation for the parties to assist an expert in determining a dispute should be limited to what is reasonable.[365]	There is already a provision in this clause for the parties to do what is reasonably requested by the expert, which we consider sufficient. **Amendment to initial draft decision position** None. We do not consider it appropriate to make the further changes proposed by QRC.

[362] QRC, 2015, sub. 84: 113.
[363] QRC, 2015, sub. 84: 114.
[364] QRC, 2015, sub. 84: 114.
[365] QRC, 2015, sub 84: 114.

Issue	*Stakeholder*	*Stakeholder's comment*	*QCA response*
Appointment of multiple experts cl. 11.1.4(f)	QRC	QRC sought clarity on the scenarios where multiple experts would be appointed to examine a dispute.[366]	We consider that it may be necessary to appoint more than one expert depending on the expertise required. However, appointing multiple experts should be subject to agreement between the parties. **Amendment to initial draft decision position** We consider it appropriate to amend this clause to require that multiple experts can only be appointed if the parties agree.
Procedure (cl. 11.1.6)			
Oral submissions cl. 11.1.6(a)(i)	QRC	QRC said that there should be flexibility to make a written or oral submission provided the submission made orally has been done in the presence of all other parties to the relevant dispute. QRC said this could apply in time sensitive scenarios.[367]	We acknowledge that allowing oral submissions may speed up the dispute resolution process. However, it is unclear how this would work in practice. For example, it would be difficult for the QCA to make decisions based on oral submissions and it may not be possible for all parties to be present when oral submissions are delivered. **Amendment to initial draft decision position** None. We do consider it appropriate to make the changes proposed by QRC.
Obligation to give effect to QCA determination cl. 11.1.6	QRC	QRC submitted that the following additional provisions should be included:[368] (a) parties to a dispute make reasonable endeavours to implement a determination as soon as practicable following notification of a decision (b) where a party to a dispute delays or frustrates implementation, that party bears the costs of the party associated with the delay.	In relation to the first point, we do not consider this is necessary because the determination could include timeframes for implementation, which are likely to vary depending on the nature of the issues disputed. In relation to the second point, it is beyond the QCA's power to include such a provision. **Amendment to initial draft decision position** None. We do not consider it appropriate to make the changes proposed by QRC.
QCA decision-making (cl. 11.2)			
QCA decision–making	QRC	QRC considered that the restrictions on the decision-making power of the QCA and	We do not consider it necessary to expand this clause to other parties. As the regulated entity, Aurizon Network is

[366] QRC, 2015, sub. 84: 115.
[367] QRC, sub no 84: 116.
[368] QRC, sub no 84: 116–117.

Issue	*Stakeholder*	*Stakeholder's comment*	*QCA response*
cl. 11.2		the right to seek a stay of a decision should be extended to decisions that affect parties other than Aurizon Network.[369]	the party most likely to be affected by the QCA's decisions. Expanding this clause could allow other parties to seek a review of the QCA's decision without establishing that their interests are adversely affected. It may be open for other parties to seek a review of a decision by the QCA under the *Judicial Review Act 1991 (Qld)*. **Amendment to initial draft decision position** None. We do not consider it appropriate to make the changes proposed by QRC.

Note: Clause references in this table are to the CDD amended DAU (unless otherwise stated).

Conclusion

For the reasons outlined above, we do not consider it appropriate to approve the 2014 DAU in respect of the processes, procedures and obligations of the dispute resolution mechanism. Having regard to the factors in section 138(2) of the QCA Act, it is not appropriate because it will result in unnecessary delays, insufficient transparency and uncertainty. It will also adversely affect the legitimate interests of both Aurizon Network and other parties, including access seekers, access holders and train operators. These issues undermine the section 138(2) factors in the manner discussed above.

To address these issues, we propose to amend the staged process proposed by Aurizon Network as set out in the CDD amended DAU. Without these amendments, our view is that Aurizon Network's proposed mechanism does not provide an appropriate balance between the legitimate business interests of Aurizon Network and the interests of other parties (s. 138(2)(b), (e) and (h) of the QCA Act). It is inappropriately weighted in Aurizon Network's favour and does not provide an appropriate level of certainty, clarity and transparency. With a balanced framework in place, this will provide other parties with more confidence and certainty, thereby promoting the efficient use of, and investment in, rail infrastructure (s. 138(2)(a)) and the public interest (s. 138(2)(d)).

[369] QRC, sub no 84: 117.

Consolidated draft decision 6.2

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the processes, procedures and obligations of Aurizon Network's proposed dispute resolution mechanism.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

- **(a) provide for disputes to be referred to the QCA for resolution if the parties cannot agree how to proceed**
- **(b) require Aurizon Network to keep the QCA informed of the progress of a dispute, including its outcome**
- **(c) simplify the expert appointment process**
- **(d) allow for the appointment of multiple experts**
- **(e) simplify the processes and procedures for disputes referred to the QCA to resolve**
- **(f) make the outcome of disputes resolved by the QCA binding on parties, subject to an exception for fraud**
- **(g) make any other amendments as proposed in our CDD amended DAU.**

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

7 NEGOTIATION FRAMEWORK

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

A robust and effective negotiation framework can promote fair and balanced negotiations that deliver timely outcomes and respond to changing circumstances. It can also help to address concerns that Aurizon Network could use negotiations to 'pick winners', delay proceedings or extract higher charges or better terms and conditions for itself.

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed negotiation framework because we consider it: does not provide sufficient clarity and certainty, does not appropriately balance the rights and interests of stakeholders, and will constrain competition between above-rail operators.

We consider it appropriate that Aurizon Network amends Part 4 and Schedules A, B, C and H to its 2014 DAU to:

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

Our consolidated draft decision is consistent with our initial draft decision, although we have proposed further amendments to clarify our intent.

The detailed drafting of Part 4 and Schedules A, B, C and H attached to this consolidated draft decision is consistent with our approach and shows the amendments we consider appropriate to approve the 2014 DAU.

7.1 Introduction

Access seekers[370] negotiate with Aurizon Network to agree the terms and conditions of access. A robust and effective negotiation framework can promote more successful negotiations, while protecting Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or present a commercial risk.

[370] The QCA Act defines an access seeker as 'a person who wants access, or increased access, to the service'.

7.2 Overview

7.2.1 Aurizon Network's proposal

The 2014 DAU sets out the process Aurizon Network proposes to follow to negotiate access and develop access agreements with access seekers. Part 4 proposes a framework for negotiating access, including processes, information requirements and timeframes for action. Also relevant to the negotiation framework are:

- Schedules A and B, which include the information that access seekers and Aurizon Network may be required to provide
- Schedule C, which includes the requirements for an operating plan
- Schedule H, which contains a diagram that outlines the key steps in the negotiation process.

Aurizon Network responded to stakeholders' comments on the 2013 DAU by seeking to provide additional rigour to the process and an increased obligation for it to negotiate reasonably and in good faith.[371] Aurizon Network accepted there is a role for regulation to ensure balanced commercial negotiations, but argued that extending regulation beyond the point proposed would be inefficient and distort commercial decision making.[372]

The Part 4 provisions are also linked to other elements of the 2014 DAU, including ring-fencing[373], access agreements and Standard Access Agreements (SAAs)[374], available capacity allocation and management[375], and network development and expansions.[376]

7.2.2 Stakeholders' position

In their initial submissions, stakeholders considered the 2014 DAU had addressed some of their concerns, but suggested further amendments were required to:[377]

- clarify the obligations and processes in the negotiation framework, including the information required and timeframes for its provision
- address Aurizon Network's ability to use its market power, by increasing the transparency and accountability of its decision making
- facilitate competition in above-rail markets.

Stakeholders considered these amendments would support successful negotiations by increasing certainty, transparency and regulatory oversight.

7.2.3 QCA assessment approach

The legislative framework guiding our decisions is discussed in detail in Chapter 2. Consistent with the framework, we have assessed Aurizon Network's proposed negotiation framework by having regard to the factors in section 138(2) of the QCA Act.

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[371] Aurizon Network, 2014 DAU, sub. 3: 3.
[372] Aurizon Network, 2013 DAU, sub. 2: 86.
[373] Part 3 of the 2014 DAU, see Chapter 4.
[374] Part 5 and Volume 3 of the 2014 DAU, see Chapter 8.
[375] Part 7 of the 2014 DAU; see Chapter 11.
[376] Part 8 of the 2014 DAU; see Chapter 12.
[377] Anglo American, 2014 DAU, sub. 7: 6–7, 31—34; Asciano, 2014 DAU, sub. 22: 30–34, 80–96; QRC, 2014 DAU, sub. 42: 20–23.

The relevance of these factors to our assessment of Aurizon Network's proposed negotiation framework is discussed below.

Promoting successful negotiations

We consider that the object of Part 5 of the QCA Act (s. 138(2)(a) of the QCA Act) and the public interest in having competition in markets (s. 138(2)(d)) are met when the negotiation framework:

- allows parties to negotiate access in a timely manner and at a reasonable cost
- provides some certainty over processes and obligations in negotiations, without being unnecessarily prescriptive or onerous
- facilitates customer engagement by removing barriers to participation, whether actual or perceived
- does not unnecessarily constrain competition between above-rail operators (e.g. when tendering for rail haulage contracts).

Rights and interests of Aurizon Network and other parties

We are required to have regard to the legitimate business interests of Aurizon Network (s. 138(2)(b) of the QCA Act). For instance, it is in Aurizon Network's 'legitimate business interests' to recover the efficient costs of negotiations and to receive some protection from negotiating with access seekers that are unlikely to use the access sought. We are also required to have regard to the interests of access seekers (section 138(2)(e)) and have also considered the interests of access holders[378], to the extent they are not already 'access seekers' (under s. 138(2)(h)).

We consider that the various interests of Aurizon Network and other parties are balanced when the negotiation framework:

- clearly defines negotiation procedures, including timeframes for action
- balances the exchange of information between parties
- addresses Aurizon Network's ability to use its position to delay negotiations, extract a higher price or better terms and conditions for itself, or favour its related above-rail provider
- has mechanisms to ensure accountability and transparency of Aurizon Network's decision making
- includes measures to ensure no unfair differentiation in the treatment of access seekers
- protects Aurizon Network from having to engage in protracted negotiations with parties that have no genuine interest in gaining access or represent a poor commercial risk
- ensures the fair prioritisation of access seekers.

Pricing matters

We are required to have regard to the effect of excluding existing assets for pricing purposes (s. 138(2)(f) of the QCA Act), and the pricing principles in section 168A of the QCA Act (s. 138(2)(g)). We consider these matters to be less relevant for the purposes of assessing the negotiation framework.

[378] Section 138(2)(h) of the QCA Act.

Summary of assessment approach

In assessing the appropriateness of Aurizon Network's proposed negotiation framework, we gave appropriate consideration to the factors in section 138(2) of the QCA Act by assessing whether it:

- provides a simple and timely process for applying for access and negotiating agreements
- provides relevant and accurate information in a timely manner
- promotes effective competition between train operators.

We address each of these considerations in turn in the following sections.

Interplay between Parts 4, 7 and 8

We have developed flowcharts to provide an overview of the processes in Part 4, and the interplay between Part 4, Part 7 (available capacity allocation) and Part 8 (network development and expansions). The flowcharts are provided in Appendix A (Volume 2) and reflect our CDD amended DAU.

7.3 A streamlined process for applying for access and negotiating agreements

7.3.1 Aurizon Network's proposal

Aurizon Network sought to promote balanced commercial negotiations by providing a clear and efficient path for parties to negotiate access rights, but without substantially altering the process in the 2010 AU.[379] This is summarised in the following table.

Table 23 Applying for access and negotiating agreements—Aurizon Network's proposal

Stage	*Effect*
Initial inquiries cl. 4.2, Sch A	Provides for preliminary meetings to seek clarification over the process and an exchange of preliminary information.
Application submitted cl. 4.3, 4.9, Sch B	A prospective access seeker (or train operator) can submit an access application (or request to enter a Train Operations Agreement (TOA)). Any such application must meet minimum information requirements. Aurizon Network must notify a party where the application is incomplete, specifying what information is required for the application to be complete. Aurizon Network can also request additional evidence required to assess capacity allocation related issues and to prepare the Indicative Access Proposal (IAP).
Acknowledgement of access application cl. 4.4	Aurizon Network will acknowledge a properly completed access application and confirm it will prepare an IAP. Aurizon Network can suspend negotiations for access where capacity is not available, pending agreement on the scope and terms of the required expansion. Aurizon Network can reject an application for access rights commencing more than 5 years after the application was received. It can also reject applications proposed to commence between 3 and 5 years away in certain circumstances.
Revisions	An access seeker can revise its access application, provided that the revision does

[379] Aurizon Network, 2013 DAU; sub. 77: 26

Stage	*Effect*
cl. 4.5, 4.10.2	not represent a material variation.
IAP cl. 4.6	Aurizon Network will develop an IAP for the access rights sought. An access seeker can notify Aurizon Network if it believes the IAP is not an appropriate basis for continuing negotiations. Aurizon Network will respond, and may revise the IAP in response to those concerns.
Negotiation process cl. 4.7, 4.10, 4.11, 4.12, Sch. A, Sch. C	The negotiation period for an access seeker (or train operator) commences when it provides a notification of intent (or provides all the relevant information for a TOA). During the negotiation period the parties endeavour to agree on the terms and conditions of access. Unless otherwise agreed, the terms and conditions are those provided in the relevant SAA. During the negotiation period, parties will commence an interface risk assessment and may prepare an Interface Risk Management Plan (IRMP). The negotiation period for an access seeker (or train operator) ceases in defined circumstances. Aurizon Network can recover its reasonable costs if it ceases negotiations because it believes the access seeker does not intend to obtain, or fully use, the access rights at the level sought.
Primacy for end users cl. 4.8, 4.9, 4.10	Provides primacy to end users (or a railway operator nominated by the end user). A train operator must include a copy of their nomination by an end user as part of its request to enter a TOA.

Note: Clause references in this table are to the 2014 DAU.

7.3.2 Summary of our initial draft decision

In our initial draft decision, we acknowledged Aurizon Network's endeavours to improve the efficacy of Part 4. However, we made an initial draft decision to reject Aurizon Network's proposed approach. We then indicated the amendments we considered were appropriate to simplify and provide a timely process for negotiations (as discussed in more detail in section 7.3.3 of the initial draft decision).

Improving the balance between the rights and interests of Aurizon Network and other parties

We were concerned that Part 4 of the 2014 DAU did not adequately balance the rights and interests of Aurizon Network and other parties, and continued to provide Aurizon Network with significant discretion in decision making. We determined that it was appropriate for a number of amendments[380] to be made to increase the transparency and accountability of decision-making.

Recovery of costs

We did not accept Aurizon Network's proposal that it was appropriate to recover its costs if it ceased negotiations on the basis that the access seeker did not intend to obtain or use access rights at the level sought.

Negotiating with access seekers is Aurizon Network's core business, and we considered these activities are sufficiently accounted for as part of its operating costs. Moreover, given the significant information requirements that access seekers must meet, we considered the likelihood of negotiating with a party that does not intend to use the access rights sought, is low.

[380] Including to clauses 4.3(c), (c)(ii), (e); 4.4 (d), (e), (g), (j); 4.5(c), (d), (f); 4.10.1 (d)(iii), 4.10.2(c); 4.8 and 4.12 of the 2014 DAU.

Cessation of negotiations

We did not accept the provisions that dealt with disputes over whether Aurizon Network was entitled to cease negotiations. We agreed with stakeholders[381] that they were unduly in Aurizon Network's favour because they substantially softened Aurizon Network's obligations to comply with the negotiation cessation provisions. We considered it was appropriate that Aurizon Network amend its draft access undertaking so that it would still be in breach of its obligations even if it made a good faith and reasonable attempt to comply.

Clarity and certainty

We considered it was appropriate that Aurizon Network amend its draft access undertaking to improve clarity and allow negotiations for access to proceed quicker and with greater certainty for all parties.[382]

We also considered it was appropriate that Aurizon Network amends its draft access undertaking by updating Schedule H of the 2014 DAU to reflect the amended arrangements, including clearly identifying linkages between the negotiation framework and other parts of the undertaking. We considered that diagrams of the negotiation process would provide greater clarity and certainty over the processes and links to other parts of the undertaking, which is in the interests of all parties. The diagrams are particularly important given the strong linkages between the negotiation framework and the processes for the allocation of available capacity[383] and network development and expansions.[384]

7.3.3 Stakeholders' comments on our initial draft decision

Aurizon Network substantially agreed with our initial draft decision, but commented on specific issues.[385] Aurizon Operations also expressed broad support, noting that it is representative of the interests of all stakeholders, but raised concerns that it was overly prescriptive and restrictive, both in terms of how a negotiation is conducted and the scope of matters subject to negotiation.[386]

Aurizon Network and other stakeholders commented on specific aspects of our initial draft decision. We have addressed these comments in Table 24 below.

7.3.4 QCA analysis and consolidated draft decision

After having regard to the QCA Act section 138(2) factors and stakeholder submissions, we do not consider it appropriate to approve the 2014 DAU in respect of the process for applying for access and negotiating agreements.

Consistent with our views in the initial draft decision, we acknowledge Aurizon Network's efforts to improve the negotiation framework, but refuse to approve the process as a whole, because:

[381] Anglo American, 2014 DAU, sub. 8; QRC, 2014 DAU, sub. 42: 23; sub. 37; Asciano, 2014 DAU, sub. 22: 33—34.
[382] See clauses 4.3(c); 4.4(a), (c), and (d); 4.5; and 4.12 of the 2014 DAU.
[383] Part 7 of the 2014 DAU; see Chapter 11.
[384] Part 8 of the 2014 DAU; see Chapter 12.
[385] Aurizon Network, 2014 DAU, sub. 83: 100—104.
[386] Aurizon Operations, 2014 DAU, sub. 93: 6.

(a) it does not adequately balance the rights and interests of Aurizon Network and other parties and continues to provide Aurizon Network with significant discretion in its decision-making

(b) the negotiation cessation provisions are substantially in Aurizon Network's favour

(c) there is too little certainty, clarity and transparency around the negotiation process.

We maintain our initial draft decision that Aurizon Network's proposal does not appropriately balance the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act) against the legitimate business interests of Aurizon Network (s. 138(2)(b)). A lack of confidence and transparency in negotiations is inconsistent with promoting efficient investment in significant infrastructure (ss. 138(2)(a) and 69E) and the public interest (s. 138(2)(d)).

The way in which we consider it appropriate for Aurizon Network to amend its draft access undertaking is set out in our CDD amended DAU. These amendments substantially reflect the IDD amended DAU, except that they address specific issues raised by stakeholders since our initial draft decisions, most notably those outlined in the table below. Clause references are to our CDD amended DAU (unless otherwise stated).

Table 24 Applying for access and negotiating agreements—stakeholders' comments

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
Clause 4.1—Overview			
Extensions for disputes cl. 4.1(f)	Aurizon Network	The clause should clarify how the proposed time extension applies. It seems to apply to the negotiation period, even if the dispute is raised during the (earlier) IAP development phase. In this situation, the extension should apply to the timeframe for developing an IAP.[387]	We agree that extensions should apply to the stage in the process that the dispute is raised and have proposed amendments to the relevant clauses.
Clause 4.4—Acknowledgement of Access Application			
Joining a queue—contingent on receiving acknowledgement notice 4.4(b)	Anglo American	Joining the queue should not be contingent on the receipt of an acknowledgement notice. If Aurizon Network does not issue a notice, an access seeker may lose its position in a queue.[388]	We do not consider that amendments are necessary. An access seeker can bring a dispute if it does not receive a notice in accordance with the undertaking and their position in the queue would be determined as part of that process (if applicable).
Joining a queue—where expansion is required 4.4(b)(ii) and 4.4(c)(ii)	Asciano	Changes that clarify the process for access applications requiring an expansion are supported. Clarification is sought about whether an application for access rights that can only be provided with an expansion would automatically join the queue.[389]	See clarifying amendments proposed to clause 7.5.2 in respect of the formation of the queue.

[387] Aurizon Network, 2014 DAU, sub. 83: 106.
[388] Anglo American, 2014 DAU, sub. 95: 45.
[389] Asciano, 2014 DAU, sub. 76: 14.

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
Resumption of negotiations when expansion is required 4.4(d)(vi)(A)	QRC	Providing for the suspension of negotiations until there is agreement on how the expansion is funded, is too vague and uncertain. The suspension should be lifted where 'planned capacity' exists and it is possible for it to be allocated to the relevant access seeker[390]	In our view, suspension until agreement is reached is not vague and uncertain. However, we have proposed amendments to clarify that the suspension will be lifted when the parties enter into an agreement in accordance with clause 8.8.1. We consider that deferring negotiations until planned capacity is in place and can be allocated may not be in the interests of either access seekers or Aurizon Network. We have accordingly made no change to reflect QRC's proposal.
Lead time when lodging an application 4.4(g)	QRC	The QCA's proposal to allow a lead time of five years for lodging an application is supported. A compromise whereby an access seeker would be required to justify a lead time of more than three years would also get support.[391]	We maintain our initial draft decision to propose to extend the lead time to five years, because it will better accommodate long lead times in mine assessment and development. This is in the interests of access seekers.
Clause 4.5—Revisions to access applications			
Provisions for revisions to an access application cl. 4.5(a)	Aurizon Network	Access seekers should be limited to requesting material variations prior to the acceptance of the IAP. Allowing access seekers to request material variations after this point means they still maintain their place in the queue, which may adversely impact other access seekers.[392]	We agree with Aurizon Network that an access seeker should not be able to maintain its place in the queue if it requests a material variation after accepting the IAP. We consider this is not in the interests of other access seekers. We have sought to address this issue in clause 4.5(j).
Extension of the time to develop an IAP cl. 4.5(d)	Aurizon Network	If a material variation to the access application is requested, the proposed five-day extension to develop an IAP is insufficient.[393]	We do not consider there is a requirement for the IAP to be developed within five days, but rather for the IAP to be provided within a reasonable time.
Various proposed drafting amendments cl. 4.5	QRC	The QRC supports attempts to streamline processes for revisions to access applications, but proposed a number of drafting amendments to ensure: • the process and timeframes for	We have considered QRC's proposed changes and have proposed amendments where we consider they improve clarity and better reflect the intent of the provisions.

[390] QRC, 2014 DAU, sub. 84: 23.
[391] QRC, 2014 DAU, sub. 84: 23.
[392] Aurizon Network, 2014 DAU, sub. no. 83: 103–104.
[393] Aurizon Network, 2014 DAU, sub. no. 83: 104.

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
		requesting a variation are clear • there are no unintended consequences of the treatment of variations, particularly in the context of the reinstatement of the queuing mechanism.[394]	
Clause 4.6—Indicative Access Proposal			
Timeframe for expiry of an IAP cl. 4.6(e)	Asciano	The timeframe for the expiry of an IAP should be 90 days, not 60 days, which would be consistent with the 2010 AU.[395]	Asciano has not provided a strong case to change to 90 days, so we have proposed to maintain the 60 day timeframe.
Obligation to prepare an IAP cl. 4.6(h) of the 2014 DAU	Aurizon Network	It appears that the proposed deletion of this clause is an error as it is unreasonable to require Aurizon Network to continue negotiations without a counter-party.[396]	We propose to reinstate this clause, as it appears to have been deleted in error.
Clause 4.8—Multiple applications for the same Access			
Negotiating with multiple access seekers cl. 4.8(a)(ii)(B)	QRC	It is unclear why Aurizon Network would be required to negotiate with multiple train operators when one of those operators is a party to an existing haulage agreement with the customer in respect of the access rights being sought.[397]	Negotiations with a railway operator may only relate to part of the access rights sought or may relate to an existing agreement with a railway operator that is due to expire or requires revision to accommodate the access rights sought.
Clause 4.10—Negotiation Process			
Extensions for disputes cl. 4.10.1(c)(iv)(D)	Aurizon Network	Changes to remove any extension to the time period for negotiations that are subject to a dispute seem to be inconsistent with clause 4.1(f) that provides for such an extension.[398]	Consistent with the amendments discussed above in relation to clause 4.1(f), we have proposed amendments to clarify the drafting.
Confidential information cl. 4.10.1(d)(iii)	Aurizon Network	The requirement to provide an evidence-based explanation as to why available capacity is being reduced may require disclosure of information about the access rights of other parties. Evidence should be limited to information that can be provided within the confidentiality provisions in the undertaking.[399]	We accept that confidential information should not be disclosed and have proposed amendments to clarify the drafting.

[394] QRC, 2014 DAU, sub. 84: 23–24; sub. 85.
[395] Asciano, 2014 DAU, sub. 76: 14.
[396] Aurizon Network, 2014 DAU, sub. no. 83: 106.
[397] QRC, 2014 DAU, sub. 84: 24.
[398] Aurizon Network, 2014 DAU, sub. 83: 106.
[399] Aurizon Network, 2014 DAU, sub. 83: 102.

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
Ceasing negotiation period cl. 4.10.1(e)	Asciano	If it is not possible to enhance rail infrastructure to provide the access rights sought, the access seeker should be placed in the queue until available capacity can potentially be created in the future.[400]	We acknowledge Asciano's view, but consider that it is reasonable for the negotiation period to cease in situations where infrastructure cannot be enhanced (e.g. no party is willing to fund it or it is technically impossible). We also note that this was not raised as a concern by other stakeholders, such as the QRC.
Limitation of IRMP development cl. 4.10.2(c) and Schedule A, cl. 1(n)	Aurizon Network	Aurizon Network disagrees with the proposal that it could only undertake an IRMP when there are material differences between proposed and existing operations. That could reduce Aurizon Network's ability to effectively manage risk and safety interfaces, as required under legislative obligations. It also disagrees with proposed changes to Schedule A for similar reasons.[401]	We consider that the safety management issues would likely constitute material differences between existing and proposed operations. However, we note Aurizon Network's concerns and accept the importance of the issues raised. Therefore, we have proposed clarifying amendments to address Aurizon Network's concerns.
Non-availability requirements cl. 4.10.2(e)	Aurizon Network	Aurizon Network agrees to this clause in the interests of resolving Part 4, but considers it may lead to inefficient capacity allocation. For example, capacity may be allocated on the basis of information being provided in the future, or there may be impediments to allocating capacity to users who are ready and able to operate.[402]	We acknowledge this view, but consider that it is appropriate to retain this clause in the interests of access seekers. However, we would appreciate Aurizon Network providing evidence that the clause is leading to the inefficient allocation of capacity.
Clause 4.12—Cessation of negotiations			
When a negotiation cessation notice may be given cl. 4.12(c)(ii)(B)	Aurizon Network	Aurizon Network queries whether proposed amendments to exclude railway operators are in error. Railway operators should provide evidence they have secured rail haulage rights for a customer's mine.[403]	We agree and have proposed drafting changes to address this concern.
Wrongful cessation of negotiations cl. 4.12(d) of 2014 DAU	Aurizon Network	Aurizon Network disagrees with the proposed removal of this provision (relating to wrongful cessation of negotiations and allocation of liability where a dispute is resolved	We maintain our view that this clause unduly favours Aurizon Network at the expense of access seekers. Wrongfully ceasing negotiations

[400] Asciano, 2014 DAU, sub. 76: 14.
[401] Aurizon Network, 2014 DAU, sub. 83: 102–103.
[402] Aurizon Network, 2014 DAU, sub. 83: 102.
[403] Aurizon Network, 2014 DAU, sub. 83: 106.

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
		in favour of the access seeker). The provision does not adversely affect access seekers because the cessation is not valid until the dispute is resolved in Aurizon Network's favour. However, removing the provision increases Aurizon Network's risk, with the potential consequence of a breach of the undertaking, even where its actions were in good faith.[404]	is not costless to access seekers. For instance, there are direct costs of resolving disputes, as well as indirect costs of delays while the dispute is resolved. We maintain our view that Aurizon Network should be considered in breach of its obligations even if it made a good faith and reasonable attempt to comply.
Recovery of costs cl. 4.12(e) of 2014 DAU	Aurizon Network	There is broad stakeholder agreement for direct cost recovery rather than socialising the costs across access holders.[405]	We consider that it is difficult and impractical to separate out a direct charge from Aurizon Network's mostly overhead costs. We are also concerned that there is scope for Aurizon Network to over-recover its costs.
Proposed reinstatement of queuing mechanism			
Related provisions to support reintroduction of queuing mechanism cls. 4.6 and 4.10	Anglo American	The QCA has not reintroduced all of the provisions relevant to the reinstatement of the queuing mechanism (see Chapter 11 of the consolidated draft decision). In particular:[406] • there should be a requirement (in clause 4.6) for the IAP to include a response regarding the position of the access seeker in the capacity queue • there should be a requirement (in clause 4.10) for Aurizon Network to notify an access seeker if they are going to be moved or removed from the queue and to allow the access seeker time to rectify any problems with its access application.	In relation to the first dot point, we do not consider this necessary because there is already a provision in clause 7.5.2(g) to provide access seekers with enough certainty as to their position in the queue. In relation to the second dot point, we consider that it would be difficult for Aurizon Network to manage this in practice. We note that the process for managing the queue is set out in clause 7.5.2 and, in our view, it is appropriate.

We consider that our proposed amendments address the reasons for refusing to approve Aurizon Network's proposal, by providing an appropriate balance between the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act) and the legitimate business interests of Aurizon Network (s. 138(2)(b)). Providing confidence and transparency in negotiations is also consistent with promoting efficient investment in significant infrastructure (ss. 138(2)(a) and 69E) and the public interest (s. 138(2)(d)).

[404] Aurizon Network, 2014 DAU, sub. 83: 103.
[405] Aurizon Network, 2014 DAU, sub. 83: 101.
[406] Anglo American, 2014 DAU, sub. 95: 30–31.

We have also made amendments to clarify the drafting of some clauses in response to issues raised by stakeholders, which we have not discussed.

Consolidated draft decision 7.1

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the process for applying for access and negotiating agreements.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

(a) address Aurizon Network's ability to use its position to delay negotiations and increase the transparency and accountability of its decision-making

(b) clarify the process for applying for access and negotiating agreements and increase certainty over the process

(c) make other amendments as reflected in our CDD amended DAU.

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

7.4 Providing relevant and accurate information in a timely manner

Parties should have access to relevant, accurate and up-to-date information. Negotiations are more likely to be effective and concluded quickly when parties have the information they need to make decisions. However, parties should not be obliged to provide any more information than what is reasonably available and necessary, particularly in the earlier stages of the process.

The information required to negotiate access should take account of information made available elsewhere in the 2014 DAU. This includes information related to network development and expansions[407], the Network Management Principles[408], and information provided through public reporting requirements.[409]

7.4.1 Aurizon Network's proposal

Part 4 of the 2014 DAU obliges Aurizon Network, access seekers and train operators to provide information throughout the application and negotiation process to facilitate negotiations and support transparent decision making. Aurizon Network's proposal is summarised in the following table.

[407] Part 8 of the 2014 DAU; see Chapter 12.
[408] Schedule G of the 2014 DAU; see Chapter 13.
[409] Part 10 of the 2014 DAU; see Chapter 5.

Table 25 Information requirements—Aurizon Network's proposal

Note:	***Stage***	***Information provided/required/requested***
	Initial inquiries cl. 4.2, Sch A	Aurizon Network must provide information to prospective access seekers either on its website (technical and operational information and standards) or on request (capacity information including the Master Train Plan (MTP) and the Daily Train Plan (DTP)).
Clause reference:	Application submitted cls. 4.3, 4.9, Sch B	An access application (or a request to enter a TOA) includes detailed information on planned operations (and also confirms that the train operator has been nominated by the end user). Schedule B sets out the access application information requirements including specific arrangements for transfers and renewals. Aurizon Network must notify a party where the application is incomplete, specifying what information is required for the application to be complete. Aurizon Network can cease negotiations if the requested information is available, but is not provided.
	Acknowledgement of access application cl. 4.4	Aurizon Network will acknowledge a properly completed access application and confirm it will prepare an IAP. Parties can suspend negotiations for access where capacity is not available, by written notice giving reasons. If access negotiations are suspended, the access seeker must confirm its ongoing requirement for access rights and any material change to the information contained in their access application; and provide information of their ability to fully use the requested access rights.
	Revisions cls. 4.5, 4.10.2	Aurizon Network will give a written notice of its view that a revision is a material variation.
	IAP cl. 4.6	Aurizon Network will prepare an IAP for the rights sought. This includes an initial capacity assessment except where the system rules indicate, or Aurizon Network considers, such an assessment is not required (and Aurizon Network has notified the access seeker of the reasons why the assessment is not required).
	Negotiation process cls. 4.7, 4.10, 4.11, 4.12, Sch A, Sch C	An access seeker must notify Aurizon Network of its intention to progress its access application under the IAP prior to the expiry of the IAP. Aurizon Network will provide the access seeker relevant additional information and any requested capacity information (as set out in Schedule A). The access seeker (other than end user) or train operator must prepare an operating plan (as set out in Schedule C) and demonstrate the rolling stock and rolling stock configurations meet the required standards. Aurizon Network can seek further information from the access seeker on any matter to be addressed during negotiations, or on the access seeker's ability to fully use the requested access rights.
	Primacy of end users cls. 4.8, 4.9, 4.10	Aurizon Network may disclose to a customer that a railway operator has submitted an access application for the same access or that that there are multiple access applications for the same access. Such disclosures will not constitute a breach of the confidentiality obligations owed. A train operator must provide a copy of its nomination as part of its application for a TOA.

Note: Clause references in this table are to the DAU 2014.

Schedules A and B of the 2014 DAU set out the specific information requirements to support the application process. Schedule C sets out the operating plan requirements. Aurizon Network advised that Schedule C seeks to expand the 2010 AU requirements to reflect best practice arrangements for providing a detailed description of how the train service will operate.

In response to stakeholder comments on the 2013 DAU, Aurizon Network also included provisions in Part 4 of the 2014 DAU that require it to provide access seekers with relevant and

accurate information in a timelier manner, and appropriately constrain the nature and type of information that it can request and require from access seekers.[410]

7.4.2 Summary of our initial draft decision

Our initial draft decision was to reject Aurizon Network's proposal in relation to information requirements. We supported Aurizon Network's objective for access applications to provide sufficient information to progress the application process, but considered that the undertaking should account for circumstances where information is not reasonably available.[411]

We were also concerned that Part 4 and Schedule B did not adequately balance the rights and interests of Aurizon Network and other parties. To address this imbalance we considered it appropriate that Aurizon Network amends its draft access undertaking to better focus information requests[412], limit the additional information Aurizon Network may request from access seekers[413] and remove the requirements for an access seeker to confirm their ongoing requirement for access rights.[414] We also strengthened Aurizon Network's obligations to provide accurate and up-to-date information[415] and to advise access seekers of decisions.

We proposed these amendments having regard to other parts of the 2014 DAU, namely network capacity, network development, expansions and reporting. We also sought to ensure confidential information is dealt with appropriately.[416]

7.4.3 Stakeholders' comments on our initial draft decision

Aurizon Network substantially agreed with the QCA's proposed amendments.[417] However, Aurizon Network and other stakeholders made a number of specific comments, which we have outlined and addressed in Table 26 below.

7.4.4 QCA analysis and consolidated draft decision

After having regard to the QCA Act section 138(2) factors and stakeholder submissions, we do not consider it appropriate to approve the 2014 DAU in respect of information requirements.

Consistent with the reasons in our initial draft decision (see section 7.4.3 of our initial draft decision), we refuse to approve Aurizon Network's proposed arrangements in respect of information requirements because the proposal does not appropriately balance the interests of access seekers and access holders (s. 138(2)(e) and (h) of the QCA Act) against the legitimate business interests of Aurizon Network (s, 138(2)(b)).

The way in which we consider it appropriate for Aurizon Network to amend its draft access undertaking is set out in our CDD amended DAU. These amendments substantially reflect the IDD amended DAU, except that they address specific issues raised by stakeholders since our initial draft decision, most notably those outlined in the table below. Clause references are to our CDD amended DAU (unless otherwise stated).

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[410] Aurizon Network, 2014 DAU, sub. 3: 44, 46, 53, 55–57, 69, 75, 78.
[411] Clauses 4.3(g), 4.4(k), 4.5(f) and 4.10.2(e)) of the IDD amended DAU.
[412] Clauses 4.4(i)(i) and 4.12(c) of the IDD amended DAU.
[413] Clauses 4.3(c) and 4.4(i) and Schedule B of the IDD amended DAU.
[414] Clauses 4.4(i)(i) and (j) of the IDD amended DAU.
[415] Clauses 4.2(d) and 4.4(i)(ii) of the IDD amended DAU.
[416] Schedule A, cl. 2 of the IDD amended DAU.
[417] Aurizon Network, 2014 DAU, sub. no. 83: 104.

Table 26 Information requirements—stakeholders' comments

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
Cl. 4.3—Access Application and cl. 4.5—Revisions to an Access Application			
Level of information in access applications cls. 4.3(c)(ii)(A) and 4.5(f)(ii)	Asciano	Access seekers should not be required to provide information in their application about their ability to use the requested access rights. This information is not necessary to develop an initial response, has the potential to delay the process and allows Aurizon Network to deem an application withdrawn if the information is not received.[418]	We consider this information is important, even at an early stage of the process. Otherwise, it may be a waste of time and money for Aurizon Network to develop an IAP. We consider this in the interests of Aurizon Network, other access seekers and access holders. We note that the provision is limited to information that is 'reasonably required' and accommodates circumstances where the information is not available.
Cl. 4.4—Acknowledgement of Access Application			
Information about joining a queue cl. 4.4(b)(ii)	Aurizon Network	It is premature to provide information in an Acknowledgement Notice as to whether the access seeker has joined the queue, because a capacity analysis may need to be undertaken before it can be determined that a queue is required. The IAP is a more appropriate stage to provide this information.[419]	We are of the view that the queue can be formed regardless of whether or not a capacity analysis is required. We consider it to be in the interests of access seekers that, if relevant, they join the queue when their application is deemed to have been received in accordance with clause 4.4(b).
Information about mitigating capacity constraints cl. 4.4(e)	Aurizon Network	It is unreasonable to explain in an Acknowledgement Notice why an identified capacity constraint cannot be mitigated. This may require an assessment of operational improvements with third parties or changes to existing contracts, which cannot be done within the timeframes for providing the notice.[420]	Aurizon Network should be sufficiently aware of its capacity and operational capability to be able to reasonably provide information about possible capacity constraints. The provision of such information would be in the interests of access seekers. Notwithstanding this, we have proposed amendments to require information to be provided to the extent that it is available.
Timeframe for	Aurizon	Aurizon Network: There is no	We accept the inclusion of a

[418] Asciano, 2014 DAU, sub. 76: 13–14.
[419] Aurizon Network, 2014 DAU, sub. 83: 104.
[420] Aurizon Network, 2014 DAU, sub. 83: 104.

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
providing certain information cls. 4.4(i)(i) and 4.4(j)	Network and QRC	timeframe specified for the customer to provide the required information, even though the information must be provided within the required timeframe (cl. 4.4(j)).[421] Aurizon Network and QRC: A timeframe of 20 business days is proposed.[422]	20-business-day timeframe, noting that it was proposed by both Aurizon Network and QRC.
Notice period when changes to an expansion impact access application cl. 4.4(i)(ii)	Aurizon Network	The obligation to provide notice within 10 business days of becoming aware of a change is too onerous. Also, notice provisions should be dealt with in Part 8, not Part 4, since a customer may choose to participate in accordance with the principles in Part 8 if it is seeking access as part of an expansion.[423]	We have proposed amendments to require information to be provided as soon as practicable, but consider that the requirement appropriately fits in Part 4.
Schedule A—Preliminary, Additional and Capacity Information			
Information on track segments and mainline paths cl. 1(h)	Asciano	Asciano is concerned about the non-provision of maps and diagrams regarding track segments and mainline paths and the exact intent of the concepts of track segments and mainline paths.[424]	We have proposed to retain the 2010 AU provisions about line diagrams in Part 3.
Restricting information for confidentiality reasons	QRC	QRC disagrees with broad exclusions to provide information to access seekers. This information is essential to ensure transparency and open access and should not be subject to broad confidentiality obligations.[425]	We consider that the confidentiality of information takes precedence over transparency.
Schedule B—Access Application Information Requirements			
Operators seeking access rights for customers cl. 3(a)	QRC	Where an access seeker is seeking access rights that will be used by a customer, it should be required to provide evidence that the proposed customer agrees to the access seeker acting on its behalf.[426]	We agree with this proposal in the interests of certainty and clarity for customers.
Power to obtain further information cl. 6(g)	QRC	The clause should restrict Aurizon Network's power to obtain further information, consistent with proposed restrictions in Part 4.[427]	We consider further information should only be provided if it is reasonably available (in line with the non-availability requirements in

[421] Aurizon Network, 2014 DAU, sub. 83: 105
[422] Aurizon Network, 2014 DAU, sub. 83: 105; QRC, 2014 DAU, sub. 83: 5.
[423] Aurizon Network, 2014 DAU, sub. no. 83: 105.
[424] Asciano, 2014 DAU, sub. 76: 23.
[425] QRC, 2014 DAU, sub. 84: 25.
[426] QRC, 2014 DAU, sub. 84: 26.
[427] QRC, 2014 DAU, sub. 84: 26.

Issue	*Stakeholder*	*Stakeholder's comments*	*QCA response*
			Part 4). We agree it is appropriate for consistency between Part 4 and Schedule B.
Footnote about renewals (footnote 5 in the IDD amended DAU)	QRC	The footnote about when a renewal exists should be deleted to avoid confusion. Whether or not a renewal exists should depend on the operative provisions of the undertaking.[428]	We agree with deleting the footnote.
Information requirements are excessive	Asciano	The additional information required by Aurizon Network is excessive and unnecessary.[429]	We have assessed the information requirements and consider them reasonable for the purposes of an access application.
Schedule C—Operating Plan and Other Plan Requirements			
Information on profiling and veneering cl. 1.1	Asciano	Asciano is concerned that profiling and veneering are required in a train operator's plan as these functions are typically controlled by miners at the mine load out.[430]	While profiling and veneering are controlled by mines, train operators would need this information as part of the operating plan. We consider that this obligation can be managed by passing the requirement through to customers in their haulage agreements.

We consider that the amendments contained in our IDD amended DAU, as refined in our CDD amended DAU, appropriately address the reasons for refusing to approve Aurizon Network's proposal, by providing an appropriate balance between the rights and interests of the various parties (s. 138(2)(b), (e) and (h) of the QCA Act). Our proposed amendments will enable stakeholders to have access to information to make informed decisions in a timely manner, and improve the efficiency of the negotiation process, which will promote the economically efficient use of, and investment in, rail infrastructure (s. 138(2)(a)) and the public interest (s. 138(2)(d)).

We have also made amendments to clarify the drafting of some clauses in response to issues raised by stakeholders, which we have not discussed.

[428] QRC, 2014 DAU, sub. no. 84: 26.
[429] Asciano, 2014 DAU, sub. 76: 23.
[430] Asciano, 2014 DAU, sub.76: 23.

Consolidated draft decision 7.2

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the information requirements for negotiating access.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

(a) better balance Aurizon Network's and other parties' rights and interests, relating to the nature and type of information provided as part of the process

(b) clarify the nature and type of information Aurizon Network provides, and can request or require, and increase certainty over when this information is to be made available (as set out in the marked changes to Part 4, Schedule A and Schedule B in our CDD amended DAU)

(c) make other amendments as reflected in our CDD amended DAU.

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

7.5 Facilitating competition in above-rail markets

7.5.1 Aurizon Network's proposal

Part 4 of the 2014 DAU separately sets out how Aurizon Network will deal with parties that want to:

- negotiate an access agreement (as an operator, access holder or end user)
- enter into a TOA under the alternative form of SAA.[431]

A train operator wishing to enter into a TOA under the alternative SAA is not treated as an access seeker.[432] Instead, the 2014 DAU outlines how a train operator will participate in the negotiation process. Aurizon Network sought to establish a structure that gives primacy to the end user as the 'access seeker', because it is the party who will eventually contract for the access rights.

Part 4 also requires a train operator to be nominated by an end user for particular functions in the negotiation process, including:[433]

- requiring a prospective train operator to provide Aurizon Network with notification that it has been nominated by an end user as part of its request to enter a TOA (cl. 4.9(a)(ii))
- requiring an end user to nominate a train operator as an access seeker where there are multiple applications from train operators for the same access (cl. 4.8(a)(ii)) and allowing Aurizon Network to suspend negotiations until an operator is nominated (cl. 4.8(c))

[431] These agreements allow an end user to contract for long-term access rights while its operator contracts with Aurizon Network regarding the operational requirements of running train services using those access rights.
[432] Although a railway operator can be treated as an access seeker in certain circumstances (e.g. if it has been nominated by the customer as the access seeker, see cl. 4.8 of the 2014 DAU).
[433] Clause references that follow are to the 2014 DAU.

- providing for an end user to nominate an operator to act on its behalf for the purposes of assisting it with its access application, including in negotiations with Aurizon Network (cl. 4.8(b))
- providing for an end user to nominate its train operator during the negotiation period, if it has not already done so (cl. 4.10.2(a)(i)).

7.5.2 Summary of our initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposal to require a customer to nominate a train operator, when there are multiple applications for the same access rights. We considered that Aurizon Network's proposal may restrict competition between train operators and proposed amendments to require Aurizon Network to continue negotiating with all train operators until a nomination is made.

However, we acknowledged that this may increase the complexity and costs of negotiations and we proposed amendments to mitigate these costs. These included requiring Aurizon Network to only continue negotiations with multiple train operators if they are negotiating (or a party to) a haulage agreement with a customer (cl. 4.8 of the IDD amended DAU). We agreed with Aurizon Network's proposal that a train operator should be allowed to negotiate access on a customer's behalf, but proposed amendments to simplify and streamline processes (cl. 4.9.1 of the IDD amended DAU).

Overall, we considered our proposed amendments would maintain the benefits of providing for competition between operators while minimising the costs of progressing multiple negotiations for the same access rights.

7.5.3 Stakeholders' comments on our initial draft decision

Aurizon Network submitted that the amendments indicated in our initial draft decision would not impact on competition in the above-rail market given the prescriptive nature of the TOD, but accepted the initial draft decision subject to the resolution of specific issues.[434]

QRC[435] and Vale[436] supported the proposed amendments to clause 4.9.1 as providing greater flexibility for customers regarding the progression of an access application.

We have addressed specific issues raised by Aurizon Network and QRC in the QCA analysis section below.

7.5.4 QCA analysis and consolidated draft decision

After having regard to the QCA Act section 138(2) factors and stakeholders' submissions, we maintain our initial draft decision (see section 7.5.3 of our initial draft decision) that it is not appropriate to require a customer to nominate a train operator, when there are multiple applications for the same access rights. Consistent with our position in the initial draft decision, we consider that this may restrict competition between train operators, which is inconsistent with the object of Part 5 of the QCA Act, and not in the public interest or the interests of access seekers and customers (s. 138(2)(a), (d), (e) and (h) of the QCA Act).

We maintain our initial draft decision that competition in the above-rail market will be promoted if Aurizon Network makes amendments to the draft access undertaking to require

[434] Aurizon Network, 2014 DAU, sub. no. 83: 105.
[435] QRC, 2014 DAU, sub. 84: 24.
[436] Vale, 2014 DAU, sub. 79: 4.

Aurizon Network to continue negotiating with all train operators until a nomination is made. We also maintain our position to make other amendments to streamline the process and minimise the costs of progressing multiple negotiations for the same access rights. This appropriately balances the factors in section 138(2) of the QCA Act by promoting competition (s. 138(2)(a) and (d)) and recognising the legitimate business interests of Aurizon Network (s. 138(2)(b)).

We disagree with Aurizon Network that our proposed changes will not positively impact on competition in the above-rail market, given the prescriptive nature of the TOD. Train operators can differentiate themselves from their competitors in many ways, including through the terms and conditions of haulage agreements, cost and service quality.

The way in which we consider it appropriate for Aurizon Network to amend its draft access undertaking is set out in our CDD amended DAU. These amendments substantially reflect the IDD amended DAU, except that they address specific issues raised by stakeholders since our initial draft decision, most notably those outlined in the table below. Clause references are to our CDD amended DAU (unless otherwise stated).

Table 27 Nomination of train operators by customers—stakeholders' comments

Issue raised	*QCA Response*
Aurizon Network argued that it should not be required to prepare an IAP if a customer fails to nominate a rail operator (cl. 4.8(b) of the IDD amended DAU).[437]	We do not agree that a customer should be required to nominate a rail operator before an IAP is issued. This is consistent with our position that Aurizon Network should continue negotiating with all train operators until the customer makes a nomination. However, we propose to amend this provision so that Aurizon Network is not obliged to enter into an access agreement with a railway operator until the operator is nominated by the relevant customer.
QRC was concerned that a train operator could progress an access application without specific support from the intended customer.[438]	While we would not expect a train operator to seek access rights without the support of a customer, we consider that this issue is adequately addressed by: • our proposed amendments to require evidence in an access application that the customer (or prospective customer) has authorised the access seeker to apply for the access rights (see Schedule B) • the requirement for a properly completed access application (see cl. 4.3) to progress through the negotiation process.
Aurizon Network considered that, where a customer nominates both train operators to use a part of their access rights, the provisions dealing with revisions to an access application (cl. 4.5) should apply.[439]	We consider that clause 4.5 would apply where a customer nominates both train operators as it broadly applies to any variation, including a change to a train operator nomination under the original access application.
To limit duplication of effort, Aurizon Network considered it should be allowed to immediately stop negotiating with a train operator when a customer nominates another train operator.[440]	We consider that this is concern is already addressed by cl. 4.8(a)(ii)(D).

[437] Aurizon Network, 2014 DAU, sub. 83: 105.
[438] QRC, 2014 DAU, sub. 84: 22.
[439] Aurizon Network, 2014 DAU, sub. 83: 105.
[440] Aurizon Network, 2014 DAU, sub. 83: 105.

We have proposed drafting changes in our consolidated draft decision as explained above.

Consolidated draft decision 7.3

(1) After considering Aurizon Network's proposal, our consolidated draft decision is to refuse to approve the arrangements that require a customer to nominate a train operator for particular functions in the negotiation process.

(2) The way in which we consider it appropriate that Aurizon Network amends the draft access undertaking is to:

(a) require Aurizon Network to continue negotiating with all train operators until the customer makes a nomination

(b) make other amendments as reflected in our CDD amended DAU.

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

8 ACCESS AGREEMENTS

Part 5 of the 2014 DAU sets out the framework for the development and execution of access agreements between Aurizon Network and access seekers in relation to the CQCN. The 2014 DAU includes standard access agreements (SAAs) which regulate access rights to the CQCN under different contracting scenarios and the terms on which access holders may exercise those rights through an accredited railway operator.

The key elements of our consolidated draft decision refuse to approve the regime and SAAs proposed by Aurizon Network. This is due to the imperative to establish a streamlined framework, including by substituting a standard Access Agreement (AA) and a standard Train Operations Deed (TOD) for the SAAs and providing stronger links to matters in the undertaking where appropriate, to remove unnecessary duplication. In our CDD proposed DAU, we have also provided for the terms of the AA/TOD to govern access to the CQCN, unless an access seeker negotiates alternative terms with Aurizon Network.

Our CDD proposed DAU also makes amendments to the terms and conditions of the standard access arrangements to ensure they reflect an appropriate balance of interests of the parties and, where possible, further streamline concepts, processes and drafting style to increase clarity and workability.

The detailed drafting of Part 5 and the standard AA and TOD attached to this consolidated draft decision is consistent with our approach and shows all of the amendments required.

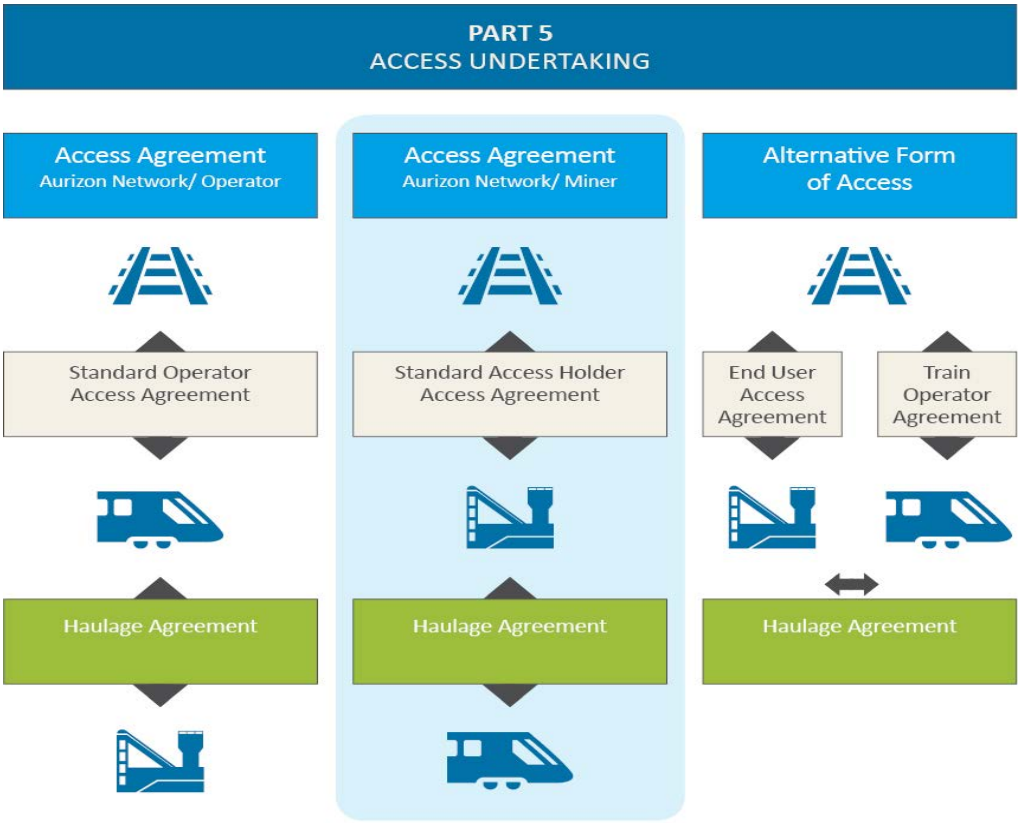
8.1 Introduction

Part 5 of the 2014 DAU sets out provisions for the development and execution of access agreements required for access to the CQCN. Volume 3 of the 2014 DAU also includes a suite of four SAAs which contain standard terms and conditions on which Aurizon Network will provide access under different contracting scenarios (see Figure 3 below).[441]

There are important linkages between the SAAs and other matters in the 2014 DAU, including allocating capacity[442] and reference tariffs.[443]

[441] The suite of SAAs included as part of the 2014 DAU are the Standard Operator Access Agreement (SOAA), the Access Holder Access Agreement (AHAA), the End User Access Agreement (EUAA) and the Train Operator Agreement (TOA). These have been developed specifically for coal-carrying services.
[442] Part 7 of the 2014 DAU, see Chapter 11.
[443] Part 6 and Schedule F of the 2014 DAU, see Chapter 17 and 18.

Figure 3 2014 DAU SAA contracting scenarios



8.2 Overview

8.2.1 Aurizon Network's proposal

Aurizon Network proposed the terms of the access agreement be agreed between Aurizon Network and the access seeker. It also establishes the SAAs as a set of 'safe harbour' arrangements.

Aurizon Network said it had reviewed the SAAs to reflect the new policy positions adopted for the 2013 DAU (and carried over into the 2014 DAU).[444] It also reviewed a number of clauses in the 2014 DAU SAAs in response to stakeholder comments on the 2013 DAU SAAs.

One of Aurizon Network's more significant amendments was to have some matters exclusively addressed in the SAAs, rather than in the undertaking. Aurizon Network intended this to facilitate negotiation by removing 'standard outcomes' from negotiations and avoiding uncertainty where matters are duplicated across the undertaking and agreements (see Section 8.5).[445]

8.2.2 Legislative framework and QCA assessment approach

Legislative framework

In assessing Aurizon Network's arrangements for the development and execution of access agreements, we have had regard to the criteria in section 138(2) of the QCA Act.

[444] Aurizon Network, 2013 DAU, sub. 2: 11, 325.
[445] Aurizon Network, 2013 DAU, sub. 2: 14, 99–100.

Against this background, we consider in our assessment of Aurizon Network's arrangements for access agreements that:

- sections 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) is relevant to the extent access charges levied under an access agreement should be consistent with the pricing principles
- sections 138(2)(c) and (f) should be given less weight, as they are less practically relevant to our assessment.

In certain circumstances the factors to which we have assigned weight may conflict. As noted in our analysis of the legislative framework (Chapter 2) when these circumstances arise, the QCA, as decision maker, is required to exercise judgement, having regarding for the factors relevant in the circumstances.

Facilitating access to the network

Section 138(2)(a) requires us to have regard to the object of Part 5 of the QCA Act (set out in section 69E), namely to promote the economically efficient operation of, use of and investment in the CQCN. Section 138(2)(d) of the QCA Act requires us to have regard to the public interest, including the public interest in having competition in markets.

As access agreements are essential for the provision of access to the service, we consider sections 138(2)(a) and (d) are likely to be best met when an access seeker can enter into an access agreement with Aurizon Network in a timely manner and on reasonable terms and conditions.

Aurizon Network's and users' rights and interests

Section 138(2)(b) of the QCA Act requires us to have regard to the legitimate business interests of Aurizon Network. We have discussed what we consider constitutes Aurizon Network's legitimate business in Chapter 2. In the context of access agreements, we consider this suggests that we should have regard to ensuring that the terms and conditions within an SAA would reflect a risk/liability split between the parties to the SAA that could be reasonably expected in a competitive market.

Section 138(2)(d) and (e) require us to have regard to the public interest, and the interests of access seekers. In broad terms, we consider these various interests are most likely to be met within a framework that:

- facilitates parties developing and entering into an access agreement in a timely manner
- uses the SAAs as a benchmark for negotiations of alternative terms of access or as default agreements
- promotes flexible use of access rights
- provides opportunities for greater competition between train operators
- ensures a transparent and consistent approach to matters which affect all access holders, or where there is a public interest in adopting this approach.

QCA assessment approach

Our approach to assessing Aurizon Network's arrangements for developing and executing access agreements is set out in the table below. Taken as a whole, this assessment approach allows for an appropriate balancing of the criteria as set out in section 138(2) of the QCA Act.

Table 28 QCA approach to assessing access arrangements

Do the arrangements facilitate the timely development and execution of access agreements?	Does Part 5 facilitate the timely development and execution of access agreements by, amongst other things: • allowing the SAAs to be used as a 'safe harbour' agreement that an Aurizon Network and an access seeker can adopt without the need for further negotiation, unless the parties wish to negotiate alternative terms? • establishing appropriate review mechanisms to ensure that an SAA remains a relevant and effective agreement over the term of the undertaking? • clearly defining terms and conditions so they are readily understood by parties and relatively simple to negotiate and administer?
Do the arrangements appropriately balance Aurizon Network's and users' rights and interests?	Does Part 5 appropriately balance Aurizon Network's and users' rights and interests by, amongst other things: • balancing the allocation of rights, obligations and risks between parties in a manner that would be reasonable in a competitive market? • providing clarity and certainty of each party's rights and obligations in relation to the development and execution of an access agreement? • ensuring that processes under which access rights can be varied, or other rights and obligations of the parties may be affected are transparent and clearly defined? • ensuring the interests of users of non-coal services are adequately provided for?
Do the arrangements promote effective competition in the above-rail market?	Do the SAAs promote effective competition in the above-rail market by, amongst other things: • providing a clear separation of roles relating to the management of access rights and the operation of train services on the network? • providing opportunities for customers (i.e. mining companies) to switch train operators?
Do the arrangements promote efficient use of the network?	Do the SAAs will promote efficient use of the network by, amongst other things: • providing an access holder with flexibility in the use and management of its access rights? • facilitating consistency of arrangements between access holders, where appropriate?

Key issues for consideration

In this consolidated draft decision, we have explained the way in which we consider it appropriate for Aurizon Network to amend the 2014 DAU where we consider the proposed arrangements omit or do not satisfactorily deal with any of these matters. This includes:

- amending the process for developing and executing an access agreement under Part 5 of the 2014 DAU, to clarify the rights and obligations of parties in relation to the standard arrangements
- establishing a new standard Access Agreement (AA) and a Train Operations Deed (TOD) to simplify existing arrangements and to clearly separate roles between the management of access rights and the operation of train services

- ensuring matters best dealt with in the undertaking are retained in the undertaking and appropriately link matters in the AA/TOD to the undertaking to reduce duplication and increase certainty.

The remainder of this chapter is shaped around these three themes and is split into the following four sections:

- an effective process for developing access agreements
- simplification of standard access agreements
- matters moved from the undertaking to the SAAs
- standard access agreements—terms and conditions.

8.3 An effective process for developing access agreements

8.3.1 Aurizon Network proposal

Part 5 of the 2014 DAU requires that access to the CQCN be underpinned by an access agreement, with terms agreed between Aurizon Network and the access seeker. Under these arrangements:

- if parties cannot agree on the terms of an access agreement, an access seeker may require, and Aurizon Network must offer to provide, access on the terms contained in the relevant SAA (modified, where required, for non coal-carrying services) (cl. 5.1(c))
- disputes in relation to the development of an access agreement will be resolved by the QCA or an expert under Part 11 of the 2014 DAU having regard to the relevant SAA (cl. 5.1(d)).

Aurizon Network said these arrangements reinforce the ability of parties to commercially negotiate terms and conditions of access, with the SAAs providing a 'clear fallback position in the event that negotiations on non-standard terms fail'.[446] Compared to the 2010 AU, Aurizon Network's proposed Part 5 of the 2014 DAU no longer:[447]

- sets out general principles to be included in SAAs—because it considered it is more informative to use the comprehensive standard arrangements as a baseline for non-coal services[448]
- requires the development of new coal-related SAAs—because it considered this is unnecessary given the suite of SAAs directly addresses the vast majority of access negotiations Aurizon Network conducts.[449]

In addition, following its submission of the 2014 DAU, Aurizon Network indicated it supported the principle of giving existing access holders the ability to migrate AAs developed under the previous undertakings into the 2014 DAU form of SAA, and would consult further with stakeholders on how this would be achieved.[450]

[446] Aurizon Network, 2013 DAU, sub. 2: 98.
[447] Part 5 of the 2014 DAU omits other provisions previously included in Part 5 of the 2010 AU relating to protections against unfair differentiation (e.g. publication of access agreements and arrangements for access agreements with a related operator). See Chapters 3 and 5 of this consolidated draft decision.
[448] Aurizon Network, 2013 DAU, sub. 2: 99.
[449] Aurizon Network, 2013 DAU, sub. 2: 100, 101.
[450] Aurizon Network, 2014 DAU, sub. 48: 11.

8.3.2 Summary of the initial draft decision

We considered stakeholder submissions on the 2014 DAU in reaching our initial draft decision.[451]

We refused to approve Part 5 of the 2014 DAU as we were not satisfied an access seeker's rights were adequately provided for. We considered it appropriate that Aurizon Network make amendments so the terms of access will be those under the relevant AA/TOD, unless otherwise agreed by the access seeker and Aurizon Network (i.e. so an access seeker could adopt the standard at the outset, rather than necessarily having to negotiate and only adopt the standard if alternative terms could not be agreed).

We accepted Aurizon Network's proposal that, if a dispute arose during the negotiation of an AA/TOD, it would be resolved through the adoption of the standard arrangements. We considered this approach to be appropriate as it reinforced the role of standard arrangements as a default and would minimise delays and uncertainty about how these disputes may be resolved.

To ensure the standard arrangements were effective over the life of the undertaking, we also proposed a mechanism to review the standard AA/TOD during the term of the undertaking and, if necessary, develop amendments to improve their workability. This mechanism was intended to be triggered sparingly and only in limited circumstances.

Aurizon Network comments on the initial draft decision

Aurizon Network agreed in concept to our proposed amendments to Part 5 of the 2014 DAU for the standard arrangements to govern the terms of access to the CQCN (unless otherwise agreed between the parties) and to establish a review mechanism for the SAAs, subject to agreeing the terms of the new standard arrangements.[452]

However, with respect to the review mechanism, Aurizon Network did not support our ability to develop our own amendments to the SAAs if we refuse to approve amendments proposed by Aurizon Network. Instead, it considered the SAA as previously approved should remain in place in these circumstances.[453]

Stakeholder comments on the initial draft decision

Most stakeholders supported the amendments we considered were appropriate to be made to Part 5 of the 2014 DAU. Remaining key concerns stakeholders considered should be addressed were:

- the regime for providing security—should be included in the undertaking itself, including to apply where Aurizon Network requires security before the commencement of train services (relating to non-expansion access rights)[454]
- ensuring the scope of the review mechanism is clear and that access seekers/holders have the opportunity to initiate a review of the workability of access agreements, not just Aurizon Network.[455]

[451] QCA 2015(a), Vol 1: 159–161.
[452] Aurizon Network, 2014 DAU, sub. 83: 107.
[453] Aurizon Network, 2014 DAU, sub. 83: 38
[454] QRC, 2014 DAU, sub. 84: 29.
[455] QRC, 2014 DAU, sub. 84: 30–31; Asciano, 2014 DAU, sub. 76: 15.

Aurizon Operations did not agree that the AA/TOD should default to the standard terms of access, unless otherwise agreed between Aurizon Network and an access seeker. It said proposing a one size fits all contracting structure to be applied (even if it is able to be varied) is restrictive and prevents parties being able to negotiate a form of contract that better addresses their commercial needs.[456]

The QRC also proposed a number of drafting amendments it considered would clarify or improve the operation of Part 5, including clarifying the process for resolution of disputes about the negotiation of access agreements.[457]

8.3.3 QCA analysis and consolidated draft decision

After having regard to the section 138(2) factors and stakeholder submissions, we do not consider it appropriate to approve Part 5 of the 2014 DAU.

Standard arrangements as a safe harbour

In particular, we do not consider it appropriate for an access seeker only to have the right to enter into an access agreement on the terms of the standard arrangements once it has been unsuccessful in negotiating alternative terms with Aurizon Network.

We agree that parties should have the ability to negotiate the terms of access agreements. However, we do not consider it is in the interests of access seekers (s. 138(2)(e)), or the legitimate business interests of Aurizon Network (s. 138(2)(b)), for access seekers to be compelled to negotiate, even if they are satisfied with entering into an access agreement on the standard terms and conditions. In our view, this may unnecessarily prolong negotiations in circumstances where the other party does not wish to accept terms different from the standard arrangements. This increases transaction costs and the length of time needed to enter into an access agreement, which we also consider is not consistent with the object of Part 5 of the QCA Act (s. 138(2)(a)) or the public interest (s. 138(2)(d)) as it could impact the efficient provision of the service and increase barriers to entry in related markets.

We also consider it is overly complicated. This creates uncertainty and could lead to otherwise avoidable disputes about when negotiations are taken to have been unsuccessful, such that the standard arrangements become available to access seekers. In addition to not serving the interests of parties efficiently, we also consider that it is not appropriate with respect to the issue of simplification of the drafting of the undertaking (s. 138(2)(h)), as discussed in Chapter 2.

On this basis, and having refused to approve Aurizon Network's proposal for Part 5 of the DAU, we maintain our view that access seekers should have the right to enter into an access agreement on the terms of the standard arrangements, without the need to first attempt to negotiate with Aurizon Network.

Accordingly, we consider it appropriate that Aurizon Network amend Part 5 of the 2014 DAU to reflect this, so that the terms of an access agreement (or TOD) will be those set out in the standard arrangements, unless otherwise agreed between Aurizon Network and the access seeker (clause 5.1(c) and (d) of our marked up 2014 DAU). We consider this will balance the interests of all parties and facilitate the timely development and execution of access agreements by ensuring an access seeker has a clear right to the standard arrangements and that Aurizon Network will only have to negotiate with access seekers that are willingly and genuinely seeking alternative terms and conditions.

[456] Aurizon Operations, 2014 DAU, sub. 93: 7.
[457] QRC, 2014 DAU, sub. 84: 27–32.

Importantly, this will not prevent parties from negotiating alternative terms and conditions or mean Aurizon Network will be in breach of the undertaking if it does participate in negotiations. However, it does make clear that the access seeker is not obliged to negotiate at the outset, and can elect to adopt the standard arrangements if they choose to do so thereby truly having the benefit of the concept of a 'safe harbour', whereby intensive negotiations are not required in order for the access seeker to receive standard terms.

Review mechanism for the AA and TOD

As part of our initial draft decision we decided not to approve the proposed suite of SAAs contained in Aurizon Network's 2014 DAU (our reasons appear in Section 8.4 of this decision). Instead, our initial draft decision proposed these arrangements be simplified into two documents (the AA and TOD). In light of this change, we also considered it appropriate to include a review mechanism in Part 5 as a safety net to facilitate a review of the AA and TOD during the term of the undertaking and, if necessary, develop amendments to improve their 'workability'.

Our intent for the review mechanism was to provide a means for any issues which affect the workability of the AA and TOD to be reviewed and, if appropriate, for amendments to be made which resolve the issue. The issues we intend to be reviewed are ones which affect the ability of the document to function effectively on an operational level. We did not intend to use this process to facilitate more fundamental reviews or changes to the SAAs that are best left for consideration as part of the development of the next access undertaking or as part of a draft amending access undertaking (DAAU) proposed by Aurizon Network.

We note Aurizon Network's comments that we should not have the ability to develop our own amendments to the AA and TOD at the conclusion of the review process in the event that we are not aligned with Aurizon Network as to the appropriate way to resolve a workability issue. We, however, consider it necessary for the effectiveness of this process that we have ability to develop amendments in these circumstances.

Having considered Part 5 and the SAAs proposed by Aurizon Network in the 2014 DAU, and determining to refuse to approve Aurizon Network's proposal, we are required under section 136(5)(b) of the QCA Act to indicate the way in which we consider it appropriate for Aurizon Network to amend Part 5 and its SAAs. In acknowledging that the amendments to the SAAs (including the change to their number and structure) could have unforeseen workability implications, it is open for us to include a regime for amending the SAAs and an ability for us to act as an objective circuit breaker in the narrow circumstances where unresolvable issues arise. This can also be justified as appropriate, having regard to the section 138(2) factors.

We consider it in the interests of access seekers (s. 138(2)(e)), as well as the object of Part 5 of the Act (s. 138(2)(a)) and the broader public interest (s. 138(2)(d)), for there to be certainty that the types of issues intended to be addressed by the mechanism are resolved in a timely manner. This is necessary to ensure the SAAs remain an effective and credible 'safe harbour' over the term of an undertaking, in that parties have the ability to enter into an access agreement on the standard terms and conditions without having to negotiate amendments to address issues with the workability of the SAAs. We also consider it is consistent with the legitimate business interests of Aurizon Network (s. 138(2)(b)) for any issues with the workability of the SAAs to be resolved upfront through this process in a timely manner, as it will avoid Aurizon Network having to negotiate amendments with individual access seekers to address common issues with the SAAs.

It should also be noted that there is precedent in the 2010 AU for the ability for the QCA to impose terms, following due consideration of issues and a decision by it not to approve arrangements proposed by Aurizon Network, such as for the development of the standard alternate form of access agreement and the standard user funding agreement.

However, we acknowledge the need for certainty, to the extent practicable, over the circumstances in which the AA and TOD may be reviewed during UT4. We have therefore made some further changes to clarify the drafting of clause 5.4 of the CDD amended DAU, including:

- definining what 'workability' means in the context of the review mechanism (cl. 5.4(g) of our CDD amended DAU)
- strengthening consultation requirements with stakeholders throughout the review mechanism process
- expressly requiring us to have regard to the section 138(2) factors when assessing Aurizon Network's proposal .

With those further revisions since our initial draft decision, we consider the review mechanism we have proposed will provide sufficient certainty to all parties over the circumstances in which the AA and TOD may be reviewed and any amendments made. In particular, we note the review mechanism will:

- only be able to be triggered by Aurizon Network or the QCA. We do not consider it appropriate for stakeholders to have the ability to trigger a review, given our intent for a review to be triggered in limited circumstances and only if required. However, we consider the interests of access seekers are still accounted for, given we would consider information from stakeholders alerting us to the need for a review to be undertaken.
- only be able to be triggered twice over a two-year rolling period.

We consider our proposed process has appropriate regard to the legitimate business interests of Aurizon Network (s. 138(2)(b)) by providing certainty over the circumstances in which the AA/TOD may be reviewed.

Other aspects of Part 5 of our IDD amended DAU

We note the QRC's comments that Part 5 of the 2014 DAU should contain provisions with respect to an access seeker's obligations to provide security to Aurizon Network. However, we do not consider it appropriate to include these provisions, as we consider this is a matter that is properly dealt with under an access agreement, rather than the access undertaking.

Stakeholders also made a number of detailed drafting comments on other aspects of Part 5 of our IDD amended DAU seeking to clarify the operation of the clauses or otherwise enhance their operation. We have considered these comments and, where we consider it appropriate, have incorporated these into Part 5 of the CDD amended DAU.

Consolidated draft decision 8.1

(1) After considering Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Part 5 of the 2014 DAU.

(2) We consider it appropriate for Aurizon Network to amend Part 5 to:

(a) provide for the standard access agreement to govern the terms of access to the CQCN, unless otherwise agreed by the access seeker and Aurizon Network; and

(b) introduce the process for the review of the standard access agreements during the term of the access undertaking, as set out in clause 5.4 of our CDD amended DAU attached to this consolidated draft decision.

(3) The amendments we consider to be appropriate to achieve the above are set out in Part 5 of our CDD amended DAU.

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

8.4 Simplification of Standard Access Agreements

8.4.1 Aurizon Network's proposal

The four SAAs included in the 2014 DAU are the:

- Access Holder Access Agreement (AHAA)
- Standard Operator Access Agreement (SOAA)
- alternative form of access agreement: comprising the End User Access Agreement (EUAA); and the Train Operator Agreement (TOA).

Aurizon Network's inclusion of these SAAs is consistent with the 2010 AU and reflects current practice with respect to the forms of SAAs made available to parties. However, following its submission of these four SAAs under the 2014 DAU, Aurizon Network later noted (in response to our Stakeholder Notice)[458] that the suite of SAAs could be simplified to an EUAA and TOA model only (excluding the AHAA and SOAA), subject to certain amendments being made.[459] Further, it considered not having to administer different forms of agreements would assist operators in the administration and implementation of these provisions on a day to day basis.[460]

[458] This stakeholder notice sought (among other things) stakeholders' views on whether there is merit in adopting a simpler approach to the SAAs by consolidating the proposed suite of four agreements into two agreements based on the EUAA and the TOA (i.e. the two agreements would separately deal with (a) holding access rights; and (b) train operations matters) (Stakeholder Notice 2, 26 August 2014).

[459] Aurizon Network, 2014 DAU, sub. 48: 6–7. These amendments provide for the situation where a train operator is both an 'End User' under the EUAA and the 'Operator' under the TOA by including certain customer related provisions (such as including an Access Interface Deed and customer initiated capacity transfers).

[460] Aurizon Network, 2014 DAU, sub. 48: 8.

8.4.2 Summary of the initial draft decision

Our initial draft decision proposed to refuse to approve Aurizon Network's proposed SAAs for the 2014 DAU. We considered the suite of SAAs had become highly complex and was unlikely to meet future needs or facilitate flexibility in the management and use of access rights, including through capacity trading. We therefore proposed a streamlined framework comprising two key documents, based on the EUAA and TOA model of SAA:[461]

- a standard Access Agreement (AA)—that allows either a mining company or a train operator to contract directly with Aurizon Network for access rights only. This agreement does not deal with above-rail operations
- a standard Train Operations Deed (TOD)—that allows a nominated train operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited operator, to contract with Aurizon Network to take on the responsibility of train operations in connection with access rights granted under an AA.

Our proposed arrangements did not affect the contracting options already available to access seekers[462] or a person's status as an access seeker.[463]

Stakeholder comments on the initial draft decision

Aurizon Network agreed in concept to simplification of the access agreements, subject to agreeing the terms and conditions of the new standard arrangements.[464]

We also had general support from most other stakeholders for a streamlined approach to the standard access agreement framework comprising only two key documents—the AA and TOD.[465] Vale said now was a good time to do a full review of access arrangements to ensure operational efficiency and appropriate risk allocation.[466]

Aurizon Operations did not support our decision to remove the SOAA. It said the new arrangements do not provide the flexibility, suitability and workability of the single operator agreement, including the ability for the operator to:

- bundle access rights within a single access agreement across multiple customers without requiring the written consent of each of those customers every time the operator seeks to vary that agreement
- provide value added services relating to access management and manage access rights of all producers in a consistent and balanced manner

[461] This approach was selected as it reflects the delineation of roles we considered important, and represented an appropriate split between the rights, obligations and risks of all parties. Additionally, these documents were developed relatively recently and with the benefit of extensive stakeholder consultation.
[462] Both an end user (i.e. mining company) and a train operator retains the ability to hold access rights, and an end user will be able to assume responsibility for operating train services if it elects to do so.
[463] Regardless of whether a person is seeking to enter into an AA or a TOD, they are still seeking access to the declared service and the protections afforded to access seekers under the QCA Act and the undertaking should apply in each case (see Chapter 2).
[464] Aurizon Network, 2014 DAU, sub. 83: 107.
[465] Vale, 2014 DAU, sub. 79: 4; Asciano, 2014 DAU, sub. 76: 7, 26; QRC, 2014 DAU, sub. 84: 3, Anglo American, 2014 DAU, sub. 95: 11.
[466] Vale, 2014 DAU, sub. 79: 4.

- contract with the access provider using a simplified single contractual document and where the train consist comprises products from multiple customers.[467]

Aurizon Operations said it is also not apparent why we proposed the train operations agreement be changed to a deed, submitting that:

- the TOD provides for the potential payment of ancillary charges to Aurizon Network and so not all access charges would be payable directly by the end user
- stakeholders have not sought to change the TOA to a TOD, nor has it been demonstrated the TOA is ineffective
- additional governance requirements come with the execution of a Deed. Time critical changes required from time to time for minor operational variations can potentially expose customers and operators to additional risks.[468]

8.4.3 QCA analysis and consolidated draft decision

Having regard to section 138(2) and stakeholder submissions, we do not consider it appropriate to approve the suite of four standard access agreements proposed by Aurizon Network as part of the 2014 DAU.

We note the suite of agreements proposed by Aurizon Network reflects the history and evolution of different types of access agreements over time.

However, we maintain our position from the initial draft decision that having a suite of four standard access agreements creates complexity, in that the number of standard access agreements included in an access undertaking has the potential to require Aurizon Network to administer different types of SAAs. We consider this approach can result in ambiguity and inconsistencies with how particular matters are dealt with in the various agreements. This is not in the interests of having clarity and certainty in regulatory arrangements (s. 138(2)(a), (d) and (h)). We do not consider it to be in the interests of Aurizon Network or access seekers to have this potential uncertainty or complexity in arrangements (s. 138(2)(b) and (e)).

We consider it appropriate for Aurizon Network to amend its draft access undertaking to reduce the level of complexity by basing the standard access agreements on the alternate form of access agreement (EUAA/TOA), with amendments to those previously settled documents to accommodate the same access contracting options currently available to parties through the existing standard access agreements.

Using this system will also promote flexibility in the management and use of access rights, and facilitate greater competition in the usage of train operators over time, given its separation of access rights from train operations matters, which we consider consistent with the object of the Part 5 of the Act and the public interest in having competition in markets (s. 138(2)(a) and (d)).

Accordingly, we maintain our view in the initial draft decision that the SAAs included as part of the access undertaking should consist of the AA and TOD.

In coming to this conclusion we have considered Aurizon Operations concerns about not having the SOAA, particularly given its use is well established and the effect its removal may have on the business offerings it can provide to its customers. However, we remain of the view that the SOAA contracting scenario, and the business offerings underpinned by this, can still be achieved

[467] Aurizon Operations, 2014 DAU, sub. 93: 7.
[468] Aurizon Operations, 2014 DAU, sub. 93: 8.

under our proposed arrangements by the operator entering into both the AA and TOD. We do not consider the fact that an operator will have to enter into two documents will impose unreasonable costs or administrative burdens.

Additionally, we note some stakeholders raised concerns regarding our initial draft decision to change the train operations agreement to a deed. This amendment was made for practical reasons to ensure the legal validity of the standard contract for train operations. By making the train operations agreement a train operations deed, the fact that no payments are required to be made by the train operator to Aurizon Network is not relevant to the effectiveness of the agreement or 'contract' in place. Further, whilst we agree that there is potential for this amendment to result in increased administration and governance, we believe this is offset by the fact that it is not in the interests of any parties for there to be any doubt as to the legal validity of the standard contract for train operations (s. 138(2)(b), (e) and (h) of the Act). Moreover, we understand that any additional administrative and governance burden may be minimised by appropriately delegating decision-making powers. This is likely to ensure there is no practical difference in the administration of a 'deed' compared with the previous 'agreement'.

Consolidated draft decision 8.2

(1) After considering Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve the suite of standard access agreements included as part of the 2014 DAU.

(2) The way in which we consider it appropriate to amend the DAU is to provide the following standard access agreements, as set out in our proposed CDD amended DAU attached to this consolidated draft decision:

- **(a) an Access Agreement (AA)—that allows either a mining company or a train operator to contract directly with Aurizon Network for access rights only. This agreement does not deal with above-rail operations.**
- **(b) a Train Operations Deed (TOD)—that allows a nominated train operator to contract directly with Aurizon Network to operate train services, or a mining company which is also an accredited operator to contract with Aurizon Network and take on the responsibility of train operations in connection with access rights granted under an access agreement.**

(3) The amendments that we consider to be appropriate to achieve the above are set out in our CDD amended DAU.

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

8.5 Matters moved from the undertaking to the SAAs

8.5.1 Aurizon Network's proposal

Aurizon Network proposed a number of matters be dealt with solely in the SAAs and not in the body and schedules of the 2014 DAU. These relate to:

- train operations—including requirements for rollingstock authorisation and development of operating plans

- capacity management arrangements—including train service specification and train scheduling, capacity resumptions, capacity relinquishments and transfers
- interface and environmental management processes—including the development of plans to manage interface and environmental risks and the amendment of plans and systems to manage compliance.

Aurizon Network said including these provisions solely in the SAAs would:

- simplify and streamline the undertaking, better aligning it to its key purpose
- remove duplication and reduce uncertainty, by having matters dealt with in only one document
- encourage open and effective commercial negotiations (rather than prescribed regulatory outcomes) in the first instance.[469]

On this, Aurizon Network considered provisions relating to access holders (i.e. users of the network that have already entered into a contract) are appropriately addressed in the SAAs, not the access undertaking.

Where processes set out in the SAA commence during the negotiation of the access agreement (e.g. the interface and environmental processes), the 2014 DAU provided for these to be conducted in accordance with the provisions set out in the SAAs (cl. 4.10.2(b), (c)).

8.5.2 Summary of the initial draft decision

We considered stakeholder submissions in reaching our initial draft decision.[470]

We refused to approve Aurizon Network's proposal to have the matters that, in previous undertakings had been included within the body of the undertaking, included in the SAAs only. We considered key rights and obligations for access should not be included solely within the SAAs where:

- it is in the public interest the arrangements apply consistently across all access seekers/holders, including enforcement under the QCA Act
- the matter has impacts beyond the interests of the parties to the contract and is relevant to the ongoing relationship of all parties in the industry operating within the CQCN and across the supply chain in general
- the resolution of disputes on the matter should take account of, and apply more broadly to, parties beyond the contract (i.e. safety or environmental obligations).

We therefore considered it appropriate for Aurizon Network to amend its draft access undertaking to introduce particular SAA provisions into the body of the undertaking itself. We also considered it appropriate to incorporate some provisions from the undertaking into the AA/TOD (i.e. provide a direct reference in the AA/TOD to provisions from the undertaking), so the SAAs can change through time, aligning with any changes to the undertaking. This approach is currently used for some matters (e.g. reference tariffs), but we proposed to extend it to include matters such as:

- transfers (AA)

[469] Aurizon Network, 2013 DAU, sub. 1: 10; sub. 2: 99–100.
[470] QCA 2015(a), Volume 1: 166–167.

- relinquishment (AA)
- the reduction factor (AA)
- conditional access rights (AA)
- interface risk matters (TOD).

We did not include drafting in the AA linking reference tariffs, and calculations, to the undertaking. Instead, we proposed to finalise Schedule 4 of the AA once policy positions on Schedule F (see Chapter 17) of the undertaking were settled.

Aurizon Network's comments on the initial draft decision

Aurizon Network did not support our initial draft decision to move matters back to the body of the undertaking and incorporate them by reference into the AA/TOD. It said the appropriate place for standard provisions is in the AA/TOD and not the undertaking, as it considered it should have the ability to agree to different terms and conditions and not be in breach of the undertaking.

Aurizon Network also submitted that linking matters in the AA/TOD to the undertaking:

- introduces uncertainty as to what the terms of the AA/TOD will be in future, noting an access agreement typically has a 10-year term, while each undertaking typically has a three/four year term. It considered this does not provide access holders with sufficient certainty over their access rights and how they may be affected over time, and could also lead to increased administrative costs for parties.
- increases its risk profile by making it subject to remedies available under the QCA Act for any breach of obligations without the benefit of the contractual limitations of liability included under the AA/TOD.[471]

Aurizon Network also had concerns about specific aspects of our proposal, including the breadth of provisions incorporated and how they would operate in practice. For instance, it said the AA incorporates all provisions relating to access charges in the undertaking, and some of these are not appropriate to be included in an AA.[472] Aurizon Network also considered there is uncertainty about whether the dispute resolution process in the undertaking or under the AA/TOD would apply in the event of a dispute. It said disputes in relation to an executed AA should be resolved in accordance with the dispute resolution procedure in the AA, with no avenue for an access holder to raise a dispute under the undertaking.[473]

Stakeholder comments on the initial draft decision

Most stakeholders supported our approach and said having matters dealt with in the SAAs or the undertaking (or both) ensures a robust and consistent approach to access across the rail network.[474]

In particular, Asciano and the QRC strongly supported maintaining the provisions relating to capacity allocation and management in the access undertaking.[475] The QRC considered this would increase transparency and consistency across different generations of access agreements

[471] Aurizon Network, 2014 DAU, sub. 83: 109.
[472] Aurizon Network, 2014 DAU, sub. 83: 110.
[473] Aurizon Network, 2014 DAU, sub. 83: 110–111.
[474] Vale, 2014 DAU, sub. 79: 4; Asciano, 2014 DAU, sub. 76: 15; QRC, 2014 DAU, sub. 84: 49–50.
[475] Asciano, 2014 DAU, sub. 76: 15.

and allow access holders to benefit from continuous improvements and refinements made to these processes over time.[476]

The QRC said further clarification on the application of these clauses would be beneficial, namely:

- how the new provisions interact with existing and new access agreements, including clarification on which mechanisms operate as an additional right available to access holders, compared to the mechanisms which should only apply to the extent they are incorporated into an access agreement
- whether incorporated provisions can be varied by parties when entering into an access agreement in accordance with the rights under Part 5 of the 2014 DAU to negotiate amendments to a standard access agreement.[477]

Aurizon Operations did not support having arrangements that allow for the terms and conditions of an access agreement to be varied with changes to an access undertaking, as it considered:

- the potential for key commercial terms of an access agreement to be varied in such a way substantially and unnecessarily increases regulatory risk, noting that access agreements (and corresponding rail haulage agreements) are often entered into for extended periods of time with some reliance and confidence that the terms not be subject to potentially significant change
- the statutory framework recognises that once an access agreement is entered into, it should not be able to be amended by changes to an access undertaking, with the primacy of commercially negotiated terms and conditions of access reflected in section 168 of the QCA Act.[478]

Aurizon Operations also said linking matters to the undertaking may limit our regulatory discretion when approving an undertaking or changes to it, as any changes to an access undertaking that amend the terms of access for existing access holders would require the QCA to consider the right of those users and how they would be adversely affected. For example, if a variation in those commercial terms had material adverse financial effects on an existing access holder then this potentially places additional limits on the regulatory discretion to the terms of an access undertaking that apply to new access rights.[479]

8.5.3 QCA analysis and consolidated draft decision

Having regard to section 138(2) and stakeholder submissions, we do not consider it appropriate to approve the 2014 DAU in respect of Aurizon Network's proposal to include particular matters solely in the SAAs.

Matters to be included in the access undertaking

As discussed in our initial draft decision, we acknowledge the role that commercial negotiation plays in securing access rights. However, there are particular matters which should not be dealt

[476] QRC, 2014 DAU, sub. 84: 49.
[477] QRC, 2014 DAU, sub. 84: 50.
[478] Section 168 of the QCA Act provides that: 'A term of an access agreement relating to a declared service is not invalid merely because it excludes, changes or restricts the application or operation of, or is otherwise inconsistent with, a provision of an approved access undertaking for the service.'
[479] Aurizon Operations, 2014 DAU, sub. 93: 10.

with solely in the SAAs but instead should be included in the access undertaking, where there is a broader interest in having greater transparency and consistency in arrangements across access holders.

Specifically, we note the matters Aurizon Network has proposed be dealt with solely in the SAAs include key capacity-related matters, such as parties' rights and obligations with respect to the transfer, resumption and relinquishment of access rights, and capacity shortfalls.

We do not consider it appropriate these matters be omitted from the body of the access undertaking. These are important matters which define the circumstances in which access rights may be affected or otherwise dealt with by an access holder and Aurizon Network. An absence of transparency and consistency in these arrangements and how they will apply across access seekers/holders is not in the public interest in having competition in markets (s. 138(2)(d)), as it is important from a competition perspective that access seekers/holders, as a whole, have confidence that there is consistency in how each access holder's access rights may be dealt with.

Moreover, an absence of consistency in these arrangements is not in the broader interest of promoting the efficient operation of the network (s. 138(2)(a)). It does not sufficiently enable Aurizon Network to facilitate capacity related processes, such as transfers, resumptions and relinquishment of access rights, in an efficient manner with less need to consider differences to the relevant processes that may be contained in individual access agreements.

Similarly, we do not consider it appropriate for other matters (i.e. operating plan requirements and interface risk management processes) to be omitted from the body of the access undertaking. These matters relate to safety, operational and environmental requirements and processes which should apply consistently to all access seekers/holders.

Accordingly, we maintain our initial draft decision and consider it appropriate that Aurizon Network amend the 2014 DAU to include matters in the body of the undertaking where they affect access seekers/holders more broadly and where there is an overall interest in providing greater transparency and certainty around the arrangements that apply. It is not inconsistent with Aurizon Network's legitimate business interests for there to be consistent processes and requirements for these matters (s. 138(2)(b)).

We acknowledge Aurizon Network's concerns that matters contained in the access undertaking only bind Aurizon Network and cannot be enforced against access seekers/holders, and that including these matters in both the undertaking and SAAs may create duplication and uncertainty. However, we consider these issues can be addressed through the use of incorporation clauses (discussed below).

'Incorporation' clauses

In our initial draft decision, we considered that it was appropriate that Aurizon Network amend the draft access undertaking to include 'incorporation' clauses to enshrine particular matters in the undertaking as contractual commitments in the AA/TOD. That is, the AA and TOD incorporate by reference defined provisions of the undertaking, so that changes to those provisions in the approved undertaking will be reflected in an AA or TOD that is in force.

We proposed the following matters would be incorporated:

- pricing related matters—access charges and reference tariff provisions
- operation related matters—interface risk provisions

- capacity related matters—transfers of access rights, relinquishment of access rights (and the reduction factor), resumption of access rights and conditional access rights.
- other matters—force majeure.

These largely reflect matters that Aurizon Network had included in its SAAs itself and which we determined were appropriate to be moved back into the body of the undertaking (as discussed in Section 8.4 above), as well as some additional matters—that is, relating to access charges and force majeure.

We also note provisions of this nature already apply to some matters under the 2010 AU arrangements (e.g. reference tariffs and take-or-pay provisions). We see no reason why this cannot be extended to other matters, where appropriate.

We note stakeholders were broadly supportive of the use of 'incorporation' clauses, although some sought clarification over how these clauses would operate in practice. Aurizon Network and Aurizon Operations did not support our approach and expressed concerns that including incorporation clauses in the AA/TOD would increase uncertainty, regulatory risk and potentially administrative costs, with Aurizon Network concerned its limitations of liability under the AA/TOD would not apply should it be found liable for a breach of an incorporation clause.

We recognise Aurizon Network's comments that including particular matters in both the body of the undertaking and the SAAs can create uncertainty and unnecessary duplication. We agree duplicating matters in such a way is not appropriate from the perspective of having clarity and certainty in regulatory arrangements (s. 138(2)(h)). It is also important that inter-generational issues do not emerge with how these matters are provided for under access agreements (i.e. where executed access agreements reflect different arrangements based on the access undertaking in place at the time). For example, we consider it will be difficult for a practical capacity trading framework to operate in future if different generations of access agreements have different terms and conditions for such trading.

Accordingly, we have proposed the use of 'incorporation' clauses to give effect to the inclusion of matters in the undertaking without duplicating the words in the AA/TOD. We also consider this has the benefit of facilitating the ability for incorporated matters to reflect changes made to the access undertaking over time, thereby minimising inter-generational issues.

We have considered stakeholder comments regarding the incorporation clauses, including that they may create a level of uncertainty for access holders over the life of an AA/TOD, if the underlying provision in the body of the undertaking changes.

We do not consider this a reasonable basis on which to discount using incorporation clauses. We note the matters subject to potential change covered by the incorporation clauses are limited and defined, and relate to matters, such as processes for the transfer and relinquishment of access rights, which are typically not administered by an access holder on a on a regular basis. While these are important matters for access holders, we do not consider these are matters which undermine the operation or commercial certainty of an access agreement, as a whole, if they are linked to the access undertaking, nor do we consider these incorporation clauses will substantially increase administrative costs for access holders or Aurizon Network.

Further, while the matters covered by these incorporation clauses can be subject to change through the undertaking approval processes in the QCA Act, parties will know which arrangements may be subject to change and know that any changes will apply equally to all parties. It would be in this context that revisions to the undertaking would be made. We also

note that access holders are already exposed to matters that affect parties on a more direct level, such as revenue cap arrangements, reference tariffs and take or pay provisions. These matters change each regulatory period (as well as potentially during regulatory periods) and impact access holders far more greatly than the arrangements for determining relinquishment fees, or how the transfers must occur.

Accordingly, we maintain our initial draft decision to include incorporation clauses within the AA/TOD to incorporate by reference particular matters contained in the access undertaking.

However, we acknowledge Aurizon Network's and other stakeholder concerns about how the incorporation clauses will operate in practice. We have revised the drafting of the AA/TOD to clarify that:

- Aurizon Network's limitations and exclusions of liability under the AA/TOD will apply for breaches of the terms of an incorporation clause
- the dispute resolution process under the AA/TOD, not the access undertaking, will apply to disputes related to the terms of an incorporation clause
- if there is a change in a relevant clause in the undertaking itself, it does not automatically flow through to a previously agreed AA/TOD (with the exception of changes to access charges and take-or-pay arrangements). However, if either party notifies the other they wish to incorporate the new clause in the undertaking, it must be incorporated and the parties must negotiate amendments the AA/TOD accordingly. To reflect existing arrangements, we have proposed for changes in the undertaking relating to take-or-pay arrangements and access charges to flow through automatically to the AA.

We consider these changes will ensure the use of incorporation clauses are an appropriate way to ensure particular matters are included within the body of the undertaking, without causing uncertainty, unnecessary duplication or disruption to the risk balance contained in the SAAs proposed by Aurizon Network.

Consolidated draft decision 8.3

(1) After considering Aurizon Network's 2014 DAU, our consolidated draft decision is to refuse to approve Aurizon Network's 2014 DAU, in respect of its decision to not include particular matters within the body of the undertaking.

(2) The way in which we propose it is appropriate to amend the DAU is to:

(a) include the following matters in the body of the undertaking and then incorporate them by reference, as set out in the AA and TOD attached to this decision:

(i) access charge and reference tariff provisions

(ii) interface risk provisions

(iii) transfer, relinquishment (and reduction factor), resumption and conditional access provisions

(iv) force majeure provisions

(3) The amendments that we consider to be appropriate to achieve the above are set out in our CDD amended DAU.

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

8.6 Standard Access Agreements—terms and conditions

The SAAs include standard terms and conditions on which Aurizon Network will provide access to the CQCN, including:

- administration (e.g. billing, invoicing)
- access rights (e.g. transfers, relinquishment, suspension and termination)
- pricing (e.g. access charges, take-or-pay and other charges)
- risk allocation (e.g. security, insurance, liability and indemnities)
- train operations (e.g. train scheduling and planning and operation of ad hoc services)
- dispute resolution.

This section of our consolidated draft decision addresses the substantive drafting of the terms and conditions of the SAAs, rather than the structural/simplification matters discussed in the previous sections.

8.6.1 Aurizon Network's proposal

Aurizon Network said its proposed terms and conditions represented a balanced and flexible framework for negotiating access,[480] including improving the operation of the access

[480] Aurizon Network 2013 DAU, sub. 2: 14.

arrangements[481] and aligning the terms and conditions to reflect how access agreements are administered in practice.[482] In addition, Aurizon Network:

- introduced new concepts to maximise the efficient use of the network, ensure users are accountable for their capacity rights and prevent unnecessary network expansion[483]
- aimed to appropriately allocate risks between parties[484], including retaining a number of terms consistent with the 2010 SAAs, where it considered these remained appropriate[485]
- clarified drafting and processes contained in the SAAs[486] and addressed key concerns and issues raised by stakeholders on its previous 2013 DAU SAAs.[487]

Aurizon Network considered the proposed 2014 DAU SAAs contained reasonable terms, if parties could not reach agreement on non-standard terms.[488]

8.6.2 Summary of the initial draft decision

We considered stakeholder submissions in reaching our initial draft decision.[489]

We indicated our intention to refuse to approve Aurizon Network's proposed terms and conditions of the SAAs, as a whole, as we did not consider them sufficiently workable, effective and commercially balanced and did not provide a credible model parties could rely on as a 'safe harbour' to meet the criteria in section 138(2) of the QCA Act. Stakeholders were similarly not convinced the SAAs provided a commercially feasible set of standard terms and conditions. Stakeholders also noted the changes to the SAAs weakened users' rights and security over those rights.[490]

We considered it to be appropriate that Aurizon Network make amendments to the 2014 DAU SAAs:

- for certainty and security—to provide a clear and more certain framework so that parties have a better understanding of their rights and obligations, and how these may be affected over the life of the contract. This included amendments around supply chain rights, removing the process Aurizon Network had included to reduce nominated monthly train services based on payloads and removed the requirement to provide security under a TOD
- to better balance the interests of Aurizon Network and those of an access seeker—if Aurizon Network had proposed amendments inconsistent with the risk profile established under the 2010 AU SAAs without sufficient justification, or to provide a better commercial balance between parties. This included some amendments to the liability and indemnity provisions, reducing the threshold for which Aurizon Network is responsible for failing to provide access

[481] Aurizon Network, 2014 DAU, sub. 5: 118.
[482] Aurizon Network, 2013 DAU, sub. 2: 366.
[483] Aurizon Network, 2013 DAU, sub. 2: 112.
[484] Aurizon Network 2013 DAU, sub. 2: 367, 375–6.
[485] Aurizon Network 2013 DAU, sub. 2: 313, 367.
[486] Aurizon Network 2013 DAU, sub. 2: 366–381.
[487] Aurizon Network, 2013 DAU, sub. 77: 113–143.
[488] Aurizon Network 2013 DAU, sub. 2: 98.
[489] QCA 2015(a), Vol 1: 170–176.
[490] QRC, 2013 DAU, sub. 46: 46–48; Rio Tinto, 2013 DAU, sub. 73: 11, 22, 106, 107; Asciano, 2013 DAU, sub. 43: 86, 90; Anglo American, 2014 DAU, sub. 7:7,35; Asciano, 2014 DAU, sub. 22: 169; Anglo American, 2013 DAU, sub. 78: 17.

from 10 per cent to 5 per cent and reducing the amount of security payable by an access holder to an amount equivalent to six months take-or-pay charges

- to streamline the arrangements—consolidating arrangements to increase their useability and workability, both now and in the future and provide a clearer delineation of roles between an access holder and a train operator. This included making the access holder responsible for payment of all charges associated with access and, as a consequence, changing the TOA to a TOD (deed)
- to simplify and provide greater clarity of the arrangements—to assist parties in understanding the arrangements and to provide more confidence and certainty on how the AA/TOD operate in practice. This included accepting the new 'train service type' concept introduced by Aurizon Network, incorporating provisions in the AA/TOD by reference to the undertaking (discussed in the previous section) and streamlining processes (e.g. the rollingstock authorisation process and the emergency response and operating plan approval process).

Aurizon Network comments on the initial draft decision

Aurizon Network had significant concerns with the terms and conditions we proposed. It did not consider the AA and TOD represented a reasonable and commercially balanced allocation of rights, obligations and risks between the parties.[491]

Aurizon Network said it was unclear why some amendments had been made, including to matters broadly agreed with industry (i.e. the provisions concerning train pay loads). On that basis, Aurizon Network said a number of its proposals should be re-instated to enhance the operation of the network, including:

- supply chain rights—it should have the ability to resume access rights for failure to hold (or have the benefit of) supply chain rights. It considered this would promote efficient utilisation of the network and, unlike current (UT3) arrangements, allows it to proactively respond and allocate capacity to access holders most likely to use it, particularly in the short term[492]
- reduction of nominated monthly train services—it considered these provisions allowed it to:
  - free up spare train paths for use by others on the network, including via a contractually agreed mechanism
  - promote above-rail efficiencies without interfering with above-rail operations
  - create capacity through increasing the maximum payload of trains where this is more cost effective than a below-rail expansion.[493]

Aurizon Network also said it could not accept amendments we made that increase its risk and potential liability without providing it any additional return, including amendments to the:

- allowable threshold—reducing the threshold from 10 per cent to 5 per cent is not acceptable as it increases potential liability for non-provision of access[494]
- security requirements—reducing the security amount from 12 to 6 months take-or-pay exposes it to increased risks for two reasons:

[491] Aurizon Network, 2014 DAU, sub. 83: 114.
[492] Aurizon Network, 2014 DAU, sub. 83: 111–112.
[493] Aurizon Network, 2014 DAU, sub. 83: 112–113.
[494] Aurizon Network, 2014 DAU, sub. 83: 115.

- there is potential for it to be out of pocket—if an access holder is liable for 12 months take-or-pay, but Aurizon Network can only recover half, the revenue cap mechanism would still recognise the full 12 months take-or-pay, resulting in Aurizon Network being out of pocket for the remainder
- increased credit risk—there is an increasing trend for end users to be access holders. Many do not have the financial capability of incumbent operators and therefore pose a greater credit risk to Aurizon Network.[495]

- liability provisions—the amendments in relation to liability for accreditation, removal of rollingstock, provision of ad hoc train services and consequential loss do not provide a reasonable balance of risks between parties and, in some instances, are unjustified and unnecessary.[496]

Stakeholder comments on the initial draft decision

In general, stakeholders broadly supported our decision to streamline the access agreements. In particular, Anglo American said the majority of our amendments were sustainable and addressed real problems, including ensuring users are free to determine the most appropriate manner of holding and dealing with access rights.[497]

In a number of instances, stakeholders considered amendments to specific aspects of the AA/TOD were still required to address outstanding issues, including balancing parties' rights, increasing flexibility and ensuring capacity was used in an efficient manner.

Across both the AA/TOD, the QRC said a range of clauses need to be amended to balance the rights of the parties with that of Aurizon Network. For instance, the indemnity and limitation of liability clauses (cl. 17.3) and restrictions on assignment are balanced in Aurizon Network's favour (cl. 26).[498] Also, exclusions for consequential loss should not apply if a party has committed fraud, gross negligence or wilful default (cl. 18.1).[499]

For the AA, the QRC said the access interface deed (AID) is not required in all circumstances, only where the access holder is the same as the operator. Also, the QRC included a recommended form of the pro-forma AID attached to its submission.[500] It was also concerned there were no provisions to review access charges, even though the undertaking provides for it.[501] In addition, for the TOD, the QRC said it was concerned with allowing Aurizon Network to pass through obligations from its electricity retailer. It said this should only occur if the obligations are relevant to the train operators' operations.[502] Also, it considered suspension and termination events needed redrafting and some aspects deleted to make them more reasonable.[503]

Anglo American considered arrangements for holding access could be made more flexible to maximise supply chain efficiency and capacity. For instance, the ability to flex by $\pm$ 10 per cent

[495] Aurizon Network, 2014 DAU, sub. 83: 115.
[496] Aurizon Network, 2014 DAU, sub. 83: 113–114.
[497] Anglo American, 2014 DAU, sub. 95: 11.
[498] QRC, 2014 DAU, sub. 84: 138, 165.
[499] QRC, 2014 DAU, sub. 84: 134, 160.
[500] QRC, 2014 DAU, sub. 84: 128; QRC, 2014 DAU, sub. 87.
[501] QRC, 2014 DAU, sub. 84: 130.
[502] QRC, 2014 DAU, sub. 84: 147.
[503] QRC, 2014 DAU, sub. 84: 169–170.

in a month would provide flexibility by allowing users to catch-up or surge as required to meet annual port entitlements, rather than relying on ad hoc pathing.[504]

Sojitz said the arrangements for reducing nominated monthly train services should be re-instated. This would allow additional capacity to be freed up for other users and, potentially, defer unnecessary capital expenditure.[505] Also, Vale said the AA should include the short-term transfer mechanism once it has been finalised.[506]

8.6.3 QCA analysis and consolidated draft decision

In coming to our consolidated draft decision, we have considered the access arrangements as a whole, having regard to section 138(2) criteria, Aurizon Network's 2014 DAU proposal and the detailed comments from stakeholders.

We remain of the view that, in order to be appropriate, the terms of the standard access arrangements need to provide:

- certainty and security over access arrangements (s. 138(2)(a) and (d))—to provide parties with adequate specification over factors affecting the holding or use of access rights. This includes transparent and clearly defined processes around how access rights can vary over the life of the contract (e.g. resumptions, relinquishments and transfers) and alternating between train operators
- appropriate terms and conditions (s. 138(2)(b) and (e))—that represent a reasonable and commercially balanced allocation of rights, obligations and risks between parties and ensures risks are allocated to those best able to manage them
- workable arrangements that are not overly complex (s. 138(2)(a) and (h))—where possible, simplifying and streamlining processes to promote ease of use, understanding and administration, including by clearly defining the rights and responsibilities associated with access rights from train operations.

We do not consider the terms and conditions of the 2014 DAU SAAs meet these objectives. Accordingly, we refuse to approve the SAAs as proposed by Aurizon Network.

The discussion below focuses on a number of key issues raised by stakeholders within the above broad categories (consistent with the format of our initial draft decision) and our consideration of these matters in forming our consolidated draft decision.

Stakeholders also raised a number of detailed comments on the individual clauses of the AA and TOD, many of which are of a drafting nature, seeking to clarify the operation of clauses, or otherwise enhance the rights and obligations of parties. We have considered these comments and, where we consider it appropriate, have incorporated these comments into the CDD amended AA and TOD attached to this consolidated draft decision. The changes we have made to the AA/TOD reflect the amendments we consider need to be made by Aurizon Network to the draft access undertaking in order for us to be in a position to approve the terms and conditions of the SAAs in accordance with section 138(2) of the QCA Act.

[504] Anglo American, 2014 DAU, sub. 95: 12.
[505] Sotijz, 2014 DAU, sub. 97: 1–2.
[506] Vale, 2014 DAU, sub. 79: 4.

Certainty and security

In order for parties to properly access and manage their risks, it is in the interests of all parties for access arrangements to clearly define:

- rights and responsibilities in providing access or holding access rights
- how access rights can be varied over time, including the processes for doing (i.e. relinquished, transferred or resumed).

We consider it appropriate that Aurizon Network made a number of changes to the agreements to provide greater certainty and security, with key matters including processes for variations to nominated payloads and supply chain rights. These matters are discussed in turn below.

Processes for the reduction of nominated monthly train services

In our initial draft decision, we did not accept Aurizon Network's proposed processes for reducing nominated monthly train services based on train payloads under different circumstances,[507] as we considered these would adversely impact on access holders' certainty and security of contracted access rights. Accordingly, we removed these processes from the AA/TOD in our initial draft decision.

We note Aurizon Network and Sojitz said these mechanisms should be retained to encourage more efficient use of capacity. We accept Aurizon Network introduced these mechanisms to benefit the supply chain and provide a means for it to assist and optimise utilisation of capacity. However, we remain of the view it is not appropriate to include these mechanisms, in addition to those already available, within the access agreements at this time. We maintain our view from the initial draft decision that these processes will adversely impact on access holders' certainty and security of contracted access rights.

A theme of our assessment of the 2014 DAU has been to promote more flexibility in the use of access rights and, in turn, allow access holders to better manage their access rights. For instance, the short term transfer mechanism will allow for transfers to occur for periods of up to three months with no transfer fee, subject to conditions. Also, the AA/TOD has clearly separated the roles of holding access rights from train operations to provide greater flexibility and ability to better meet the needs of their business.

Given this, and the fact these arrangements have not been implemented or tested, there is no evidence to suggest these additional processes are necessary, or that such mechanisms would genuinely assist and complement the regime, rather than just adding additional layers of complexity or avenues for access rights to be affected.

In addition, we query why Aurizon Network considers it necessary to introduce arrangements to deal with train services exceeding the maximum payloads. Given other provisions in the undertaking and access arrangements, we would have considered overloading would not have been a persistent and prevalent issue. For instance, Schedule F of the 2014 DAU sets out the reference tariff train service criteria, including the maximum axle load for train services travelling within each of the coal systems. It then states 'loading in excess of this maximum axle load dealt with in accordance with the relevant Load Variation Table'. As such, it is not clear how these two mechanisms would work concurrently.

[507] That is, reductions of nominated monthly train services if: (1) Operator exceeds maximum payload on an average annual basis (cl. 8 of the 2014 DAU EUAA); (2) access holder requests an increase to maximum payload (cl. 9 of the 2014 DAU EUAA); and (3) Aurizon Network notifies its intention to increase nominal payload (cl. 10 of the 2014 DAU EUAA).

Supply chain rights

In our initial draft decision, we proposed to accept Aurizon Network's concept of including obligations for an access holder to demonstrate it holds, or has the benefit of, the necessary supply chain rights to use its access rights (e.g. access to relevant private infrastructure or port facilities). However, we considered that a failure to demonstrate such rights should not be grounds for resumption.

We note Aurizon Network's comments that providing it with the ability to resume access rights if an access holder fails to hold or have the benefit of supply chain rights will promote the efficient operation of the network, particularly in the short term.[508] The promotion of the efficient use of the CQCN underpins the object of Part 5 of the QCA Act and is a relevant factor under section 138(2) of the QCA Act to which we must have regard. However, this must be balanced with the other factors under section 138(2), including the interests of access seekers. In particular, we consider that it is in the interests of access seekers to have certainty and security over their access rights for the term of their access agreement, including the ability to determine how best to manage their own access rights. This also promotes efficiency in the longer term.

We maintain our view that it is not appropriate to provide Aurizon Network with the ability to resume access rights on the basis of a failure to demonstrate supply chain rights. While we note Aurizon Network's concerns about ensuring unused capacity can be re-allocated in a timely manner, we are not satisfied there is sufficient justification to introduce a further mechanism to allow Aurizon Network to resume access rights, in addition to the existing resumption process. We remain of the view that there are already sufficient incentives and tools in place for access holders to appropriately manage their access rights, such as take-or-pay obligations, and relinquishment and transfer mechanisms. We also consider the introduction of the short term capacity trading framework (as discussed in Chapter 11 of this decision) will assist in this regard.

Overall, we consider the introduction of an additional resumption process will detract from the certainty and security of access rights, and impinge on the ability of access holders to manage their own access rights, including determining how best to deal with circumstances that affect their ability to use access rights. We consider it appropriate to rely on these existing arrangements to promote the efficient utilisation of the network in the short term, noting existing resumption processes will apply if access rights are not utilised in the long term. We consider this provides an appropriate and balanced means for ensuring access rights are used efficiently.

An appropriate balance between the interests of an access seeker and the legitimate business interests of Aurizon Network

It is important for access arrangements to include terms and conditions that reflect a reasonable and commercially balanced allocation of rights, obligations and risks between parties to reflect what would have been the outcome in a competitive market. This is necessary to ensure these arrangements appropriately balance the interests of access seekers/holders with the legitimate business interests of Aurizon Network. We consider an appropriate balance between these interests is essential for ensuring that the SAAs provide a credible and effective 'safe harbour' or default negotiating platform for all parties that will facilitate the development and execution of access agreements in a timely and efficient manner. We have proposed a number of changes to the 2014 DAU SAAs where we consider the terms and conditions are not

[508] Aurizon Network, 2014 DAU, sub. 83: 111–112.

reasonable as they do not appropriately balance these interests. In particular, discussed below is our decision in relation to the following issues:

- the allowable threshold
- security amount for an access holder
- compliance with Aurizon Network's accreditation.

Allowable threshold

The AA sets out the circumstances in which Aurizon Network may be liable to the access holders for claims in respect of non-provision of access, including an 'allowable threshold' for cancelled train services. We maintain our decision that the 'allowable threshold' be reduced from 10 per cent to 5 per cent of the total number train services scheduled for a billing period.

We recognise that, given the nature of the operation and maintenance of a rail network, Aurizon Network will not always be able to make the infrastructure available for access, and that it has a legitimate business interest in managing its potential liability in this regard.

However, we also consider it important that Aurizon Network is accountable to its customers in its delivery of contracted services, as access holders have a legitimate expectation that the infrastructure will be made available for the delivery of contracted services. Greater accountability in this regard is not only in the interests of access holders but is also important to promote the efficient use of the service in that it provides increased incentive for Aurizon Network to make the infrastructure available for the provision of access.

We do not consider the inclusion of an allowable threshold of 10 per cent, when combined with the other circumstances in which Aurizon Network's liability for non-provision of access is excluded[509], represents an appropriate balance between the interests of access seekers/holders and the legitimate business interests of Aurizon Network. We consider these interests will be appropriately balanced where Aurizon Network's liability is excluded due to the occurrence of defined events, rather than on reliance of an allowable threshold of 10 per cent.

In making this decision, we note an allowable threshold was included in the 2010 AU SAAs, although the percentage was left undefined and subject to negotiation between the parties. Given its previous use, we consider a reduction of the threshold proposed by Aurizon Network, rather than its complete removal, is appropriate in the context of UT4. We consider a reduction to 5 per cent is appropriate, as it provides greater accountability for Aurizon Network, while still providing it with some margin for the non-provision of access, in addition to the other circumstances set out in the clause where liability is specifically excluded.

We note the allowable threshold links to the breach mechanism in Schedule F of the undertaking.[510] This mechanism ensures Aurizon Network does not use the revenue cap mechanism to recover access charges which it is not entitled to under an access agreement.

We have amended the breach threshold in the Schedule F revenue cap provisions to align with the allowable threshold we have proposed in the access agreement (i.e. 5 per cent). This means Aurizon Network will not be entitled to recover revenues via the revenue cap more (or less) than it is entitled to under its contractual arrangements.

[509] See clause 21.4(b)(iii)(A)–(G) of the AA.
[510] Clauses 4.3(d)(iii) and 4.3(g)(ii) of Schedule F of the 2014 CDD amended DAU (relating to the non-electric and electric revenue cap calculations, respectively).

Security amount

We do not consider the 12 months take or pay security amount proposed by Aurizon Network to be appropriate, as we do not consider this appropriately balances the interests of an access holder with the legitimate business interests of Aurizon Network. As such, we maintain our decision that six months take or pay charges be the security amount an access holder may be required to provide Aurizon Network.

We consider the 12 month security amount is a significant and potentially burdensome amount for an individual access holder to provide as security, and we do not consider that such an amount is necessary in order to sufficiently protect the legitimate business interest Aurizon Network has in mitigating its exposure to credit risk.

We consider Aurizon Network already has significant protection from credit risk through the revenue cap form of regulation under which it operates, as this will allow it to recover any unrecovered revenue through the existing revenue adjustment mechanisms already in place.[511] In this way the credit risk is socialised across system users, rather than borne by Aurizon Network.

In light of the above, we see no reason to link the security amount with the annual take or pay charge. We consider six months is a more reasonable amount, noting it still represents an increase from the three months that was used in previous undertakings and is an amount stakeholders have indicated they consider reasonable to pay.[512]

Compliance with Aurizon Network's accreditation

In our initial draft decision we did not consider it appropriate to approve the inclusion of clause 16.2 of the 2014 DAU EUAA (cl. 14.6 of the 2014 DAU TOA),[513] as we were concerned with the effect it would have on the contractual certainty of the standard arrangements and were not satisfied its inclusion had been sufficiently justified by Aurizon Network.

We note Aurizon Network's comments that this clause should be reinstated as the terms of its safety accreditation may change over time and it cannot accept a position where compliance with its accreditation causes it to be in breach of a AA/TOD.[514]

We acknowledge safety is an important concern that is in the interests of all parties. However, the clause proposed by Aurizon Network has a broad application that will have a significant effect on the contractual certainty for access holders (and train operators), including in relation to fundamental matters such as each party's liability to each other under the AA/TOD. This goes to the core of our consideration of whether the terms and conditions of the SAAs are commercially reasonable and balanced.

In light of this significance, Aurizon Network must justify the need for this clause, including by demonstrating the types of risks to Aurizon Network's accreditation this clause is intended to address and how these risks are not already addressed within the existing framework of the SAAs. In particular, we note this clause has not been included in SAAs under previous access undertakings.

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[511] Revenue cap adjustment mechanisms are detailed in Schedule F of the DAU.
[512] QRC, 2014 DAU, sub. 28: 25.
[513] This clause can affect whether or not Aurizon Network or an access holder/train operator is in breach of the AA/TOD depending on whether an act or omission (including those done in accordance with the AA/TOD) conflicts with, or may otherwise affect, Aurizon Network's accreditation.
[514] Aurizon Network, 2014 DAU, sub. 83: 113, 290.

We remain of the view that Aurizon Network has not provided sufficient justification for the inclusion of this clause. In the absence of such justification, we do not consider the inclusion of this clause is appropriate in respect of the interests of access seekers (and holders), as it introduces significant contractual uncertainty for access holders (and train operators) and does not reflect an appropriate allocation of risks and liabilities between the parties.

Streamlining the agreements

It is in the interests of all parties for access arrangements to be workable and not overly complex. Access arrangements that best meet the needs of Aurizon Network and access seekers/holders will include terms and conditions that can be easily understood, readily entered into and able to be administered effectively over the life of the contract.

Accordingly, we have proposed a number of changes to the AA and TOD to streamline the agreements, including clearly separating rights and obligations associated with access rights from train operations, and simplifying processes and providing greater clarity more generally.

Clear separation of rights and responsibilities

We have proposed a number of changes to the AA/TOD to promote a clearer separation of rights and responsibilities associated with access rights from train operations matters. We consider this important from the perspective of promoting effective competition in the above-rail market by ensuring access arrangements reflect the separate roles of the management of access rights and the operation of train services.

In addition, we also consider that access arrangements which conflate these rights and obligations across the AA and TOD are not in the interests of access holders, as it creates complexity and could result in parties under either agreement being allocated responsibilities for matters they are not best placed to perform or manage.

We are accordingly of the view that it is appropriate that Aurizon Network amend its access undertaking to more clearly separate rights and responsibilities associated with access rights and train operations. We maintain our reasoning from the initial draft decision that the access holder be responsible for payment of all access charges (removing the option for the train operator pay all or part of the access charges) and as a result of this change, also removing the requirement for train operators to provide security to Aurizon Network. Stakeholders have not indicated any opposition to this proposal.

However, we have revised amendments we proposed in our Initial draft decision, where appropriate, in response to stakeholder submissions. These include:

- re-inserting an obligation for an access holder to participate in the IRMP development process and comply with the IRMP—we acknowledge Aurizon Network's comments about the importance that it actively manages interface risks to comply with safety requirements, and that such interface risks are not limited to Aurizon Network and a train operator.[515] In this context, we consider it appropriate for the access holder to have these obligations with respect to the IRMP (we have incorporated these in cls. 15.1 and 18.1 of the AA)
- re-establishing the ability for an operator to request an adhoc train service under the TOD—in our initial draft decision, we provided for all requests for adhoc train services to be made by the access holder, as we considered this would reinforce the separate role of managing access rights from that of operating train services. However, we note Aurizon Network's

[515] Aurizon Network, 2014 DAU, sub. 83: 290–291

comments that it is impractical and not reflective of current train ordering practices for the operator to not be able to order ad hoc train services in its own right.[516] On this basis, we have re-established this ability in the TOD (see cl. 4.3 of the TOD).

Simplifying processes and providing greater clarity

We consider it is appropriate that Aurizon Network make a number of amendments to the AA/TOD where it may assist parties in understanding the arrangements and to provide more confidence and certainty on how the AA/TOD operate in practice.

As discussed in Chapter 2, we consider clarity and certainty in regulatory arrangements to be a relevant factor for us to consider as part of our assessment of the 2014 DAU (s. 138(2)(h) of the QCA Act). We do not consider it appropriate for access arrangements to be unclear or uncertain in meaning, as this can lead misunderstandings and ambiguity over the terms of the SAAs. This can increase transaction costs in administering the access agreements, as well as increasing the potential for disputes between parties to arise.

In our assessment of whether there is clarity and certainty in the terms and conditions of the 2014 DAU SAAs, we maintain our initial draft decision to accept the 'train service type' concept proposed by Aurizon Network. We continue to consider this concept has merit, insofar as it will:

- better reflect how access agreements are administered in practice
- clearly separate the various train services (e.g. multiple origin-destination pairs) that can be included in an agreement over time
- provide greater clarity around how this links to the concept of a reference train in the undertaking.

However, we have revised amendments proposed in our initial draft decision, where appropriate, in response to stakeholder submissions. These include re-instating the ability of Aurizon Network to accept or reject the decision of an independent certifier to certify rollingstock as being compliant with the rollingstock standards. In our initial draft decision we considered providing the decision of an independent certifier to be binding on parties (absent fraud or manifest error) would streamline the process for the authorisation of rollingstock and rollingstock configurations. However, we note Aurizon Network's comments that it needs to have input and control into the rollingstock certification process, given the safety implications involved and its ultimate responsibilities as rail infrastructure manager.[517] On this basis, we consider it appropriate to re-instate this ability for Aurizon Network, although we do not accept the inclusion of a deemed refusal should it not make this decision within the required timeframe (see cl. 15 of the TOD).

[516] Aurizon Network, 2014 DAU, sub no. 83: 283.
[517] Aurizon Network, 2014 DAU, sub. 83: 299.

Consolidated draft decision 8.4

(1) After considering Aurizon Network's proposal for the terms and conditions of SAAs under the 2014 DAU, our consolidated draft decision is to refuse to approve the proposal.

(2) The way in which we consider it appropriate that Aurizon Network amend the terms and conditions of the 2014 DAU SAAs is to:

- **(a) provide access holders with increased certainty and security over their access rights**
- **(b) ensure there is an appropriate balance between the interests of Aurizon Network and those of an access holder / train operator**
- **(c) better separate out the rights and responsibilities relating to an access holder and an operator**
- **(d) simplify arrangements and provide greater clarity around the rights and obligations of parties to an AA / TOD, reflecting our broader structural reforms.**

(3) The amendments we consider to be appropriate to achieve the above are set out in our CDD amended DAU.

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

9 CONNECTING PRIVATE INFRASTRUCTURE

The connection of private infrastructure to the rail network is dealt with in two sections of the 2014 DAU. The circumstances under which Aurizon Network will consent to a connection of private infrastructure to the rail network are identified in Part 9 of the 2014 DAU. The standard terms and conditions for connection are set out in the Standard Rail Connection Agreement (SRCA).

Our initial draft decision was to refuse to approve Aurizon Network's arrangements for connecting private infrastructure. We required amendments to Part 9 and the SRCA that focused on arrangements that allow connections to the network to be designed and developed efficiently and with greater certainty for all parties.

Our consolidated draft decision generally adopts our initial draft decision except for the manner in which we consider the 2014 DAU and the SRCA should be amended with respect to Aurizon Network's obligations to forecast connection milestones.

9.1 Introduction

Third parties are increasingly required, and want the option, to develop and own private infrastructure that is connected to Aurizon Network's existing rail track.[518] They therefore require the ability to connect to the network (on reasonable terms and within a reasonable time). The arrangements for such connections are an important component of the regulatory framework.

Including provisions in the undertaking to deal with the process of connecting private infrastructure to the network constrains Aurizon Network's ability to use its monopoly power beyond its current network by:

- allowing third parties to construct, own and operate private infrastructure that connects to the network
- specifying a process to underpin the connection of private infrastructure to the network
- imposing obligations on Aurizon Network in its dealings with these matters, particularly in relation to timing.

The SRCA assists negotiations by setting out standard terms and conditions for the connection. Parties can agree to other terms and conditions on a case-by-case basis—but in the event that negotiations fail, the SRCA provides a fall-back position for resolving a dispute. The SRCA was approved under the 2010 AU and has applied from April 2013.[519]

Overall, the provisions in the undertaking and the SRCA facilitate timely and efficient connections of private rail infrastructure—and so underpin the economically efficient operation and use of the network.

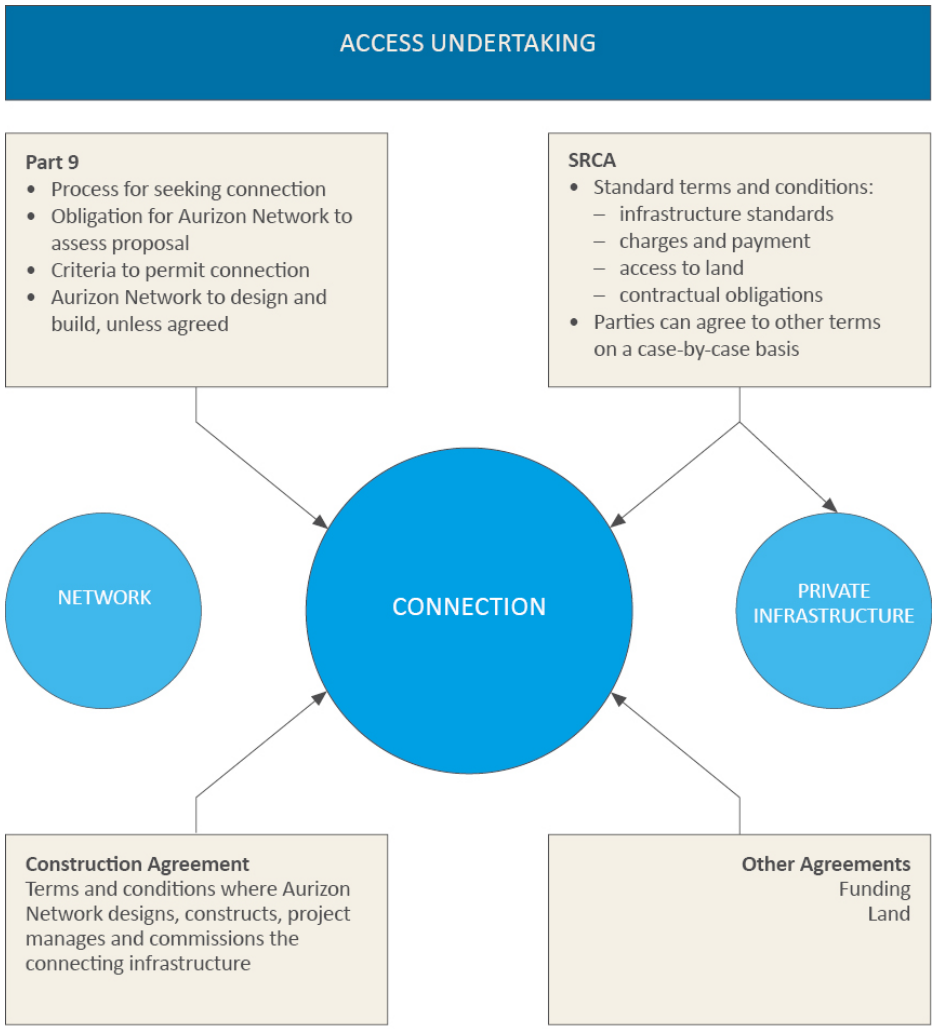
[518] The development of mine-specific infrastructure is a competitive service. Aurizon Network said it will not necessarily undertake the development, construction and management of spur lines through the UT4 period (Aurizon Network, 2013 DAU sub. 2: 101).
[519] QCA 2013(a).

9.2 Overview

9.2.1 Aurizon Network's proposal

Part 9 of the 2014 DAU sets out the process for connecting private infrastructure to the network. The 2014 DAU also includes a SRCA with standard terms and conditions for connection. Parties also need to reach agreement on other matters for the connection to go ahead, including construction, land and funding (see figure below)

Figure 4 Connecting private infrastructure



Connecting infrastructure

Aurizon Network said the 2014 DAU arrangements for connecting private infrastructure represent a material simplification of existing arrangements in the 2010 AU.[520] This includes removing a number of obligations from the body of the undertaking on the basis these are now generally dealt with in the 'safe harbour' of the SRCA (see Section 9.6) and dealing with disputes under Part 11 (dispute resolution).[521]

[520] Aurizon Network, 2013 DAU, sub. 2: 102.
[521] Aurizon Network, 2013 DAU, sub. 2: 102, 312, 345.

These arrangements set out a framework to connect private infrastructure to the rail network, including identifying the circumstances where Aurizon Network will consent to a connection. These arrangements apply to a private infrastructure owner (PIO): a person proposing to construct and own private infrastructure which will connect to the network in order to allow trains to enter and exit the network for the purpose of access.

SRCA

Volume 3 of the 2014 DAU includes a SRCA that sets out standard terms and conditions for connecting private rail infrastructure to the network. Aurizon Network said the SRCA ensures no party is disadvantaged with regard to the requirements for interconnection of rail infrastructure when electing to construct and own its own infrastructure.[522]

Aurizon Network intends the SRCA to cover the connection of private rail infrastructure to the network for the purpose of entering loaded coal trains into the relevant individual coal system. While the proposed SRCA largely reflects the existing approved SRCA arrangements[523], it adopts a different approach to coal loss mitigation provisions (CLMPs) and includes a number of new provisions that clarify interpretation of the SRCA or otherwise reflect consequential amendments.[524]

Aurizon Network said the SRCA is not intended to apply to the connection of major new expansions (which will require varied terms and conditions) or to the connection to the rail network for services other than coal services (which would be dealt with under separate contractual agreements).[525]

9.2.2 Legislative framework and QCA assessment approach

In assessing Aurizon Network's 2014 DAU, we have had regard to all of the factors in section 138(2) of the QCA Act. In doing so, we have applied to each matter a weighting we consider appropriate based on the practical relevance of that matter.

Against this background, we consider that in our assessment of Aurizon Network's arrangements for connecting private infrastructure:

- section 138(2)(a), (b), (d), (e) and (h) should be given more weight
- section 138(2)(g) refers to the pricing principles mentioned in section 168A of the QCA Act, which we consider relevant to the extent that a connection agreement should only allow Aurizon Network to recover the costs of a connection not already built into access prices
- section 138(2)(c) and (f) should be given less weight, as they are less relevant to the matter of connecting private infrastructure.

Section 138(2)(a)

Within the context of Part 9 of the 2014 DAU, we are of the view that the object of Part 5 of the QCA Act is taken into account when it:

- minimises total economic costs (including commercial risks) associated with building and connecting private infrastructure

[522] Aurizon Network, 2013 DAU, sub. 2: 330.
[523] Aurizon Network, 2013 DAU, sub. 2: 332.
[524] Aurizon Network, 2013 DAU, sub. 2: 332; Aurizon Network, 2014 DAU, sub. 3: 242–243.
[525] Aurizon Network, 2013 DAU, sub. 2: 330–331.

- promotes an efficient allocation of economic costs and rights associated with building and connecting private infrastructure between Aurizon Network and PIOs
- minimises the ability of Aurizon Network to behave in a manner that unfairly differentiates between PIOs in a materially adverse way
- promotes user participation by being simple and effective.

The 2014 DAU approach to connecting private infrastructure should minimise and efficiently allocate economic costs associated with a project to build private infrastructure. Economic costs include costs associated with delay, administration costs, transactional costs and build cost. Minimising total economic costs means that private infrastructure projects are more affordable, which promotes greater user participation, and hence promotes competition in related markets. We consider this is best achieved by a framework that appropriately allocates these costs between the parties so that they are incentivised to keep costs as low as possible.

The most efficient allocation of costs (including commercial risks) occurs when it is determined by the parties themselves rather than by regulation. Therefore, our approach is to examine the process rather than attempt to shape results according to what we believe is an efficient outcome.

In our view, the process outlined in Part 9 of the 2014 DAU should not allow Aurizon Network to misuse its monopoly power to unreasonably shift economic costs to a PIO. This will promote the object of Part 5 of the QCA Act.

As a monopoly, Aurizon Network has significant bargaining power and could leverage that power to extract significant concessions from PIOs. We consider that the process should take into account the difference in bargaining power; for example, setting out timeframes where possible so that parties are incentivised to proceed with the project in a timely manner.

The framework for connecting private infrastructure should maximise effectiveness by being sufficiently clear and flexible in order to encourage investment and participation by giving users and access seekers adequate confidence in the system.

Section 138(2)(b)

We consider Aurizon Network's legitimate business interests include:

- having infrastructure connected to its network that is built and maintained appropriately
- being able to recover the reasonable costs for work undertaken
- operating within a framework that is sufficiently flexible to allow a tailored approach to connecting private infrastructure
- not being subject to unnecessary and over-burdensome regulation, thereby increasing compliance and transactional costs.

Aurizon Network has a legitimate business interest in having private infrastructure connected to its network that is fit for purpose, that is, it facilitates entry and exit from the CQCN, the operation of the connecting infrastructure is sound and safe, and its connection does not adversely affect the network and other users of the network.

We also consider that it is in the legitimate business interest of Aurizon Network to be able to recover the reasonable costs it incurs for participating in a relevant project, including the design, construction, project management and commissioning of the connecting infrastructure. However, in having regard to this factor alongside the other section 138(2) factors, we consider that it would not be appropriate to approve an undertaking that allowed Aurizon Network to

charge a margin on costs associated with these tasks. Aurizon Network earns a regulated return on providing access rights to the CQCN. PIOs (to the extent that they are the associated access holder), or a relevant access holder will incur a cost in seeking access from Aurizon Network that is a direct result of connecting private infrastructure. Aurizon Network therefore will gain an access charge associated with a connection which includes a regulated return on investment.

We further consider that a flexible approach to its role in a project is in the legitimate business interest of Aurizon Network. Connecting private infrastructure is a complicated process that may take a significant time from inception to completion. No two projects are likely to be the same. It is therefore in Aurizon Network's interest to be able to develop a tailored approach to connecting private infrastructure for a PIO.

Finally, we consider that it is in Aurizon Network's legitimate business interests to not be subject to unnecessary and over-burdensome regulation, thereby increasing compliance and transactional costs. We consider that this interest is served by a simple, flexible regulatory approach that may be tailored in the manner set out above.

Section 138(2)(d)

We consider that it is in the public interest for private infrastructure to be able to connect to the CQCN, and that the process for connecting private infrastructure is efficient and effective. This is best served by an undertaking that minimises costs and promotes competition in related markets. The discussion above regarding section 138(2)(a) is relevant and applicable here.

Section 138(2)(e)

We consider it is in the interests of access seekers if the process for connecting private infrastructure to the CQCN is flexible, timely, does not unfairly differentiate to a material extent, and allows connection at a reasonable cost (irrespective of who designs, constructs, maintains or upgrades the infrastructure).

We consider that omitting or insufficiently developing a process, including applicable timeframes for connecting private infrastructure may, of itself, hinder or prevent access against the interests of access seekers—in particular if it allows Aurizon Network to extract monopoly rents, delay connections or favour a related party. The discussion above regarding section 138(2)(a) is relevant and applicable here.

We also consider that effectiveness will be achieved by maximising transparency and certainty of the process. PIOs should have confidence that the process works and does not allow Aurizon Network to use its monopoly power to behave in an anticompetitive manner. In practical terms, this means the process should be to some extent mechanical, with Aurizon Network required to provide an up-front commitment to timeframes for steps involved in the process. However, it is also in stakeholder's interests to have a process that is sufficiently flexible to accommodate their individual needs. An effective process will balance certainty and flexibility.

Section 138(2)(g)

We also consider that Part 9 of the 2014 DAU should provide a way for economic costs to be appropriately shared between Aurizon Network and a PIO. This will align interests of the parties to reduce costs. The discussion above regarding section 138(2)(a) is relevant and applicable here. The discussion above regarding section 138(2)(b) is relevant and applicable here.

Section 138(2)(h)

Section 138(2)(h) of the QCA Act requires us to have regard to any other issues that we consider relevant. We note that this broad discretion should be used appropriately. We include in this

criterion the interests of access holders as these are not specifically addressed in section 138(2). Where applicable, we have identified issues that we consider relevant in the circumstances.

Conclusion

Having had regard to the factors outlined in section 138(2) of the QCA Act, we have assessed Aurizon Network's proposed Part 9 of the 2014 DAU with a view to balancing the aims of:

- having infrastructure that is built and maintained to a standard that meets minimum technical, operational and safety requirements (including not adversely affecting the safety and operation of the network)
- providing a process that aligns the interests of Aurizon Network and PIOs
- achieving an appropriate balance between flexibility and certainty of the process for connecting private infrastructure
- minimising Aurizon Network's ability to unfairly differentiate in a materially adverse way
- enabling Aurizon Network to recover reasonable costs.

The chapter should be read in conjunction with our specific analysis in the sections below and our overarching approach in Chapters 2 and 3.

9.3 Summary of the initial draft decision

Stakeholder submissions on the 2014 DAU did not support Aurizon Network's proposal for connecting private infrastructure.[526] They said amendments were necessary to support successful negotiations between Aurizon Network and PIOs to ensure connections to the network are designed and developed more quickly and with greater certainty for all parties. The amendments they sought included providing:

- further detail around the obligations and processes included in the Part 9 framework
- greater certainty over terms and conditions where Aurizon Network constructs the connecting infrastructure
- changes to the proposed treatment of CLMPs.

After considering the section 138(2) factors and having regard to stakeholder submissions, our initial draft decision was to refuse to approve Aurizon Network's proposed arrangements for connecting private infrastructure. We considered it appropriate that Part 9 of the 2014 DAU and the SRCA should be amended to balance Aurizon Network's and PIOs' rights and interests and simplify and speed up the negotiation process.

9.4 QCA analysis

Having had regard to the section 138(2) factors and stakeholders' submissions we refuse to approve Aurizon Network's proposed framework for dealing with connecting private infrastructure, composed of Part 9 of the 2014 DAU and the SRCA.

We consider that while the general framework proposed by Aurizon Network is acceptable, it would be inappropriate to approve the following two matters:

[526] Anglo American, 2014 DAU, sub. 7: 57–60; sub. 11; Asciano, 2014 DAU, sub. 22: 41–42; 125–126; QRC, 2014 DAU, sub. 42: 50; sub. 36.

- the clarity of the negotiation process (milestones) between Aurizon Network and a PIO set out in the 2014 DAU and the SRCA. This is referenced in our consolidated draft decisions 9.2 and 9.3
- the inclusion of CLMPS in the SRCA. This is referenced in our consolidated draft decision 9.4.

9.4.1 Connection milestones

We consider that the process by which Aurizon Network may design, construct and commission the connecting infrastructure is inappropriate. The process proposed by Aurizon Network gives it total discretion as it is only obligated to review a PIO's proposal in a timely fashion under clause 9.1(c) of Aurizon Network's proposed 2014 DAU. This obligation is subjective and lacks certainty. We consider that this works against the interests of access seekers and is not outweighed by the legitimate business interests of Aurizon Network.

Further, it does not promote the object of Part 5 of the QCA Act because it would allow Aurizon Network an opportunity to unfairly differentiate between PIOs in a materially adverse manner, which may adversely affect competition in related markets. For example, Aurizon Network could under its proposal prioritise projects undertaken by a related party over a non-related party, or simply delay progress on a non-related party's project.

Such delays have potential to cause suboptimal outcomes for the CQCN as PIOs may become discouraged from investing due to the lack of certainty and transparency in the process.

The lack of certainty under the process proposed by Aurizon Network may also allow it to engage in tactics like delaying a project until a PIO accepts unfair or unreasonable terms. For example, Aurizon Network could delay work until a PIO agrees to absolve Aurizon Network from any compensation claims, even if Aurizon Network was at fault. A more overt example is that Aurizon Network could extract excessive payments from PIOs to review a PIO's proposal in a 'timely fashion'.

A framework that has the potential for such outcomes would not be consistent with the object of Part 5 of the QCA Act or be in access seekers' interests or in the public interest.

However, we recognise that the more the process is regulated the less flexible it becomes, leading to unnecessary increases in regulatory and transactional costs. We also recognise that each project to connect private infrastructure is likely to be unique, and that a 'one-size-fits-all' approach is undesirable as it may be too inflexible to deal with unforeseen circumstances.

The access undertaking should not impose all the economic costs of a project on Aurizon Network. A project which connects private infrastructure is by nature speculative and forward-looking, and carries real associated commercial risks. Where possible, costs due to delays should be attributed to the party that caused the delay. Where fault cannot be attributed, the costs of a delay should be borne by both parties. Aurizon Network's proposed process does not articulate how such costs would be attributed between the parties.

Aurizon Network's proposed SRCA is drafted in a manner that reflects the approach Aurizon Network has taken in respect of Part 9 of its proposed 2014 DAU. We consider that the proposed SRCA is not sufficiently clear in respect of timeframes. For example, where a PIO is responsible for the design, construction, project management, and commissioning of connecting infrastructure, the only requirement on Aurizon Network is to 'promptly' provide assistance to a PIO (cl. 6(a) of SRCA). We consider the concern about the lack of certainty in the 2014 DAU outlined above to be relevant and equally applicable here.

Section 9.5 outlines how we consider Aurizon Network should amend the 2014 DAU in regards to clarifying the process.

9.4.2 Coal loss mitigation provisions

We consider Aurizon Network's proposal in relation to the CLMPs in the 2014 DAU to be inappropriate due to the potential for Aurizon Network to unfairly differentiate between PIOs in a materially adverse manner, which may adversely affect competition in related markets.

Aurizon Network's proposal is to remove the CLMPs from the 2014 DAU and include them in the SRCA. The effect is that the PIOs would be primarily responsible for ensuring wagons conform to the CLMPs as a condition of the SRCA. This will likely increase costs for the PIO depending on the terms and conditions of its rail connection agreement with Aurizon Network.

Since Aurizon Network can agree with a PIO to vary or to contract out of these provisions, there is an incentive for Aurizon Network to do so with a PIO that is a related party, ensuring that the latter's costs are minimised. Aurizon Network would not have the same incentives to reach the same agreement with a non-related party.

We recognise that the CLMPs are designed to minimise damage to the CQCN and that it is in the public interest that these provisions are recognised in the 2014 DAU. However, given that Aurizon Network's proposal may create incentives for it to engage in behaviour that unfairly differentiates between parties in a materially adverse manner, we consider Aurizon Network's proposal to be inappropriate in these circumstances.

The CLMPs are also referenced in clause 1.3 of Schedule F to the 2014 DAU (Reference Tariffs). Aurizon Network's proposal may unnecessarily complicate this by removing the CLMPs from the 2014 DAU. Aurizon Network's proposal would create a situation where reference tariffs refer to the SRCA, which is susceptible to variation.

Aurizon Network put forward an argument that its proposed treatment of the CLMPs was to ensure that it is adequately protected. The CLMPs are already accounted for in reference tariffs and their placement within the 2014 DAU does not alter any obligations. We consider it unlikely that a situation could occur where a train service could avoid paying the reference tariffs by utilising Part 9 of the 2014 DAU. Aurizon Network's proposal is likely to create uncertainty, leading to increased costs, and is not in the interest of stakeholders and would not promote the object of Part 5 of the QCA Act.

Section 9.5 outlines how we consider Aurizon Network should amend the 2014 DAU in relation to the treatment of CLMPs.

9.4.3 Arguments raised by Aurizon Network

We have given particular consideration to Aurizon Network's argument that the process it has submitted is done on a voluntary basis and that there is no requirement under the QCA Act to include this process in an undertaking.[527]

Section 136(4) of the QCA Act imposes a statutory duty on the QCA to consider a draft access undertaking given to us. The QCA Act does not permit us to differentiate between provisions that are specifically required to be present in an access undertaking and any other provisions. Therefore we have to consider the entirety of Aurizon Network's 2014 DAU (including the framework for connecting private infrastructure) within the confines of the QCA Act.

[527] Aurizon Network, Response to Policy & Pricing Principles Draft Decision, p. 13.

Accordingly, we must consider whether or not it is appropriate for us to approve Aurizon Network's proposed process for connecting private infrastructure, having regard to the factors set out in section 138(2). If we refuse to approve that process, we must provide Aurizon Network with reasons for the refusal (s. 136(5)(a)), and the way in which we consider it is appropriate to amend the process (s. 136(5)(b)). This was the approach we adopted in the initial draft decision, and it is our approach in this consolidated draft decision. This chapter sets out our reasons for the refusal, and the way in which we consider it is appropriate to amend the process.

Consolidated draft decision 9.1

(1) **After considering Aurizon Network's proposed framework for connecting private infrastructure, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.**

(2) We consider it appropriate that Aurizon Network amend its draft access undertaking in the manner proposed in our consolidated draft decisions 9.2, 9.3 and 9.4.

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

9.5 Amending the process for connecting private infrastructure

9.5.1 Aurizon Network's proposal

Part 9 of the 2014 DAU sets out the following process for connecting private infrastructure to the CQCN:

- The PIO provides Aurizon Network with a written proposal for the proposed connection for it to review and assess (cl. 9.1(b), (c)).
- Aurizon Network will permit the connection if:
  - it is satisfied that the connection is to be used to allow trains operating on the private infrastructure to enter or exit the network for the purpose of access; meets minimum construction and service standards and will not adversely impact safety; and will not, by virtue of its existence, reduce capacity or supply chain capacity (cl. 9.1(c))
  - it owns, or holds the appropriate lease, over the connecting infrastructure (cl. 9.1(d))
  - it can access the necessary land (cl. 9.1(e))
  - it and the PIO have entered into required relevant agreements—including a rail connection agreement (consistent with the SRCA, unless agreed) and any other agreement necessary relating to design, construction, project management or commissioning of the connecting infrastructure or other works (cl. 9.1(e)).
- Aurizon Network must notify the PIO, providing reasons, if it is not satisfied the connection requirements are met, and it refuses to enter a connection agreement (cl. 9.1(f)).

Part 9 of the 2014 DAU provides for Aurizon Network to be responsible for designing, constructing, project managing and commissioning the connecting infrastructure, unless otherwise agreed (cl. 9.1(g)). It does not include the 2010 AU arrangements that outline the standards required and the PIO's role for connections in this event (2010 AU, cl. 8.3(c)).

Part 9 of the 2014 DAU does not include other 2010 AU arrangements that Aurizon Network said are now dealt with in the SRCA which require Aurizon Network to:

- ensure connecting infrastructure built by third parties is physically connected to the network, facilitate the movement of trains and offer to provide train control and planning services (2010 AU, cl. 8.3(b))
- pay reasonable costs where it has unreasonably delayed the development of the connecting infrastructure (2010 AU, cl. 8.3(d)).[528]

Part 9 of the 2014 DAU does not include a process to refer disputes to dispute resolution. Instead, Aurizon Network has advised disputes in relation to the connection framework are subject to the Part 11 dispute resolution provisions (see Chapter 6).

In initial submissions, stakeholders did not accept Aurizon Network's proposed process for connecting private infrastructure.[529] The overarching view of stakeholders was that the 2014 DAU provides Aurizon Network with too much discretion which Aurizon Network could use to favour its related party rail operator.[530]

9.5.2 Summary of the initial draft decision

Our initial draft decision was to refuse to accept Aurizon Network's proposed arrangements for connecting private infrastructure. We proposed amendments to Part 9 of the 2014 DAU and the SRCA to balance Aurizon Network's and PIOs' rights and interests, and simplify and speed up the negotiation process.

Our initial draft decision 9.1 refused to approve Part 9 of the 2014 DAU as proposed by Aurizon Network. We proposed amendments to:

(a) clarify the process for connecting private infrastructure and improve transparency

(b) address Aurizon Network's ability to unreasonably delay or fail to enter agreements required to connect private infrastructure

(c) clarify arrangements where Aurizon Network is responsible for designing and building the connecting infrastructure.

Clarifying the process and improving transparency

We considered a clear process for proposing connecting infrastructure, assessing the proposal, and putting it into effect would simplify and speed up negotiations for connections. While we accepted Aurizon Network's approach in principle, we proposed amendments to Part 9 of the 2014 DAU to clarify the process and improve transparency. These included:

- requiring that the PIO's proposal provides reasonably sufficient detail about the proposed connection (cl. 9.1(a) of the IDD amended DAU)—so Aurizon Network can assess the proposal without delay
- testing for whether the connection would reduce capacity following the completion of any planned expansion (cl. 9.1(b)(v) of the IDD amended DAU)—to provide a realistic view of the capacity implications of connection

[528] Aurizon Network, 2013 DAU, sub. 2: 345.
[529] Anglo American, 2014 DAU, sub. 7: 57–60; Asciano, 2014 DAU, sub. 22: 41–42,125–126; QRC, 2014 DAU, sub. 42: 50.
[530] Asciano, 2014 DAU, sub. 22: 42.

- requiring Aurizon Network to promptly assess the PIO's proposal and notify the PIO (and the QCA) whether the requirements for connection are satisfied or not satisfied and identify the amendments that need to be made (cl. 9.1 (d), and (f) of the IDD amended DAU)—to make Aurizon Network more accountable for its decision-making, and give the PIO a better understanding of what is required and to assist in determining the facts should the matter go to dispute resolution
- providing that the SRCA may be used by parties as an 'anchor' or starting point to guide negotiations (cl. 9.1(e)(i)).

Dealing with delays

We considered that Part 9 of the 2014 DAU did not appropriately deal with Aurizon Network unreasonably delaying or failing to enter agreements required for connection beyond requiring it to review a written proposal in a timely fashion. For this reason, we proposed that the way in which the DAU should be amended was that Aurizon Network pay all reasonable costs arising out of loss suffered by PIOs, access seekers or access holders from Aurizon Network's unreasonable delays in meeting key milestones.

We also proposed that Aurizon Network to notify a timeframe for reaching key connection milestones[531], providing reasons explaining the length of the timeframe selected (cl. 9.1(d) of the IDD amended DAU)—to provide transparency for the likely timing of progress to connection.

Construction matters

We considered unambiguous terms of the construction agreement are important where Aurizon Network constructs the connecting infrastructure. Uncertainty regarding terms of a construction agreement could lead to disputes and delays, particularly where there is limited competitive pressure on Aurizon Network to provide a timely or cost effective response or where Aurizon Network seeks to use its monopoly position inappropriately to reduce or remove risk and liability for the project being built.

We considered matters relevant to the negotiation of the construction of the connecting infrastructure to be within the scope of the access undertaking, including the SRCA.[532]

We also considered the manner in which the design and construction contract is negotiated, and the timeframes applicable to the negotiation and performance of the contract, fall within the scope of the 2014 DAU. While the performance of the construction contract itself might not be within the scope of the relevant access agreement, the 2014 DAU already covers disputes relating to the negotiation and formation of the construction contract.[533] Including these matters within an access undertaking is also implicitly permitted by the framework of the QCA Act.[534] Accordingly, we proposed amendments to increase certainty and limit the possibility for

[531] These include entering a rail connection agreement with the PIO; the design and construction of any connecting infrastructure; and commissioning.

[532] Aurizon Network said disputes on a construction agreement are out of the scope of the 2014 DAU (Aurizon Network, 2014 DAU, sub. 4: 239).

[533] The intent and scope of the access undertaking deals with facilitating the negotiation of access arrangements. Where connecting infrastructure is required, access cannot be negotiated or provided without the existence of a construction contract between the parties—and the formation of an appropriate construction contract for connecting infrastructure is one of the pre-conditions to access.

[534] For example, the QCA Act provides that an access undertaking must include provisions preventing Aurizon Network from unfairly differentiating between access seekers or users (s. 137(1A)) and may include details of

delay and cost blow-outs. We also proposed amendments to the SRCA to set out required steps and timeframes to guide the process where Aurizon Network designs and builds the connecting infrastructure (see Section 9.6.2 of this chapter).

In proposing the amendments, we noted a standard construction agreement is being developed for SUFA[535] and we believed this could be the reference point for a construction agreement for connecting infrastructure.

9.5.3 Stakeholders' comments on the initial draft decision

Aurizon Network

Aurizon Network agreed the process for connecting infrastructure could be improved by the proposed amendments requiring PIOs to provide sufficient details about proposed connections, Aurizon Network provides a realistic view of the capacity implications of a connection and the SRCA is used as an anchor for negotiations.

However, in general, Aurizon Network had serious concerns with other amendments we proposed. Generally, it said our approach attempts to allocate risks, determine performance management arrangements and even impose penalties, which only parties to a contract can properly determine through negotiation.[536] In addition, Aurizon Network said it included the arrangements for connecting infrastructure in the 2014 DAU on a voluntary basis; there is no requirement to do so under the QCA Act.[537] As such, it will not accept amendments that allocate costs or risks to Aurizon Network above what it has voluntarily offered.[538]

On this basis, Aurizon Network said it does not support:

- connection milestones—agreeing milestones immediately after receiving the PIO's initial connection proposal is impractical and meaningless as it can take some time before the actual connection is required
- notifications—requiring it to notify us of connection milestones and criteria is unwarranted and intervenes in its day-to-day operations[539]
- requiring it be subject to traditional market based remedies for delays (i.e. damages), while only permitting reasonable, direct costs be recovered (excluding profit, margin and overheads) which allocates risks to Aurizon Network it is not willing to assume.[540]

Other stakeholders

While QRC supported aspects of our proposal, it remained concerned with:

- the lack of a construction agreement—QRC reiterated its concerns that requiring parties to agree the terms of the construction agreement will result in unacceptable delays and disputes and will undermine the benefit of having a SRCA[541]

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time frames for giving information in the conduct of negotiations (s. 137(2)(c)) and provisions to be included in access agreements (s. 137(2)(j)). The QCA must also have regard to the interests of persons who may seek access to the service in deciding whether to approve a draft undertaking (s. 138(2)(e)).

[535] For more detail on the SUFA construction agreement, or the SUFA assessment process more broadly, see the SUFA project page on our website.

[536] Aurizon Network, sub. 82: 117.

[537] Aurizon Network, sub. 82: 30, 117.

[538] Aurizon Network, sub. 82: 117.

[539] Aurizon Network, sub. 82: 119.

[540] Aurizon Network, sub no 82: 120.

- Aurizon Network's discretion—if Aurizon Network is responsible for design and construction of the connecting infrastructure, it should not be able to determine timeframes and potentially delay the process to its advantage.[542] Also, there should be deemed approval of a connection proposal if Aurizon Network fails to notify a PIO otherwise within the prescribed timeframe.[543]

9.5.4 Amending the 2014 DAU

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure. The reasons for our refusal have regard to the section 138(2) factors and are set out in Section 9.4 of this chapter. This section sets out the amendments we consider appropriate. We are of the view to largely adopt our initial draft decision 9.1 and the analysis set out in section 9.3 of our initial draft decision except with regards to matters outlined below.

As noted in Section 9.4.1, we recognise that each project to connect private infrastructure is likely to be unique, and will likely require tailored planning, design and construction. A 'one-size- fits-all' approach is likely to be too inflexible.

It would be appropriate for Aurizon Network to amend the 2014 DAU so that upon the receipt of a written proposal from a PIO, Aurizon Network is required to reach an agreement with the PIO regarding appropriate connection milestones. Without limiting the matters that Aurizon Network and a PIO can agree to, the milestones should include provisions for the parties to enter into a Rail Connection Agreement, the design and construction of any connection infrastructure, and the commissioning of connection infrastructure (cl. 9.1(e) of the CDD amended DAU).

The negotiations should be conducted in good faith and that Aurizon Network should not behave in a manner that would unfairly differentiate between acess seekers in a materially adverse way. We consider the parties should reach agreement within a period of no longer than two months from the date Aurizon Network notifies the PIO it has decided the PIO's proposal meets the required criteria. Under our proposal, the parties may agree to delay committing to set timeframes until an access agreement which requires the proposed connection to the rail infrastructure to be completed has been entered into between Aurizon Network and the PIO (cl. 9.1(f) of the CDD amended DAU).

We consider it appropriate that the negotiation of a relevant access agreement is a clear trigger for the agreement on connection milestones to occur.

This approach will appropriately balance the interests of the parties. Aurizon Network will still have an obligation to provide some certainty to PIOs, while also ensuring the process can be flexible where it needs to be.

In recognition of the need for a flexible process, we encourage Aurizon Network and PIOs to engage prior to the submission of a written proposal. This is a practical recommendation for the purposes of fostering a collaborative approach. However, we have not included explicit drafting for this within the CDD amended DAU as it is simply our recommendation. We do not consider it appropriate to include a strict obligation on either party in this regard.

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[541] QRC, sub no 84: 79.
[542] QRC, sub no 84: 85.
[543] Aurizon Network, sub. 82: 82.

We consider the proposal outlined above to be appropriate as it allows Aurizon Network and PIOs an opportunity to work collaboratively to reach mutually agreeable timeframes. Where the parties are unable to reach agreement on milestones, the parties may seek to resolve the dispute in accordance with Part 11 of the 2014 DAU.

In our initial draft decision, we proposed a clause requiring Aurizon Network to pay all reasonable costs to a PIO arising out of Aurizon Network's unreasonable delay. In light of the matters outlined above, we consider this clause to be appropriate. Aurizon Network and the PIO may agree to extend the timeframe for entering into connection milestones in appropriate circumstances. In those cases the clause requiring Aurizon Network to pay all reasonable costs arising out of its delay (clause 9.1(l) of the CDD amended DAU) will not be applicable until the timeframes for connection milestones are agreed to.

While this approach may result in more disputes arising from parties being unable to agree on milestones, we believe that the parties will have incentives to negotiate terms rather than seek to enter a dispute.

We also consider that the process we have proposed addresses the QRC's concern that a construction agreement will be subject to limited oversight. The process will allow the parties to negotiate terms and conditions, including timeframes that are appropriate and tailored to each project, and there may be cost implications for unreasonable delay by Aurizon Network. This includes a milestone for agreeing terms on which design and construction will occur. Requiring every agreement to be regulated will be too inflexible and is likely to increase regulatory and transactional costs.

Other drafting revisions we have made to the IDD amended DAU, as reflected in the CDD amended DAU, are:

- Clause 9.1(b) — we propose amending this clause to permit the parties to agree to a different period to the prescribed two months for Aurizon Network to assess a proposal received from a PIO. This change was made to provide flexibility to both parties in response to stakeholder submissions. We consider that this amendment will promote the interests of both parties.
- Clause 9.1(e)(iv) — we propose adding an option for the parties to be able to agree connection milestones for any other matters the parties consider necessary. This was made in response to a submission from QRC which raised the possibility that there may be other matters in relation to which it is appropriate to have connection milestones. We consider this will give the parties greater flexibility and an enhanced ability to "tailor" the process to suit their requirements, thereby promote the interests of both parties. (This change is also reflected in the consequential change to clause 9.1(l)(iv).)
- Clause 9.1(l) — Aurizon Network submitted that its obligation to reimburse the PIO, Access Seeker or Access Holder for costs arising out of Aurizon Network's unreasonable delay should relate to efficient costs rather than reasonable costs which is what we had proposed in the IDD amended DAU. Aurizon Network submitted that changing the requirement to reference efficient costs would better accord with the object of Part 5 of the QCA Act (as set out in section 69E, and which is to promote the economically efficient operation of, use of and investment in, significant infrastructure) as well as the pricing principle set out in section 168A(a). Our view is that 'reasonable costs' is appropriate in these circumstances because the terms of the agreement between Aurizon Network and a PIO are likely to be negotiated on commercial terms. The economic incentives for Aurizon Network and PIOs are likely to be different because unlike Aurizon Network, PIOs are not monopoly service providers.

- Clause 9.1(n)(i) — we propose an amendment to ensure that any party may seek to resolve a dispute in relation to the connection milestones under Part 11.

Consolidated draft decision 9.2

(1) After considering Aurizon Network's proposed framework for connecting private infrastructure, our consolidated draft decision is to refuse to approve Aurizon Network's process for connecting private infrastructure.

(2) We consider it appropriate that Aurizon Network amend its draft access undertaking in the manner proposed in Part 9 of the CDD amended DAU, that is:

(a) upon the receipt of a written proposal from a PIO, Aurizon Network is required to negotiate with the PIO and to agree on the milestones

(b) the connection milestones negotiation process should conclude within a period no longer than two months from the date Aurizon Network notifies the PIO it has decided the PIO's proposal meets the required criteria

(c) arrangements should be clarified for where Aurizon Network is responsible for designing and building the connecting infrastructure

(d) Aurizon Network is to pay reasonable costs incurred by a PIO arising out of Aurizon Network's unreasonable delay.

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

9.6 Amending the Standard Rail Connection Agreement

The SRCA guides negotiations between Aurizon Network and PIOs seeking to connect private infrastructure to the network. While a negotiated connection agreement may differ from the SRCA, the conditions in the SRCA will be relied upon in resolving a dispute if negotiations fail.

9.6.1 Aurizon Network's proposal

Aurizon Network said its proposed SRCA for the 2014 DAU largely reflects the approved SRCA arrangements from the 2010 AU.[544] The key difference is the proposed SRCA now includes CLMPs as a schedule to the SRCA (see below). The proposed SRCA also includes a number of new provisions that clarify interpretation of the SRCA or otherwise reflect consequential amendments.[545]

Aurizon Network proposed that the SRCA cover the connection of private rail infrastructure to the network for the purpose of entering loaded coal trains into the relevant individual coal system. In particular, Aurizon Network said:

- the SRCA is not intended to apply to the connection of major new expansions, as these may require varied terms and conditions

[544] Aurizon Network, 2013 DAU, sub. 2: 332.
[545] Aurizon Network, 2014 DAU, sub. 3:242–243.

- connection to the rail network for services other than coal services would also not be covered by the SRCA, but by other agreements negotiated between Aurizon Network and the other party.[546]

Stakeholders generally supported continuing to use the recently approved SRCA.

9.6.2 Summary of the initial draft decision

Our initial draft decision accepted the SRCA included in the 2014 DAU where it was consistent with the recently approved SRCA in the 2010 AU. The SRCA in the 2010 AU had been reviewed and approved following a lengthy and comprehensive assessment, including extensive consultation with stakeholders. We did not consider stakeholders had raised any new or material concerns.

On this basis, we proposed the SRCA be amended to:

- provide a process by which Aurizon Network may design, construct and commission the connecting infrastructure—to provide greater clarity and certainty and reduce delay:
  - setting out timelines for Aurizon Network to prepare a proposed construction contract and design for the connecting infrastructure and for the PIO to respond to Aurizon Network's proposal (SRCA, cl. 7(b)(ii), (iii), (v), (vi))[547]
  - providing for the PIO to request modifications to each document in particular circumstances[548] and for Aurizon Network to consider the PIO's proposal and modify and resubmit or dispute (SRCA, cl. 7(b)(ii), (iii)(C), (iv), (v), (vi)(A))
  - providing a process to modify any agreed construction contract or design to reflect a material change in circumstances (SRCA, cl. 7(b)(vii))
  - requiring that, unless otherwise agreed, the construction agreement must contain terms and conditions identified in the SRCA (SRCA, cl. 7(b)(viii))
- require Aurizon Network to consult with (not just notify) the PIO on proposed changes to system operating parameters as soon as practicable (SRCA, cl. 8(i))– to reflect proposed amendments to the process for changing system operating parameters to put greater emphasis on third-party involvement and consultation (see Chapter 13 of this consolidated draft decision)
- define consequential loss with greater particularity (SRCA, cl. 1)—to improve clarity and certainty.

We considered our amendments would simplify and speed up negotiations for connections whilst taking proper account of Aurizon Network's, PIOs' and users' rights and interests. We considered including an SRCA in the access undertaking with transparent terms and conditions, is preferable to individually negotiated arrangements for each connection.

We did not accept Aurizon Network's proposal to exclude particular connections from using the SRCA. We considered it is inappropriate for the SRCA to apply to some connections but not others.

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[546] Aurizon Network, 2013 DAU, sub. 2: 330–331.
[547] In doing so, we seek stakeholders' comments on what timeframes would be appropriate.
[548] Being limited to the technical specifications required, the standard appropriate to the nature of traffic and current service standards, safety and capacity; and project management or timing issues that will result in non-prudent or unreasonable costs or delays.

Where a party requires a connection to access the network the SRCA should be applied, but we accepted flexibility might sometimes be required to finalise terms and conditions. In these circumstances, we considered the SRCA provided a baseline template.

9.6.3 Stakeholders' comments on the initial draft decision

Aurizon Network did not agree the SRCA needed further amendment. It said the SRCA was negotiated with stakeholders and did not need to be renegotiated.

Aurizon Network did not agree that where the PIO is responsible for design and construction of the connecting infrastructure, it should also be responsible for planning the works. This was on the basis that Aurizon Network is obliged to maintain responsibility for the mainline network and works could be required to be undertaken on the mainline, including closures of sections of track.[549]

The QRC considered the SRCA required further refinement and, to this end, provided a marked-up SRCA as part of its submission. In particular, the QRC proposed amendments to:

- clarify meanings and definitions—for example, force majeure and security, and processes and obligations such as post commissioning procedures, exchange of safety and interface information, the interface risk management and emergency response plan
- align the SRCA with the undertaking
- ensure that provisions similar to remedy provisions in Part 9 of the undertaking are also incorporated in the SRCA.

Stakeholders queried how the cost of private infrastructure would be taken into account when setting reference tariffs. The potential exists for double counting if the PIO pays for the cost of the infrastructure and it gets included in the RAB and reference tariff calculations.

9.6.4 Amending the 2014 DAU

Our consolidated draft decision) is to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure. The reasons for our refusal have regard to the section 138(2) factors and are set out in Section 9.4 of this chapter. This section sets out the amendments we consider appropriate. We have decided to adopt the proposed amendments in our initial draft decision with respect to the SRCA (including the reasons set out at sections 9.3.3 and 9.4.3 of our initial draft decision), with changes to:

- the SRCA, where relevant, so that it is consistent with our consolidated draft decision 9.2
- a number of drafting revisions to clarify meaning and definitions, as noted in submissions.

We are of the view that the changes proposed in the CDD amended DAU, predominantly the insertion of a new clause 7, are appropriate as they will provide a framework for the parties to negotiate a construction agreement in circumstances where Aurizon Network is undertaking the construction of the private infrastructure project.

This is appropriate in light of our consolidated draft decision 9.2. As outlined in Section 9.4 above, it is appropriate for parties to negotiate timeframes for milestones to allow for greater flexibility in the framework. However, once parties agree to enter into a Rail Connection Agreement, the terms of that agreement should largely be mechanical as it deals with interconnection to the CQCN.

[549] Aurizon Network, sub. 82: 121.

The terms of the SRCA should also provide a sufficiently clear framework for the negotiation of a construction agreement. This will improve certainty for the parties involved and promote confidence in the process. However, the SRCA should not unnecessarily dictate the terms of the construction agreement as each construction project is likely to be unique.

As discussed in section 9.3.3 of our initial draft decision, transparency and certainty of process, coupled with a basis for agreement negotiations is likely to promote efficient outcomes and efficient investment in the CQCN. We consider that the amendments we have proposed would promote the object of Part 5 of the QCA Act, balance the interests of the parties and promote the public interest.

In Section 9.7 below, we assess issues relating to the placement of the CLMPs.

Consolidated draft decision 9.3

(1) After considering Aurizon Network's proposed framework for connecting private infrastructure, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) We consider it appropriate that Aurizon Network amend the 2014 DAU in the manner proposed in the SRCA contained in the CDD amended DAU; that is, to provide greater clarity (without changing the intent), and to:

(a) provide a process by which Aurizon Network may design, construct and commission the connecting infrastructure

(b) require Aurizon Network to consult with (not just notify) the PIO in respect of proposed changes to system operating parameters as soon as practicable.

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

9.7 Coal Loss Mitigation Provisions in the SRCA

9.7.1 Aurizon Network's proposal

Aurizon Network included proposed CLMPs as a schedule to the SRCA (SRCA, Schedule 7). Under these arrangements, the PIO has primary responsibility for ensuring wagons are loaded, profiled and veneered in a manner that prevents coal loss (i.e. by taking measures to satisfy relevant standards, targets and levels when handling and loading coal) (cl. 1.1(c), 1.3 of Schedule 7 of the proposed SRCA). This includes:

- a general requirement for the PIO to comply with applicable laws, instructions, guidelines and standards (now or in the future) (cl. 1.4 of Schedule 7 of the proposed SRCA)
- detailed requirements relating to the PIO's operations and practices (cls. 1.5, 2.3, 2.4, 2.5 of Schedule 7 of the proposed SRCA)
- reporting requirements relating to material non-compliance with the CLMPs (cl. 1.8 of Schedule 7 of the proposed SRCA).

Stakeholders' comments

In initial submissions, stakeholders reiterated concerns about Aurizon Network's proposed approach to deal with CLMPs in the SRCA.[550] The two key issues raised were:

- whether the SRCA is an appropriate mechanism to deal with coal loss mitigation
- the nature and content of the proposed CLMPs.

Asciano said CLMPs should not be included in the SRCA, which should focus on connections, not coal management. It said the infrastructure owner is not in the best position to manage the handling and loading of coal at all load-out sites served by the infrastructure. Asciano considered it would be more appropriate to address CLMPs issues through a separate process or agreement (similar to the access interface deed in the 2010 AU).[551]

9.7.2 Summary of the QCA initial draft decision

Our initial draft decision was to refuse to approve Aurizon Network's proposal to include CLMPs as a schedule to the SRCA. While we consider it is appropriate to address coal loss mitigation through the SRCA, we proposed the CLMPs be:

- included as a schedule to the 2014 DAU (with the SRCA referring to CLMPs as specified in the access undertaking)
- amended to align with the 2010 CDMP, while also providing an adequate framework to implement 'best practice' strategies if it is practicable for the relevant coal producer to do so.

Inclusion of CLMPs in the access undertaking

We considered the CLMPs are best dealt with in the body of the access undertaking (see the new Schedule J of the CDD amended DAU) and not as a schedule to the SRCA. Coal loss mitigation is a matter of broader interest to PIOs, access seekers and access holders and in which there is a public benefit in having a consistent approach applied and enforced by us.

We considered having the CLMPs as a part of the access undertaking:

- ensures ongoing connection between the SRCA and Aurizon Network's broader coal loss mitigation obligations
- provides more structure about how changes to the CLMPs should be implemented and can ensure equity of treatment
- continues to allow sufficient stakeholder consultation and regulatory oversight on the exact terms of the CLMPs (and future changes to those provisions).

Content of the CLMPs

We proposed amendments to the nature and content of the proposed CLMPs to ensure they do not impose obligations which are higher, different or in addition to the obligations agreed under the CDMP (we attached drafting for the new Schedule J in Volume V of the initial draft decision). We took account of recent developments in best practice for coal loss management (in particular where methods outlined may not be applicable to all supply chain participants due to location and operation characteristics). Our proposed amendments:

[550] See QCA 2013(a) and 2012(b) for a summary of matters raised in that process.
[551] Asciano, 2013 DAU, sub. 43: 78, 117.

- focused on meeting standards, targets and levels that reflect applicable laws (now and in the future) and not those otherwise specified by Aurizon Network (cl. 1.3 of Schedule J to the IDD amended DAU)
- provided a general obligation for the PIO to use reasonable endeavours to prevent coal loss (cl. 1.4 of Schedule J to the IDD amended DAU) as well as new requirements for the PIO's particular operations and practices (cls. 1.5, 2.1, 2.3, 2.5 of Schedule J to the IDD amended DAU); and provided clarity over the factors that might affect the proposed approach[552]
- provided a general process for continuous improvement for parties to identify where performance gaps exist/improvements can be made with a focus on using their reasonable endeavours to achieve 'best practice' (cl. 1.9 of Schedule J to the IDD amended DAU)
- clarified the proposed reporting requirements and monitoring (cls. 1.6, 1.8 of Schedule J to the IDD amended DAU)—including, in the event of noncompliance, requiring parties to agree on a reasonable program setting out the activities, and a timetable to undertake those activities, to prevent its reoccurrence.

9.7.3 Stakeholders' comments on the initial draft decision

Aurizon Network did not agree the CLMPs should be removed from the SRCA and included as a schedule in the undertaking.[553] It said requiring it to be ultimately responsible for implementing coal loss strategies:

- disadvantages existing network users that have obligations
- is inconsistent with the requirement for all persons to comply with all laws
- transfers the risk of coal loss mitigation to Aurizon Network, despite it having little ability to manage it.[554]

On the last point, Aurizon Network said if a PIO does not implement coal loss strategies due to 'prevailing business conditions', it would be left to rectify the degradation with no compensation or ability to prevent the risk arising.[555]

With regard to the content of the CLMPs, Aurizon Network said:

- obligations on PIOs to limit coal loss should be absolute, and not subject to any limiting factors—this is unfair to existing users who have such obligations and means Aurizon Network bears the risk of strategies not being implemented when it has little capacity to manage that risk[556]
- the obligation on the PIO to comply with requirements not to overload coal and prevent spillage should not be removed—it does not have the ability to control loading and there is

[552] By taking into account limiting factors including the: prevailing business conditions; effectiveness of the particular mitigation approach given technology and cost constraints; timeframes required to implement mitigation strategies; specific characteristics underlying the relevant PIO's contribution to dust; and the impact on other supply chain participants.
[553] Aurizon Network, sub. 82: 116.
[554] Aurizon Network, sub 82: 121.
[555] Aurizon Network, sub. 82: 121.
[556] Aurizon Network, sub. 82: 121.

potential for increased safety risks and wear and tear, as well as increased coal fouling and asset degradation.[557]

The QRC agreed with our proposal to include the CLMPs in Schedule J of the access undertaking. It said the undertaking is the more appropriate mechanism to deal with coal loss mitigation provisions.[558] The QRC considered the content of Schedule J could be improved by:

- ensuring Aurizon Network is obliged to act reasonably when exercising its rights and obligations under Schedule J
- narrowing the obligation for the PIO to prevent coal loss, as it is currently too broad
- reducing the oversight and monitoring capability of Aurizon Network in respect of coal loss prevention
- making the meeting requirements less onerous (i.e. we proposed quarterly meetings).[559]

The QRC also raised a number of drafting related issues. Asciano said there are additional factors to consider when it comes to coal loss mitigation, including additional contractual obligations that may be required if coal handling and load out is managed by a third party (not the private infrastructure owner). Also, increased administrative requirements on the PIO can be costly (e.g. additional reporting, monitoring and testing).[560]

Amending the 2014 DAU

Our consolidated draft decision is to refuse to approve Aurizon Network's proposed framework for connecting private infrastructure. The reasons for our refusal have regard to the section 138(2) factors and are set out in Section 9.4 of this chapter. We have decided to adopt our initial draft decision and the analysis set out at section 9.5.3 of our initial draft decision with respect to the treatment of CLMPs.

As outlined in Section 9.4.2, our proposed amendments do not alter any obligations imposed by the CLMPs on PIOs. Further, the CLMPs are also referred to in clause 1.3 of Schedule F to the 2014 DAU (Reference Tariffs) and provide for Aurizon Network to be appropriately compensated.

We note that the requirements for loading and profiling of wagons set out in clause 2.3 of Schedule J are already consistent with retaining an obligation on the PIO to comply with requirements not to overload coal and to prevent spillage. It is also in the PIO's interests to minimise coal loss. In response to the QRC's comments, we remain of the view that the CLMPs need to be broad and effective in order that individual operators do not have an incentive to avoid meeting their obligations and passing the resulting costs to other users. We also consider quarterly meetings are appropriate. However, we have made minor amendments to clauses 1.6 and 1.7 in response to the QRC.

We also consider this approach promotes clarity and certainty regarding the operation of the CLMPs. It limits Aurizon Network's discretion with respects to the contents of the CLMPs, as well as Aurizon Network's ability to unfairly differentiate between PIOs in a materially adverse way. The CLMPs should be included as part of the 2014 DAU as they are applicable to multiple parts of the 2014 DAU, not just in relation to Part 9.

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[557] Aurizon Network, sub. 82: 121
[558] QRC, sub. 84: 74.
[559] QRC, sub. 84: 102–104.
[560] Asciano, sub. 76: 25.

In making this consolidated draft decision, we have taken into account Aurizon Network's legitimate business interests and the interests of other stakeholders. We consider this would promote the object of Part 5 of the QCA Act, and the public interest.

Consolidated draft decision 9.4

(1) After considering Aurizon Network's proposed framework for connecting private infrastructure, our consolidated draft decision is to refuse to approve Aurizon Network's proposal.

(2) We consider it appropriate that Aurizon Network amend its draft access undertaking in the manner proposed in the CDD amended DAU, by:

- **(a) including CLMPs as a schedule to the access undertaking (Schedule J)— with the SRCA referring to CLMPs as specified in the access undertaking**
- **(b) better aligning the CLMPs with the 2010 CDMP, while also providing an adequate framework for coal producers to implement 'best practice' strategies if it is practicable for them to do so.**

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

APPENDIX A: PROPOSED NEW STRUCTURE OF PART 10

The following table shows the proposed movement of the clauses in Part 10 between our IDD amended DAU and CDD amended DAU (as discussed in Chapter 5, section 5.3).

Table 29 Change in Part 10 clauses from IDD amended DAU to CDD amended DAU

IDD amended DAU		*CDD amended DAU*	
Clause	***Title***	***Clause***	***Change in title***
N/A	N/A	10.1	Overview (new clause)
N/A	N/A	10.2	General principles (new clause)
10.1.1	Annual financial report	3.7 10.4.1	Accounting separation Annual financial report
10.1.2	Annual compliance report	10.5.2	Annual compliance report
10.1.3	Annual maintenance plan	10.3.1	No change
N/A	N/A	10.3.2	Quarterly maintenance cost report (new clause)
10.1.4	Annual maintenance cost report	10.3.3	No change
10.1.5	Monthly network performance report	10.3.4	Quarterly nework performance report
10.1.6	Annual regulatory asset base roll-forward Report	10.4.2	Public annual regulatory asset base roll-forward report
10.1.7	Errors in reports	10.7.2	No change
10.2	Breach reports to the QCA	10.5.3	No change
10.3.1	Disclosure of access agreements	10.7.1	Information provision
10.3.2	QCA requested onformation	10.7.1	Information provision
10.4	Conditions based assessment	10.4.3	No change
10.5	Compliance	10.5.1	Compliance officer
10.6	Certifications required from Aurizon Network's Executive Officer	10.7.3	No change
10.7	Report auditing	10.6.1	No change
10.8	Compliance audit requested by the QCA	10.6.3	No change
10.9	Conflicts audit	10.6.2	No change
10.10	Audit process	10.6.4	No change