



QRC SUBMISSION
QCA CONSOLIDATED DRAFT
DECISION
MARCH 2016

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Executive summary

The Queensland Resources Council (**QRC**) provides this submission on behalf of its coal members.

The QRC generally supports the Consolidated Draft Decision on the 2014 DAU. The QCA's Consolidated Draft Decision proposes substantial changes to the 2014 DAU, which are necessary to achieve an undertaking consistent with section 69E and section 138 of the QCA Act. Given the extensive consultation which has been undertaken by the QCA in regard to both the 2013 DAU and the 2014 DAU, we have generally endeavoured to accept the QCA's Consolidated Draft Decision. This does not mean that the QRC now fully accepts the QCA's position. Rather, we acknowledge the advanced stage of the process and we accept that achieving an outcome necessarily requires compromises to be made. The QRC hopes Aurizon Network will also adopt a pragmatic approach in making its submission on the Consolidated Draft Decision and in subsequently preparing a new draft undertaking (2016 DAU) which is consistent with the QCA's final decision. In the event that Aurizon Network continues to seek further gains at each stage of the UT4 process, the QRC will necessarily reconsider its approach.

The QRC urges the QCA to make a final decision which does not succumb to pressure to revert to the unbalanced nature of the 2014 DAU. The QCA should make a final decision which is consistent with the Consolidated Draft Decision, except to the extent amendments are required to rectify an error in the Undertaking or to the extent new information has been presented to justify a move away from the QCA's previous position.




A non-exhaustive selection of some of the key issues identified in this Submission are set out below:

- **Maximum Allowable Revenue:** The QRC proposes to accept the Consolidated Draft Decision in regard to MAR. While we consider that the Consolidated Draft Decision over-estimates efficient costs in a number of areas, these matters have been extensively consulted on and we consider that it is now time for all parties to accept the outcomes of the QCA's review. In the event that Aurizon Network seeks any further increase in MAR in its response to the Consolidated Draft Decision and the QCA supports an adjustment in the final decision, we will respond to this in our submission on the 2016 DAU.
- **Adjustment Charges for FY2015:** The QRC does not support the draft decision that Adjustment Charges should be applied in regard to differences between approved allowable revenues and transitional revenues for FY2015. It is not appropriate that producers may face an Adjustment Charge for FY2015, likely to be payable a full year (or more) after completion of FY2015, and which is still currently incapable of being accurately calculated. This adjustment should be smoothed and recovered over a future period. It is our understanding that Aurizon Network supports this approach.
- **Revenue smoothing:** The QRC suggests that Aurizon Network should consult with stakeholders regarding the profiling of revenue over the final two years of the undertaking period. The QRC's preference is that revenue be profiled so that tariffs are reasonably consistent over this period.
- **Take or Pay - Force Majeure relief:** Aurizon Network's 2014 DAU proposed that the definition of Aurizon Network Cause would include "a Force Majeure Event affecting Aurizon Network". The QCA's mark-up of the DAU amends the definition of Aurizon Network Cause to remove this. We do not support this amendment and it is our understanding that this change in position was not sought by Aurizon Network. Aurizon Network's definition of Aurizon Network Cause, which was consistent with UT3, ensured that an Access Holder which is not offered its contracted paths due to an Aurizon Network force majeure event would receive relief from take or pay, without prejudice to Aurizon Network's ability to recover that lost revenue through the revenue cap arrangements.
- **Investment obligation:** In the absence of an approved SUFA arrangement, and in recognition that the final approved SUFA arrangements are unlikely to be suitable for the funding of lower value projects, the QRC continues to seek a commitment from Aurizon Network to fund expansion projects up to a reasonable defined value (per project or in aggregate) during the term of UT4. If that commitment is not given, then:
 - the Undertaking should provide a process for the development of a user-funding arrangement suitable for lower value projects; and

- Aurizon Network should (consistent with the position in the Consolidated Draft Decision) not have any ‘first right’ to fund expansions. The QRC sees the first right to fund as being linked to a funding commitment, for the reasons explained further in Part 8 of this submission.
- **Form of Access Agreement - Renewals:** Clause 7.3(h) of the Undertaking allows an Access Holder to renew its Access Agreement “on the same terms” as its existing agreement, unless the Access Holder agrees otherwise. The QRC does not agree that a Renewing Access Seeker should have the option of retaining its existing terms. For example, a renewed Access Agreement should adopt the current standard terms for take or pay, rather than retaining (for example) the UT1 or UT2 take or pay terms.
- **Ringfencing:** The QRC acknowledges the material amendments made by the QCA since the submission of the 2013 DAU. However, those amendments were off a very low base compared to UT3, which itself was inadequate in this area. It is now widely accepted that vertical integration has seriously anti-competitive effects. The ACCC takes the view that behavioural undertakings such as those contained in UT4 are barely good enough to address these concerns. It is also widely accepted by all stakeholders other than Aurizon that Aurizon enjoys significant competitive advantage in its vertically integrated model. The ringfencing provisions are also weakened through the expanded scope of exceptions which allow Aurizon Network to transfer or delegate a broader range of Below Rail Services. This moves the performance of these functions (notably including maintenance and construction activities) outside of the behavioural undertakings given by Aurizon Network under the Undertaking (including the requirement not to unfairly differentiate). The QRC urges the QCA to address ringfencing once and for all by further refining the ringfencing regime proposed.
- **Obligation to maintain infrastructure:** The QRC strongly opposes the QCA’s draft decision to accept the deletion of Aurizon Network’s obligation to maintain the network in a “fit-for-purpose” manner. This obligation is central to the provision of access and is not adequately addressed through the standard access agreements. The QRC recommends the reinstatement of the UT3 maintenance obligation and the incorporation by reference of that obligation in both the Standard Access Agreement and Standard Train Operations Deed.
- **Transfers:** The QRC is generally comfortable with the capacity transfer provisions proposed in the Consolidated Draft Decision. However, we are concerned that:
 - the formula for transfer fees appears to be based on an assumption that transfers relate to all of the Access Rights held by the transferor, for the full remaining term of the Access Agreement. The transfer fee should relate only to the portion of the Access Rights being transferred, and should reflect the duration of the transfer;
 - the ability to transfer Access Rights for up to three months without payment of a transfer fee, and to repeat such a transfer on an unlimited number of occasions, should be subject to a requirement that the transferee has a genuine intention to use the transferred paths. In assessing this genuine intention, Aurizon Network should be required to have regard to the utilisation of previous transfers involving the relevant transferor; and
 - the three month limit on ‘fee-free’ transfers is quite short, and may involve unnecessary administration where the transfer is continued through successive further short-term transfers. While the shorter time limit provides a more frequent opportunity to assess the ‘genuine intention’ discussed above, we do not consider that a limit of six months would materially increase the risks to other parties of allowing fee-free transfers. A six month limit would reduce administrative costs.
- **Capacity Deficits:** The QRC accepts the QCA’s draft decision to remove the requirement, included in the previous draft decision, that Aurizon Network must provide funding to rectify any capacity deficit. However, we suggest that this obligation should apply in the case where a further expansion of the relevant system is undertaken. As part of the next expansion project, Aurizon Network should commit to fund the rectification of the deficit at its own cost (that is, without Access Conditions, but with prudent costs to be included in the RAB) unless the QCA determines otherwise.
- **Connecting Private Infrastructure:** The QRC remains concerned that the current framework for connecting Private Infrastructure requires improvement in order to ensure that the connection process is workable, commercially efficient and balanced for all stakeholders. An improved connection framework would help to underpin industry investment.

Legend

The QRC has used the following legend to categorise its concerns as set out in this Submission.

-  = Agree
-  = Low to medium concern
-  = High concern

Reference Table

Reference to the 2014 DAU	How the item is addressed?	Where the item is addressed?
Part 1 – Preamble	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC supports the preamble section of the Consolidated Draft Decision.
Part 2 – Intent and scope	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 2 – Intent and scope Some issues are addressed in Part 3 – Ringfencing
Part 3 – Ringfencing	<ul style="list-style-type: none"> Written submission 	<ul style="list-style-type: none"> Part 3 – Ringfencing
Part 4 – Negotiation framework	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 4 – Negotiation framework
Part 5 – Access agreements	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 5 – Access agreements
Part 6 – Pricing principles	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 6 – Pricing principles
Part 7 – Available capacity allocation and management	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 7 – Available capacity allocation and management
Part 7A – Baseline capacity	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 7A – Baseline capacity
Part 8 – Network development and expansions	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 8 – Network development and expansions
Part 9 – Connecting private infrastructure	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 9 – Connecting Private Infrastructure
Part 10 – Reporting	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC has no further comments in respect of Part 10. Please refer to the QRC's April 2015 Submission.
Part 11 – Dispute resolution and decision making	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC has no further comments in respect of Part 11. Please refer to the QRC's April 2015 Submission.
Part 12 – Definitions and interpretation	<ul style="list-style-type: none"> Comments throughout submission 	<ul style="list-style-type: none"> The QRC has not proposed amendments to the entirety of Part 12. Rather, the QRC has addressed specific key definitions throughout the relevant sections of this Submission.

Reference to the 2014 DAU	How the item is addressed?	Where the item is addressed?
Schedule A – Preliminary, additional and capacity information	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC has no further comments in respect of Schedule A.
Schedule B – Access application information requirements	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC has no further comments in respect of Schedule B.
Schedule C – Operating and other plan requirements	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC has no further comments in respect of Schedule C. Please refer to the QRC's April 2015 Submission.
Schedule D – Ultimate Holding Company Deed	<ul style="list-style-type: none"> Written submission 	<ul style="list-style-type: none"> Part 3 – Ringfencing
Schedule E – Regulatory Asset Base	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 6 – Pricing principles
Schedule F – Reference Tariff	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 6 – Pricing principles
Schedule G – Network Management Principles	<ul style="list-style-type: none"> No comment 	<ul style="list-style-type: none"> The QRC has no further comments in respect of Schedule G.
Schedule H – Explanatory diagrams and flowcharts	No comment	<ul style="list-style-type: none"> The QRC does not have a submission on Schedule H except that it should be updated to reflect the amendments to the remainder of the Undertaking
Schedule I – Confidentiality Agreement	<ul style="list-style-type: none"> Table of comments Mark-up 	<ul style="list-style-type: none"> Part 3 – Ringfencing Annexure 2 – Confidentiality Agreement mark-up
Schedule J – Coal loss mitigation provisions	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 9 – Connecting Private Infrastructure
Standard Access Agreement	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Standard Access Agreement
Standard Train Operations Deed	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Standard Train Operations Deed
Standard Studies Funding Agreement	<ul style="list-style-type: none"> Table of comments 	<ul style="list-style-type: none"> Part 8 – Network development and expansions
Standard Access Interface Deed	<ul style="list-style-type: none"> Table of comments Mark-up 	<ul style="list-style-type: none"> Standard Access Agreement Annexure 1 – Standard Access Interface Deed mark-up

Reference to the 2014 DAU	How the item is addressed?	Where the item is addressed?
Standard Rail Connection Agreement	<ul style="list-style-type: none">• Table of comments	<ul style="list-style-type: none">• Part 9 – Connecting Private Infrastructure

Part 2 – Intent and Scope

This part of the Submission outlines the QRC's comments with respect to the Consolidated Draft Decision in relation to the intent and scope of the Undertaking, as captured in Schedule D of the Undertaking.

Clause Reference	Issue	Description	QRC Position
Part 2			
2.1	Adjustment Charges	As drafted, an Adjustment Charge would be calculated from 1 July 2013 (see definition of Adjustment Date). The QRC does not support the use of the Adjustment Charge mechanisms for FY2014 or FY2015, for the reasons explained in the Executive Summary. Adjustments required in respect of FY13 are reflected in the reference tariffs for FY2015, 16 and 17 (which we support), while adjustments for FY2015 should be reflected in Reference Tariffs within the final two years of the undertaking period.	●
2.4	Behavioural obligations	The QRC supports the proposal to move these matters relating to unfair differentiation to clause 2.4 and to ensure that these are obligations rather than objectives. The QRC supports the extension of the 'consistent application' requirement (clause 2.4((i)) to Access Holders and Railway Operators.	●
2.5(a)	Scope	The QRC supports the amendment which clarifies that Access includes all aspects of access to the service which is taken to be declared under the Act. This avoids any potential lack of alignment between the scope of the Undertaking and the declared service.	●
2.5(g)	Rights under the Act not affected	The QRC does not support the retention of this clause. UT4 is a voluntary undertaking. A voluntary undertaking should be able to modify the rights of Aurizon Network under the QCA Act. As drafted, we are concerned that this statement could be used to avoid compliance with the express provisions of the final Undertaking. If the clause is to be retained, the QRC suggests it should be revised to clarify that it is subject to the provisions of the Undertaking.	●
2.7	Electricity supply	The QRC supports the deletion of the statement that supply of electricity is not part of Access. The QRC understands that the QCA considers the supply of electricity to be part of the declared service (Consolidated Draft Decision Volume 1, page 70), while Aurizon Network disagrees. The QCA's proposed amendment to clause 2.5(a) clarifies that the Undertaking applies to the service taken to be declared under section 250(1)(a) of the Act. This ensures that the services covered by the Undertaking are aligned with the Act. Including the previous statement (that the supply of electricity is not part of Access) is unnecessary if Aurizon Network is correct in its view, and would inappropriately limit the scope of the Undertaking in the event that the QCA is correct.	●

Part 3 – Ringfencing

1 Overview

Ring-fencing and related protections against conflicts of interest are essential to the coal industry's confidence that there will be the level playing field for access to, and provision of, the below rail services necessary to enable competition in related markets to the benefit of the industry and Queensland generally.

The QRC acknowledges that the amendments made by the QCA since the submission of the 2013 DAU by Aurizon Network are substantial and go a significant way to addressing the QRC's concerns. However, the ACCC has recently emphasised the competition concerns associated with vertical integration and the difficulties in enforcing and monitoring behavioural undertakings to address those concerns, particularly on a day of operations basis. The QRC considers that these competition concerns have materialised in the past under Aurizon Network's regulatory arrangements and that a strong ring-fencing regime is required as a result.

The QRC considers that further amendments and improvements are required in order to ensure that Part 3 of UT4 is effective and meaningful. The QRC addresses the issues that it considers would strengthen the ring-fencing regime in Part 3 of UT4 in this section. The QRC also comments on clause 2.6 of UT4 and the Ultimate Parent Company Support Deed (**Deed**).

2 Separation of Aurizon Network from other businesses

As set out in previous submissions, the QRC submits that Aurizon Network should be prohibited from providing other services that are not regulated by UT4. Currently, clause 3.4(d) of the QCA's proposed UT4 only prohibits Aurizon Network from providing Above Rail Services in respect of the Rail Infrastructure and, subject to certain exceptions, the operation or marketing of Train Services on the Rail Infrastructure. At a minimum, clause 3.4(d) should restrict Aurizon Network from:

- (a) acquiring any interest in a port or terminal that is, or may become, a destination for services using the Rail Infrastructure, and providing any services from such a port or terminal; and
- (b) acquiring any interest in a coal mine.

2.1 Real risk of unfair differentiation

The QRC considers that there is a real risk of unfair differentiation if Aurizon Network is allowed to acquire an interest in or provide a service from a port, terminal or coal mine. For example, in the case of an interest in a port or terminal, there is a real prospect that Aurizon Network will use its monopoly in below rail services to favour customers that use the port or terminal also owned by Aurizon Network. This is likely to be an acute risk where there are multiple terminals servicing a rail system in the Central Queensland Coal Network. The same risk arises if Aurizon Network obtains an interest in a mine.

These risks of unfair differentiation are not adequately addressed by the behavioural obligations in clause 2.4 of UT4 or the self-reporting regime set out in clause 3.4(e). Differentiation is difficult to detect and monitor by users and Aurizon Network has limited incentive to self-report, particularly differentiation on day-to-day operational matters. The QRC already has concerns over the potential for Aurizon Network to differentiate in favour of Aurizon Operations even with the restriction in clause 3.4(d). However, even if users wanted to take these concerns further, it would be difficult to do so, given the difficulties in obtaining evidence.

2.2 ‘Related Competitor’ concept does not resolve the issue

While the QRC acknowledges that the ‘Related Competitor’ concept is intended to address this risk in part, it does not provide adequate protection for users. A ‘Related Competitor’ has been defined as:

Functional units within the Aurizon Group or an Aurizon Party that has a direct or indirect interest (whether as owner, lessee, trust unit holder, operator, manager or otherwise and whether alone or together with others) in a:

(a) port; or

(b) coal mine or coal-extraction project,

that is an origin or destination for any good conveyed over the Rail Infrastructure

However, there is no description of what a ‘functional unit’ is and no obligation on Aurizon Network to ensure that any port or mine operations undertaken by Aurizon Network are included within a ‘functional unit’ separate from the unit providing below rail services. For example, if Aurizon Network acquired an interest in a port or terminal, it could use the same personnel that manage the access application process for below rail services to also fulfil a similar function in relation to the port or terminal. This would result in a real risk of unfair differentiation, but would not be addressed by the ‘Related Competitor’ concept because the relevant personnel are not within a separate functional unit of Aurizon.

Nonetheless, the QRC considers that the ‘Related Competitor’ concept is helpful in addressing the risks of unfair discrimination provided that the relevant functional unit does not form part of Aurizon Network.

2.3 Drafting risks and unintended consequences

The QRC also considers that other drafting risks and unintended consequences may result if Aurizon Network is not prohibited from acquiring an interest in a port, terminal, coal mine or coal-extraction project and providing services related to those interests.

UT4 is a lengthy and complex document that attempts to address competition concerns from vertical integration through behavioural undertakings. The definitions used in the undertakings set out in UT4 are central to the scope of the undertakings given. These, and the undertakings themselves, need to be carefully considered in light of the prospect of further vertical integration by Aurizon Network.

For example, the QRC notes that certain undertakings relating to security and confidential information in clauses 3.13 and 3.18 refer to ‘Aurizon Network Personnel’. ‘Aurizon Network Personnel’ is defined as:

The:

(a) directors and officers of Aurizon Network; and

(b) employees, contractors and agents of Aurizon Network and any other person under the control or supervision of Aurizon Network involved in the provision of Below Rail Services (including secondees working in the business of Aurizon Network).

It is uncertain whether the qualification ‘involved in the provision of Below Rail Services’ in paragraph (b) applies to ‘all employees, contractors and agents of Aurizon Network’ or only to ‘any other person under the control or supervision of Aurizon Network’. If the latter view is adopted, then employees of Aurizon Network who are involved in the management or operation of other businesses, such as a port terminal will fall within the definition of ‘Aurizon Network Personnel’.

The consequence of this is that these employees may then access Confidential Information to the extent necessary to perform their duties (which are not limited to the provision of below rail services) under clause 3.13 and access Aurizon Network’s premises under 3.18. This undoes the ring-fence, making it ineffective.

The QRC submits that the only certain way to resolve this issue is by prohibiting Aurizon Network from owning or operating related port, terminal and coal mine businesses. The possibility of making further amendments to resolve this issue carries with it a significant risk that an issue with the

drafting will be missed given the complexity of UT4. This has a corresponding impact on the confidence that the industry has in the protection provided by the ring-fencing arrangements.

2.4 Conclusion

The QRC submits that the best and most effective manner in which unfair differentiation can be prevented in circumstances where the Aurizon group acquires an interest in a port, terminal on coal mine is to prohibit Aurizon Network from owning or operating it, similar to the approach currently taken for Above Rail Services.

3 Aurizon Network’s functions

The QRC reiterates its previous submissions to the QCA that Aurizon Network’s functions should also include the development of the undertaking, standard documents and any future Undertaking as well the protection of confidential information. These are central obligations of Aurizon Network in the provision of below rail services and should be reflected in Aurizon Network’s functions.

4 Transfer or delegation of Below Rail Services

The QRC supports the introduction of the ‘Related Competitor’ concept in clause 3.5(a) of the QCA’s proposed UT4, which prohibits Below Rail Services being transferred or delegated to, contracted out to, or otherwise undertaken by a Related Operator or a Related Competitor. However, the QRC has concerns regarding the extent of the proposed exceptions to this prohibition being:

- (i) maintenance for or renewal of the Rail Infrastructure;*
- (ii) project delivery, engineering or rail construction services in relation to the procurement, construction or design of Rail Infrastructure;*
- (iii) the safe operation of the Rail Infrastructure (including any incident investigations);*
- (iv) environmental related services (including any incident investigations); or*
- (v) normal corporate governance arrangements and management reporting, including assessing the credit risk of counterparties or otherwise assessing the implications of an arrangement on Aurizon Network’s access to funds or the taxation consequences of that arrangement.*

4.1 Breadth of the functions that may be transferred

The proposed exceptions allow Aurizon Network to transfer the performance of key functions related to the provision of Below Rail Services to a Related Operator or Related Competitor.

In addition, there are limited functions provided by Aurizon Network that do not fall within one of these exceptions and if the exceptions are literally read then Aurizon Network may only be left with functions relating to the negotiation and entry into of access agreements, and the maintenance of the ring-fence and confidentiality.

4.2 Functions are currently performed by Aurizon Network

These exceptions are far broader than those provided in clause 3.1(c) of UT3. Aurizon Network’s ability to transfer or delegate functions under UT3 are limited to ‘Field Incident Management’ and ‘Yard Control services at yards other than Major Yards’ as well as corporate services contemplated by the ring-fencing arrangements. Accordingly, the functions that may be transferred to a Related Operator or a Related Competitor under the QCA’s proposed UT4 are currently provided by Aurizon Network.

There is no compelling reason for the transfer of these functions to Related Operators or Related Competitors to be allowed given the relative size of Aurizon Network’s business when compared with the remainder of Aurizon’s business in Queensland when the function is already performed by Aurizon Network. For example, Aurizon Network is likely to represent a significant share of Aurizon’s overall construction and railway maintenance activity in Queensland. In addition, environmental management and the safe operation of the Rail Infrastructure are significant Aurizon Network undertakings currently.

4.3 Related Operators and Related Competitors do not give behavioural undertakings

The transfer of these functions also moves their performance outside of the behavioural undertakings given by Aurizon Network in clause 2.4 of the proposed Undertaking. These undertakings require Aurizon Network to not unfairly differentiate amongst other things. It is of significant concern to the QRC that these protections will not apply to a Related Operator or Related Competitor when performing the functions that have been contracted out.

While a Related Operator or Related Competitor may not have access to confidential information, access to confidential information would not be required for a Related Operator or Related Competitor to differentiate in its favour. For example, both a Related Operator and a Related Competitor would know that undertaking construction or maintenance services on parts of the CQCN that it uses most (or requires in order to operate) before others would be of most advantage to it, and would disadvantage other users.

4.4 Related Operator and Related Competitor may gain access to Confidential information

In addition, the performance of functions related to Below Rail Services such as those excepted by clause 3.5(a) of the QCA’s proposed UT4 by a Related Operator or a Related Competitor entitles that Related Operator or Related Competitor to receive Confidential Information under clauses 3.12 and 3.13.

The QRC acknowledges that there are various restrictions on the right to obtain Confidential Information, including that Confidential Information is provided “solely for the purpose of undertaking Below Rail Services”. However, these restrictions should not be relied on given the breadth of the functions that may be transferred. Once Confidential Information is provided to a Related Operator or Related Competitor, despite any theoretical restrictions on use, that information is then nevertheless available to, or known by, that Related Operator or Related Competitor. The potential for misuse when the Related Operator or Related Competitor goes to perform its other duties therefore remains. The QRC considers this substantial weakening of the ringfence inappropriate.

4.5 Conclusion

The QRC therefore submits that the exceptions included in clause 3.5(a) of the QCA’s proposed UT4 should be deleted, other than the exception relating to corporate governance arrangements. However, as previously submitted in relation to other provisions of the undertaking, the QRC would prefer to have the exception related to corporate governance arrangements further defined.

5 Confidential information

The QRC supports the QCA’s intention to allow any relevant party at any time during negotiations for access, to require Aurizon Network to enter into a confidentiality agreement. However, the QRC has concerns as to whether this is achieved by the drafting of clause 3.10 of the Consolidated Draft Decision. In addition, the QRC does not support giving Aurizon Network the right to require a third party to enter into a confidentiality agreement.

5.1 Ability for prospective Access Seekers to require Aurizon Network to enter into a confidentiality agreement

The right to require Aurizon Network to enter into a confidentiality agreement only applies to 'Access Seekers', 'Third Party Access Seekers' or 'Train Operators'. An entity only becomes an 'Access Seeker' once it has submitted a properly completed access application.

There are circumstances where confidential information may need to be given to Aurizon Network for the purpose of obtaining access prior to an Access Application being made. For example, it is typically the case that an Access Seeker will meet with Aurizon Network numerous times before submitting an Access Application. Material information is usually disclosed at those meetings. A prospective Access Seeker should therefore also have the ability to require Aurizon Network to enter into a confidentiality agreement under clause 3.10.

5.2 Ability for Aurizon Network to require parties to enter into a confidentiality agreement

As reflected in the QRC's comments on the confidentiality agreement included as Schedule I of the QCA's Draft Decision, the QRC does not support Aurizon Network having the ability to require an access seeker or train operator to enter into a confidentiality agreement to keep confidential any information disclosed to it by Aurizon Network during or prior to the Negotiation Period in clause 3.10.

Aurizon Network is required to give the undertaking under UT4 because it is the operator of the declared service. Accordingly, Aurizon Network should have confidentiality obligations imposed on it under UT4, particularly given the risk of unfair differentiation and misuse of that information. In contrast, providing Aurizon Network with a right to require an access seek or train operator to enter into a confidentiality agreement in Aurizon Network's favour is inappropriate. The nature of the information disclosed by Aurizon Network to an access seeker or train operator does not require confidentiality obligations to be attached to that information.

The QRC is also concerned that giving Aurizon Network the ability to restrict an access seeker's right to use information provided by Aurizon Network during the negotiation process would not be practicable. In many circumstances, an access seeker needs to provide this information to other parties in the supply chain so as to obtain corresponding supply chain rights. The ability for Aurizon Network to require an access seeker or train operator to enter into a confidentiality agreement for Aurizon Network's benefit in clause 3.10 should therefore be removed.

6 Complaints

The QRC supports the complaints process proposed by the QCA and the right given for an access seeker, access holder or train operator to complain directly to the QCA rather than Aurizon Network.

However, the class of people who may complain about a potential breach of UT4 is unduly limited. The QRC submits that any person should be entitled to make a complaint given the breadth of Aurizon Network's obligations under Part 3 of UT4. For example, there is no reason why a terminal operator should not be entitled to make a complaint. Similarly, prospective access seekers should also have the right to make a complaint given that complaints may arise prior to an access application being made.

7 Line diagrams

The QRC is concerned by the proposed amendments to clause 3.21(c) of the Consolidated Draft Decision.

The original intent of clause 3.21(c) was to restrict Aurizon Network from assigning or transferring the ownership of existing or new rail infrastructure from Aurizon Network to another Aurizon Party. It is essential that Aurizon Network remains the owner of the rail infrastructure because it is the entity that will give the undertaking under UT4. Furthermore, to avoid unnecessary complexity and inconvenience for access seekers, Aurizon Network should not be entitled to assign or transfer parts of the rail infrastructure to other Aurizon Parties because this may lead to multiple access applications to several Aurizon Parties being required in order for access to a relevant train path to be acquired.

Consistent with this intention, the original clause 3.21(c) prohibited the assignment or transfer of rail infrastructure without the QCA's approval. The proposed amendments, however, remove this prohibition and effectively give Aurizon Network the right to assign or transfer the rail infrastructure to an Aurizon Party and for UT4 to cease to apply to the rail infrastructure so transferred.

This is clearly inconsistent with the regulation of access under UT4 as well as the regime for reallocating rail infrastructure to Aurizon Network set out in clause 3.22. The amendments proposed by the QCA should not be made as a result.

8 Ultimate Holding Company Support Deed

The QRC does not support the softening of Aurizon Network's obligation to procure that its ultimate holding company enter into the Ultimate Holding Company Support Deed (**Deed**) to a requirement for it to request that its ultimate holding company do so. This relaxation fails to acknowledge the central importance of the Deed to the ring-fencing arrangements as recognised by the QCA (at page 100 of the Consolidated Draft Decision):

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.

A failure to obtain the Deed jeopardises the entire ringfencing regime, which extends beyond the undertakings to be given in relation to confidential information. The non-provision of confidential information to members of the Aurizon Group (other than Aurizon Network) if the Deed is not obtained does not therefore address all of the risks to the ringfencing regime. Accordingly, the QRC submits that Aurizon Network should be required to use reasonable endeavours to procure that its Ultimate Holding Company enter into the Deed.

For similar reasons, the QRC does not support the amendments proposed to clauses 3.1.3 and 3.1.4 of the Deed. While the QRC agrees that one of the consequences from a breach of the Deed should be the ceasing of other members of Aurizon having confidential information disclosed to them or the ability to use that information, this consequence does not reflect the full scope of the obligations included in Part 3 of UT4. As a result, it is inappropriate to limit the remedy for a breach of the Deed in this way. Clauses 3.1.3 and 3.1.4 should therefore be reinstated in addition to the current clause 3.1.4.

Schedule I – Confidentiality pro-forma

The QRC set out its concerns with the structure of the pro-forma confidentiality agreement in the QRC's April 2015 Submission. Whilst the QCA has attempted to address those concerns in its Consolidated Draft Decision, the QRC considers significant issues remain. In particular, the Consolidated Draft Decision pro-forma confidentiality agreement operates ineffectively and inconsistently because it is structured to account for both of the following disclosure scenarios:

- an Access Seeker, Third Party Access Seeker or Train Operator disclosing Confidential Information to Aurizon Network; and
- Aurizon Network disclosing Confidential Information to a Related Party of Aurizon Network.




The QRC recommends implementing separate confidentiality pro-formas for each of the scenarios discussed above to ensure that the obligations of the parties reflect the appropriate disclosure scenario. To assist the QCA, the QRC has marked up the Consolidated Draft Decision pro-forma to reflect a workable framework for a situation where an Access Seeker, Third Party Access Seeker or Train Operator discloses Confidential Information to Aurizon Network. This mark-up is set out in Annexure 2.

Part 4 – Negotiation framework

This part of the QRC’s Submission outlines the QRC’s comments with respect to the Consolidated Draft Decision in relation to the negotiation framework, as captured in Part 4, Schedule A and Schedule B of the Undertaking.

The QRC generally supports the revised Part 4 contained in the CDD, subject to the comments below. The QRC has no further comments on Schedule A or Schedule B.

The QRC sets out its position in respect of the key aspects of Part 4 below.



Clause Reference	Issue	Description	QRC Position
Part 4			
N/A	Train operators as access seekers and access holders	<p>The QRC remains concerned that the definitions of Access Seeker, Access Holder and Train Operator have the potential to overlap. The QRC recommends the following drafting amendments to the definitions under the Undertaking to add further clarity:</p> <ul style="list-style-type: none"> • Train Operations Deed: amend the definition to read “A Train Operations Deed agreed (or otherwise entered into) between Aurizon Network and the relevant Train Operator under clause 5.3 of the Undertaking.” • Access Application: include the following words at the end of the definition “but does not include a request to enter into a Train Operations Deed”. • Access Holder: include the following words at the end of the definition “but does not include that person in its capacity (if any) as a Train Operator”. 	
N/A	Access applications by railway operators	<p>The QRC remains concerned that there is no express prohibition on an operator’s ability to progress an access application for coal carrying train services without the support of a customer. Without an express prohibition, the underlying purpose of an access undertaking, to provide for open and fair access to all, is at risk. This is because an operator (including the related party operator) could secure available capacity, or the capacity arising from an Expansion, placing expanding and new mines in a position of having to choose between offering above rail contracts to that operator, or face delays in obtaining below rail capacity.</p> <p>Whilst the QRC acknowledges the QCA’s further amendments to Schedule B which would allow Aurizon Network to terminate negotiations where an operator is seeking Access Rights without the support of a customer, this right is in Aurizon Network’s control and is ultimately at Aurizon Network’s discretion. The QRC would prefer to see a clear prohibition of an operator progressing an Access Application for coal-carrying trains services without support from a customer.</p>	
4.4(d)(vi)	Suspension of negotiation process for an expansion	<p>Clause 4.4(d)(vi)(A) has been amended to provide clarity as to when the negotiation process for Access Rights affected by an Expansion will recommence following suspension. That clause now provides that the suspension ends when Aurizon Network and the Access Seeker enter an agreement as to how an Expansion is to be funded in accordance with clause 8.8.1. The QRC has two concerns:</p> <ul style="list-style-type: none"> • Funding of the Expansion may be resolved without the parties entering into an agreement. For example, Aurizon Network may agree to fund an Expansion without seeking Access Conditions. 	

Clause Reference	Issue	Description	QRC Position
Part 4			
		<ul style="list-style-type: none"> An agreement may be entered into regarding funding which is not in accordance with clause 8.8.1. This would apply, for example, if Aurizon Network agrees to provide funding with Access Conditions. <p>The QRC suggests that Clause 4.4(d)(vi)(A) should refer to the condition in clause 8.2.1(c)(ii) having been satisfied. This clause captures the different methods for fully funding an Expansion.</p>	
4.5	Revisions to an access application	<p>The QCR has amended clause 4.5(j)(i) and (v) to provide that a Material Variation can only be made prior to the acceptance of an IAP. If a Material Variation is made after acceptance of an IAP, clause 4.5(j)(i) and (v) provides that the Material Variation is automatically deemed to be withdrawn by the Access Seeker (without allowing the Access Seeker the right to choose to proceed or withdraw the variation as exists under clause 4.5(d)). It appears, although unclear, that the relevant Access Application will also be deemed to be withdrawn in these circumstances (as paragraphs (v), (vi) and (vii) of clause 4.5(j) are cumulative). The QRC disagrees with these amendments.</p> <p>The QRC considers that an Access Seeker should have the ability to decide whether or not to proceed with a variation after it is notified that the variation is a Material Variation. This right should exist even where the variation was submitted after the acceptance of the IAP.</p> <p>The QRC otherwise supports the amendments adopted by the QCA in the Consolidated Draft Decision to clause 4.5 of the Undertaking regarding variations to Access Applications and suggests the following further drafting amendments:</p> <ul style="list-style-type: none"> insert “and clause 4.5(j) will apply to that portion of the Access Rights sought which cannot be provided in the absence of an Expansion” at the end of clause 4.5(e)(i); and replace reference to “clause 4.5(f)(ii)” in clause 4.5(f)(iv) with “clause 4.5(f)(iii)”. 	●
4.12(c)(ii)(B)	Railway operator reasonably likely to enter rail haulage agreement	<p>Clause 4.12(c)(ii) should be amended to ensure the effect of granting the Access Rights is disregarded from any consideration of the reasonable likelihood of a Railway Operator securing a rail haulage agreement with a Customer (i.e. similar to clause 4.12(c)(i)(A)(2)).</p>	●

Part 5 – Access agreements

This part of the Submission outlines the QRC's comments with respect to the Consolidated Draft Decision in relation to the entry into access agreements, as captured in Part 5 of the Undertaking. The QRC provided a number of comments in relation to Part 5 in the QRC's April Submission. The QRC notes that some of those comments have been adopted by the QCA, however, a number have been left unanswered. The QRC continues to consider those amendments are required, however, the QRC has not repeated those comments in this Submission unless it considered further explanation or comment was required.

Clause Reference	Issue	Description	QRC Position
Part 5			
5.1(i)	Execution of access agreement up to two years prior to commencement of train services	The QRC has previously expressed concern that the two-year limitation in clause 5.1(i) should not apply to access agreements that are conditional on the completion and commissioning of an expansion. Clause 5.1(i) is also inconsistent with clause 4.4(g) which allows an Access Application to be negotiated up to five years before the commencement of the relevant Access Rights. Given that clause 4.4(g) has previously been agreed with Aurizon Network, the QRC requests that clause 5.1(i) is amended to ensure consistency.	●
5.1(j)	Aurizon Network is not required to agree to terms additional access rights	The QRC considers that a clarification is required in relation to the interaction between clause 5.1(j) and clause 7.3(b) of the Undertaking. Clause 7.3(b) provides that certain variations to train services are to be disregarded for the purposes of determining whether the access rights are equivalent access rights. In order for clause 5.1(j) to operate effectively, the QRC considers that clause 5.1(j) should be expressed as "subject to" clause 7.3(b).	●
5.1	Development of access agreement	<p>The QRC considers that Part 5 should include provisions in relation to security for an access seeker's financial obligations under an access agreement and that these should form part of the provisions from the Undertaking incorporated into the terms of the Standard Access Agreement. The QRC has previously requested that the following provisions should be included but is disappointed that these matters have not been addressed in the Consolidated Draft Decision. The QRC considers that the security provisions should reflect the following, preferably in the Undertaking:</p> <ul style="list-style-type: none"> • Aurizon Network may require an access seeker to provide security under an access agreement, before the commencement of train services, if the access seeker is not financially sound (and the access seeker may dispute the requirement to provide security if it considers that it is financially sound) but only for the period during the term of the access agreement that the access seeker is not financially sound. This should be the only test for when security is required. • if the access seeker is required to provide security then the form of the security must be at the election of the access seeker and the form of security may be: <ul style="list-style-type: none"> – a bank guarantee; or – a company guarantee from a company (that may include a parent company) that is of sufficient financial standing (based on a similar test to that which applies to the access seeker); 	●

Clause Reference	Issue	Description	QRC Position
Part 5			
		<ul style="list-style-type: none"> if the access seeker is required to provide security and elects to provide a bank guarantee, then the amount of the bank guarantee must be equivalent to six months of maximum take or pay charges; and the QRC commends that the QCA has reflected this amount in the Standard Access Agreement in the Consolidated Draft Decision (subject to one comment on the drafting which is contained in the QRC's Submission in respect of the Standard Access Agreement). <p>The QRC notes that the comments made in this section apply only in respect of an access agreement entered into which relates to access rights capable of being provided without an expansion.</p>	
5.3(h)	Timing of execution	<p>This clause provides that Aurizon Network will execute a train operations deed before the operation of train services under the related access agreement. This restriction should only relate to the operation of train services for which the operator has been appointed under the relevant train operations deed.</p> <p>The reason for seeking the clarification is that at the time a train operations deed is being negotiated, the access holder might already have another train operator operating train services under another train operations deed. This should not then restrict the execution of subsequent train operations deeds.</p> <p>The QRC considers there is still an issue with the wording of this clause where the access holder has an existing train operator operating certain train services under an existing train operations deed but may wish to change its nomination to a different train operator for those same train services. Clause 5.3(h) should not restrict the execution of a new train operations deed with the new train operator (because the train services have already “commenced under the Access Agreement” albeit with the to-be-replaced train operator).</p> <p>The QRC considers that the words “by that Train Operator” should be inserted after “commencement” as well as “or the execution of subsequent Train Operations Deeds with different Train Operators that relate to the same Train Services but which have already commenced by any prior nominated Train Operators” after “relate to different Train Services”.</p>	
5.4(a)	Review of standard access agreement or standard train operations deed	<p>The QRC considers that access holders and train operators should also have a right to request a review of the standard access agreement or standard train operations deed.</p>	

Part 6 – Pricing principles

The QRC supports the version of Part 6 included in the Consolidated Draft Decision. The QRC's reasons for supporting the amendments which were included in the previous draft decisions, and which have been retained, were provided in previous submissions and are not repeated here. This section discusses the further changes proposed in the Consolidated Draft Decision.

Clause Reference	Issue	Description	QRC Position
Part 6			
6.3	Private Infrastructure Costs	In the previous Draft Decision, the QCA proposed to remove the distance discount relating to private spur lines. The QRC considered that the absence of any discount was inequitable, due to the inclusion of many existing spur lines within the RAB. The QRC suggested that either Aurizon Network's proposed distance discount formula should be accepted, or the UT3 discount linked to Private Incremental Cost should be reinstated. The QCA has now proposed to reinstate the UT3 mechanism, supported by improved processes. The QRC supports the proposed clause 6.3.	●
6.4	Expansion pricing	Expansion Pricing has been a complex and difficult issue throughout the UT4 process. Aurizon Network and the QRC worked collaboratively to develop a proposed approach, however the QCA (informed by the WIRP experience) identified a number of concerns with that approach. The process proposed in the Consolidated Draft Decision draws heavily on the approach developed by Aurizon Network, but provides an opportunity to tailor the solution to the needs of each future project. The QRC supports this approach. While not providing a definitive set of rules for all projects, the proposed clause 6.4 does enshrine the key Expansion Pricing Principles within the undertaking, provide an "Endorsed" approach for certain projects and ensures that expansion pricing issues are considered and settled relatively early in the life of an Expansion project. The amended approach to the Common Cost contribution in the case of an Endorsed Expansion addresses the issue which the QRC raised in regard to the Common Cost approach within the Draft Decision. The QRC supports the proposed clause 6.4.	●
6.13	Access Conditions	Consistent with the Draft Decision, the Consolidated Draft Decision DD retains provisions regarding the development and approval of Access Conditions. For the reasons set out in previous submissions, the QRC supports this clause.	●



Schedule E – Regulatory Asset Base



This part of the QRC’s submission outlines the QRC’s comments with respect to the Consolidated Draft Decision in relation to the Regulatory Asset Base (RAB), as set out in Schedule E of the Undertaking.

Clause Reference	Issue	Description	QRC Position
Schedule E			
1.2	Reductions to asset values	<p>QRC supports the Consolidated Draft Decision in regard to circumstances in which the QCA may require the value of assets in the RAB to be reduced.</p> <p>The QRC agrees with the QCA’s comments regarding the difficulties of setting prescriptive rules for the application of clause 1.2(b)(ii) regarding a sustained reduction in demand. The circumstances surrounding such a situation, and the appropriate response, may vary significantly on a case by case basis.</p> <p>While the QRC would hope that Aurizon Network would recognise the need to voluntarily take action in circumstances where “<i>regulated prices on an unoptimised asset would result in a further decline in demand</i>”, the QRC cannot be confident that this would always be the case, or that Aurizon Network would respond to such a situation in an appropriate or timely manner. For example, the QRC do not consider that Aurizon Network’s response to the Blackwater AT5 issue was timely or that the proposed solutions were appropriate. This, according to Aurizon Network’s April 2013 submission, was a situation in which continuation of existing regulated pricing could “<i>make electric haulage entirely uncompetitive, stranding the electrification assets</i>”.</p> <p>The QCA, when considering the appropriate response to a situation in which regulated prices on an unoptimised asset would result in a further decline in demand, is required to consider a range of important matters, including the public interest, the interests of Access Holders, the interests of Aurizon Network, and can consider any other matter which it considers relevant in the circumstances. Aurizon Network’s considerations in such a situation are likely to be far more limited. It is appropriate that a matter of such importance be decided by an independent party whose decision-making takes into account all relevant impacts and matters.</p> <p>The QRC notes that the Consolidated Draft Decision states “<i>we agree with the QRC that determining what is ‘long term and sustained’ demand deterioration should be done on a forward-looking basis</i>”. The QCA has not amended the drafting of the clause in any way to reflect this statement. The QRC considers that an amendment is required as the clause could otherwise be read as requiring that the reduction in demand be sustained on a long term basis before the QCA can take any action. This should not be the case. It is important that action be taken as soon as it becomes clear that the reduction in demand is likely to be long term and sustained, on a forward-looking basis.</p>	●
4.1	Approval of capital expenditure and voting	<p>The QRC supports the amendments to clause 4.1(b) which require Aurizon Network to include in its Voting Proposal the timeframe for constructing the relevant capital expenditure project and the cost tolerance.</p>	●

Clause Reference	Issue	Description	QRC Position
Schedule E			
		<p>However, the QRC remains concerned that there is no express provision which provides that the acceptance of a capital expenditure project has an expiry date and that any material change to the scope, standard or costs of a project requires reacceptance. Whilst this may be implied by the operation of clause 4.1(a) and clause 4.1(g)(iv), the QRC considers an express provision is required to ensure this position is clear.</p>	
N/A	Maintenance of Rail Infrastructure	<p>Aurizon Network should be subject to an express obligation to maintain the Rail Infrastructure in a condition which is fit for the purpose of provision of contracted Train Service Entitlements to Access Holders. The maintenance of the Rail Infrastructure is integral to the provision of access by Aurizon Network.</p> <p>This obligation previously existed in clause 1.5 of Schedule A of UT3 (the equivalent of Schedule E of UT4). Aurizon Network deleted this obligation on the basis that the issue was already dealt with in the standard access agreements.</p> <p>In one part of the Consolidated Draft Decision, the QCA supported an obligation on Aurizon Network to maintain the Rail Infrastructure. The QCA stated as follows:</p> <p style="padding-left: 40px;"><i>We consider that an obligation under the undertaking is reasonable, in order to maintain assets in a 'fit-for-purpose' state. We consider this to be in the interests of access holders who have made their own investments, and it is also consistent with the section 69E object of Part 5 of the QCA Act to promote the economically efficient operation of, use of and investment in significant infrastructure.</i></p> <p>This position is later conflicted in the Consolidated Draft Decision, where the QCA accepts Aurizon Network's proposal to remove the obligation to maintain the Rail Infrastructure from the Undertaking.</p> <p>The QRC requests the QCA to reconsider this issue. Aurizon Network is not subject to an express obligation to maintain the Rail Infrastructure under the Standard Access Agreement. Whilst the Standard Train Operations Deed does include some maintenance requirements, these alone are insufficient to provide Access Holders with comfort, particularly as:</p> <ul style="list-style-type: none"> • those maintenance requirements are narrower than the UT3 maintenance obligation; • Access Holders and Train Operators are likely to be affected in different ways from any failure by Aurizon Network to properly maintain the Rail Infrastructure; and • the obligation to maintain from the Standard Train Operations Deed is only incorporated into the Standard Access Agreement to the extent an Access Holder might be able to rely on the relevant indemnities under that agreement and then only if Aurizon Network's liability would not otherwise be excluded. <p>The QRC suggests the UT3 provision should be reinstated under the Undertaking, and incorporated by reference into the Standard Access Agreement and Train Operations Deed (notwithstanding the limited provisions which already exist in that deed). This will ensure an express and clear obligation exists for the benefit of all Access Holders and Train Operators.</p>	●

Schedule F – Reference Tariffs

Clause Reference	Issue	Description	QRC Position
Schedule F			
General	Support for Consolidated Draft Decision	<p>The QRC generally supports the Consolidated Draft Decision version of Schedule F, including:</p> <ul style="list-style-type: none"> the proposed changes to the calculation of charges for cross-system traffic (introduced within the Consolidated Draft Decision mark-up of the 2014 DAU); and the proposed changes which were contained within the previous draft decision, and retained within the Consolidated Draft Decision. <p>These include:</p> <ul style="list-style-type: none"> the rejection of the rebalancing of revenue recovery towards greater recovery through AT2. The QRC supports the consideration of this issue as part of a full revenue of tariff-related matters; the rejection of additional requirements which Aurizon Network proposed for a train service to qualify as a Reference Train Service; maintaining the exclusion of AT1 from the revenue cap; the removal of the “Increment” until a balanced a reciprocal incentive regime is developed; and the removal of the proposed non-reciprocal review event relating to maintenance spending. 	
3.3(d) 3.3(h)	Effect of Aurizon FM on TOP	<p>Aurizon Network’s 2014 DAU proposed that the definition of Aurizon Network Cause would include “a Force Majeure Event affecting Aurizon Network”. The QCA’s markup of the DAU deletes the reference to Aurizon Network FM from the definition of Aurizon Network Cause. The QRC does not support this amendment and it is the QRC’s understanding that this change in position was not sought by Aurizon Network. Aurizon Network’s definition of Aurizon Network Cause, which was consistent with UT3, ensured that an Access Holder which is not offered its contracted paths due to an Aurizon Network FM event would receive relief from TOP. Aurizon Network was then able to recover the lost revenue through the revenue cap arrangements.</p> <p>Unless Aurizon Network FM is included within the definition of Aurizon Network Cause, or specifically referred to within clauses 3.3(d) and 3.3(h) (in addition to Aurizon Network Cause):</p> <ul style="list-style-type: none"> an individual Access Holder may be exposed to TOP under clause 3.3(d) when they are unable to access train paths due to an Aurizon Network FM event; and the TOP trigger (clause 3.3(h)) may result in TOP being payable within a system despite the shortfall in gtk’s operated is a result of Aurizon Network FM. <p>This would be a significant change from UT3 TOP terms, which has not been explained in the Consolidated Draft Decision or in the draft decision, and to the QRC’s knowledge was not sought by any stakeholder. If this is not simply an unintended outcome of other drafting</p>	





Clause Reference	Issue	Description	QRC Position
Schedule F			
		changes which can be rectified in the final decision, then the QRC encourages the QCA to explain the change within the final decision.	
7-11	FY 2015 adjustments	<p>Clauses 7.2, 8.2, 9.2, 10.2 and 11.2 state that the difference between 2013-14 approved allowable and transitional revenues has been smoothed over 2014-15, 2015-16 and 2016-17. The QRC supports this approach.</p> <p>However, in regard to the difference between approved allowable and transitional revenues for 2014-15, the Consolidated Draft Decision (Volume III, Appendix A, item 11) states that an Adjustment Charge will apply (therefore the relevant revenue is not reflected in the reference tariffs set out in Schedule F). The QRC does not support this draft decision. It is not appropriate that producers may face an Adjustment Charge for 2014-15, likely to be payable a full year (or more) after completion of 2014-15, and which is still currently incapable of being accurately calculated. This adjustment should be smoothed and recovered over a future period, via an adjustment to reference tariffs applicable to those future periods (that is, not through an Adjustment Charge calculated by reference to the individual railings of specific customers during 2014-15). It is the QRC's understanding the Aurizon Network supports a smoothed approach, consistent with the approach applied to 2013-14.</p> <p>QRC accepts that an Adjustment Charge may apply in regard to the current financial year (2015-16).</p>	
7-12	System-specific issues	The QRC relies on the QCA to assess the appropriateness of system-specific pricing issues which effect the tariffs and other parameters set out in clauses 7 to 12. This includes cost allocation and pricing decisions relating to new infrastructure and new mines. The QRC notes that the QRC and individual producers have provided numerous previous submissions on these matters.	

Part 7 – Available capacity allocation and management

This part of the QRC's Submission outlines the QRC's comments with respect to the Consolidated Draft Decision on available capacity allocation and management, as captured in Part 7 of the Undertaking.

Clause Reference	Issue	Description	QRC Position
Part 7			
7.2.1(a)(iii)	Railway operator reasonably likely to enter rail haulage agreement	Clause 7.2.1(a)(iii) should be amended to ensure the effect of granting the Access Rights is disregarded from any consideration of the reasonable likelihood of a Railway Operator securing a rail haulage agreement. The QCA has made the same amendment to clause 4.12(c)(i)(A)(2).	●
7.2.2, 7.2.3	Capacity notification register and committed capacity register	<p>Clause 7.2.2(a)(i) should be extended to cover the circumstances described under clause 4.5(e) and (j) (i.e. in respect of a Material Variation which causes the requested Access Rights to be unable to be provided in the absence of an Expansion).</p> <p>Clause 7.2.2(b)(iii) should be linked to Part 4 in respect of when a "properly completed" Access Application is received (i.e. clause 4.4(b)).</p> <p>The reference in clause 7.2.2(e) to "clause 7.2.2(b)(iii)" should be replaced with "clause 7.2.2(d)".</p>	●
7.3	Replacement mine concept and renewals	<p>In its Consolidated Draft Decision the QCA refuses to approve Aurizon Network's proposed removal of the replacement mine concept and instead proposes that the provisions relating to the replacement mine concept from UT3 be reinstated. The mark-up of the Undertaking in the Consolidated Draft Decision does not reflect this position.</p> <p>The QRC requests the QCA to clarify its decision in this respect.</p>	●
7.3(h)	Form of renewed access agreement	The QRC considers that the right of a Renewing Access Seeker should be a right to negotiate a renewed Access Agreement based on the Undertaking in force at that point in time, and with the benefit of priority over any other Access Seeker. The right to negotiate an Access Agreement should include the right to seek the terms of the current Standard Access Agreement (at that time). The QRC is concerned that clause 7.3(h) appears to provide an evergreen right to terms of the existing (expiring) Access Agreement. The QRC considers that providing a renewal right on the same terms as the existing agreement will perpetuate issues such as the existing 'generations' of take or pay. The QRC notes the further clarification in the Consolidated Draft Decision which allows the parties to agree to adopt the Standard Access Agreement. This does not address the QRC's concern because the Renewing Access Seeker still has the right to insist on retaining the terms of its existing agreement.	●
7.3(i)(iii)	Renewals and the Queue	Clause 7.5.2(b)(i) provides that a Renewing Access Seeker is placed ahead of all other Access Seekers in the Queue. This is appropriate. However, clause 7.3(i)(iii)(A) provides that Access	●

Clause Reference	Issue	Description	QRC Position
Part 7			
Rights the subject of the Renewal are not included in the Queue (although item (B) of the same clause repeats the position of clause 7.5.2(b)(i)). The QRC suggests that clause 7.3(i)(iii)(A) should be deleted to avoid confusion.			
7.4	Transfers	<p>The QRC considers that the proposed transfer mechanisms, as set out in the Consolidated Draft Decision, may be acceptable on a trial basis, subject to the comments below. The QRC notes that the QCA proposes to monitor transfers and to require a review of the effectiveness of the mechanism, and the QRC supports these proposals.</p> <p>Given the QCA intends to limit 'fee-free' transfers to a period of three months (discussed further below), the review will provide an opportunity to address any 'gaming' behaviour which is found to have arisen under this arrangement without the transfers undertaken during the trial period having a long lasting effect. However, the QRC has a number of remaining concerns which the QRC suggest need to be addressed before the proposed mechanisms are implemented.</p> <p>Transfer fee formula: The QRC considers that the calculation of the Transfer Fee requires amendment. The calculation does not seem to be limited to:</p> <ol style="list-style-type: none"> 1 the period for which the Nominated Access Rights are being transferred, as the calculation refers to 'the remainder of the term of the relevant Access Agreement'. For example, if a transfer is for a period of four months rather than for the remaining term of the Access Agreement, this does not seem to be captured by the formula; and 2 the Nominated Access Rights. The calculation refers to all of the TOP under the relevant Access Agreement, rather than being limited to the Nominated Access Rights. <p>'Gaming' behaviour: The QRC remains concerned about 'gaming' behaviour. In the current environment there is a significant risk that excess capacity will be held by Access Holders (on behalf of Customers), and there are strong incentives to reduce TOP exposures by transferring to an origin with a shorter haul. The QRC has explained that this is not a concern in cases where the transferee has a genuine intention to use the paths. However, the QRC considers that a mechanism is required to prevent the repeated use of three month, fee-free transfers, in circumstances where there is a history of previous transfers involving the same origin mine not being substantially used by the transferee. The QRC would be comfortable with a requirement that the transferee demonstrate a genuine intention to use the transferred paths, provided Aurizon Network was able to take past performance into account when assessing this genuine intention. The QRC considers that an explicit requirement to this effect is required in clause 7.4, rather than relying on any of the Part 4 provisions.</p> <p>Three month limit on 'fee-free' transfers: This time limit may involve unnecessary administration where the transfer is continued through successive further short-term transfers. While the shorter time limit provides a more frequent opportunity to assess the 'genuine intention' discussed above, we do not</p>	●

Clause Reference	Issue	Description	QRC Position
Part 7			
		<p>consider that a limit of six months would materially increase the risks to other parties of allowing fee-free transfers. A six month limit would reduce administrative costs.</p> <p>'Same reference tariff' requirement: Clause 7.4.2(n)(iii) requires that a Transfer Fee must be paid on all transfers which do not involve two parties which pay Access Charges based on the same Reference Tariff. It is unclear to us whether this requirement would be satisfied if a transfer involved parties within the same system where:</p> <ol style="list-style-type: none"> one party will use a diesel service, and the other use electric; or one of the parties is subject to a System Premium or System Discount. <p>For the first case, we do not consider that a Transfer Fee should be paid for a short term transfer. This position is consistent with the Transfer Fee formula, which is limited to Take or Pay components (and therefore excludes AT5).</p> <p>For the second case, we suggest that, if a Transfer Fee is to be paid on a short-term transfer (which would arise only as a result of the System Premium) then the Transfer Fee should be calculated solely by reference to the System Premium, and not include reference to the tariff elements which are common to both parties.</p>	
Formerly within 7.4	Customer Initiated Transfers	The QRC supports the QCA's Consolidated Draft Decision (decision number 11.8) that provisions regarding Customer Initiated Transfers should be reinstated within clause 7.4. However, the QRC notes that the amendment has not been included in the marked up DAU contained within the Consolidated Draft Decision.	
7.7.2	Mitigation in respect of a force majeure event	<p>The QRC supports the QCA's proposal that Aurizon Network be subject to an express obligation to mitigate and minimise the effects of a force majeure event. The QRC recommends that:</p> <ul style="list-style-type: none"> this obligation is linked to Aurizon Network's ability to claim a suspension of its obligations under clause 7.7.1; or paragraph (b) of the definition of Force Majeure is clarified to require Aurizon Network to have complied with clause 7.7.2. <p>Without this clear link, there is little incentive for Aurizon Network to comply with the obligation to mitigate.</p>	
7.7	Provision of notices in relation to force majeure to a customer and train operator	<p>The QRC supports the QCA's proposal to require notices in respect of Force Majeure to be provided to an Access Holder's Customer and Train Operator (as applicable). The QRC recommends clause 7.7.1(d)(ii) is amended to clarify that:</p> <ul style="list-style-type: none"> it applies to any notice given under clause 7.7; and that the notice provided to a Customer or Train Operator (as applicable) must be provided at the same time as that notice is provided to the Access Holder. 	
7.7.4	Obligation to pay	The QRC raised a number of concerns in respect of clause	



Clause Reference	Issue	Description	QRC Position
Part 7			
	additional costs where actual costs of repairs or replacement exceed what was agreed	<p>7.7.4(c) of the Undertaking in the QRC's April 2015 Submission. Whilst the QCA acknowledged these comments in its Consolidated Draft Decision, the QCA has not adopted any amendments or otherwise rejected the comments.</p> <p>In particular, the QRC considers that clause 7.7.4(c)(ii) should be amended so that an Access Holder's (or Customer's) obligation to contribute funds is restricted to the actual costs reasonably and necessarily incurred by Aurizon Network. Without this restriction, Aurizon Network could easily misuse its powers and leave the relevant Access Holder (or its Customer) liable for endless amounts of funding.</p>	




Part 7A – Baseline Capacity

This part of the Submission outlines the QRC’s comments with respect to the Consolidated Draft Decision in relation to baseline capacity, as captured in Part 7A of the Undertaking. The QRC does not have any further comments on Schedule G of the Undertaking.

The QRC’s specific comments in respect of the Consolidated Draft Decision in relation to Part 7A are set out in the table below.

Clause Reference	Issue	Description	QRC Position
Part 7A			
7A.2.3	System Rules	<p>The QRC makes the following recommendations for amendments to clause 7A.2.3:</p> <ul style="list-style-type: none"> the consultation under clause 7A.2.3(a)(ii) in relation to the initial System Rules should extend to Customers; clauses 7A.2.3(b)(ii), 7A.2.4(c)(iv) and 7A.2.4(d)(ii)(B) should also require compatibility with the System Operating Parameters; clause 7A.2.4(a)(i) - (ii) and clause 7A.2.5(b)(ii) seem to have referencing errors; clause 7A.2.4(b)(ii) should extend to where there is a decrease greater than 10% and clause 7A.2.4(b) should be amended to include a right for the QCA to undertake a review of the System Rules where Aurizon Network does not undertake a review of the System Rules as required by clause 7A.2.4(b). 	●
7A.4.2(d)	Independent expert engaged by Aurizon Network to undertake a review of a capacity assessment	<p>The QRC recommends the following further amendments to clause 7A.4.2(d):</p> <ul style="list-style-type: none"> in paragraph (iii) delete the words “or the Access holders (or Customers) if the review is triggered by the Access Holder or Customers” so that an independent expert need only be acceptable to the QCA; and insert the following at the end of paragraph (v), “and acknowledge a duty to the Access holders (and their Customers) to act independently and in accordance with the Undertaking”. Without this, the independence of the expert is likely to be in question given the expert will be engaged by Aurizon Network. 	●
7A.4.2(e)	Outcome of independent expert review of capacity assessment	<p>Clause 7A.4.2(e) provides that an independent expert report undertaken in relation to a capacity assessment is binding on Aurizon Network. The QRC agrees with the intention of this provision, however considers the clause requires further clarity. For example, Aurizon Network should be required to adopt the expert report as its capacity assessment and this should be linked to clause 7A.4.3 which deals with capacity deficits.</p>	●


Clause Reference	Issue	Description	QRC Position
Part 7A			
7A.4.1(i), 7A.4.2(h), 7A.4.3(d), 7A.5(g)	Confidentiality obligations in respect of a disclosure of: <ul style="list-style-type: none"> • baseline capacity assessment; • capacity assessments; • capacity deficits; and • system operating parameters. 	The QRC recommends amending paragraph (ii)(B) of each of these clauses to make sure Aurizon Network’s ability to withhold information is subject to the prohibition on Aurizon Network agreeing confidentiality obligations intended to circumvent its disclosure requirements under the Undertaking. For example, insert “subject to clause 7A.4.2(i)” at the beginning of clause 7A.4.2(h). An equivalent amendment should be made to each other similar provision throughout the Undertaking.	
7A.4.3	Capacity deficit	<p>In the QRC’s April 2015 Submission, the QRC supported the QCA’s proposal to develop a capacity assessment regime whereby Aurizon Network is held accountable for a capacity deficit. Under the QCA’s Consolidated Draft Decision, Aurizon Network is no longer required to rectify a capacity deficit. However, the QCA has adopted the QRC’s proposal to expressly provide that nothing in clause 7A.4.3 affects or limits Aurizon Network’s obligations or liabilities under an Access Agreement. The QRC strongly supports clause 7A.4.3(f). The QRC considers Aurizon Network should be held accountable for the capacity which it contracts. Clause 7A.4.3(f) goes some way to ensuring Aurizon Network can be held accountable for a capacity deficit at least from a contractual perspective to the extent Aurizon Network fails to provide train paths under an Access Agreement.</p> <p>The QRC has three key remaining concerns in relation to the capacity deficit regime.</p> <p>First, Aurizon Network should be obliged to seek a voluntary relinquishment of contracted capacity where this would resolve a capacity deficit, before undertaking an Expansion. The QRC considers that seeking voluntary relinquishment of capacity is a real alternative which would be likely to assist in overcoming a capacity deficit, however, Aurizon Network is unlikely to be incentivised to employ this option unless obliged to do so by the Undertaking.</p> <p>Second, if an Expansion is required to overcome a capacity deficit, but the parties are unable to agree to a funding arrangement, how will the unresolved capacity deficit impact a subsequent Expansion? For example, if a capacity deficit exists in relation to a Coal System, there becomes a question as to whether the next Expansion related to that Coal System should deal with the deficit. In these circumstances, it would be unfair to expect the expanding users to fund the cost of rectifying the deficit. Rather, Aurizon Network should be obliged to rectify the deficit when undertaking the Expansion at its own cost unless the QCA approves otherwise (for example, because of the relevant cause of the deficit makes it unfair for Aurizon Network to fund the cost).</p> <p>Third, whilst the QRC supports the information requirements imposed under clause 7A.4.3, the QRC also suggests Aurizon Network should be required to:</p>	



Clause Reference	Issue	Description	QRC Position
Part 7A			
		<ul style="list-style-type: none"> provide information about the possible cause of a given capacity deficit to the QCA and stakeholders; and identify upfront (to both the QCA and stakeholders) whether it considers an Expansion is required (or not) and the reasons for that position. <p>This will assist the affected parties to determine appropriate and informed responses to a given capacity deficit.</p>	
7A.5	System operating parameters	<p>The QRC accepts the QCA's decision not to be involved in the approval of the SOPs or changes in the SOPs except in conjunction with a Baseline Capacity Assessment or where the change in the SOPs causes a change in the System Rules. However, the QRC is concerned that clause 7A.5(e) (which provides that nothing in clause 7A.5 obliges Aurizon Network to vary the SOPs) renders various protections enshrined in clause 7A.5 redundant. For example, the QRC generally supports requirements that the SOPs be reviewed in consultation with stakeholders and that the SOPs be consistent with Good Engineering Practices. However, any potential benefits of these provisions appear to be undone by clause 7A.5(e). Clause 7A.5(e) would mean, for example, that Aurizon Network would not be obliged to vary an SOP which is inconsistent with Good Engineering Practices. The QCA's only ability to impose changes to the SOPs on Aurizon Network is through the Baseline Capacity Assessment. There is also no way for stakeholders to meaningful impact the amendments Aurizon Network makes to the SOPs. Stakeholders only have a right to make submissions, which although Aurizon Network is obliged to consider, it could easily dismiss. The QRC understands that Aurizon Network may have concerns it could be required to vary SOPs which are reflected in existing contracts, so that the SOPs would become inconsistent with those contracts. To address this concern, the QRC would support an additional requirement within clause 7A.5(b)(iv) ensuring that SOPs do not conflict with the terms of an existing Access Agreement, except to the extent the relevant Access Holder agrees to amend the terms of their Access Agreement to reflect the updated SOPs. Clause 7A.5(e) should then be deleted, or widened in terms of the circumstances in which Aurizon Network is obliged to vary the SOPs (i.e. to ensure the SOPs are consistent with the requirements set out in clause 7A.5 or otherwise provided for in the Undertaking).</p>	
7A.5(c)	Review of the system operating parameters	<p>Clause 7A.5(c)(i) should be amended by deleting the reference to "adversely". There appears no reason to restrict a review of the system operating parameters to an adverse effect.</p>	
12.1	Capacity related definitions: <ul style="list-style-type: none"> Absolute Capacity Available Capacity Capacity Capacity Analysis 	<p>The QRC is concerned that the capacity definitions are overly complex and because of this are likely to be misapplied or misunderstood. In addition there may be some errors with some of the definitions. For example, the definition of "Available Capacity" is entirely circular. The circularity in the definition of "Available Capacity" also causes the definition of "Capacity" to be circular (as it relies on the definition of "Available Capacity"). There are potentially unnecessary overlaps between the definitions of "Committed Capacity" and "Planned Capacity" which causes resulting issues in respect of the definition of "Capacity".</p> <p>The QRC suggests that the capacity related definitions should be</p>	




Clause Reference	Issue	Description	QRC Position
Part 7A			
	<ul style="list-style-type: none"> • Capacity Assessment • Committed Capacity • Existing Capacity 	<p>significantly simplified. In concept, the QRC suggests the following definitions of Capacity:</p> <ul style="list-style-type: none"> • the ultimate “Capacity” of the system is defined by reference to the outcome of undertaking a capacity analysis which assesses the capacity of the rail infrastructure rather than being tied to contracted, available and expansion capacity; • “Available Capacity” is defined as the “Capacity” of the rail infrastructure less Aurizon Network’s contractual commitments; and • “Planned Capacity” is defined by reference to the outcome of a capacity analysis undertaken in respect of a planned Expansion (ie the additional capacity that the Expansion is intended to produce as assessed in accordance with the Part 8 principles). <p>The QRC would be willing to work with the QCA and Aurizon Network going forward to refine the capacity definitions.</p>	

Part 8 – Network development and expansions

This part of the Submission outlines the QRC’s position with respect to Part 8 of the Consolidated Draft Decision in relation to network planning, expansion and expansion funding obligations, as captured in Part 8 of the Undertaking.



Clause Reference	Issue	Description	QRC Position
Part 8			
N/A	Generally	<p>The version of Part 8 which was included in Aurizon Network’s original UT4 submission was wholly unbalanced. It proposed a process which gave Aurizon Network broad discretions and lacked transparency. The QRC and Aurizon Network spent considerable time discussing Part 8. The result of those discussions held over a long period was a substantially modified and from the QRC’s point of view, improved version of Part 8. Aurizon Network submitted that updated version of Part 8 with its updated draft UT4. In the main, the drafting included in the updated version of Part 8 was the result of negotiation and compromise between the QRC and Aurizon Network. Accordingly, the drafting included in that version was not elegant and in some cases was unclear. In the QRC’s view, the drafting suggested by the QCA provides greater clarity to Part 8 while remaining largely consistent with the principles of the draft proposed by Aurizon Network. Other than as noted in this submission, the QRC fully supports the draft of Part 8 proposed by the QCA.</p>	n/a
N/A	No funding obligation	<p>Other than for Asset Replacement and Renewal Aurizon Network has no obligation to fund Expansions.</p> <p>An obligation to fund is not unusual. The Dalrymple Coal terminal access undertaking obliges DBCT Management to fund all Bay expansions, other than those expansions which are unreasonable or uneconomic. UT3 included an obligation to fund Expansion projects of less than \$300m (although the practical implementation of that obligation was not effective).</p> <p>ARTC’s Hunter Valley access undertaking does not include an obligation to fund. However, it is the case that without exception ARTC have funded all Expansions at the regulatory rate of return and without additional conditions, security or premium. The process to plan for and then execute expansion projects for the Hunter Valley network has, compared to the CQCN, been simple and efficient.</p> <p>A funding obligation is important because without it Aurizon Network can fully exploit its monopoly power. Aurizon Network has demonstrated that it will only fund material Expansions at a premium to the regulatory rate. Aurizon Network unashamedly says that it will not undertake meaningful Expansion work other than at a premium.</p> <p>The absence of a funding obligation has an impact on the time taken to reach an agreement on an access agreement for Expansion capacity. A clear funding obligation means that access seekers enjoy the process provided for in the Undertaking. Without a funding obligation access seekers are faced with a choice of negotiating Access Conditions or embarking on user funding. Both of these methods are flawed.</p> <p>Although the QCA has oversight to any Access Conditions, in circumstances in which Aurizon Network has provided no funding</p>	



Clause Reference	Issue	Description	QRC Position
Part 8			
		<p>commitment, the ultimate decision and power of whether or not to agree Access Conditions rests with Aurizon Network. The experience of access seekers in negotiating GAPE and WIRP deeds was that Aurizon Network was uncommercial and negotiations were unnecessarily protracted. We recognise since this time Aurizon Network has made a more collaborative effort and the QCA has sought to improve the expansion framework, however, there has not yet been a project to test these improvements.</p> <p>SUFA is also not the panacea to Expansion funding. In the current environment due to its novel nature and complexity it would be very difficult to execute an Expansion using SUFA. Even if SUFA were an economic option it will only be an economic option for large scale projects and with a single funder and, in any event, under the QCA's draft decision, SUFA will not immediately exist.</p> <p>For the reasons outlined above Aurizon Network should be obliged to fund Expansions at the regulatory rate. The QRC acknowledges that this obligation cannot be open ended and that there will need to be reasonable limitations on the obligation.</p>	
8.7.1	No right to fund Expansions	<p>The QRC supports section 8.7.1(a) which acknowledges that an Access Seeker may fund an Expansion even where Aurizon Network is willing to fund that Expansion at the regulatory rate. There is no justification for Aurizon Network to have a first right to fund Expansions. This is particularly the case when Aurizon Network has not offered an obligation to fund some Expansions.</p> <p>In an environment where Aurizon Network has not offered a voluntary funding obligation, potential access seekers require the freedom to go elsewhere to obtain that funding. This right should be without the threat of Aurizon Network subsequently overriding any third party funding arrangement by triggering a first right of refusal.</p>	
8.2.1(h)	Insufficient process to govern the execution of Expansion projects	<p>The Undertaking makes it clear that Aurizon Network is the only party that is permitted to undertake an Expansion. The QRC accepts that decision.</p> <p>If Aurizon Network is the only party that is to carry out Expansions, it should have a clear obligation to carry out an Expansion diligently, without delay and in accordance with the agreed scope of the Expansion. Without addressing these obligations Aurizon Network can undertake an Expansion in its own time, to an uncertain standard and not in accordance with the scope of the Expansion studied. Without an express obligation the Access Holder has no rights, other than implied rights to the extent that there are any. This is not a satisfactory position.</p> <p>Section 8.2.1(h) of UT4 attempts to address (in part) potential delays in Expansions. It provides that Aurizon Network “will not unnecessarily or unreasonably delay” an Expansion. That is a relatively weak obligation.</p> <p>The QRC considers that the access undertaking or Standard Access Agreement should be amended to oblige Aurizon Network to undertake relevant Expansions which have been committed to (and funding agreed) diligently, without delay and in accordance with the agreed scope. Relevant similar obligations are included in the Dalrymple Bay coal terminal access undertaking.</p>	

Clause Reference	Issue	Description	QRC Position
Part 8			
8.3.4(g) and (h)	Disclosure of study materials	Aurizon Network is not obliged to disclose a study to the extent that it includes confidential information. Complete disclosure of information is important to enable an access seeker to make an informed decision about the appropriateness of the scope of an Expansion. Complete disclosure of study materials is also important to enable a meaningful negotiation of user funding documents. Aurizon Network is not obliged to disclose a Study report to the extent that it is confidential. Aurizon Network's practice has been to claim confidentiality over a broad range of documents. While the QRC notes section 8.3.4(h), the QRC remains of the view that any confidentiality exception must be at the very least be subject to the QCA's approval or oversight.	
8.8.4	SUFA	The QRC remains supportive of the need to develop a SUFA suite. As noted earlier in this submission, if Aurizon Network refuses to offer a funding obligation, a form of SUFA for smaller projects will be needed. The QRC would have preferred that SUFA be finalised as a part of UT4. In lieu of finalising SUFA as a part of UT4, the QRC supports the QCA's proposal that finalisation of SUFA is a process provided for under UT4. The QRC supports a fast finalisation of SUFA and UT4 giving the QCA obligations to impose a SUFA suite on Aurizon Network if Aurizon Network fails to offer an appropriate SUFA suite.	
Standard Studies Funding Agreement			
N/A	Standard Studies Funding Agreement	The QRC are supportive of the changes which have been made by the QCA to the Standard Study Funding Agreement. In particular, the refinement of the price schedule to remove double cost recovery, and the deletion of the double margin (reflecting the effective no risk position which Aurizon Network takes under the agreement). The QRC considers that a much simpler form of document could be used in lieu of the standard agreement proposed by Aurizon Network. In the interests of finalising UT4 the QRC are willing to support the document amended by the QCA. In the future it may be necessary to refine the document to make it work more efficiently for all parties. The only change which is sought by the QRC is for there to be greater information flow from Aurizon Network during the progression of the study. In particular, regular drafts of the study report should be provided at regular intervals. Additionally, as is noted in respect of Part 8, Aurizon Network should provide the whole of the report and not a report with redactions. There is no reason why Aurizon Network should be redacting parts of the report.	

Part 9 – Connecting private infrastructure

This part of the QRC's Submission outlines the QRC's comments with respect to the Consolidated Draft Decision in relation to the connection of 'Private Infrastructure', as captured in Part 9 and Schedule J of the Undertaking and the Standard Rail Connection Agreement. The QRC provided a significant number of proposed amendments to Part 9 in the QRC's April 2015 Submission. The QRC notes that some of those comments have been adopted by the QCA, however, a number have been left unanswered. The QRC continues to consider those amendments are required, however, the QRC has not repeated those comments in this submission unless it considered further explanation or comment was required.

Clause Reference	Issue	Description	QRC Position
Part 9			
N/A	Lack of standard construction agreement for connection purposes	<p>The QRC remains concerned about the requirement for a separate construction agreement in respect of the construction of Connecting Infrastructure by Aurizon Network. The QRC maintains the view that this is a significant shortfall in the connection process set out in Part 9 and again suggests that requiring the parties to agree the terms of the construction agreement (with the background of limited principles set out in the SRCA) will result in unacceptable delays and potential disputes. The QRC again suggests that the requirement to agree the terms of a separate construction agreement undermines the benefit of having a SRCA.</p> <p>As submitted in the QRC's April 2015 Submission, the QRC would be supportive of using the SUFA construction contract with the amendments proposed by the QRC as a part of its January 2015 SUFA submission. The QRC again submits that implementing a standard connection construction agreement:</p> <ul style="list-style-type: none"> • is key to improving the commercial workability of the overall connection process; and • will help to give stakeholders the confidence and certainty required to underpin long-term investment decisions associated with the development of Connecting Infrastructure. 	
N/A	Connecting Infrastructure in Regulatory Asset Base	<p>The QRC submits that it remains unclear how Aurizon Network proposes to treat the Connecting Infrastructure when valuing the Rail Infrastructure for the purpose of developing Reference Tariffs.</p> <p>Further to the QRC's April 2015 submission, the SRCA still contemplates that the cost of constructing, modifying, repairing and replacing the Connecting Infrastructure will be borne by the Private Infrastructure Owner. However, the Undertaking provides that the Connecting Infrastructure will be owned by Aurizon Network or leased by Aurizon Network under an infrastructure lease. Similarly, the SRCA also provides that the Connecting Infrastructure must be owned by Aurizon Network. The intended outcome appears to be that the Connecting Infrastructure will become Rail Infrastructure under the Undertaking.</p> <p>Given that Aurizon Network will not have paid for the construction of the Connecting Infrastructure in such a scenario, the QRC sought clarification in its April 2015 Submission as to how Aurizon Network proposes to treat the Connecting Infrastructure when valuing the Rail Infrastructure (including the Connecting Infrastructure) for the purpose of developing Reference Tariffs.</p>	




Clause Reference	Issue	Description	QRC Position
Part 9			
<p>This issue has not been addressed in the Consolidated Draft Decision. The QRC considers that it is very important for Aurizon Network and the QCA to address this issue in a transparent and accountable manner in order to avoid a scenario where Aurizon Network may see an unintended benefit reflected in Reference Tariffs.</p>			
Throughout, such as 9.1(e)(ii), 9.1(e)(ii), 9.1(h)(ii), 9.1(k), 9.1(l) and 9.1(m)	Ability for Aurizon Network or Private Infrastructure Owner to design and construct Connecting Infrastructure – drafting overlap	The QRC remains concerned that although Part 9 and the SRCA clearly contemplate that Connecting Infrastructure may be designed and constructed by either Aurizon Network or the Private Infrastructure Owner, Part 9 (and to a lesser extent the SRCA) is in some areas drafted from the perspective of only Aurizon Network designing and constructing. The QRC suggests that the capability of the Private Infrastructure Owner to design and construct Connecting Infrastructure needs to be more consistently provided for in Part 9 and where relevant, the SRCA, in order to appropriately reflect the rights and interests of stakeholders.	
	Determining whether Aurizon Network or the Private Infrastructure Owner will design, construct and commission Connecting Infrastructure	<p>The Undertaking does not specify a process for determining which entity (i.e. the Private Infrastructure Owner or Aurizon Network) will undertake the design, construction and commissioning of the Connecting Infrastructure. To clarify this issue, the QRC previously recommended that the connection proposal submitted by the Private Infrastructure Owner under clause 9.1(a) should specify the Private Infrastructure Owner’s preference as to whether the design, construction and commissioning of the Connecting Infrastructure should be undertaken by Aurizon Network or the Private Infrastructure Owner, and the connection proposal should be formulated on the basis of that preference. This QRC recommendation was not adopted in the Consolidated Draft Decision.</p> <p>The QRC notes the amendment at the beginning of clause 6 of the SRCA which suggests that under clause 9.1 of the Undertaking, Aurizon Network must design, construct and commission the Connecting Infrastructure unless otherwise agreed with the Private Infrastructure Owner. However, the QRC maintains that:</p> <ul style="list-style-type: none"> • it is commercially important and appropriate for the Private Infrastructure Owner to be able to elect to undertake the design, construction and commissioning work in its discretion, rather than having to agree this with Aurizon Network; • in any case, the matters the subject of the clause 6 SRCA amendment are <i>not</i> clearly reflected in clause 9.1 of the Undertaking; and • even if it were appropriate for the Private Infrastructure Owner to have to agree these matters with Aurizon Network, this process should be reflected in the Undertaking rather than clause 6 of the SRCA. <p>The QRC considers it important that:</p> <ul style="list-style-type: none"> • the QRC’s April 2015 Submission recommendations on this issue are reflected in the Undertaking (rather than the SRCA) in order to ensure a sufficiently certain and efficient connection process for all stakeholders from the outset of that process; and • Private Infrastructure Owners should have a discretionary right to elect to undertake the design, construction and commissioning work, rather than having to agree this with Aurizon Network. 	



Clause Reference	Issue	Description	QRC Position
Part 9			
9.1(b)	Deemed approval of connection proposals where Aurizon Network does not assess in permitted timeframe	<p>In the QRC's April 2015 Submission, the QRC submitted that clause 9.1(b) should be amended to provide that if Aurizon Network fails to notify the Private Infrastructure Owner of the outcome of its assessment of the connection proposal within the specified timeframe, then:</p> <ul style="list-style-type: none"> • Aurizon Network will be deemed to have approved the connection proposal; and • the Private Infrastructure Owner will determine the timeframes referred to in clause 9.1(e). <p>The QRC acknowledges the Consolidated Draft Decision amendment to clause 9.1(e), which promotes a collaborative approach to agreeing timeframes where a connection proposal meets the clause 9.1(b) criteria. However, the QRC is disappointed that its suggested deemed approval amendment has not been adopted.</p> <p>The QRC again submits that connection proposals should not stall or suffer from undue delay if Aurizon Network fails to assess such proposals in the timeframe required by the Undertaking. The QRC notes that costs incurred by Private Infrastructure Owners which are caused by undue delays by Aurizon Network in assessing connection proposals are not captured within the clause 9.1(l) delay compensation provision. The QRC submits that incorporating the suggested deemed approval concept would contribute to:</p> <ul style="list-style-type: none"> • overcoming the commercial imbalance around the assessment response process that is currently reflected in clause 9.1(b); and • promoting a more efficient and certain connection process. 	●
9.1(c)	Ownership of Connecting Infrastructure	<p>The QRC sought clarification as to the intended operation of clause 9.1(c) in its April 2015 Submission. Specifically, if this clause seeks to impose on Aurizon Network an obligation to have title to the Connecting Infrastructure transferred to itself or to have the Connecting Infrastructure included in an infrastructure lease, then this must be clearly stated.</p> <p>The process for vesting in Aurizon Network title to or a leasehold interest in the connecting infrastructure is not dealt with the SRCA. The SRCA simply states that the connecting infrastructure must, at all times, be owned by Aurizon Network (clause 8(a)(i)).</p> <p>This issue has not been clarified in the Consolidated Draft Decision and the QRC again requests that this matter be addressed.</p>	●
9.1(d)(e)	Timeframes following a decision by Aurizon Network	<p>The QRC commends the collaborative approach adopted in the Consolidated Draft Decision to setting timeframes for Connection Milestones and considers that:</p> <ul style="list-style-type: none"> • this approach achieves a more commercially balanced position than Aurizon Network's previous unilateral right to determine these timeframes; and • the parties will be incentivised to work collaboratively in respect of agreeing Connection Milestones in order to progress the connection process. <p>The QRC also commends the amendment at clause 9.1(f). This amendment permits Aurizon Network and the Private Infrastructure Owner to, in their discretion, agree to delay setting the Connection Milestones until an Access Agreement which requires the proposed</p>	●



Clause Reference	Issue	Description	QRC Position
Part 9			
		<p>connection to the Rail Infrastructure has been entered into. The QRC suggests that this will go towards ensuring that the dates for construction and commissioning of the Connecting Infrastructure are aligned with a date for commencement of train services under the relevant Access Agreement.</p> <p>However, the QRC suggests that the new clause 9.1(g) should provide that if Aurizon Network notifies the QCA of a decision to delay setting Connection Milestones (as permitted in clause 9.1(f)), Aurizon Network should also be obliged to notify the QCA of each Connection Milestone and the supporting reasons within 5 Business Days of these being determined. The QRC considers that this will contribute to a more transparent and accountable connection process.</p>	
9.1(e), 9.1(n)	Permission to connect	<p>Clause 9.1(e) specifies the conditions that must be satisfied before Aurizon Network must permit the connection of the Private Infrastructure to the Rail Infrastructure. The QRC again submits that the Private Infrastructure Owner must be entitled to dispute a decision by Aurizon Network under clause 9.1(e) not to permit the connection of the Private Infrastructure to the Rail Infrastructure, or that the criteria in clause 9.1(b) has not been met. The Private Infrastructure Owner should also be entitled to dispute any amendments that Aurizon Network may require to be made to the Private Infrastructure Owner's proposal under clause 9.1(i)(v). The QRC remains very concerned that:</p> <ul style="list-style-type: none"> • these matters are not listed in clause 9.1(n) as specific matters that may enliven the Part 11 dispute resolution process; and • there is some uncertainty as to whether these are otherwise matters that are captured by clause 11.1.1. <p>To improve clarity regarding the enlivening of the Part 11 dispute resolution process in relation to the Part 9 matters described in this section, the QRC's preference is for clause 9.1(n) to be amended to specifically include these matters.</p>	●
9.1(l)	Definition of 'Consequential Loss'	<p>In the QRC's April 2015 Submission, the QRC submitted that the definition of 'Consequential Loss' in clause 9.1(l) lacked certainty. The QRC submitted that a more ordinary legal definition should be adopted and a party should not have the benefit of an exclusion of liability for 'Consequential Loss' if it has committed fraud, gross negligence or a wilful default. The QRC was particularly concerned to ensure the deletion of "<i>loss or damage that does not naturally, according to the usual course of things, flow from the delay</i>", as this language is vague and uncertain.</p> <p>The QRC is disappointed that the submissions above have, to a substantial extent, not been adopted in the Consolidated Draft Decision. The QRC emphasises its April 2015 Submission comments on this issue and suggests that it is important for this issue to be more substantively addressed.</p>	●
Schedule J			
All	Schedule J	The QRC maintains that to the extent not adopted in the Consolidated Draft Decision, its comments in respect of Schedule J in QRC's April 2015 Submission should be reflected in the Undertaking.	n/a

Standard Rail Connection Agreement

The QRC sets out its position in respect of the key aspects of the SRCA below. Capitalised terms used in the table below have the meaning given in the SRCA, unless otherwise defined. The QRC provided a significant number of proposed amendments to the Agreement in the QRC's April 2015 Submission. The QRC notes that some of those comments have been adopted by the QCA, however, a number have been left unanswered. The QRC continues to consider those amendments are required, however, the QRC has not repeated those comments in this submission unless it considered further explanation or comment was required.

Clause Reference	Issue	Description	QRC Position
Standard Rail Connection Agreement			
1	Definition of 'Consequential Loss'	<p>Further to the QRC's April 2015 Submission on this issue, the QRC maintains that the definition of Consequential Loss in the SRCA lacks certainty despite the changes made in the Consolidated Draft Decision. The QRC again refers to similar comments on this issue in relation to the Access Undertaking. The QRC is disappointed that the QRC's April 2015 Submission comments were not reflected in the Consolidated Draft Decision and is of the view that a more ordinary legal definition should be adopted. Specifically, the QRC is concerned to ensure the deletion of:</p> <ul style="list-style-type: none"> • <i>"any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport"</i>, as this item is too broad; • <i>"loss or damage that does not naturally, according to the usual course of things, flow from the delay"</i>, as this language is vague and uncertain; and • the language in clauses (h)-(k). <p>In addition to the QRC's concerns as to the definition of Consequential Loss, the QRC remains of the view that a Party should not have the benefit of an exclusion of liability for Consequential Loss if it has committed fraud, gross negligence or a wilful default.</p>	
1	Definition of 'Force Majeure Event'	<p>The QRC is disappointed that the QCA did not adopt the QRC's April 2015 Submission comments regarding the need for an exhaustive definition of 'Force Majeure Event'. The QRC:</p> <ul style="list-style-type: none"> • again submits that this definition should be exhaustive rather than inclusive; and • requests the adoption of the definition proposed in the QRC's April 2015 Submission SRCA mark-up. The QRC maintains that the QRC-proposed definition is an appropriate exhaustive ordinary legal definition of 'Force Majeure Event'. 	
1(b)(iv)	Interpretation	<p>The QRC commends the amendments to clause 1(b)(iv)(A) and considers that this clause is now more consistent with clause 9.1(h)(iii) of the Undertaking. However, the QRC remains concerned that clause 1(b)(iv)(B) is too narrow and</p>	




Clause Reference	Issue	Description	QRC Position
Standard Rail Connection Agreement			
		<p>submits that Aurizon Network should not be entitled to reimbursement of any costs arising in connection with a breach of contract or negligence, error or omission of:</p> <ul style="list-style-type: none"> • Aurizon Network; or • any Aurizon Party or any officer, employee, agent, contractor or consultant of Aurizon Network or an Aurizon Party. 	
3(e)	Auditor's scope and expert appointment	<p>The QRC previously outlined a number of concerns regarding auditing scope matters. The QRC commends the limited Consolidated Draft Decision changes to this clause and agrees that it is appropriate for the scope of the auditor's appointment to be broadened to ensure that the costs, fees and charges invoiced to the Private Infrastructure Owner are:</p> <ul style="list-style-type: none"> • properly allocated; • reasonable and prudent; and • incremental and direct. <p>However, the QRC remains concerned that the expert appointment and audit procedure set out in the Standard Train Operations Deed has not been consistently adopted in the Standard Rail Connection Agreement. The QRC again suggests that incorporating a clear audit expert procedure which is consistent with the Standard Train Operations Deed will contribute to a more workable and consistent Undertaking and connection framework. To promote clarity, the QRC would particularly like to see the following reflected in the audit expert procedure at clause 3(e) of the Undertaking:</p> <ul style="list-style-type: none"> • a statement as to whether a decision of the auditor, in the absence of manifest error, is final and binding on the parties; and • qualifications and other requirements in relation to the auditor (as are reflected at clause 27.3(f) of the Standard Train Operations Deed). 	
11	Accreditation	<p>The QRC remains concerned about the scope of the Private Infrastructure Owner's obligations in respect of accreditation. The QRC maintains that:</p> <ul style="list-style-type: none"> • the Private Infrastructure Owner's obligations in relation to ensuring the Rail Infrastructure Manager's compliance with accreditation conditions should only apply to the extent the Private Infrastructure Owner has been notified of these conditions in cases where the Private Infrastructure Owner contracts this role to another entity; and • Aurizon Network should be required to make the Private Infrastructure Owner aware where Aurizon Network receives a notice from an authority that will be likely to affect the accreditation of Aurizon Network. <p>The QRC considers that these are important outstanding matters that should be addressed in order to achieve a transparent, workable and commercially balanced position on</p>	

Clause Reference	Issue	Description	QRC Position
Standard Rail Connection Agreement			
<p>accreditation. The QRC submits that it is impractical to require a Private Infrastructure Owner to comply with the Rail Infrastructure Manager's accreditation conditions where these conditions are not notified to the Private Infrastructure Owner.</p>			
12	Exchange of safety and interface information	<p>The QRC is disappointed that the QCA has failed to reflect the QRC's April 2015 Submission comments regarding clause 12 in the Consolidated Draft Decision.</p> <p>Clause 12 contemplates that if a third party is contracted as the Rail Infrastructure Manager for the Private Infrastructure, then that party will be a 'Party' for the purposes of this clause. However, without privity of contract, this arrangement is unenforceable by the third party Rail Infrastructure Manager. The QRC maintains that the SRCA should include a section 55 of the <i>Property Law Act 1974</i> (Qld) clause, to enable the third party Rail Infrastructure Manager to have the benefit of these provisions.</p>	
18	Insurance	<p>The QRC is disappointed that the QCA has not reflected the QRC's April 2015 Submission comments regarding clause 18 in the Consolidated Draft Decision. The QRC remains of the view that Aurizon Network should not be entitled to require adjustments to the value of the insurances effected under the SRCA, as this entitles Aurizon Network to exercise an unacceptable level of discretion. The QRC considers that clause 18 of the Undertaking should be amended according to the QRC's April 2015 Submission drafting.</p>	




Standard Access Agreement





The table below sets out the QRC's comments on the Access Agreement – Coal (as set out in the Consolidated Draft Decision) (**Agreement**) between Aurizon Network Pty Ltd (**Aurizon Network**) and an Access Holder (**Access Holder**). The QRC provided a significant number of proposed amendments to the Agreement in the QRC's April 2015 Submission. The QRC notes that some of those comments have been adopted by the QCA, however, a number have been left unanswered. The QRC continues to consider those amendments are required, however, the QRC has not repeated those comments in this submission unless it considered further explanation or comment was required.

Capitalised terms used in the table below have the meaning given in the Agreement unless otherwise defined.

Clause Reference	Issue	Description	QRC Position
Definitions			
1.1, 21.1	"Consequential Loss"	<p>Further to its April 2015 Submission on this issue, the QRC maintains that the definition of Consequential Loss lacks certainty despite the changes made in the Consolidated Draft Decision. The QRC again refers to similar comments on this issue in relation to clause 9.1(i) of the Access Undertaking and the SRCA. The QRC remains of the view that a more ordinary legal definition should be adopted. Specifically, the QRC recommends the deletion of:</p> <ul style="list-style-type: none"> • <i>"any loss of whatever nature concerning supply of product from a mine to any third party or to make product available to transport"</i>, as this item is too broad; • <i>"loss or damage that does not naturally, according to the usual course of things, flow from the delay"</i>, as this language is vague and uncertain; and • the language in clauses (h)-(k). <p>In addition to the QRC's concerns as to the definition of Consequential Loss, the QRC remains of the view that a Party should not have the benefit of an exclusion of liability for Consequential Loss if it has committed fraud, gross negligence or a wilful default (ie see clause 21.1 of the Agreement). This is a common carve out to a Consequential Loss exclusion clause.</p> <p>The definition of Consequential Loss under the Access Interface Deed should also be amended as provided above (see Schedule 7, clause 1.1).</p>	
1.4	Material published on Website	If material is not available directly to the Access Holder (including via secured, password protected access), it should not constitute "material published on the Website" under this agreement. The QRC requests the deletion of the words "or its Operator".	
Access Undertaking			
3.2	Changes in Access Undertaking	<p>As well as being able to dispute the drafting of the amendments, the QRC considers that under clause 3.2 the Receiving Party should also be able to dispute the following:</p> <ul style="list-style-type: none"> • whether the Change in Access Undertaking outlined in the Amendment Notice does relate to the provisions set out in clause 3.1(b). Clause 3.2(d) means that the Receiving Party cannot dispute this aspect of the Notifying Party's interpretation of a Change in 	

Clause Reference	Issue	Description	QRC Position
		<p>Access Undertaking; and</p> <ul style="list-style-type: none"> if the parties have previously agreed to vary any provision of the Access Undertaking which is incorporated by reference, whether the change in the Access Undertaking (partially, fully or in some varied form) ought (taking into account the variation previously agreed between the parties) to be incorporated into the Agreement. <p>Clause 5.3(d) of the Undertaking recognises that amendments may be agreed to provisions of the Undertaking which are incorporated by reference into the Standard Access Agreement. Where this has happened and there is a later change in the Access Undertaking which the Receiving Party considers (acting reasonable and in good faith, taking into account the variation previously agreed) should not be incorporated by reference or should be incorporated only to a limited extent, then the Receiving Party should be entitled to dispute this matter. The QRC considers that the following proviso should be inserted immediately prior to “).” at the end of clause 3.2(d):</p> <p><i>“provided that the Receiving Party may notify the Notifying Party:</i></p> <ul style="list-style-type: none"> <i>(i) if the Receiving Party acting reasonably considers that the Change in Access Undertaking does not relate to the provisions in clause 3.1(b) as set out in the Amendment Notice, the extent to which the Receiving Party does or does not accept that the Change in Access Undertaking set out in the Amendment Notice does relate to the provisions in clause 3.1(b); or</i> <i>(ii) where the Parties have previously agreed any of the provisions set out in clause 3.1(b) to be varied for the purposes of application and incorporation into this Agreement (agreed variations) and the Receiving Party acting reasonably considers the incorporation of the Change in Access Undertaking into this Agreement to the extent outlined in the Amendment Notice is unreasonable taking into account those agreed variations, the extent to which the Receiving Party accepts or does not accept the incorporation of the Change in Access Undertaking outlined in the Amendment Notice into this Agreement”</i> <p>The wording in clause 3.2(e) should then also be amended to reflect the above proviso by inserting the words “or notifies the Notifying Party in accordance with clause 3.2(e)(i) or (ii)” immediately after “If the Receiving Party does not accept the drafting of the amendments to the terms of this Agreement”.</p> <p>Irrespective of whether the QRC’s proposed additional wording is added to clause 3.2(d), there can be different types of notice under clause 3.2(d). Clause 3.2(h)(i) should refer to the “notice of acceptance under clause 3.2(d)”, not just a “notice under clause 3.2(d)”.</p> <p>The QRC has remaining concerns that clause 3.2 should specify the consequences of:</p> <ul style="list-style-type: none"> the below rail services provided by Aurizon Network ceasing to be a declared service under the QCA Act; and the below rail services provided by Aurizon Network becoming a declared service pursuant to a Commonwealth regulatory regime. <p>This comment also applies to clause 3.1(c) where the Access Charge Provisions and Reference Tariff Provisions are incorporated by reference</p>	





Clause Reference	Issue	Description	QRC Position
		into the Agreement (as they are defined as being those under the Access Undertaking from time to time).	
Access Rights			
4.4	Access Interface Deed	<p>The Access Holder will not be acting as an agent for the Customer in entering into the Agreement. The QRC considers that clause 4.4 should be amended to correctly reflect the arrangements as follows:</p> <ul style="list-style-type: none"> clause 4.4(a) should be changed to read “If the Access Holder is also a Railway Operator and the Access Rights are to be used for the purposes of a rail haulage agreement between the Access Holder and a Customer (as that term is defined in the Access Undertaking), prior to or on the date it exercises its rights under clause 4.3(b), the Access Holder must procure the Customer execute and deliver the Access Interface Deed to Aurizon Network.”; the pro forma Access Interface Deed proposed by the QCA is not a deed poll. Therefore, clause 4.4(b)(i) should include a requirement for Aurizon Network to duly execute and deliver the Access Interface Deed; and in two places in clause 4.4(b) the reference to “duly executed by the Access Holder” should be changed to “duly executed by the Customer”. 	
4.9	Supply Chain Rights	<p>In addition to the amendments proposed in the QRC’s April 2015 Submission, the QRC requests the following drafting amendments to clause 4.9:</p> <ul style="list-style-type: none"> clause 4.9(d) – this clause overlaps with clause 4.9(a) (as both apply “prior to the commencement of the operation of the Train Services for each Train Service Type”). At the end of clause 4.9(d)(i) insert the words “since the Access Holder’s compliance with clause 4.9(a) or, if applicable, most recent provision of details under this clause 4.9(d)”; and the wording “prior to the commencement of the operation of the Train Services for each Train Service Type” in clause 4.9(d) is ambiguous because it could capture every Train Service. The QRC requests the drafting be clarified. If it is intended only to apply in the period prior to the commencement of the operation of the first Train Service for a Train Service Type, “Train Services” should be replaced with “first Train Service”. 	
Billing and payment			
5.1	Charges	<p>The QRC has previously raised that the Agreement does not include review provisions in compliance with clause 6.5.2 of the Undertaking (clause 6.5.2 of the Undertaking requires the Standard Access Agreement to contain Access Charge review provisions). The QRC cannot identify any response from the QCA in its Consolidated Draft Decision in respect of this concern. The QRC requests that these review provisions be inserted into the Agreement or otherwise requires the QCA to indicate which clauses in the Agreement are considered to constitute the requirements of clause 6.5.2 of the Undertaking.</p>	

Clause Reference	Issue	Description	QRC Position
5.4	Disputes	<p>The QRC made a number of drafting recommendations in respect of this clause in the QRC's April 2015 Submission which have not been adopted by the QCA. In particular, the QRC considers that clause 5.4(b) and (c) should be made reciprocal. There are circumstances under the Agreement in which an Access Holder may issue an invoice to Aurizon Network. Currently clause 5.4(b) and (c) only provide for a dispute mechanism in respect of an invoice issued by Aurizon Network to an Access Holder. The QRC considers this is unduly strict.</p> <p>The QRC also suggests the following further amendments:</p> <ul style="list-style-type: none"> • clause 5.4 should also contain an acknowledgement that the clause (once redrafted as a reciprocal clause) applies to any situation where under the Agreement a Party is otherwise required to pay an amount or reimburse the other party for an amount unless the terms of the Agreement specifies otherwise. For example, consider the drafting of clause 5.5(a); and • consistent with the Train Operations Deed, in item 1 of Schedule 6 the words "(and always subject to clause 5.4)" should be inserted at the end of the item in both columns. 	
Security			
6.1(b)	Requirement to provide Security	<p>The QRC has previously raised concerns about a number of aspects of the security provisions in the Standard Access Agreement and, in addition, has raised these in the context of Part 5 of the Undertaking. In this Submission on the Consolidated Draft Decision in respect of Part 5 of the Undertaking the QRC has commented that the security requirements should be contained in the Undertaking itself and incorporated into the Agreement through the clause 3.1 provisions. Whether contained in the Undertaking or only in the Agreement, the QRC reiterates that the security regime required for the Standard Access Agreement should be amended to reflect the points raised in the QRC's April 2015 Submission.</p> <p>The QRC also supports the "Security Amount" adopted by the QCA in Item 4 of Schedule 1 of the Agreement, however, considers that further clarification is required. The QRC recommends the words "reasonably estimated as" should be inserted immediately prior to "equivalent".</p>	
6.8	Return of Security	<p>The amendment made by the QCA in its Consolidated Draft Decision to this provision does not address the issue previously raised by the QRC as clause 6.8(a) is still stated to be "subject to Aurizon Network's rights of recourse to the Security under clause 6.6". The QRC still considers that if Aurizon Network wishes to retain Security after the date of termination or expiry of the Agreement pursuant to its rights of recourse under clause 6.6 then it should be explicitly stated in clause 6.8 that Aurizon Network is only allowed to retain Security in an amount equivalent to the lesser of:</p> <ul style="list-style-type: none"> • the Security Amount as at the date of termination or expiry; and • an amount equivalent to the amount which has been determined by an expert to be the subject of the relevant right of recourse. 	
Resumption of Access Rights			
8, 9.3(a)(i)	Resumption of Access Rights	<p>The QRC considers that it is not clear under clause 8(c) how long the Access Holder has to decide whether to dispute the proposed</p>	

Clause Reference	Issue	Description	QRC Position
		<p>resumption. If it takes longer than 2 Business Days after receiving the Resumption Notice to make a decision whether or not to dispute the matter and decides that it will not, then the Access Holder will have lost the right to give the relevant notice under clause 8(c). The Access Holder should be entitled to a more reasonable time period of 10 Business Days, not 2 Business Days, to make the relevant decisions, including after the outcome of any dispute process.</p> <p>The same comment applies in respect of clause 9.3(a)(i).</p>	
Compliance			
15.3	Non-compliance by Operator with Train Description	<p>Clause 15.3(a)(ii) – The QRC requests that this clause be amended so that Aurizon Network is required to copy the notice requiring the Defaulting Operator to demonstrate compliance to the Access Holder, including notice of any suspension or termination under the Train Operations Deed, to enable the Access Holder as much opportunity as possible to investigate solutions.</p> <p>Clause 15.3(b), (c) – Once an Access Holder receives a notice from Aurizon Network of the action it intends to take under clause 15.3(c) (including details of any variation to the Train Description), that Access Holder should have another opportunity to nominate an alternative Operator so that the relevant variation need not be made.</p>	●
Infrastructure management			
17	Maintenance	The QRC considers that Aurizon Network should have maintenance obligations to the Access Holder. The QRC refers to its comments made in respect of Schedule E (“Maintenance of Rail Infrastructure”).	●
17.1	Notifications	The notification obligation in clause 17.1(b)(ii) is very broad and requires a materiality threshold. There should also be a carveout for matters which the Access Holder, acting reasonably, considers that Aurizon Network ought reasonably to have been aware of.	●
17.2	Investigations	<p>This clause suggests that there will be separate investigations under this Agreement and the Train Operations Deed for the same Incident. As “Incident” relates to the activities of the Operator, the QRC considers that the relevant Investigation is the one under the Train Operations Deed, with involvement only as relevant by the Access Holder and the Access Holder otherwise kept informed. Clause 17.2 should be clarified in respect of these matters.</p> <p>Aurizon Network should also be obliged to notify the Access Holder of any Investigation under the Train Operations Deed to ensure the Access Holder is kept fully informed.</p>	●
Indemnities			
20.2	Indemnity by Access Holder	This indemnity should be removed as it is a repeat of the indemnity at clause 20.1 (which is now reciprocal).	●
20.3	Duty to mitigate	The QRC requests that the words “, except to the extent that such loss, damage.....of the other Party or the other Party’s staff” be deleted. The standard of the duty is only to use reasonable endeavours and it is	●

Clause Reference	Issue	Description	QRC Position
		reasonable to expect that a party will fulfil this requirement in the case of property damage or personal injury or death irrespective of what it results from.	
Limitations and exclusions of liability			
21.3	Claims and exclusions re: Infrastructure Standard	The QRC considers that this exclusion of liability for the standard of the Infrastructure is unreasonably broad. The exclusion should not apply if it is the result of Aurizon Network's breach of the Agreement (not only the obligation to maintain the network under the Train Operations Deed) or if it is the result of its Staff (as well as its own negligence). Accordingly, the QRC remains of the view that the carve-out should be redrafted as follows: <i>"except to the extent that such loss, damage, injury or death, cost or expense results from a breach of this Agreement, the failure to perform obligations under clause 19.2(a) of a Train Operations Deed or any negligent act or omission of Aurizon Network or Aurizon Network's Staff"</i> .	●
21.4	Claims and exclusions in respect of non-provision of access	The QRC remains of the view that the extent of Aurizon Network's exclusion of liability for non-provision of access is unreasonably broad. In the QRC's April 2015 Submission, the QRC requested a number of amendments to this clause. The QRC continues to consider those amendments are required. The QRC also makes the following additional comments: <ul style="list-style-type: none"> clause 21.4(b)(iii)(G) – delete this clause – unless the circumstances meet the requirements for a Force Majeure Event (in which case paragraph (D) already applies), the Access Holder should not be required to take on the risk of acts or omissions of the Infrastructure Lessor; and clause 21.4(b)(iv) – the QRC considers that there is no justification for allowing Aurizon Network the 5% buffer in each and every Month (reflected in clause 21.4(b)(iv)(A)) as the exclusions already afforded to Aurizon Network are more than comprehensive. While under UT3 there was scope for the parties to agree to some level of buffer, the QRC does not consider it is reasonable for level of "buffer" to be imposed (in the absence of it being agreed by the Access Holder) for Aurizon Network's benefit for failures which are not permitted or are the result of Aurizon Network's breach or negligence. Together with clause 21.4(b)(iv)(B) being unlikely to apply, the QRC considers clause 21.4(b)(iv) should be deleted in its entirety. 	●
Liability for wrongful suspension			
27	Liability for wrongful suspension	The QRC considers this clause should also extent to where the suspension is of the Operator's rights under the Train Operations Deed.	●
Assignment			
29.1	Assignment by Aurizon Network	The QRC notes that, consistent with the QRC's April 2015 submission, a requirement that an Assignee must be Accredited has been included. However, the QRC is disappointed that the remainder of its concerns surrounding potential assignment by Aurizon Network have not been addressed. The QRC remains of the view that it is reasonable for Access	●

Clause Reference	Issue	Description	QRC Position
		Holders to seek reciprocal restrictions on Assignment.	
Relationship with Train Operations Deed			
32.2(a)	Performance Levels	The QRC considers that the Access Holder should not be required to use reasonable endeavours to agree to vary Performance Levels merely because either Aurizon Network or its Operator considers they are “no longer appropriate”. Clause 32.2(a) should be amended to reflect that if such a notice is given under the Train Operations Deed, Aurizon Network should be required to notify the Access Holder and afford the Access Holder the opportunity to observe or participate (at the Access Holder’s election) in the process.	●
Notices			
33.5	Train Control Direction or Incident Commander’s Direction	An Access holder who is not a Train Operator will not receive a Train Control Direction or a direction from an Incident Commander. It is therefore unreasonable to deem an Access Holder to receive such a direction. Clause 33.5 should be amended to specify that: <ul style="list-style-type: none"> a Train Control Direction is deemed to be given <i>to the Operator</i> at the time the direction is given, issued or made <i>to the Operator</i>; and a direction from an Incident Commander is deemed to be given <i>to the Operator</i> at the time the direction is communicated <i>to the Operator</i>. 	●
Other comments			
Various	Other drafting comments	The QRC provides a number of further drafting comments below: <ul style="list-style-type: none"> Clause 1.1: <ul style="list-style-type: none"> “Dispute Provisions” – replace the definition with “has the meaning given in clause 32.1(a)”. “Investigation Procedures” – is reference to “Access Holders” in paragraph (b) correct? Or should this definition be the same as that in the Train Operations Deed? Clauses 4.5(a)(iii) and 4.5(e) – The QRC considers that each of these clauses should also recognise that a variation or withdrawal may result from clause 10.3(c)(iv)(A)(2) of the Train Operations Deed (“Reduced Operational Rights”) as well as clause 10.2(d) of the Train Operations Deed. Clause 5.7(c) – The words “(after application of any other set-off or other credit owed to the Access Holder)” should be inserted after “and other charges”. Clause 6.6 – Both 6.6(a) and 6.6(b) should state that they are “subject to clause 6.6(c)”. Clauses 25.1 and 25.2 – Both clauses should be deleted as they are already covered in the Access Undertaking (clause 7.7.1) and incorporated into the Agreement by clause 3.1. Clause 32.2(b) – Insert the words “and clause 15.3(c)(ii)” at the end of this paragraph. 	●

Clause Reference	Issue	Description	QRC Position
Pro forma Access Interface Deed (Schedule 7)			
N/A	Customer	As a matter of principle, the QRC considers that the Customer should not be worse off (in respect to the limitations and exclusions which apply to its ability to claim as well as any indemnities) than if it were the Access Holder. The QRC considers that there are a number of provisions in the pro forma Access Interface Deed proposed by the QCA where the exclusions or limitations are broader than those which apply under the equivalent provision in the Standard Access Agreement. The QRC has included a mark up to the pro forma Access Interface Deed proposed by the QCA in this Submission. Comments on some of QRC's mark up is set out below.	
Schedule 7, clause 2.2	Indemnities	<p>If indemnities are to be required, QRC considers a single reciprocal indemnity should apply which is (to the extent relevant) similar to that in the Standard Access Agreement (clause 20.1). QRC also considers that a more specifically defined concept of "Wilful Misconduct" should be used in the indemnity.</p> <p>For the same reasons provided in the comment above regarding clause 20.3 of the Standard Access Agreement, the QRC considers that an indemnified party should be under a "reasonable endeavours" obligation to mitigate its loss.</p>	
Schedule 7, proposed new clause 2.6	No effect on other arrangements	<p>It is possible that an entity may have multiple arrangements for access, structured in different ways. For example, as a Customer (and therefore a party to an Interface Access Deed) in respect of certain access rights but as an Access Holder (and therefore a party to an Access Agreement) for other access rights.</p> <p>The QRC considers that it should be expressly stated that the exclusions and limitations under clause 2 of the Interface Access Deed should not apply to other arrangements directly between Aurizon Network and the entity which is the Customer. For example, the exclusion of Consequential Loss should not apply to exclude Consequential Loss which may be expressly available to the entity under another arrangement with Aurizon Network (the equivalent of clause 27 from the Standard Access Agreement).</p> <p>Similarly, the QRC considers that it should be expressly stated that liability of the Operator to the Customer is not affected by the exclusions as between Aurizon Network and the Customer. In particular, if the Operator (in its capacity as Access Holder) has the ability to claim Consequential Loss from Aurizon Network under clause 27 of the Standard Access Agreement, then the very broad exclusion of Consequential Loss under clause 2.1 of the Interface Access Deed should not affect the Operator's liability (if any) to the Customer under the Rail Haulage Agreement.</p> <p>The QRC's mark up proposes clarification of these matters in a new clause 2.6.</p>	
Schedule 7, proposed new clause 5	Joint Venture	If the Customer is required to give an indemnity under the Deed, then where the Customer is entering into the Deed for an unincorporated joint venture, equivalent provisions to clauses 36.1-36.4 from the Standard Access Agreement are required to be included (with relevant details of the joint venture as at the time the deed is executed and delivered by the Customer) in a schedule.	

Standard Train Operations Deed

The table below sets out the QRC's comments on the Train Operations Deed – Coal (as set out in the Consolidated Draft Decision) (Deed) between Aurizon Network Pty Ltd (Aurizon Network) and an Operator (Operator). The QRC provided a significant number of proposed amendments to the Deed in the QRC's April 2015 Submission. The QRC notes that some of those comments have been adopted by the QCA, however, a number have been left unanswered. The QRC continues to consider those amendments are required, however, the QRC has not repeated those comments in this submission unless it considered further explanation or comment was required.


Capitalised terms used in the table below have the meaning given in the Deed unless otherwise defined.



Clause Reference	Issue	Description	QRC Position
Definitions			
1.1, 26.1	"Consequential Loss"	<p>The QRC refers to its comments in respect of the Standard Access Agreement. In particular:</p> <ul style="list-style-type: none"> the QRC maintains that the definition of Consequential Loss lacks certainty despite the changes made in the Consolidated Draft Decision. The QRC has provided suggested amendments in its comments in respect of the Standard Access Agreement; and the QRC remains of the view that a Party should not have the benefit of an exclusion of liability for Consequential Loss if it has committed fraud, gross negligence or a wilful default (i.e. see clause 26.1 of the Deed). 	●
Access Undertaking			
3.2	Changes in Access Undertaking	The QRC proposes the same amendments as proposed in respect of the analogous clause of the Standard Access Agreement.	●
Operational Rights			
4.2	Nature and scope of Operational Rights	<p>Clause 4.2(b)(i)(B) – "and" should be replaced with "or".</p> <p>Clause 4.2(b)(ii) – QRC considers that, subject to the above comment regarding clause 4.2(b)(i)(B), paragraphs (B) and (C) from clause 4.2(b)(i) should also be included at the end of this clause. The Train Operator may have multiple Train Operations Deeds for the Nominated Network and clause 4.2(b)(ii) should not preclude the Train Operator from using the Nominated Network for any of the matters listed in (A)-(D) as permitted under those arrangements.</p>	●
Nomination of the Operator			
6.1 and 6.3	Nomination Variation of Nomination	The QRC requests the words "after the Commencement Date" be deleted from clause 6.1. While under the Standard Access Agreement a nomination must be accompanied by a Train Operations Deed executed by the Train Operator (if there is not already an existing Train Operations Deed), the process in clause 4.3 of the Standard Access Agreement contemplates that Aurizon Network is likely to execute that new Train Operations Deed after it processes the nomination (i.e. the nomination may come before the date of the Deed – the "Commencement Date").	●

Clause Reference	Issue	Description	QRC Position
		<p>The QRC requests if Aurizon Network fails to promptly issue the relevant Schedules to the Train Operations Deed after the nomination or variation of the nomination of the Operator is accepted then:</p> <ul style="list-style-type: none"> the Operator will be relieved of liability to Aurizon Network arising from such failure by Aurizon Network; and Aurizon Network will indemnify the Operator for losses suffered in connection with the delay. <p>The QRC considers the following words should be inserted at the end of clause 6.1(c) to accommodate where a later start date is nominated by the Access Holder: “or, if later, the relevant start date specified in the nomination given by the Access Holder”.</p> <p>In clause 6.3(a)(iii)(C), the QRC requests the insertion of “consistent with the Access Holder’s notice or withdrawal or deemed notice or withdrawal” so that the date of a variation of nomination is consistent with the date determined under the Access Agreement.</p>	
Billing and payments			
8.4	Disputes	Refer to comments in respect of the Disputes provision under the Standard Access Agreement.	●
Day to day Train Movements			
11.5	Removal at the end of Authorised Parking	Clause 11.5(a)(iii) provides that where Aurizon Network takes action under clause 11.5(a)(ii), Aurizon Network is excused from liability for damage to or loss of freight, the Train or Rollingstock and the Operator provides an indemnity for loss suffered as a result of any such action. The QRC considers this is unreasonable. Clause 11.5(ii)(B) already requires the Operator to pay Aurizon Network’s reasonable costs in taking the action. Clause 11.5(a)(iii) should be redrafted so that, apart from the recovery of those costs, Aurizon Network should have a positive obligation not to damage the Train or Rollingstock when taking action under clause 11.5(a)(ii). The indemnity by the Operator should be deleted.	●
Plans			
13.1	Approval of Plans	<p>The QRC requests the following amendments to clause 13.1:</p> <ul style="list-style-type: none"> Clause 13.1 – This clause should recognise that the Access Holder’s agreement to the IRMP (and any variation) is required. Clause 2(e) of Schedule C of the Access Undertaking and clause 4.3(f)(ii) of the Standard Access Agreement both refer to the agreement of the IRMP being between all 3 – the Train Operator, Access Holder and Aurizon Network. Clause 13.1 requires clarification of the Access Holder’s role in agreeing or determining the IRMP and any variation. Clause 13.1(d)(iii) – as drafted, this clause only provides for dispute resolution if the IRMP (or part) actually meets the relevant test (as drafted “Unreasonable”). The QRC considers that the matter should be referred for dispute resolution if the Train Operator or Access Holder forms the view that the relevant test may be satisfied (and the dispute then resolves if it is unreasonable). The QRC considers that the clause should read as follows: 	●

Clause Reference	Issue	Description	QRC Position
		<p>“(d) If a dispute arises:</p> <p>.....(iii) as to whether the IRMP.....(Disputed Aspect) is Unreasonable”.</p> <ul style="list-style-type: none"> • Clause 13.1(e)(i) – insert “or whether or not the Disputed Aspect is Unreasonable” immediately after “clause 13.1(a)(i). • Clause 13.1(f)(ii)(B) – if a dispute arises the IRMP should not be effective until the date when it is resolved or determined through the Dispute resolution process that the Disputed Aspect is not Unreasonable or if it is resolved or determined through the Dispute resolution process that the Disputed Aspect is Unreasonable, the IRMP (amended as resolved or determined through the Dispute resolution process) becomes effective on the date it is so resolved or determined. • Clause 13.1(g) – The IRMP should be amended as agreed or determined through the Dispute resolution process. Aurizon Network should not have the right to redetermine the IRMP after the process has been completed. 	


Compliance with Scheduled Time

14.5	Operator to supply information	<ul style="list-style-type: none"> • The QRC considers that the Operator’s ability to comply with clause 14.5(a)(ii) can be adversely impacted by acts or omissions of Aurizon Network or its staff and the Operator should not be taken to have failed to provide the relevant information where that is due to Aurizon Network or its staff. Accordingly, the QRC requests the inclusion of the following words at the end of clause 14.5(a)(ii): “provided that the Operator will not be responsible for failure to provide information or the provision of incomplete information to the extent that an act or omission of Aurizon Network or Aurizon Network’s staff has contributed to the Operator being unable to provide such information or to provide complete information”. • Clause 14.5(b) – the QRC considers that the intent of the drafting of this clause is unclear. If the intent is an acknowledgement that such controls may be imposed by Aurizon Network, the QRC requests this clause be reworded as follows: <p>“Aurizon Network may specify reasonable controls to protect the integrity and confidentiality of Aurizon Network’s information systems and the information contained in them and the Operator will not be taken to have failed to have complied with an obligation connected with the Operator’s interface with Aurizon Network’s information systems to the extent arising from any of such controls.”</p> • Clause 14.5(c) – Aurizon Network’s obligation to cooperate should expressly extend to provision of relevant systems and links to enable Operator to comply with its obligations under clause 14.5(a)(i). The QRC requests the following words be included at the end of clause 14.5(c) “including the provision and maintenance of software, hardware and associated communications links reasonably required to enable the Operator to comply with clause 14.5(a)(i)”. Alternatively, the QRC considers that clause 14.5(a)(i) should be reciprocal. 	
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Clause Reference	Issue	Description	QRC Position
Authorisation of Rollingstock and Rollingstock Configurations			
15.5(b), 15.6	Certificate of Compliance, Disputes	<p>The amendment of clause 15.5(b) to include the requirement to provide additional information and documentation as well as Aurizon Network's right to dispute the Certificate of Compliance and new clause 15.6 has potential for significant timing delays in the process for authorisation of Rollingstock and Rollingstock Configurations. The timing between provision of the Certificate of Compliance and reference to an Expert could be in the vicinity of up to 50 Business Days. Aurizon Network is in control of who can be a "Certifier" (which is dependent on Aurizon Network's own reasonable satisfaction with the qualifications of the person). Therefore, there should be no need for Aurizon Network to re-examine the certification absent fraud or manifest error.</p> <p>The amendments to clause 15.5(b) and 15.6 also means that the provision of the Certificate of Compliance (and other documentation) to Aurizon Network (not just that the Certificate has been obtained) is essentially mandatory before the Operator can use the Rollingstock and Rollingstock Configuration.</p> <p>Therefore, the QRC requests that the deletion of the final paragraph of clause 15.5(b) and clause 15.6.</p> <p>If, contrary to the QRC's request, these additional processes are to be included, the QRC requests the following as a minimum:</p> <ul style="list-style-type: none"> • Clause 15.5(b)(i)(B) should only cover documentation, tests or reports which are already in existence at the time the Certificate of Compliance was given and which are specifically referred to in the Certificate of Compliance. The use of "information" is too broad and could be interpreted as suggesting that an Operator could be required to undertake additional testing or preparation of documentation to justify information in the Certificate after the Certificate of Compliance has been given. <p>This certainty would also assist the Operator to minimise delay as it can ensure that any such documentation can be provided at the same time as the Certificate of Compliance is provided.</p> <ul style="list-style-type: none"> • Where the documentation is not provided at the same time as the Certificate, Aurizon Network should have an obligation to make any request for clause 15.5(b)(i)(B) documentation not later than 3 Business Days after the provision of the Certificate of Compliance. • Aurizon Network should be required to give the notification of non-satisfaction within a shorter period, say not longer than 10 Business Days. 20 Business Days is too long. 	
Amendments to System Wide Requirements			
16.1	Amendment Notice	<p>The QRC reiterates its previous request to impose consultation obligations on Aurizon Network in respect of Amendment Notices. The requirement that the Amendment Notice be given at least 20 Business Days prior to the proposed implementation date does not address the QRC's concerns in relation to consultation. The QRC requests the following be included as a proviso to both clause 16.1(a)(i) (in this case replacing the current proviso) and 16.1(a)(ii):</p> <p style="padding-left: 40px;">"provided that, before its implementation, Aurizon Network has consulted with the Operator for at least 20 Business Days after giving the Amendment Notice in compliance with the requirements of clause 16.1(b) and has taken into account the</p>	

Clause Reference	Issue	Description	QRC Position
		<p>Operator's reasonable views in relation to the Amendment Notice"</p> <p>Except in the case of an emergency, Aurizon Network must not be allowed to implement the proposed amendments unless and until the consultation period has expired (which, as noted above, must not commence until Aurizon Network has given a valid Amendment Notice).</p> <p>The QRC also considers that the words "<i>(such agreement not to be unreasonably withheld or delayed)</i>" in clause 16.1(a)(iii)(A) should be deleted. They potentially limit the Operator's rights under the balance of the provisions in clause 16 in respect of Discretionary System Amendments and, in light of the detail of these clauses (which specify the circumstances in which the Operator may disagree with a Discretionary System Amendment) are unnecessary from Aurizon Network's perspective.</p>	
Infrastructure management			
19.2	Maintenance of the Nominated Network	The QRC refers to its comments on Schedule E ("Maintenance of Rail Infrastructure").	●
Interface and environmental risk management			
22.8	Noise management during Train Services	This clause should be deleted if these costs are factored into Aurizon Network's calculation of Access Charges.	●
Inspection and audit rights			
23.2	Right of inspection	<p>Clause 23.2(b) – The QRC considers that before the requirements of this clause apply, Aurizon Network should be required to have formed a view, acting reasonably, that there may be an issue of non-compliance which cannot otherwise be reasonably determined except through invoking the requirements of clause 23.2(b) and Aurizon Network must have given reasonable prior notice of such to the Operator.</p> <p>Clause 23.2(c) – The Access Holder should also be granted relief from take or pay charges to the extent it cannot operate a Train Service because Aurizon Network has required the Rollingstock, which are otherwise required for the operation of the Train Service, to be made available for inspection.</p>	●
Limitations and exclusions of liability			
26.3	Claims and exclusions	<p>The QRC considers that the exclusion is unreasonably narrow. The carve out only applies to Aurizon Network's failure to comply with its maintenance obligation under a specific clause in the Deed (clause 19.2(a)) or its negligence in performing that obligation. The carve out should also cover breach of the relevant underlying Deed (or agreement – depending on which standard document the provision is contained in) or Aurizon Network's negligent act or omission generally.</p> <p>The QRC requests that the carve-out be redrafted as follows: "<i>except to the extent that such loss, damage, injury or death, cost or expense</i></p>	●

Clause Reference	Issue	Description	QRC Position
<i>results from the breach of this Deed or any negligent act or omission of Aurizon Network or Aurizon Network's Staff</i> .			
26.4	Claims and exclusions in respect of non-provision of access	<p>In the QRC's April 2015 Submission, the QRC requested a number of amendments to this clause which have not been addressed in the Consolidated Draft Decision. Consistent with the QRC's approach to these previously made (but not addressed) comments described above, the QRC continues to consider those amendments are required. The QRC also makes the following additional comments:</p> <ul style="list-style-type: none"> clause 26.4(b)(i) – insert the words “to a Scheduled Time in the Train Schedule that was able to be utilised by the Operator to operate the relevant Train Service” at the end of the paragraph; and clause 26.4(b)(iv) – The QRC considers that there is no justification for allowing Aurizon Network the 5% buffer in each and every Month (reflected in clause 26.4(b)(iv)(A)) as the exclusions already afforded to Aurizon Network are more than comprehensive. While under UT3 Standard Access Agreement there was scope for the parties to agree to some level of buffer, the QRC does not consider it is reasonable for level of “buffer” to be imposed (in the absence of it being agreed by the counterparty) for Aurizon Network's benefit for failures which are not permitted or are the result of Aurizon Network's breach or negligence. Together with clause 26.4(b)(iv)(B) being unlikely to apply, the QRC considers clause 26.4(b)(iv) should be deleted in its entirety. 	●
Suspension			
30.6	Effect of suspension	<p>Clause 30.6(d) should only apply if the direct contractual arrangement has a provision which includes an equivalent statement of Aurizon Network's liability for suspension of the Operator's rights where no reasonable person could have formed that view.</p> <p>The QRC refers to its comments on clause 27 of the Standard Access Agreement. The QRC requests that the following words be inserted at the end of clause 30.6(d):</p> <p><i>“and under that contract there is a provision at least equivalent to clause 30.6(c), in respect of Aurizon Network's liability to the Access Holder arising from a suspension of the Operator's right to operate some or all of the Train Services.”</i></p>	●
Assignment			
32.1	Assignment by Aurizon Network	<p>The QRC notes that, consistent with its previous submission, a requirement that an Assignee must be Accredited has been included. However, the QRC is disappointed that the remainder of its concerns surrounding potential assignment by Aurizon Network have not been addressed. The QRC remains of the view that it is reasonable for Operator's to seek more reciprocal restrictions on Assignment.</p>	●
Suspension and Termination			
Schedule 9, Part B	Suspension Events and Termination	<p>The QRC requests the QCA to reconsider its comments in respect of Schedule 9, Part B as set out in the QRC's April 2015 Submission. In particular, the QRC provides the following further explanation in respect</p>	●

Clause Reference	Issue	Description	QRC Position
	Events	<p>of its comments on clause 3(a):</p> <ul style="list-style-type: none"> The further detail from item 2 (in respect of Suspension Event) has been lost in the translation to the Termination Event. The following words should be inserted at the end of item 3(a) in respect of the Termination Event: <ul style="list-style-type: none"> <i>“and Aurizon Network is of the reasonable opinion that such failure:</i> <ul style="list-style-type: none"> (i) <i>adversely affects the entitlements of any Access Holder (other than the Operator under this Deed) or other users of the Infrastructure (including Infrastructure Services Providers); or</i> (ii) <i>has caused an increased risk to the safety of any person or increased material risk to property,”</i> 	
Other comments			
Various	Other drafting comments	<p>The QRC provides a number of further drafting comments below:</p> <ul style="list-style-type: none"> There are a number of references throughout the Deed to “Agreement” which should be amended to refer to “Deed”. There are a number of cross referencing errors throughout the Deed. Clause 8.2(a) – The words “minus any amounts payable by Aurizon Network as a set off under clause 8.6” should be inserted as the final line in clause 8.2(a). Clause 8.2(c) anticipates that invoices will include particulars of any set-off amounts. Clause 12.2(a) – The QRC considers that this clause should be clarified so that it must still be the case at the end of the 20 Business Days’ notice period Aurizon Network continues to not be reasonably satisfied that the Operator will consistently comply with the Train Description for the remainder of the Term. At present the clause only imposes this requirement as a precondition to the giving of the notice. Clause 13.1(a) – “environment” should be replaced with “Environment” as the term is now defined. Clause 21.1 – The reference in this clause to clause 25 should be to “clause 26” (exclusions and limitations of liability). Clause 24 – In clauses 24.1 and 24.3, insert the word “first” prior to “Train Services” to clarify that the intention is to refer to the period before the date the Operator operates the first Train Service under the Deed. Otherwise, the phrase “commencement of Train Services under this Deed” is ambiguous because it could capture every Train Service under the Deed. Clause 29.5 – The QRC considers the following amendments to clause 29.5 are required: <ul style="list-style-type: none"> 29.5(b) – The reference to “clause 25.4(a) of the Access Agreement” is incorrect. 29.5(b) – The notice should also set out the changes referred to in clause 25.3(c)(i) of the Access Deed. 	

Annexure 1 – Standard Access Interface Deed Mark-up

Please refer to External Document: 'QRC Submission February 2016 – Annexure 1 – Standard Access Interface Deed Mark-up'.

Annexure 2 – Confidentiality Agreement Mark-Up

Please refer to External Document: 'QRC Submission UT4 – Annexure 2 – Confidentiality Agreement Mark-up'.

Glossary of terms

Any capitalised terms used throughout this submission have the meaning given in the Undertaking unless otherwise defined below or stated otherwise.

Term	Meaning
2013 DAU	Aurizon Network's 2013 Draft Access Undertaking
2014 DAU	Aurizon Network's 2014 Draft Access Undertaking
Act / QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
Aurizon	Aurizon Group
Aurizon Group	the group of companies for which Aurizon Holdings Limited ACN 146 335 622 is the ultimate holding company
Aurizon Network	Aurizon Network Pty Ltd ACN 131 181 116
Consolidated Draft Decision	The QCA's December 2015 draft decision on Aurizon Network's 2014 Draft Access Undertaking
CQCN	Central Queensland Coal Network
Draft Decision	The QCA's January 2015 draft decision on Aurizon Network's 2014 Draft Access Undertaking
GAPE	Goonyella to Abbot Point Expansion
IRMP	Interface Risk Management Process
QRC's April 2015 Submission	The QRC's April 2015 submission in relation to the 2014 DAU
QRC's October 2013 Submission	The QRC's October 2013 submission in relation to the 2014 DAU
QRC's October 2014 Submission	The QRC's October 2014 submission in relation to the 2014 DAU
QCA	Queensland Competition Authority
QRC	Queensland Resources Council
RAB	Regulatory Asset Base as defined under the Undertaking
Reference Tariff	The reference tariff under the Undertaking

Term	Meaning
Standard Access Agreement	The standard form access agreement under the Undertaking
Standard Rail Connection Agreement / SRCA	The standard form rail connection agreement under the Undertaking
Standard Studies Funding Agreement	The standard form studies funding agreement under the Undertaking
Standard Train Operations Deed	The standard form train operations deed under the Undertaking
Standard User Funding Agreement / SUFA	The standard form of user funding agreement under the Undertaking
Submission	This QRC submission in response to the Draft Decision
TOP	Take or pay
Undertaking / UT4 / Access Undertaking	The access undertaking 4
UT1	QR's 2001 Access Undertaking
UT2	QR's 2006 Access Undertaking
UT3	QR Network's 2010 Access Undertaking (1 October 2010)
UT3 Standard Access Agreements	The standard form access agreements under UT3
WIRP	Wiggins Island Rail Project