Queensland Rail's 2015 Draft Access Undertaking:

Volume 2

Submissions on other stakeholders' submissions on QCA Draft Decision

14 March 2016

1 Introduction

On 5 May 2015, Queensland Rail (***QR***) submitted a draft access undertaking in relation to QR's rail network (the ***2015 DAU***).

On 8 October 2015, the Queensland Competition Authority (***QCA***) released its Draft Decision in respect of the 2015 DAU (***Draft Decision***), containing a draft determination that the 2015 DAU was not appropriate to approve, having had regard to each of the matters in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***).

Following the Draft Decision:

(a) stakeholders have made further submissions to the QCA;

(b) the QCA has published a Request for Comments paper (19 January 2016) and an addendum to the paper (15 February 2016); and

(c) the QCA has invited further submissions on both the issues raised in that paper and other issues raised in stakeholder submissions.

New Hope Corporation Limited (***NHC***) has made submissions on the 2015 DAU prior to and after the Draft Decision, and continues to largely support the principles in the Draft Decision and the detailed changes which the QCA has proposed to ensure that the new access undertaking will be appropriate.

These further submissions set out NHC's views on:

(a) each of the issues raised in the QCA's Request for Comments paper; and

(b) a number of additional issues raised in other stakeholders' submissions in response to the Draft Decision.

NHC in particular, has included responses which address the many strident, but unjustified, comments made by QR in its latest submission, particularly in respect of the QCA's approach to pricing matters in the Draft Decision.

2 Structure of NHC Submission

This submission is provided in two volumes, as follows:

(a) **Volume 1**: comprising of:

  (i) an introduction and overview of NHC's submissions; and

  (ii) submissions in response to the issues raised in the QCA's Request for Comments Paper; and

(b) **Volume 2**: (this document), submissions on a selection of the most material issues raised in other stakeholders' submissions in response to the Draft Decision.

In particular this Volume 2 focuses on those aspects of QR's submissions regarding access pricing matters which were not expressly included in the QCA's Request for Comments paper, but on which NHC considers QR's submissions are clearly inappropriate, misconceived or simply legally incorrect.

It is also clear from NHC's submission that NHC's and QR's views regarding the appropriate content of the Standard Access Agreement (***SAA***) and the 2015 DAU diverge greatly. This demonstrates the importance of the approved 2015 DAU and SAA being prescriptive enough to provide real certainty on all key issues and minimise areas of future dispute, such that the various stakeholders are able to efficiently progress access negotiations. If that approach is not taken, NHC unfortunately anticipates that negotiations will quickly descend into a stalemate requiring

QCA arbitration, due to the extent of the disparity between the positions of QR and access seekers.

3 Adjustment amount – appropriateness and retrospectivity

NHC continues to consider that an adjustment amount must be included for the 2015 DAU to be appropriate. It also rejects all of QR's assertions that an adjustment amount is beyond the QCA's powers as:

(a) the QCA has clear power to approve an undertaking which contains provisions which apply to a point in time earlier than the point in time at which it comes into effect (section 3.2 and advice from Mr O'Donnell QC in Schedule 1);

(b) the adjustment amount is not retrospective in any case – rather it is entirely prospective in nature as it only applies to future pricing from the commencement of the new undertaking (section 3.3);

(c) the adjustment amount is not inconsistent with the transfer notice which can only have relevance to the period before commencement of the new undertaking (section 3.4);

(d) the pricing principles in section 168A(a) QCA Act and object of Part 5 are only one of the factors to have regard to under section 138(2) QCA Act and do not have prevalence or priority over other factors in that section (section 4.1, 4.3 and advice from Mr O'Donnell QC in Schedule 1);

(e) the QCA's proposal in relation to the adjustment amount is compliant with the pricing principle in section 168A(a) QCA Act in any case as the time period over which the revenue referred to in that section should be measured is not confined to a single regulatory period (section 4.2); and

(f) the weight to be given to each of the factors in section 138(2) is a matter for the QCA to determine and will properly involve the very weighing or balancing exercise that is evident in the Draft Decision (section 4.4).

3.1 Appropriateness

Draft access undertakings previously submitted (and subsequently withdrawn) by QR to replace the 2008 DAU had included an adjustment charge provision which provided, in effect, for recovery or refund (as applicable) of the difference between the access charges paid by access holders since 1 July 2013 and the access charges that would have been paid if calculated in accordance with the new reference tariff approved by the QCA (an 'adjustment amount').

In the Draft Decision, the QCA decided it was not appropriate to approve the 2015 DAU, which:[1]

> should be amended to include an adjustment charge provision which provides for what is effectively a refund to access holders for the difference between access charges paid since 1 July 2013 and the access charges that would have been paid if calculated on the basis of the reference tariff approved in this Draft Decision (ie, the 'refund' being the adjustment amount).

For the reasons set out in NHC's previous submissions, the consistent reasoning in the Draft Decision and section 6.1 of Volume 1 of this submission, NHC firmly agrees that the proposed undertaking is not appropriate without such an amendment.

Access holders had a very clear expectation that an adjustment amount would be applied based on both QR's actions and the existing regulatory precedent in relation to Aurizon Network. QR is now seeking to achieve a substantial benefit and windfall gain from a delay in approval for which its own conduct (in submitting and withdrawing numerous access undertakings and the

[1] Draft Decision at p 209.

obstructionist way it has approached the regulatory process in relation to the 2015 DAU) is principally responsible. Allowing such a result is clearly an inappropriate outcome. One assumes QR would not be adopting its current stance if the adjustment amount was in its favour.

3.2 The QCA has the power to approve an adjustment amount

QR continues to assert that the adjustment amount is beyond the QCA's power due to it being retrospective in nature.

However, NHC has obtained an opinion from Mr Brian O'Donnell QC which wholly discounts QR's assertions that the adjustment amount is beyond the QCA's power due to being 'retrospective'.

In the opinion (a copy of which is included as Schedule 1 to this Volume 2), Mr O'Donnell concludes that although an approved access undertaking cannot commence to operate prior to the time of its approval, '… once approved, the terms of the access undertaking can regulate matters between the access provider and the user by reference to events that occurred prior to the time of the approval.'[2]

In summary, Mr O'Donnell's reasoning in reaching that conclusion is based on a number of points, most significantly:

(a) there is no principle against retrospectivity which would prevent inclusion of such an adjustment mechanism in the new access undertaking;

(b) the effect of section 149(a) of the QCA Act is that when the QCA approves the new access undertaking, it will come into operation at the time of approval; and

(c) once the new access undertaking does come into operation, there is no impediment in the legislation to the access undertaking operating by reference to events that occurred prior to the time the undertaking commenced to operate.

In support, Mr O'Donnell cites *Application Optus Mobile Pty Ltd & Optus Networks Pty Limited* (2007) ATPR 42-137, in which the issue arose as to whether an access undertaking by Optus infringed section 152BS(10) of the *Trade Practices Act 1974* (Cth) (as it then was). Section 152BS(10) substantially corresponds with section 149 of the QCA Act.

In rejecting Telstra's argument that the undertaking in question was inconsistent with section 152BS(10) by virtue of the fact that once the undertaking came into effect, the terms of the undertaking would operate by reference to a time prior to approval by the Australian Competition and Consumer Commission, the Australian Competition Tribunal held that:[3]

> … once an undertaking has been given legal effect and has become operative, it can contain provisions which apply to a point of time earlier than the point of time at which it comes into effect without offending s.152BS(10).

Accordingly, NHC continues to consider (consistent with the reasoning in the Draft Decision) that the adjustment charge is wholly within the QCA's power.

3.3 The adjustment amount is not 'retrospective' in operation in any case

NHC considers that the points made in section 3.2 above are the end of the issue in relation to QR's assertions regarding the QCA's powers on the basis of retrospectivity.

However, for the avoidance of any doubt, NHC considers it is equally clear that what is being proposed is not in fact legally retrospective in nature.

---

[2] See page 3 of Schedule 1.

[3] At [53].

In the Draft Decision, the QCA did not accept QR's assertions that an adjustment amount would be retrospective, stating that:[4]

> The kind of term in question would apply from the date that the 2015 DAU is approved. Such a term would take matters that have occurred in the past as the basis for calculating amounts that are to be paid by or to Queensland Rail after the 2015 DAU is approved. The fact that such a clause would operate by reference to things that have happened in the past would not make it retrospective.

In response to the conclusion reached by the QCA on the issue of retrospectivity, QR has once again asserted in submissions to the QCA in response to the Draft Decision on 24 December 2015 (***QR December Submissions***) that:[5]

> The retroactive effect of the proposed reference tariff cannot be avoided by stating that the reference tariff will only apply from the date of the approval of the 2015 DAU. One must look to the substance, not the form, of the QCA's proposal to assess its true effect.

Similarly, QR further submitted that the proposal by the QCA that reference tariffs for coal carrying train services using the West Moreton and Metropolitan Networks be adjusted downwards throughout the regulatory period because of a perceived over-recovery of revenue by QR for the 2013/14 and 2014/15 years is beyond the power of the QCA because 'it has a retroactive effect, even though it applies through a future price'.[6]

Accordingly, NHC continues to consider (consistent with the reasoning in the Draft Decision) that the adjustment charge is wholly *prospective* in nature because it only applies from the date that the 2015 DAU is approved. It does not create liability for past conduct. The mere fact that the proposed future pricing for access to the West Moreton Network would operate, in part, by reference to past circumstances does not make it retrospective or retroactive at law.

Indeed, QR's assertions that an adjustment charge determined by reference to past circumstances is impermissible is directly contradicted by its own submission, which states that recovery of QR's costs must be assessed over a period which is not limited to the term of the undertaking:[7]

> The QCA Act entitles Queensland Rail to recover at least its efficient costs and a relevant return. Where the costs and return relate to a capital investment, the requirement that Queensland Rail recover at least its efficient costs ***can only be assessed over the longer term***. (emphasis added).

NHC has previously made extensive submissions on this subject which clearly demonstrate that provisions providing for an adjustment amount as proposed by the QCA in the Draft Decision are not legally retrospective in operation.

In particular, NHC provided a legal opinion in support of Volume 2 of its submissions on 23 December 2015 to the QCA (***NHC December Submissions***). That opinion confirms that:

(a) what is proposed in the Draft Decision is in fact not 'retrospective' at all, such that the conclusion reached in the legal advice from Corrs Chambers Westgarth of 29 May 2015 (even if it is correct) is completely irrelevant to what is being proposed; and

(b) retrospectivity, in a legal sense, involves the operation of a law or regulation prior to its enactment or approval. The QCA proposes something entirely different, being an adjustment to tariffs that will apply entirely during periods after approval of an access

[4] Draft Decision at p 210.

[5] QR December Submissions at p 16.

[6] QR December Submissions at p 12.

[7] QR December Submissions at p 52.

> undertaking in respect of QR's network. The adjustment amount does not create liability for past conduct. The adjustment is entirely prospective or forward looking. The fact that it is calculated by reference to past circumstances does not make it retrospective.

Judicial consideration of alleged retrospectivity supports NHC's position. Laws are retrospective if they apply to facts or events that have already occurred so as to affect rights or liabilities which are 'vested or 'accrued'.[8] However, it is well established that a law is not retrospective simply because it relies on conduct or events that happened before the law existed.[9] A change that is operative with regard to past events is only retrospective if the legal nature or effect of a past act is retroactively altered by the change.[10]

By way of example, in *Robertson v City of Nunawading* the Court held that a change in the law is not objectionable merely because it attaches new legal consequences to a past event.[11] The Court held the presumption (in statutory interpretation) against retrospectivity 'is not concerned with the case where the enactment … merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future'.

Similarly, in *Coleman v Shell Co of Australia* the Court described retrospectivity as follows:[12]

> If events have occurred before the passing of an Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities.

The QCA summarised retrospectivity in the context of access undertakings in the Aurizon 2014 draft access undertaking:[13]

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

In support of this, the QCA referred to *Application by Optus Mobile Pty Limited & Optus Networks Pty Ltd.*[14] In that case, Telstra argued than an access undertaking submitted by Optus was invalid due to retrospectivity. The Australian Competition Tribunal said:[15]

> the fact that a term or condition may operate in respect of a period of time prior to the undertaking becoming operative does not mean that the term or condition has been expressed to come into effect prior to the undertaking.

It is therefore very clear from the relevant case law that the QCA's proposed adjustment amount is not legally retrospective in nature. Although the adjustment would operate with regard to the over-payment of access charges under QR's 2008 Access Undertaking (***2008 AU***) and since expiry of the 2008 AU, it would not purport to retroactively alter the legal nature or effect of those over-payments. Rather, the over-payments would merely be taken into account as the basis for

---

[8] *Maxwell v Murphy* (1957) 96 CLR 261.

[9] <https://www.legislation.qld.gov.au/Publications/OQPC/FLP_Retrospectivity.pdf>

[10] F A R Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008).

[11] *Robertson v City of Nunawading* (1973) 29 LGRA 44.

[12] *Coleman v Shell Co of Australia* (1943) 45 SR (NSW) 27.

[13] Aurizon Network 2014 Draft Access Undertaking (December 2015) (Vol 1 at p 39).

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

[15] *Application by Optus Mobile Pty Limited & Optus Networks Pty Limited* (2007) ATPR 42–137 at [53].

an adjustment amount prescribed for the future. The fact that the adjustment essentially affixes new consequences to the past payments does not make it retrospective in the legal sense.

The QCA has rightly supported this position in its most recent draft decisions regarding draft access undertakings submitted by both Aurizon Network and Queensland Rail, and QR's continuing legally incorrect assertions to the contrary should not alter that position.

3.4 No inconsistency between the transfer notice and application of adjustment amounts

QR has submitted that the provisions providing for an adjustment amount proposed by the QCA in the Draft Decision would:[16]

> override, or retroactively alter, the requirements of the transfer notice which gave rise to accrued rights in favour of QR to be paid specified access charges for the provision of access prior to the approval of a replacement access undertaking.

That demonstrates a misunderstanding of how the transfer notice[17] operates on a number of levels.

Firstly, and as a complete answer to QR's submission, there is clearly no inconsistency between the transfer notice (even assuming it had the impact QR asserts) and the pricing methodology in the Draft Decision (including the adjustment amount). As discussed above in relation to the alleged retrospectivity, the Draft Decision proposes applying an approach to pricing for reference tariffs *after* commencement of a new access undertaking. That is not inconsistent with the transfer notice which, on any view, has ceased to apply the 2008 AU to QR at that point (and therefore necessarily ceased to provide any position in respect of pricing that could be inconsistent with the requirements of the new access undertaking).

Second, QR has misinterpreted the outcome of the transfer notice. NHC acknowledges that QR is correct in stating that the transfer notice, read purely literally, refers to the 2008 AU being applied to QR from 30 June 2010 to 'the date the QCA approves a subsequent access undertaking for Queensland Rail under the QCA Act that replaces the Access Undertaking in so far as it relates to Queensland Rail'.[18] However, the transfer notice is merely a statutory instrument made pursuant to the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld), and consequently the scope of what a transfer notice can achieve is constrained by what that Act allows to be done by a transfer notice.

In particular, section 9(1)(j) of the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) provides that a transfer notice can 'make provision for or about the … application of an instrument to a declared entity'. In other words, the Act empowers a transfer notice to *apply* the undertaking (originally given by the entity then named QR Network Pty Ltd) to QR. It does now empower a transfer notice to otherwise change the terms of an instrument. The transfer notice is therefore correctly interpreted as applying the 2008 AU to QR until the earlier of the end of its term (as stated from time to time, including following QCA approved amendments) and the time on which a subsequent access undertaking applying to QR is approved.

The interpretation QR propounds would be beyond the scope of what a transfer notice under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) can achieve. It would also have the clearly undesirable and improbable result that an extension of the undertaking (which requires QCA approval under the QCA Act) would effectively be deemed appropriate and

[16] QR December Submissions at p 17.

[17] Transfer Notice – Project Direction (Queensland Rail – QR National Restructure), 29 June 2010 (as included in the Queensland Government Gazette at p 861 (Transfer Notice).

[18] Transfer Notice, clause 5 'Provision of instrument'.

granted without any QCA oversight for an unknown period of time. A court will clearly not adopt such an interpretation.

Accordingly, once the impact of the transfer notice is properly understood, it becomes absolutely clear that QR is not currently bound (by virtue of the transfer notice) to comply with the 2008 AU. It has not been bound since the 2008 AU expired on 30 June 2015, and extensions of the term before that date were, in fact, dependent on the QCA approved amendments to extend the term (rather than the transfer notice) in any case.

Accordingly, the transfer notice is irrelevant to whether the QCA should require an adjustment amount be provided for in the 2015 DAU.

4 Section 138(2) factors

4.1 Relationship between the section 138(2) factors and section 168A(a)

In Volume 1 of its 'Explanatory Submission – Queensland Rail's Draft Access Undertaking 1 (2015)' provided to the QCA on 6 May 2015 (***Explanatory Submissions***), QR submitted that:[19]

> The requirement in section 168A(a) is a cornerstone requirement in support of the object of Part 5 of the QCA Act…
>
> …
>
> If there is to be a hierarchy [in respect of the factors listed in section 138(2)], the hierarchy proposed by the QCA in the draft decision [in respect of the 2013 Draft Access Undertaking submitted and subsequently withdrawn by QR] is not consistent with the QCA Act. Revenue adequacy must be paramount as contemplated by section 168A.

In Volume 1 of its submissions to the QCA on 5 June 2015 (***NHC June Submissions (Volume 1)***), NHC submitted that:[20]

> …
>
> (c) contrary to QR's assertions regarding section 168A(a) QCA Act, no single factor listed in section 138(2) QCA Act is 'a cornerstone requirement', or a dominant or paramount factor that is required to be given greater weight;
>
> (d) the QCA has the power to approve an undertaking which is inconsistent with any of the factors set out in section 138(2), including any of the pricing principles set out in section 168A QCA Act. This is demonstrated by the fact that section 138(2)(f) specifically acknowledges the possibility that existing assets may be excluded for pricing purposes, and requires the QCA to consider the effects of such a decision;
>
> (e) in fact, the QCA must seek an undertaking which is inconsistent with a pricing principle in Section 168A if it would be appropriate to do so, having regard to all of the section 138(2) factors;
>
> …

The legal opinion provided in support of the NHC June Submissions (Volume 1) further identified that:

(a) section 138(2) of the QCA Act does not impose a list of mandatory conditions that must be satisfied before an undertaking can be approved. Rather, it specifies a number of matters which the QCA must 'have regard to';

(b) as one of the factors the QCA must 'have regard to' under section 138(2)(g)) the only requirement of the QCA Act in respect of the pricing principles in section 168A is that they

[19] Explanatory Submissions at p 4, 23.

[20] New Hope June Submissions (Volume 1) at p 4.

be taken into account and considered by the QCA in making the appropriate decision about whether to approve or refuse to approve an undertaking;

(c) there is no requirement in the QCA Act that the appropriate decision is consistent with or gives priority to any particular one or more of the factors to which regard is to be had;

(d) the QCA's role is clearly specified in the QCA Act as one involving balancing of a number of factors to reach an appropriate decision on a draft access undertaking. Consequently, a particular factor, including the pricing principles in section 168A, may be given less weight, or departed from, or not followed, in what the QCA ultimately determines is the appropriate decision on the relevant draft access undertaking; and

(e) if the QCA was to determine the appropriate position as one which is not consistent with or offends the pricing principles in section 168A(a), that does not invalidate the QCA's decision, provided it has considered the pricing principles and then has nevertheless determined that despite being inconsistent with the pricing principles it remains the appropriate position.

In the Draft Decision, the QCA considered the factors listed in section 138(2), and declined to afford primacy to the pricing principles in section 168A, stating that 'the QCA considers that the pricing principles are outweighed by other considerations under s.138(2)'.[21]

QR disputed the QCA's position on the weighting to be afforded to section 168A, submitting in the QR December Submissions that:[22]

> … the QCA has proceeded on the basis that it is entitled to trade-off the factors listed in section 138(2) of the QCA Act against one another.
>
> The QCA has unequivocally stated that it can, in effect, trade-off the pricing principles in section 168A against other factors that it considers more important.
>
> This is an error of law and a fundamental flaw in the QCA's draft decision.

In the NHC December Submissions, NHC provided further submissions in support of its contention that section 168A was not to be given 'priority' over the other factors listed in section 138(2). As noted in the legal opinion provided in support of those submissions, in considering whether it is appropriate to approve the 2015 DAU (including provisions which provide for an adjustment amount):

(a) the QCA must have regard to each of the factors specified in section 138(2) of the QCA Act (which includes the pricing principles in section 168A and any factors the QCA considers relevant); and

(b) provided it has properly considered those factors, the QCA has a wide discretion as to how to balance the factors and come up with an appropriate position. There is no single factor which is to be given priority or with which the appropriate position must be consistent (or to put it another way, inconsistency with such a factor is not grounds for invalidity of the QCA's decision on appropriateness, provided that factor has been considered).

The QCA's analysis in the Draft Decision was in line with NHC's position, with the QCA indicating the pricing principles in section 168A(a) are outweighed by other considerations in section 138(2).[23] The QCA's interpretation of section 138(2) was succinctly articulated in the

[21] Draft Decision at p 262.

[22] QR December Submissions at p 9.

[23] QCA Draft Decision at p 262.

QCA's recent consolidated Draft Decision on the Aurizon Network 2014 draft access undertaking:[24]

> In making our decision as to whether the 2014 DAU is appropriate to approve, we must have regard to the factors in section 138(2)(a)-(h) of the QCA Act. The phrase 'have regard to' has been interpreted by Australian courts as requiring the decision maker to take into account the matter to which regard is to be had and given weight, as an element in making the decision. The language is intended to convey no more than the factor must be regarded. Accordingly, we are to consider the identified factors, rather than treat them as fundamental elements in the decision-making process….
>
> In determining whether the 2014 DAU provided is appropriate by 'having regard' to each of the factors set out in section 138(2)(a)–(h) of the QCA Act, we note that neither the Act nor the explanatory material for the QCA Act prescribes the relative weight to be given to each factor. The High Court of Australia has indicated that in the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard (as is the case in the QCA Act), it is generally for the decision-maker to determine the appropriate weight to be given to them.

NHC agrees that the QCA correctly interpreted section 138(2) as being a list of matters that are to be taken into account when deciding whether to approve a DAU, with no particular matter needing to be accorded greater weight or treated as fundamental to the decision. There is no reason for the QCA to depart from this interpretation of section 138(2), and to do so would be both legally incorrect and undermine certainty in the access undertaking approval process.

NHC has now obtained an opinion from Mr Brian O'Donnell QC on this issue, which is entirely consistent with NHC's submissions (and the Draft Decision) in this regard.

In the opinion (a copy of which is included as Schedule 1 to this Volume 2), Mr O'Donnell concludes that:[25]

> The phrase "having regard to" requires the QCA to take the nominated matter into account when deciding whether or not to approve an undertaking. But it does not require more than that. In particular, it does not make achieving an outcome which satisfies the pricing principles a pre-condition to approval.
>
> …
>
> important is the recognition in the authorities that giving active consideration to a matter does not equate to slavish adherence to that matter.
>
> …
>
> It is apparent that in arriving at a decision which takes into account all of the matters listed in s.138(2), the QCA will be required to balance a number of considerations, some of which may be competing, and to give more weight to some matters over others (depending on the circumstance of the particular situation under consideration). The authorities recognise that in such situations, it is a matter for the decision maker as to what is the appropriate weight to give to the various matters that the legislation requires to be taken into account.

As noted, the QCA's reading of section 138(2) is also consistent with the large body of statutory interpretation of the phrase 'have regard to'. By way of additional examples to some of those noted in Mr O'Donnell's opinion:

(a) in *Commissioner of the Australian Federal Police v Courtenay Investments* the Court gave the phrase its dictionary meaning of 'to take into account' or 'to consider', and

[24] Aurizon Network 2014 Draft Access Undertaking (December 2015) (Vol 1).

[25] See page 4-6 of Schedule 1.

concluded that 'having regard to' a matter did not equate to relying or placing weight upon the matter;[26]

(b) in *Australian Competition and Consumer Commission v Leelee Pty Ltd* the Court held that 'having regard to' a matter does not require the decision maker to 'act upon it, or even ultimately be influenced by it'[27] and

(c) similarly, in *Singh v Minister for Immigration and Multicultural Affairs* the Court held that 'a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process'.[28]

As recognised in Mr O'Donnell's advice, QR's submission that the pricing principles are paramount is not supported by the wording of the QCA Act or case law. The courts have accepted that '… in some cases, it may be apparent that among the factors to which a decision-maker is bound to have regard, there is one factor … which is critical or fundamental to the making of the decision'.[29] However, this can only occur where the language of the statutory provision makes it clear that a particular factor is critical. There is nothing in the language or context of section 138(2) to indicate that the pricing principles are a fundamental factor. If the legislature had intended the pricing principles to have special status among the list, the drafting of the provision would make that clear.

QR's submission argues that the pricing principles are a cornerstone requirement because without revenue adequacy, QR cannot provide access to, maintain or invest in the infrastructure. QR submitted that 'any decision by the QCA on reference tariffs and other pricing aspects of an undertaking that fails to meet the requirement in section 168A(a) would run contrary to the QCA Act'.[30] QR effectively contends that revenue adequacy is of such fundamental importance that it should be considered paramount even in the absence of words to that effect in the provision.

The QCA was party to a Supreme Court case that considered a similar argument.[31] Origin Energy Ltd (***Origin***) challenged the QCA's price determination of regulated electricity tariffs on the basis that the QCA failed to afford primacy to one of the matters to which the QCA 'must have regard' under the *Electricity Act 1994* (Qld). The relevant matter was 'the actual costs of making, producing or supplying the goods or services'. Origin argued that when one factor to which an authority 'must have regard' is a 'substantive matter', that matter must be given weight 'as a fundamental element in making the decision'.

The court clearly rejected this submission and identified that inquiring whether a particular matter in a list is 'substantive' is 'no substitute for interpreting the requirements of and meaning of the particular provision in question'. The Court held that 'in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker … to determine the appropriate weight to be given to the matters which are required to be taken into account'.[32]

That reasoning is equally applicable to section 138(2) and the relevance of the pricing principles as a matter that must be had regard to. The Origin case makes it clear that even if revenue

[26] *Commissioner of the Australian Federal Police v Courtenay Investments* (2014) 289 FLR 331.

[27] *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121.

[28] *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152.

[29] *Minister for Immigration And Citizenship v Khadgi* (2010) 274 ALR 438.

[30] QR Explanatory Submissions at pp 4, 23.

[31] *Origin Energy Electricity Ltd v Queensland Competition Authority* (2012) 8 ARLR 91.

[32] *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24.

adequacy is a 'substantive matter' relative to the other factors in the list, it is still left to the QCA to determine the appropriate weight to be given to it, and it need not be treated as a fundamental element in the QCA's decision.

QR further submitted that the fact that the pricing principles appear in the Act as a standalone provision is indicative of their priority status. This argument has no legal basis. It is likely that the pricing principles appear at section 168A because that was the most convenient option for placement when they were inserted into the QCA Act in 2008 (given that they are referred to in more provisions of the QCA Act than just section 138).

NHC also notes that section 168A includes the following note:

> *'The authority must have regard to the pricing principles when it makes an access determination or decides whether to approve a draft access undertaking. See sections 120 and 138.'*

The note resolves any doubt as to how section 168A is to be considered and underpins the conclusion that the QCA need only 'have regard to' the pricing principles.

In addition, interpreting section 138(2) of the QCA Act in the way suggested by QR would make the decision-making process unworkable, because there are unavoidable conflicts among the listed matters. For example, conflicts are likely to arise when balancing the legitimate business interests of the Operator and the interests of access seekers. If revenue adequacy was paramount, it would clearly then not be possible for the QCA to adequately protect the interests of access seekers in all circumstances.

The QCA identified in the Aurizon Network draft access undertaking that neither the QCA Act nor the explanatory material for the QCA Act prescribes the weight to be given to each factor in section 138(2). However, guidance can be taken from the explanatory notes to the identical provision in the Commonwealth consumer legislation. The pricing principles were inserted into the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010*) in 2006. The explanatory notes provide the following:

> *The Bill does not require the decision maker to be satisfied that each and every principle has been met when making its decision, but that the decision maker `have regard to' the objects of Part IIIA.'*[33]

The pricing principles were replicated in the QCA Act two years later. Given that the Queensland provision is identical to the Commonwealth provision, it is likely that the Queensland Parliament intended it to operate in the same way (and the explanatory notes to the *Queensland Competition Authority Amendment Act 2008* (Qld) confirm the intention in respect of section 168A):

> *Clause 52 inserts a new section 168A (Pricing principles) which sets out pricing principles to which the Authority must have regard when making access determinations or deciding whether to approve an access undertaking.*

The pricing principles in section 168A are accordingly nothing more than a matter for the QCA to consider when assessing a DAU under section 138(2) of the QCA Act. The QCA has the power to decide how much weight to give each factor, and it is not mandatory that any particular pricing principle be 'achieved' by the pricing methodology adopted by the QCA. It is absolutely clear from the QCA's draft decision that the QCA did consider and give weight to the pricing principles when balancing the section 138(2) factors. Having done that, the QCA has clear power to require an adjustment amount even if this means that a particular factor in section 138(2), such as the pricing principle in section 168A(a), is not 'achieved'. However, as is discussed in the following section, NHC considers that the QCA's proposed pricing arrangements, inclusive of the adjustment amount, are entirely consistent with the pricing principle in section 168A(a), and that

[33] Explanatory Notes, Trade Practices Amendment (National Access Regime) Bill 2005 (Cth).

the QCA could (and should) reach the same decision in regard to the adjustment charge even if section 168A(a) was incorrectly treated as a 'cornerstone' requirement.

(For completeness, NHC notes this also means that QR is incorrect in its assertions about section 168A(a) being problematic for the QCA's proposals in relation to the hierarchy of pricing principles).

4.2 The QCA's approach is consistent with section 168A(a) in any case

It is clear from the previous sections of this submission that provided the QCA has 'had regard to' (ie, effectively just considered) the pricing principles in section 168A in determining whether it is appropriate to approve or refuse to approve the 2015 DAU, it will have met the requirements of section 138(2).

In any case, NHC disputes QR's assertions that the pricing for access proposed by the QCA does not comply with the pricing principles in section 168A(a).[34]

In particular, NHC notes that the pricing principles in section 168A(a) does not state any particular period across which the 'price of access to a service' should:

> *… generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved …*

QR's submissions appear to assume (and the QCA's Draft Decision could be perceived in places as adopting the approach) that the expected revenue is calculated solely by reference to the period of the undertaking under consideration. That is reading wording into section 168A(a) which does not exist.

Indeed, QR's assertions in that regard are directly contradicted by its own submissions on other issues, where QR clearly takes the view when it suits it that recovery of QR's costs must be assessed over a period which is not limited to the term of the undertaking:[35]

> The QCA Act entitles Queensland Rail to recover at least its efficient costs and a relevant return. Where the costs and return relate to a capital investment, the requirement that Queensland Rail recover at least its efficient costs ***can only be assessed over the longer term***. (emphasis added).

The legal opinion annexed to Volume 5 of the submissions made by NHC to the QCA on 5 June 2015 'Responses to QCA Paper and Adjustment Charges' (***NHC June Submissions***) concludes that 'the QCA has the power to determine the appropriate form of access undertaking is one which backdates reference tariffs to 1 July 2013 (whether through applying the existing Adjustment Charges regime or an alternative form of financial adjustment).'[36] This conclusion is based on the following reasoning (which remains equally applicable to the adjustment charge regime proposed in the Draft Decision):

(a) the reference to 'at least enough to meet efficient costs' in section 168A(a) does not confine the QCA to considering only the costs and revenue during the term of the new undertaking, and there is no basis evident in the QCA Act as to why such a confined view should be taken;

(b) this confined view would be a peculiar approach to take when interpreting the methodology for providing a return to an infrastructure owner on a long life infrastructure asset where the term of the undertaking forms only a small part of that asset life and can

[34] QR December Submissions at p 12.

[35] QR December Submissions at p 52.

[36] New Hope June Submissions (Volume 5), Attachment B at p 4.

be changed readily (as demonstrated aptly by the many recent extensions to the Queensland Rail and Aurizon Network access undertakings);

(c) such a view would ignore the common regulatory practice of applying many different types of 'carryover' mechanisms from one regulatory period to another. For example, in addition to the treatment of reference tariffs through adjustment charges, other provisions approved by Australian economic regulators have included capital carry-over accounts, efficiency/incentive arrangements, 'unders and overs' under a revenue cap and price paths. To the extent there is considered to be any ambiguity, a court would be anticipated to prefer a meaning which did not invalidate regulatory practices that were common at the time the pricing principles were introduced into the QCA Act;

(d) in the current circumstances the narrow interpretation QR would need to establish to support its assertions would also have the absurd consequences of the principle in section 168A(a) being interpreted as:

(i) requiring that, where the QCA had the view that the reference tariff to apply should be lower than that which has been transitionally applied, the QCA should knowingly allow QR to retain a clear over-recovery during the period where transitional tariffs applied in excess of the 'return on investment commensurate with the regulatory and commercial risks involved'; and

(ii) allowing the retention of such an over recovery, thereby rewarding an inefficient entity (which has charged a higher tariff than the QCA would recommend) for the delay in having a replacement access undertaking approved.

When an alternative interpretation is open (as it clearly is here), a court will not adopt an interpretation which produces these sort of results.

Accordingly, NHC continues to consider it is clear that taking into account the over-recovery of tariff charges by QR since 1 July 2013 is entirely consistent with the 'efficient cost' and 'commensurate return' principles in section 168A(a).

4.3 Relationship between the section 138(2) factors and the object of Part 5

QR has also made assertions about the object of Part 5 of the QCA Act having an overriding nature compared to the other section 138(2) factors (these assertions are very similar to those made in relation to the pricing principles).

For the same reasons as discussed in relation to the pricing principles in section 4.1 above, the object of Part 5 is a factor which must be had regard to, not something which overrides the other factors in section 138(2).

An additional reason why it is clear that the object of Part 5 does not have an overriding impact is the clear tension between the three aspects of efficiency expressed in the object itself (section 69E QCA Act):

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

It is evident that there is a balancing exercise to occur even within this single factor in section 138(2)(a) of the QCA Act. Outcomes which promote the efficient operation and use of significant infrastructure may not promote the efficient investment in significant infrastructure. The object is not expressed in a way that suggests there to be a clear single outcome to which precedence could be given, even if that was thought desirable.

Even if the object of Part 5 of the QCA Act was to be incorrectly assessed as having some kind of additional weight, NHC agrees with the QCA's analysis that the pricing methodology proposed in

the Draft Decision (including reference tariffs and the adjustment amount) is consistent with the object.

4.4 Appropriateness and balancing having regard to the section 138(2) factors

In its Draft Decision, the QCA has clearly set out the balancing analysis undertaken in accordance with section 138:[37]

> The pricing principles state that regulated access prices should generate revenue for a regulated service that is at least enough to meet the efficient costs of providing access.
>
> …
>
> It is open to the QCA to consider that a DAU which provides for a price that allows a service provider to recover at least the efficient costs of providing access to the service and a relevant return on investment is, including by reference to other factors such as the object of Part 5 of the QCA Act (section 138(2)(a)), the interests of access seekers and holders (section 138(2)(e) and (h) and the public interest (section 138(2)(d)), not one which is appropriate.

Having undertaken this balancing analysis in accordance with the requirements of the QCA Act, it is clearly open to the QCA to reach the conclusion that it does regarding the appropriate balance of the factors in section 138(2):[38]

> The West Moreton Network tariff will not generate expected revenue for Queensland Rail over the regulatory period that is at least enough to meet efficient costs and includes a return on investment commensurate with the regulatory and commercial risks of providing access (section 168A(a)). This is because of the adjustment amount to account for the over-recovery of access charges by Queensland Rail.
>
> However, for the reasons set out in Chapter 8, the QCA considers that the pricing principles are outweighed by other considerations under section 138(2), including s.138(2)(a) - the objects clause, s.138(2)(d) - the public interest, and s.138(2)(e) and (h) - the interests of access seekers/holders.

NHC considers that this process of reasoning demonstrates that the QCA has complied with the requirements to 'have regard' to the section 138(2) factors (as described earlier in this submission).

4.5 Public interest

One of the factors in section 138(2) to which the QCA must have regard in considering whether to approve a draft access undertaking is 'the public interest, including the public interest in having competition in markets (whether or not in Australia)'.[39]

The term 'public interest' is not defined for the purposes of section 138(2)(d) (or elsewhere in the QCA Act). However, section 76(2)(e) (which is also in Part 5 of the QCA Act) provides that in considering whether a service should be declared, the Minister must be satisfied 'that access (or increased access) to the service would not be contrary to the public interest'.

In determining whether he or she is so satisfied, the Minister must have regard to a number of factors, including:[40]

> …
>
> (c) social welfare and equity considerations including community service obligations and the availability of goods and services to consumers;

[37] Draft Decision at pp 260 – 261.

[38] Draft Decision at p 262.

[39] QCA Act s128(2)(d).

[40] QCA Act s76(3).

…

(e) economic and regional development issues, including employment and investment growth;

(f) the interests of consumers or any class of consumers;

(g) the need to promote competition;

(h) the efficient allocation of resources;

…

Section 76(2)(e) mirrors section 44H(4)(f) of the *Competition and Consumer Act 2010* (Cth) (***CCA***), which lists the matters in respect the Minister must be satisfied before he or she can declare a service under Part IIIA of the CCA.

Case law which has considered section 44H(4)(f) of the CCA provides guidance on the meaning of 'public interest'. In *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that:[41]

> It is well established … that, when used in a statute, the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning* …, when a discretionary power of this kind is given, the power is 'neither arbitrary nor completely unlimited' but is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'. It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed.

Their Honours further held:[42]

> Because so many different kinds of consideration may be relevant to an assessment of what is 'contrary to the public interest', many if not all of those matters which can be described as 'social costs' *could* be relevant to that assessment. And the significance to be attached to such social costs would, no doubt, be affected by the existence of any countervailing social benefits.

The following factors have been identified as relevant to a consideration of whether access to a service would be 'contrary to the public interest':[43]

(a) ecologically sustainable development;

(b) social welfare and equity considerations;

(c) transitional issues created by reform programs;

(d) policies concerning occupational health and safety and industrial relations;

(e) economic and regional development, including employment and investment growth;

(f) the interests of consumers generally, or a class of consumers; and

(g) the competitiveness of Australian businesses.

Accordingly, it is clear that the range of matters to which an entity that is required to consider the 'public interest' may have regard is 'very wide indeed', and will readily encompass factors such as the efficient allocation of resources, the competitiveness of affected businesses, regional

[41] At [42].

[42] At [111].

[43] *Re Specialised Container Transport* [1997] ATPR (NCC) 70-004.

economic development and employment impacts, each of which were taken into account by the QCA as part of its consideration of section 138(2)(d).[44]

In its December Submissions, QR asserted:[45]

> The QCA has stated that:
>
> > *'The QCA maintains an approved access undertaking that delivers regulatory certainty and provides a major stimulus to the Queensland economy and local employment which is an important public interest consideration.'*
>
> It is not clear what the QCA's statement means. Queensland Rail assumes that the QCA is indicating that for an access undertaking to be capable of being approved it must provide regulatory certainty and a major stimulus to the Queensland economy and local employment.,

and that QR:

> … does not consider that it is necessary for the access undertaking to provide 'a major stimulus to the Queensland economy and local employment'.

Contrary to QR's assertions, there is nothing in the Draft Decision which suggests the QCA has indicated that it will only approve an access undertaking if the undertaking provides a major stimulus to the Queensland economy and employment. As stated by the QCA, this factor is an important public interest consideration. The QCA has not in any way indicated that this is the sole factor it has considered in relation to the public interest.

Rather, as it is clearly entitled at law to do, the QCA has considered this factor (among others) in reaching the logical and reasonable conclusion that 'it is in the public interest for there to be regulatory certainty with regard to the inclusion of an adjustment amount in circumstances where stakeholders relied on Queensland Rail's previously stated intention to that effect.'[46]

QR appears to assert the QCA's position is that either the QCA, or QR, are required under the QCA Act to 'make coal mines competitive'.[47] The grounds for any such assertion are difficult to identify. There are no statements by the QCA in the Draft Decision which form a basis for such a conclusion.

However, NHC submits that it is entirely appropriate for the QCA to consider the economic contribution of upstream and downstream businesses, and the impact that QR's proposed pricing has on these businesses as part of its consideration of the public interest. The weighting to be given to this factor is entirely a matter for the QCA. For clarity, NHC is not suggesting that QR should subsidise coal mines. However, QR should also not be able to benefit from its status as a monopoly service provider to the point where it is effectively price gouging (as would be the case here in the absence of an adjustment amount, with QR making a significant windfall profit at the expense of access holders).

QR has further asserted that:[48]

> The QCA's position that Queensland Rail has adversely affected certainty against the public interest by changing its position on the backdating of reference tariffs is ill-founded.

The decision by QR to refuse to provide for an adjustment amount in the 2015 DAU, after having consistently stated in previous draft access undertakings and extensions that it would continue to include an adjustment amount, clearly creates uncertainty for access holders who have acted in

[44] Draft Decision at pp 214 – 215.

[45] QR December Submissions at p 18.

[46] Draft Decision at p 215.

[47] QR December Submissions at p 18.

[48] QR December Submissions at p 19.

reliance on QR's stated position. QR's continued denial of the uncertainty that its change of position has created is unjustifiable.

Regardless of what economic conditions may prevail at any point in time, businesses make investment and operational decisions based on future forecasts of income and expenditure. Any sudden and unexpected alteration of a component of expenditure in the face of repeated assurances will, by its very nature, generate uncertainty. The fact that QR stands to make a windfall gain from its change of position is clearly not in the public interest. Given the importance of regulatory certainty, it is not desirable that the QCA condone such a windfall, given that this would incentivise other owners and operators of monopoly infrastructure to 'change tack' at will and damage the stability of economic regulatory regimes in Queensland more broadly.

QR has expressed further concern regarding the QCA's consideration of what is in the public interest in the context of the investment framework, submitting that:[49]

> … the QCA's interpretation of the public interest is too narrow and limited. The QCA should look at the public interest issue, in relation to infrastructure extensions, more broadly.
>
> In this regard, Queensland Rail notes the QCA's Draft Decision on Aurizon Network's UT4 MAR said, *'the need for costs to be minimised is also particularly important in light of the current adverse economic climate in the Queensland mining industry'*... This was seen to be consistent with the public interest.
>
> Given the likelihood of substantial costs and time involved in the QCA's proposed investment framework (without an analysis by the QCA of cost/benefit trade-offs), it is not clear how the QCA's proposed process could lead to efficient investment, and consequently, a cost-efficient outcome for the coal industry and its participants or any other users or upstream or downstream business in relevant supply chains. In this context, the QCA's proposal does not properly consider the public interest and the QCA cannot reasonably be satisfied that its proposals are appropriate having regard to the public interest – or, indeed, other matters referred to in section 138(2) of the QCA Act.

QR's statements do not provide any guidance on what additional factors QR considers the QCA should take into account to 'broaden' its consideration of the public interest, and ultimately seek to ignore that competitiveness of the industry or industries dependent on access is clearly a matter which is in the public interest.

5 Asset valuation

5.1 QR's assertion of QCA accepting initial asset base value

The QCA has clearly stated that the June 2010 final decision on QR Network's (as QR then was) June 2010 Extension DAAU did not 'set the initial asset base' for the West Moreton Network.[50] QR disputes this assertion. In its December Submissions QR asserted that:[51]

> The QCA has incorrectly claimed that because an initial asset base was not established at the time of the declaration of the service relating to the West Moreton Network, no initial asset base has ever been settled for the West Moreton Network. However, an asset base valuation was approved by the QCA subsequent to the declaration of the service.

QR further asserted:[52]

> It is apparent that the QCA was of the view that there had not been a full meeting of the minds on the way to allocate costs for the purpose of deriving the relevant reference tariff. However, it is also apparent that there is no dispute or disagreement about the initial asset valuation or the

[49] QR December Submissions at pp 86-87.

[50] Draft Decision at p 174.

[51] QR December Submissions at p 20.

[52] QR December Submissions at p 22.

> methodology used to derive that asset valuation. Any disagreement related to the allocation of the value between different traffics, not the value itself.

The June 2010 Extension DAAU was preceded by the 2009 DAU. The need to develop a transparent and repeatable process for assessing QR's tariffs for the West Moreton Network is discussed by the QCA in its Draft Decision on the 2009 DAU. It is clear that at the time QR provided the QCA with its proposed 2009 DAU, there was no 'transparent and repeatable approach' in place:[53]

> The Authority and QR Network have, through successive undertakings, developed a mechanism for assessing QR Network's tariffs in central Queensland, which has involved both establishing a regulatory asset base, and putting in place a process for adding future capital expenditure to that asset base. The Authority considers that a transparent and repeatable approach for the western system should include a similar mechanism. The treatment of the western system asset base needs to balance the interests of all stakeholders by providing:
>
> > (a) QR Network with a fair recognition of the value of the infrastructure that is used to transport coal on the western system; and
> >
> > (b) miners with certainty about the future impact on tariffs of the return on the asset base, and a reasonable allocation of incremental infrastructure costs, bearing in mind that coal trains share the western system with other users.

In the 2009 Draft Decision, the QCA rejected QR's proposed methodology for calculating the tariff for the West Moreton Network, stating that it did not accept that 'a process where the tariff is set on the basis that it is lower than a ceiling tariff is sufficiently transparent, robust or repeatable.'[54]

In particular the QCA identified that it:[55]

> … does not accept that QR Network's proposed western system asset value for assessing coal tariffs is reasonable. Therefore, it has applied a series of adjustments to the DORC valuation and to the way it is allocated between traffics.

and

> … does not accept that QR Network's proposed asset value represents a reasonable estimate of an allocation of the common costs of the western system across all traffics plus the incremental costs of the coal traffics.

Clearly, the QCA's concerns with the methodology proposed by QR in the 2009 DAU were not only directed at the allocation between coal and non-coal traffic, but also the DORC valuation itself. The QCA proposed '… a series of adjustments to Connell Hatch's DORC valuation, to produce a valuation for the coal-only regulatory asset base on the western system …'[56]

In developing its alternative approach to the calculation of tariffs for the West Moreton Network, the QCA noted that in doing so it had 'sought to develop a robust, transparent and repeatable methodology for developing a tariff.'[57]

In its draft decision on the 2010 DAU, the QCA identified that:[58]

> QR Network ***rejected the Authority's proposed methodology*** for deriving the western system tariff, ***including the Authority's treatment of the capital base***, investment, and operating and

[53] 2009 Draft Decision at p 80.

[54] 2009 Draft Decision at p 73.

[55] 2009 Draft Decision at p 82.

[56] 2009 Draft Decision at p 84.

[57] 2009 Draft Decision at p 91.

[58] 2010 Draft Decision at p 88.

> maintenance spending. It used a different methodology to derive a ceiling price of $15.17/'000gtk and $3,962/train path. However, QR Network accepted the Authority's proposed tariff and two-part tariff structure as being below that ceiling, and included them in the 2010 DAU. [emphasis added]

The QCA's analysis and draft decision made subsequent to that statement are recited in full by QR in its December Submissions.[59] Relevantly, the QCA stated that:

> *Authority's Analysis and Draft Decision*
>
> QR Network has included in the 2010 DAU the same western system coal tariffs that the Authority proposed in its December 2009 draft decision. While stakeholders have criticised this approach, the Authority does not believe that the issues they have raised are sufficient to alter the Authority's view that the tariffs that it had proposed, and which QR Network has now adopted, are reasonable. Accordingly, the Authority proposes to accept the western system tariffs included in the 2010 DAU.
>
> However, there remains outstanding the question of the most appropriate way of deriving these tariffs.

While the QCA was of the view that the quantum of the tariffs was 'reasonable' and could therefore be accepted, it was very clear that the mechanism used by QR to determine the tariffs was not the 'repeatable and transparent methodology for deriving the western system tariff' required by the QCA to be established in respect of the West Moreton Network:[60]

> It is apparent, therefore, that the Authority and QR Network are still quite some distance apart on the appropriateness of the methodology for deriving the western system tariff ***even if they are in agreement on the quantum of that tariff***. It is also apparent that the Authority has not achieved its desired objective of finalising a repeatable and transparent methodology for deriving the western system tariff. [emphasis added]

QR contends that:[61]

> … there is no dispute or disagreement about the initial asset valuation or the methodology used to derive that asset valuation. Any disagreement related to the allocation of the value between different traffics, not the value itself.

The emphasis on the issue of allocation across traffics in the QCA's analysis on pages 88 and 89 of the 2010 Draft Decision stems from QR having 'rejected the Authority's methodology for assessing the tariff in part because it included a pro rata adjustment of the capital expenditure between coal and non-coal services', to which the QCA was responding in its analysis.

However, the issue of allocation across traffics was but one aspect of the methodology for the calculation of the tariffs for the West Moreton Network which remained unresolved. While the QCA approved the tariff on the basis that the quantum was acceptable, it is clear on a proper analysis of the QCA's statements that it did not approve *any part* of methodology used by QR to arrive at the relevant figure, including not approving QR's approach to the determination of the initial asset value to be used in the calculation of the tariffs.

5.2 Zero valuing of assets

NHC has previously argued the inappropriateness of using a 'DORC' methodology for the West Moreton network due to factors including:

(a) the standard of the West Moreton network is very far from a modern engineering standard;

(b) the train operations are constrained to small inefficient trains imposing significant above rail costs compared to modern bulk rail systems;

[59] QR December Submission at pp 21 – 22.

[60] 2010 Draft Decision at p 89.

[61] QR December Submission at p 22.

(c) QR has not applied a structured or consistent asset strategy to improve the standard of the assets in a manner that would deliver train operational benefits. In fact, QR's costs and proposed future work is littered with 'rework' (e.g. removing excess ballast through ballast undercutting); and

(d) the scale economies and physical characteristics of the infrastructure (tight curvature, very low axle load, short passing loops etc) are extreme outliers in terms of modern standards.

NHC's views from Volume 2 of our December 2015 submission are repeated below, with added comment where appropriate. NHC considers that the 'zero valuation' approach for assets which have exceeded their expected useful lives (as proposed by the QCA in the Draft Decision) has a number of clear advantages, including that this approach reflects:

(a) the reality that these assets are likely to remain in service only because of future (high) maintenance allowances (eg, QR's proposed Lockyer's creek bridge strengthening to replace fatigued components of the bridge that are more than 100 years old followed by extensive repainting);

(b) that these assets may have undergone replacement, partial replacement or renewal over time in order to remain in service, with the relevant costs being expensed as maintenance (but arguably being of a capital nature). Re-establishing an asset value in such cases would represent a double payment of the past maintenance costs and an inefficient windfall gain for QR;

(c) that QR has had an opportunity to fully recover the economic costs of these assets during their useful lives via depreciation, and that the Financial Capital Maintenance Principles (page 163 of Draft Decision) suggest that capital should not be over-recovered, nor a fully depreciated asset be revalued; and

(d) the method is consistent with that generally used to value assets once they are accepted within a regulated asset base; that is, the value declines over time due to depreciation, and, at the end of the expected useful life, the value is zero, regardless of whether the asset remains in use.

Applying and balancing the section 138(2) criteria in regard to asset valuation

NHC supports the QCA's view that the method of asset valuation should be selected to suit the particular circumstances of the West Moreton Network, applying the section 138(2) criteria. We support the QCA's treatment of life expired assets and do not consider this treatment to be inconsistent with QR's legitimate business interests (section 138(2)(b)) or with the pricing principles (section 138(2)(g)). To the extent that QR considers that there is any inconsistency, we agree with the view of Aurizon that:[62]

> *… the objective of promoting efficient investment and utilisation of rail infrastructure requires that increased weight should be given to improving the standard and capacity of the rail infrastructure relative to providing a return on tunnels, land and civils where the original costs were incurred over a century ago*..

We support this sentiment as we consider that the QCA's approach to these assets:

(a) promotes the utilisation of the infrastructure (section 138(2)(a));

(b) is in the public interest (section 138(2)(d));

(c) is in the interests of persons who may seek access (section 138(2)(e));

[62] Draft Decision at p 174.

(d) appropriately considers the effect of excluding assets for pricing purposes (section 138(2)(f)); and

(e) prevents inefficient windfall gains and monopoly rents (section 138(2)(h)).

We suggest that it is entirely appropriate to give these matters greater weight than any claimed legitimate business interest of QR in receiving a return on assets which have exceeded their expected useful lives. In any case it is very difficult to see how it can be truly legitimate for QR to seek to recover capital charges on investments which it ought to have already fully (or more than fully) recovered in the past.

6 Capital, maintenance and operating cost allowances

NHC previously provided comments on the review of QR's undertaking by B&H Strategic Services (***B&H***). Our key concerns have been that there is no evidence that QR's costs are anywhere near efficient nor is there any coherent and consistent asset plan.

6.1 Maintenance Plan and Costs

The annual maintenance cost of $59,376 per track kilometre[63] excluding mechanised resleepering has increased, even above the very high level of the 2013 DAU. This is counter-intuitive given the lower demand for paths and reduced gross tonne kilometres, making it highly questionable as to whether that level of expenditure constitutes efficient costs.

The benchmarking undertaken by Balance Advisory (Volume 2 of the July NHC submission) is reasonably consistent with the B&H position that a good benchmark close to $30,000 per kilometre should be aimed for.

NHC also supports the B&H view that the:[64]

> …maintenance program for structures appears, like the capital program for structures to be not well structured in expenditure timing with large lumps of expenditure and a 'loss of continuity' in the elements.

Below is a table summarising QR's concerns with the B&H report and NHC's comment about the Maintenance Plan and Costs.

B&H Reference / Item	QR Concern	New Hope Comment
2.3.3 Steel Bridge Painting	The majority of painting expenditure is for the Lockyer River Bridge ($4.9m) so it is not practical to spread this expenditure out.	The bridge referred to is understood to be Lockyer's Creek at the 96.640km (from Roma Street) near Gatton. The bridge is approximately 120m long and consists of three trussed longer spans

[63] B&H, section 2.2 at p 5.

[64] B&H, section 2.3.3 at p 8.

B&H Reference / Item	QR Concern	New Hope Comment
		as shown below:  A repainting cost of $4.9m is considered excessive (inefficient) for a bridge approximately 120 metres in total length, even allowing for protection systems.
2.3.4.1 Ballast Undercutting	QR considers B&H did not understand the task. It is one of removing excessive ballast and not relating to formation repair.	In essence, QR's submission is an admission of fixing its own past poor practice of applying excessive ballast which resulted in an unstable support base. It could be reasonably argued that this re-work cost should be absorbed by QR and not included in either maintenance or capital costs passed on to customers.
2.3.4.11 Minor Yard Maintenance	QR considers B&H did not fully appreciate the scope of minor yards for stowage of track machines and coal trains.	QR has included $230,000 per annum for minor yard maintenance (Summary of Maintenance Costs, QR p 11). Given maintenance of yards is undertaken to a lower standard, the QR amount would be sufficient to maintain approximately 20km of yard track, nearly double that required for storage purposes. B&H correctly identified that there should be opportunities to reduce the scope or cost of yard maintenance.
2.3.4.5 Rail Renewal	QR accepts B&H's assessment of the quantum and value of work but disagrees that the replacement should be treated as capital.	NHC has no objection to QR' s position on accepting B&H's assessment and the expensing of rail replacement lengths shorter than 110 metres.
2.3.4.15 Maintenance Ballast	QR accepts B&H's assessment of expenditure in the first three years of the program but wishes to	NHC has no objection to QR's position on accepting B&H's assessment for the first three years of the program. However QR has failed to demonstrate

B&H Reference / Item	QR Concern	New Hope Comment
	maintain the QR estimate for subsequent years.	that its costs are efficient for any subsequent year.
2.3.4.18 Rail Stress Adjustment	QR does not agree with B&H's assessment that QR's allowance is excessive. QR's position is that the scope of its program results from rail creep etc.	NHC appreciates that QR has reduced its previous estimate for this item. However, given QR has failed to demonstrate prudency and efficiency, it is likely QR's revised costs are still excessive.
2.3.4.7 Mechanised Resurfacing	QR agrees in principle that the program can be reduced but disagrees with the quantum of the reduction proposed by B&H.	QR has not provided any supporting evidence that its program is prudent or that costs are efficient. NHC supports the unbiased assessment by B&H.
2.3.4.25 Level Crossing Construction/ Reconditioning	QR agrees in principle with B&H that costs should be capitalised but disagrees with the B&H cost estimate.	QR has not provided any supporting evidence that its costs are efficient. NHC supports the unbiased assessment by B&H.
2.3.5 Mechanised Resleepering	QR considers its costs to be efficient in undertaking this task and disagrees with B&H's assessment.	QR has not provided any supporting evidence that its costs are efficient. NHC supports the unbiased assessment by B&H.

6.2 Capital Plan and Costs

The report by NHC's consultant Balance Advisory (which was attached to our June 2015 submission) supports B&H's view that:[65]

> …in fact a deep review of this network at the forecast traffic levels could conclude that it contained many redundant assets and that an entirely different RAB is constructed and a new maintenance plan conceived.

NHC supports B&H's view that:[66]

> …in the capital project documentation there is little regard to 'do nothing' or alternative strategies to expenditure…

It is clear that QR's scopes of work are not fully developed because of the lack of detail apparent in them. This same point was made by Balance Advisory in Section 2 of NHC's July 2015 submission on the 2015 DAU. Consequently NHC supports B&H's estimations of capital costs.

Below is a table summarising QR's concerns with the B&H report and NHC's comments about the Capital Plan and Costs.

[65] B&H section 2.1 at p 4.

[66] B&H at p 34.

B&H Reference / Item	QR Concern	New Hope Comment
6.3.1 Formation Strengthening	QR disagreed with B&H combining formation repairs/strengthening with ballast undercutting.	NHC is concerned at the lack of coherent and enduring approach to addressing formation weaknesses. QR has not provided any supporting evidence that its program is efficient.
6.3.2 Steel Bridge Strengthening	QR has programmed the strengthening to address fatigue issues.	NHC understand that the scope relates to Lockyer's Creek Bridge strengthening. Based on QR's preliminary estimate the costs of selective strengthening will be $4m in total to selectively strengthen approximately 90 metres of structures (assuming all three require work). QR asserts that the *fatigue issues have been brought on by the increased traffic i.e., coal trains* (p 12.) This is arguable given impact loads from steam trains are recognised as being more severe than conventional diesel electric trains especially over the first 80 years of its life under steam trains. NHC questions if a more innovative approach is required to selectively replace fatigued components. NHC also queries if the strengthening and painting can be more efficiently coordinated to re-use safety systems needed to protect workers in order to reduce costs.
6.3.3 Toowoomba Slope Stabilisation	QR has provided an initial estimate and three concept reports for remediation.	NHC considers the estimate to be preliminary only. While the Golder reports provided very high estimated costs and extensive track closures, the design appeared to be a QR one. Given the preliminary nature of the estimate, the B&H approach of continuing the current expenditure level seems reasonable. There must also be opportunities for more innovative approaches to design and construction.
6.3.6 Toowoomba Plant Maintenance Depot	QR agrees that this project is not related to declared services and will be removed from the submission.	NHC agrees with the QR position.

B&H Reference / Item	QR Concern	New Hope Comment
6.3.7 Check Rail Curves	QR contends that its cost estimates are efficient based on experience from the 10 curves already completed.	QR has not provided any supporting evidence that its estimates reflect efficient costs. Just because 10 curves have been completed it does not follow that the costs are efficient. NHC supports the unbiased assessment by B&H.
6.3.8 Rerailing Rosewood to Helidon	QR refers to section 2.3.4.5 of the B&H report and disagrees with B&H's proposed accounting treatment.	NHC agrees with the QR position.
6.3.10 Level Crossing Reconditioning	QR agrees in principle with B&H that the program should be capitalised. QR acknowledges that 'the failure of these crossings is not solely attributed to rail traffic…' (p15.)	NHC supports the position that the failure of the crossings is not solely due to rail traffic. NHC questions why funding has not been shared with other stakeholders such as Local Governments and the Department of Transport and Main Roads as per the tripartite level crossing funding agreement. Alternatively, the crossing works could be funded under the Transport Service Contract. In the absence of better information, NHC is prepared to accept the estimates from B&H as a party without a vested interest.

6.3 Operating Costs

The QR response to the B&H report does not appear to address fixed and variable operating costs (B&H, Section 5).

Table 2 (B&H, Section 5.3 at p 32) is considered to overstate the allocation of costs from Business Management, Group Management and Corporate Overheads. In QR's case these account for an additional 85% over direct and allocated costs. This is well in excess of previously published annual reports indicating Business and Corporate overheads combined were approximately 15%.

For comparison, it is noted from the Surface Transportation Board (USA) website that General and Administration Expenses as a percentage of operating costs are 7.5% in the case of BNSF Railroad for the year ending 31 December 2013. In addition, a report prepared by Ernst and Young for Aurizon Benchmarking of Corporate Overhead Costs for Aurizon Network Operations dated 22 January 2013 suggested norms for corporate overheads of 6.4% of revenue. This suggests that QR's overheads are either extremely inefficient or are allocated disproportionately to the West Moreton Network.

QR has presented no cogent evidence to support their operating costs being efficient and NHC requests that the QCA scrutinise the prudency and efficiency of the costs being claimed.

7 Standard Access Agreement

7.1 Tripartite structure

As noted in its previous submissions, NHC considers that it is critically important for end users to be able to hold access rights directly. A contracting structure that has the potential to result in more efficient use of QR's network and greater above rail haulage competition.

In that context, it is extremely disappointing that QR has chosen to persist with proposing a form of Standard Access Agreement (***SAA***) in which an end user is a party, but lacks the control over the access rights which are necessary to give rise to the anticipated efficiency and competition benefits. NHC appreciates that the SAA attached to the 2015 DAU does not prevent QR from negotiating an alternative access agreement, but NHC's experience in attempt to do so has been that such negotiation is both time consuming and fruitless.

NHC is concerned that unless the SAA provides the end user with a genuine ability to hold access in its own right (and control the use of those rights), an end user seeking to hold access will be forced into a lengthy negotiation, potentially requiring triggering the QCA's dispute resolution processes, creating (arguably completely avoidable) delay and cost. QR has indicated that it is aware of activity of this nature in the Central Queensland Coal Region and has been ready and willing to negotiate such access agreements. However, this bears little, if any, resemblance to NHC's actual experience with QR in respect of the West Moreton Network. NHC has stated repeatedly (see for example, page 3 of Volume 4 of NHC's June 2015 submission and page 4 Volume 4 of NHC's December 2015 submission) that a 'split form' agreement similar to that used in the Central Queensland Coal Region would be acceptable, but this is not the form of access agreement that QR has presented to NHC's related entity or the form of access agreement QR is proposing to the QCA.

NHC accepts that Operator held access is the form of access that is currently adopted by all colliers on the West Moreton Network. However, as QR is well aware, a related entity of NHC has actively sought for the past two years an alternative option. It remains NHC's intention to have this entity hold access rights as an end user and to engage an Operator to use such rights.

The result is likely to be that such end user held access is considered a 'Claytons' form of access and access seekers will be practically forced into continuing to use the former model of Operator held access.

NHC has previously outlined what it considers is the appropriate division of rights and obligations, where an end user has a genuine right to hold access rights.[67] For completeness NHC reiterates that the structure would need to involve:

(a) for the Operator's Customer (end user), holding a bundle of rights and obligations relating to the underlying capacity, including:

  (i) control over the capacity – i.e., transfers, relinquishment, assignment, renewals (without requiring the consent of the Operator);

  (ii) flexibility to engage multiple Operators to use access rights without being disadvantaged in relation to take or pay or requiring the consent of the Operator;

  (iii) responsibility for payment of charges;

  (iv) interface risk management as it relates to activities of the end user regarding activities such as loading;

  (v) provision of all notices and information; and

[67] See Volume 4 of NHC's submission dated 5 June 2015 on the 2015 DAU.

(vi) involvement in the resolution of disputes.

(b) For the Operator (or Operators), holding a bundle of rights and obligations relating to the operational matters, including all responsibility for:

(i) above rail services;

(ii) compliance with QR operational requirements;

(iii) interface risk management (except as it relates to activities of the end user regarding activities such as loading);

(iv) scheduling; and

(v) incident response.

NHC is not wedded to a particular structure of agreement provided that the above key requirements are achieved. The SAA as proposed by QR does not achieve those outcomes. For the record NHC would accept the structure of the current QCA endorsed Aurizon Network SAA (involving a separate end user access agreement and train operations agreement).

7.2 QR's December Submissions (clause 13.2) on the 2015 SAA

NHC does not share the concern expressed by QR that the SAA as amended in accordance with the Draft Decision is irrevocably flawed.

NHC notes that:

(a) QR has raised issues regarding the formation of the contract; however, these do not arise if the Operator signs the agreement at the same time as the Access Holder and QR; and

(b) the scenario of an Operator being later joined to the agreement could be fixed by requiring any new Operator consent to be bound as an Operator to the terms of the original agreement.

In relation to a number of particular clauses in the SAA (and QR's related comments), NHC's views are set out below:

Clause reference	NHC comment
2.2(e)	NHC agrees with QR that this clause would benefit from some additional clarity.
3.1	NHC agrees with QR's comment. NHC made this change to the amended SAA provided as part of its December 2015 submission.
4.1	NHC is not opposed to an amendment which provides additional clarity as to QR's responsibilities.
4.1(v)	NHC is unsure as to which clause QR is referring to.
4.2(a)(iii)	NHC is unsure as to the true nature of QR's concern, as the parties still have to agree amendments.
4.5	NHC previously proposed amendments that address this issue.
4.6	An Access Holder is not excluded from the dispute resolution process. It may elect not to participate, which is wholly in keeping with controlling its use of access rights (but potentially not becoming embroiled in purely operational disputes).
6	See discussion in Volume 1 of NHC's submission.

Clause reference	NHC comment
6.7	It is regrettable that QR has stated that some of the reporting measures are irrelevant to decision making but failed to list which ones, so that this assertion can be properly tested. QR states that it welcomes transparency but also considers that the regime is unduly onerous. QR has failed to provide an alternative which could be reviewed and commented on by access holders as part of this process. In light of this NHC would urge the QCA to approach any amendments cautiously. It remains NHC's position that at a minimum a failure to agree a KPI regime should be deemed a dispute that is to be resolved in accordance with the dispute resolution process. NHC agrees with the proposal put forward by Glencore in that regard as part of its December 2015 submission.
7.1(a) and (b)	In relation to QR's concerns regarding the definition of Maintenance Work, NHC accepts that the QCA's view is that QR should generally not be required to fund capacity expansions and the definition should reflect this. However, equally it is essential that the standard of the network continues to be maintained to ensure that the existing levels of capacity and access are maintained and that Operators do not incur additional expense mitigating outcomes caused by reduced maintenance.
7.1(d)	See amendments proposed in NHC's amended SAA included in Volume 4 of its December 2015 submission.
7.2(e)	All stakeholders are aware that QR has passenger priority obligations. However, clause 7.2(e) as proposed by QR was significantly more expansive than its legislative obligations. NHC would not support a reinstatement of QR's previously proposed clause. NHC's more detailed comments on this issue can be found in Volume 4 of its June 2015 Submission as referenced to clause 6.2(e)(iii).
7.3	The QCA's proposed amendments attempt to redress this imbalance.
Clause 8	Amendments to the ORM have the potential to result in additional costs. NHC notes the detailed comments made in its June 2015 Volume 4 submission, which continue to reflect its views.
8.3(b)(viii)	QR's previously proposed clause was extremely broad and materially expanded the contractual obligations of an Operator. If QR is concerned about a particular matter then it should be included as a condition in the agreement, allowing all parties to manage their risks and obligations.
8.4(c)(iv)	NHC disagrees with QR's position that the requirements of clause 8.4(a) are not specific to certain train services. NHC considers that under the amendments that it previously proposed in Volume 4 of its December 2015 submission, the insurance relevant to an Operator will be tied to the train services it provides.

Clause reference	NHC comment
8.8(d)	See discussion in Volume 1 of NHC's submissions.
8.12	See discussion in Volume 3 of NHC's December 2015 submission. NHC considers that the proposed amendments will have a positive effect on the system as they will both promote obtaining an understanding of the costs ahead of imposing amendments to the ORM, and discourage frequent amendments to the ORM. Where an end user is a party to the agreement it is appropriate that they obtain the benefit of such a clause.
9.6(d)(iv)	NHC does not consider that phrase to be ambiguous.
10.1	NHC considers the inclusion of 'acting reasonably' to be a welcome amendment. It is concerning that QR are effectively stating that they would like the capacity to act unreasonably. Where QR are acting as a result of a genuine safety concern, NHC struggles to understand how that would not meet the criteria of acting reasonably.
10.5	See comments in Volume 1 of NHC's submissions.
12.2	It is essential that the Operator is a party to the agreement.
12.2(d)	QR has not commented
12.3	See Volume 1 of NHC's submission.
12.5 (a), (b) and (c)	See previous discussion of third party works.
12.5(d)	QR has not commented.
13.1(b)	NHC agrees with QR's assessment that such losses fall within the definition of consequential loss and for that reason it is unreasonable of QR to seek to expand its rights to claim consequential loss. NHC highlighted this concern in Volume 4 of its May 2015 submission. NHC disagrees that the clause is ineffective; rather with these deletions it operates appropriately by quarantining consequential loss from a claim, except where this is as a result of inspection behaviour. The QR proposed amendment also departs from the established liability position in the 2008 AU. In particular, the definition of 'Consequential Loss' should also be amended to include loss of revenue as per the definition in current access agreements
13.1(b)(i)(ii)	As above.
13.4(b)	It is critical that the system be maintained appropriately to ensure that access holders can use their access rights. The amendments proposed by the QCA address the critical nature of these QR obligations.
13.4(c)	The impact on an access holder of a system that is inadequately maintained is sufficiently critical to warrant the amendments as proposed by the QCA.
13.6(b)	The amendment made by the QCA is appropriate. QR should not be allowed to escape liability because the claim event can be in a small way attributed to another party.

Clause reference	NHC comment
15.9(a)	-
14.1(ii)	Where the access rights are held by an end user, it is imperative that the Operator cannot 'lose' the end user's access rights. This issue bears out one of NHC's concerns regarding the form of SAA proposed by QR failing to provide the end user with true access rights.
14.1 & 15	NHC considers the inclusion of 'acting reasonably' to be a welcome amendment. NHC does not consider this requirement to be vague or uncertain and it should not be an onerous obligation on QR. The concern expressed by QR is open to the interpretation that QR would like the capacity to act unreasonably.
15.2	NHC strongly disagrees with the position proposed by QR. It is imperative that an Operator's conduct does not result in an end user losing its access rights. If the QR positon is adopted an end user would need to engage two Operators simply to ensure that it did not lose access rights if an Operator was terminated. This is particularly problematic on the West Moreton Network where only one operator currently provides haulage services
15.6	NHC strongly disagrees with the position proposed by QR. It is imperative that an Operator's conduct does not result in an end user losing its access rights. A change in control of an Operator (unless also an access holder) should be irrelevant.
16.11	NHC considers that where the role of end user access holder and Operator are separated appropriately it will be clear which party carries the risk and therefore the appropriate insurance. In the event that QR is correct in asserting that joint insurance will not be possible to obtain presumably this clause would continue to stand but not be used.
17.1(a)	NHC agrees with QR's position it would be preferable to make it clear that a party with a particular credit rating is not required to provide security.
19.5	NHC considers that the QCA's interpretation of this clause is correct and it should be deleted. All disputes should be resolved either through dispute resolution or the rail regulator, QR should not unilaterally be entitled to decide a dispute.
20	NHC welcomes the QCA's amendments. NHC renews its comments on force majeure in the SAA made in Volume 4 of its June 2015 submission and discussion in Volume 1 of this submission.
23(a)(ix)	NHC considers that the QCA have appropriately deleted the warranty that QR sought to have an Operator give. It remains important that the Operator have the right to inspect the network to allow it to make operational decisions.

Clause reference	NHC comment
25.4	NHC is surprised to learn that QR will not accept service by email. It has been NHC's experience that QR has been willing to include this form of service in other agreements.
27.4	All amendments should take effect between all parties.
Definition of 'Acceptable Credit Rating'	See Volume 1 of NHC's submission.
Definition of 'Alternative Schedule time'	QR is the party best placed to consider those issues.
Definition of 'Force Majeure Event'	NHC does not consider that this is inconsistent as an event which is a force majeure event is not the same as an Operator failing to obtain or maintain rights. NHC agrees that it would be necessary to show that those access rights but for the FM Event would have been useable.
Definition of 'Maintenance Work'	This definition should be amended clarifying that it does not impose an obligation on QR to fund capacity expansions.
Definition of 'Operational Constraint'	NHC considers the inclusion of acting reasonably to be a welcome amendment. NHC does not consider this requirement to be vague or uncertain and should not be an onerous obligation on QR because the alternative is that QR would like the capacity to act unreasonably. Where there is a safety reason for an operational constraint it is difficult to conceive of a situation where this would not meet the acting reasonably requirement.
Definition of 'QR Cause'	QR states that Force Majeure Events are by their nature and definition events beyond the control of QR, equally by nature and definition they are beyond the control of all other parties. QR is unable to make the network available. An access holder should not be required to pay access charges where QR cannot provide the service they had contracted to provide.
28.2(j)(ii)	NHC agrees with QR's position
Schedule 1	If the obligations are unclear to QR NHC would welcome a further clarifying statement. NHC also welcomes the certainty associated with a method of calculating the security amount alleviating the risk for a dispute over what constitutes and appropriate security amount. NHC is unconvinced of the merit of QR's argument that this is an insufficient amount. The agreement provides for replenishment and also a right to terminate in certain circumstances.
Schedule 2	NHC considers that this issue is intimately linked to the definition of access rights. It is NHC's view that where the requested stowage will not interrupt mainline running, QR should be required to

Clause reference	NHC comment
	accommodate it as part of providing the access services and at no additional charge.

7.3 Comments on QR's Annexure 5

NHC appreciates QR's desire to align the SAA with its commercial practices. However, this is not sufficient reason in itself to justify the alteration of the risk allocation between the parties. There are a number of areas in which QR has altered the risk matrix without offering any further explanation for the amendments, examples include amendments to clause 7.1, clause 13.2 and footnotes on page 44.

NHC agrees with the inclusion of 'environment' risks throughout the document, in reference to the IRMP is appropriate; however Aurizon Network has highlighted a number of areas of concern relating to environmental based amendments which are echoed by NHC.

NHC agrees that network control directions are not required to be written.

NHC agrees with the non-substantive amendments made by QR correcting grammar.

8 Access Undertaking

8.1 Investment framework

QR continues to seek limited regulation in relation to future investments in the network.[68]

NHC continues to have concerns with QR's position, given how difficult past discussions with QR regarding extensions or modifications of the West Moreton Network have been. NHC and its rail haulage Operator Aurizon have had extended discussions with QR regarding network modifications which would be required in the event of a change to the rolling stock used on the network. The obstructionist attitude displayed by QR during those discussions has practically demonstrated to NHC the need for a regulatory response of the type the QCA is proposing in its Draft Decision.

NHC also does not agree with QR's assertions that:

(a) parts of the investment framework proposed by the QCA are beyond the QCA's power. In particular:

  (i) the amendments being proposed by the QCA are not 'minor and inconsequential'. The QCA has clearly make a package of changes and the limit in section 138(5) does not involve consideration of whether any single wording change alone within that package is minor and inconsequential (as QR's submissions assume); rather it only limits the QCA's power to make a change where the only changes being proposed are minor and inconsequential;

  (ii) section 119 of the QCA Act (which QR relies heavily on for its assertions about the QCA's powers) is clearly stated to apply to access determinations (and does not limit the QCA's consideration of an access undertaking or the appropriate provisions of such an undertaking); and

  (iii) even incorrectly assuming (as QR does) that section 119 of the QCA Act has some application, QR's submissions demonstrate a clear misunderstanding of what constitutes the costs of an Extension which would not be borne by QR.

[68] QR December Submission at pp 69-87.

Those would clearly only be the truly incremental costs of that Extension (not costs that QR would incur in any case); and

(b) the investment framework does not reflect the legitimate business interests of QR or the public benefit. As noted earlier in this submission:

(i) both QR's legitimate business interests and the public benefit are matters to which the QCA must have regard in making a decision on appropriateness. The QCA has clearly complied with this obligation in making its Draft Decision. The 'trading' referred to by QR is not a flaw in the QCA's decision making, but rather cogent evidence of the balancing or weighing of the section 138(2) factors that the QCA is required by statute to undertake; and

(ii) the public interest is clearly wide enough in nature to include the interests of access holders or users, the interests of society in the continuing positive economic contribution delivered to Queensland and the relevant regions through greater competitiveness and viability of the West Moreton coal industry and other matters – all of which justify the investment framework proposed by the QCA.

In relation to the particular issues QR has raised, NHC has provided comments below. In the vast majority of cases, QR is simply making incorrect assertions or assumptions about the QCA's powers or how the QCA Act operates. There are a small number of provisions where QR has identified an issue with the particular wording used, and NHC has proposed a refinement to address that issue.

Clause reference	**NHC comment**
Extension Costs	QR's basis for rejecting this definition is unjustified, as: • section 119 of the QCA Act has no application to consideration of an undertaking or the provisions an undertaking can contain; and • even if one is to incorrectly assume QR's view of section 119 is right, QR appears to be alleging it should be entitled to recover inefficient costs of an Extension, which is clearly not appropriate. This same comment is not repeated in each row of this table below – but it equally applies to many of the other points raised by QR.
1.4.1(a)	It is not clear to NHC why QR's submissions both seek a more light-handed regime and then seek a wider application of clause 1.4. The clause is not beyond the QCA's powers for the reasons noted in relation to the Extension Costs definition.
1.4.1(b)	QR has not provided any evidence of the assertions raised in relation to this clause (particularly regarding how it is said to be beyond power). QR is simply incorrect in asserting that an undertaking cannot oblige QR to Extend the Network. Section 137(2)(g) of the QCA Act makes it clear that an undertaking can regulate the terms on which an extension occurs. There is nothing in the QCA Act which suggests that, outside the context of negotiation of an access agreement, it is beyond the QCA's power to regulate how QR interacts with access funders.

Clause reference	NHC comment
	While there are issues which NHC would prefer to be changed, it is willing to support the QCA's investment framework as an appropriate outcome of the weighing up of the matters under section 138(2). There is no actual issue of double-obligations (under the undertaking and contractual arrangements) as QR will know what its obligations are under the investment framework prior to negotiating a funding agreement or access agreement) under the new regulatory framework.
1.4.1(b)(ii)	This wording is consistent with the Extension Conditions, so NHC has no issue with it appearing here as well for clarity. This provision is not beyond power. There is no provision in the QCA Act that prevents the QCA regulating the circumstances in which QR invests in an Extension. Whether the exceptions for any investment obligation should be provided for (in the four circumstances raised by QR) is a matter for the QCA in determining what is appropriate, not a matter of whether it is beyond power. NHC would be comfortable with the obligation to be premised on the Funding Agreement being executed and QR not being relieved of its obligation under the terms of the Funding Agreement (provided there continues to be a robust dispute regime in relation to the terms of the Funding Agreement).
1.4.1(b)(iii)	If decisions on security are not able to be disputed, then QR will effectively be able to undermine the entire investment framework by being unreasonable in relation to security. That is clearly not appropriate. The credit rating threshold proposed by QR is completely unreasonable.
1.4.1(c)	The reference to clause 1.4.1(d) is not beyond power for the reasons noted in relation to that clause below. QR's legitimate business interests are a matter to be weighed up by the QCA in determining the appropriate undertaking. They are not a matter that it is appropriate to repeat on a stand-alone basis in relation to individual provisions of the access undertaking. The deletion should stand.
1.4.1(d)	This provision is not beyond power. There is no provision in the QCA Act that prevents the QCA regulating the circumstances in which QR invests in an Extension. It is clearly appropriate for all Extensions to occur in accordance with the approved access undertaking and, where applicable, the QCA Act.
1.4.2(a)	NHC assumes the cross-reference should be to 2.7.2(d).
1.4.2(a)(i)	NHC appreciates that some of this information may need to be provided subject to the results of subsequent studies, but if so it should just be made clear that information can be provided on that

Clause reference	NHC comment
	basis (subject to a requirement to provide updated information after each relevant study) rather than deleting this entirely. Operational integrity is a well understood concept (which QR has cited as a reason for seeking to reject other parts of the investment framework). NHC submits that reasonableness is an appropriate standard.
1.4.2(a)(ii), (iii) and (iv)	If QR considers that the obligation to negotiate in good faith already requires this then it is difficult to understand what QR's concern is. It is preferable and appropriate to provide potential funders and QR with more certainty regarding the information to be provided. Given that QR has not usefully engaged on how the various study stages should be provided, NHC continues to support the QCA determining what is appropriate. To the extent QR considers this is too prescriptive for particular extension, then the appropriate course is likely to be an ability for either or both of 1) the relevant funder to agree a particular stage is not required or 2) the QCA to have the ability to waive one or more stages QR indicates are not required for Extensions below a certain materiality threshold, or where a recent study could be updated.
1.4.2(b)	QR appears to be suggesting that an access seeker can unilaterally decide to discontinue funding a study. That is not an appropriate option (at least without cost) where an expansion for the benefit of multiple users is being studied.
1.4.2(c)(iii)	QR's legitimate business interests are a matter to be weighed up by the QCA in determining the appropriate undertaking. They are not a matter that it is appropriate to repeat on a stand-alone basis in relation to individual provisions of the access undertaking. The deletion should stand.
1.4.2(c)(iv)	As noted above, the limit on section 138(5) of the QCA Act on minor and inconsequential amendments is not assessed on a stand-alone single provision basis (as QR assumes in its comment).
1.4.2(c)(vi)	As noted above, the limit on section 138(5) of the QCA Act on minor and inconsequential amendment is not assessed on a stand-alone single provision basis (as QR assumes in this comment).
1.4.2(d)	If QR considers that the obligation to negotiate in good faith already requires this then it is difficult to understand what QR's concern is. NHC is concerned the requirement to negotiate in good faith does not cover this, as satisfying the conditions may be a matter than needs to occur (in whole or in part) after an agreement is entered.
1.4.2(e)	QR has provided no basis for its assertion that matters post the Funding Agreement are beyond power. In most cases the access negotiations themselves will be post the Funding Agreement. Whether matters should be covered in the Funding Agreement or by the undertaking is a question for the QCA to consider in determining

Clause reference	NHC comment
	the appropriateness of the undertaking. However where QR is resisting provision of a standard funding agreement, it will be appropriate for the undertaking to contain regulation of issues that, if a standard funding agreement existed, would only be dealt with in the funding agreement. No issue of 'double-obligations' arises, as QR will know what its obligations are under the investment framework prior to negotiating a funding agreement under the new regulatory framework. NHC would support refinement of the wording as to which parts of the obligation apply where the funding agreement relates to earlier study stages rather than to development of the Extension itself.
1.4.2(e)(i)	NHC accepts that there could be some wording improvements to the drafting of this section. QR is the developer of the Extension. It is however appropriate for it to be required to provide all assistance with the Extension reasonably required for it to be developed in accordance with the design proposed in the relevant study (which could be an alternative formulation for 'project assistance' to comply with the 'required study standard').
1.4.2(e)(iii)	QR is incorrect in asserting that an undertaking cannot oblige QR to Extend the Network. Section 137(2)(g) makes it clear that an undertaking can regulate the terms on which an extension occurs.
1.4.2(f)	Section 137(2)(bb) of the QCA Act makes it clear that undertakings can include provisions about disputes. There is nothing in the QCA Act which limits dispute provisions to the circumstances in which arbitration of an access dispute would apply under the QCA Act. NHC supports this provision continuing in addition to the more general dispute regime in clause 6.
1.4.3(b)	NHC agrees that there would be merit in this provision specifying which requirements do not apply to Funding Agreements for a study (as opposed to an Extension), noting that the potential to 'otherwise agree' would practically resolve this concern in any case.
1.4.3(b)(i)(A)	As noted above, the limit on section 138(5) of the QCA Act on minor and inconsequential amendments is not assessed on a stand-alone single provision basis (as QR assumes in this comment).
Deleted 1.4.3(b)(iii)	QR's legitimate business interests are a matter to be weighed up by the QCA in determining the appropriate undertaking. They are not a matter that it is appropriate to repeat on a stand-alone basis in relation to individual provisions of the access undertaking. The deletion should stand.
1.4.3(b)(iv)	QR's arguments would be equally applicable to any number of obligations. It is not uncommon for parties to have obligations under regulatory instruments or contracts which impose an obligation to perform in a particular manner where it will not be absolutely clear immediately whether that has occurred (hence the common existence

Clause reference	NHC comment
	of audit, review, dispute and other mechanisms designed to resolve that issue).
1.4.3(b)(iv)(B)	NHC suggests the requirement to be consistent with obligations in Schedule E is replaced with a requirement that the Extension is constructed 'efficiently and prudently' (with prudency being important for future acceptance of the costs into the regulatory asset base in accordance with Schedule E).
1.4.4	This provision does not have the result contended for by QR. As noted above, section 119 has no application to the QCA's decision, so it would not be beyond power in any case.

The only other issue in QR's December submissions regarding the investment framework that NHC considers has sufficient merit to justify a change is the proposal that maintenance of an Extension should be conducted by QR (unless otherwise agreed) (provided however that this is coupled with the heightened maintenance obligations proposed in the Draft Decision).

8.2 Schedule I

NHC appreciates the QCA will reconsider Schedule I as part of the wider full review of the 2015 DAU that will occur as part of the final decision.

However, provisions of Schedule I should not be altered based on the long list of unsubstantiated complaints that QR has raised in its December submissions given QR's failure to provide any specific amendments. Such submissions cannot be responded to properly by the QCA or other stakeholders.

NHC acknowledges it is likely that drafting refinements can be produced through a further review by the QCA. In particular NHC would support a review of Schedule I:

(a) to make it clearer which obligations apply at the stage of funding agreements for studies and which obligations apply to the stage of funding agreements for development of an Extension (noting that same obligations will appropriately apply to both);

(b) to permit hybrid funding where that is agreed with the potential funding parties; and

(c) to take into account the *Building Queensland Act 2015* (noting that QR's assertions about how it impacts on QR need to be carefully scrutinised);

8.3 Network planning

It is truly extraordinary that QR is alleging that the QCA has no power to regulate network planning.

The QCA has a broad power in the QCA Act to determine whether the 2015 DAU is appropriate and, if it is not, to determine how it should be amended. QR does not substantiate in any way how the QCA Act limits this power and prevents the QCA from including network planning obligations where it considers appropriate.

Most of the issues raised by QR concern appropriateness. NHC considers it is critically important that QR engages in proper network planning. As such, it is clearly appropriate for the QCA to impose the network planning obligations proposed in the Draft Decision. The need for that is reinforced by the comments in the B&H report about QR's planning.

In the context of the West Moreton Network, where there are numerous complications like an aging network that was not initially designed for coal usage, interfaces with the Metropolitan Network, declining non-coal volumes, policy limits regarding coal usage which may change over time and a limited number of customers, it is absolutely critical that there is real rigour in determining where future costs should be incurred on the network.

If QR genuinely believes that it is acting prudently in its future planning for the network then it has much to gain from the QCA's proposal in regard to network planning.

8.4 Cost impacts

NHC strongly rejects QR's assertions that it will bear significant additional costs to those proposed in the Draft Decision.

QR participates in the South West Rail Corridor User Group, formerly known as the Western System User Group, and has alleged that many of the obligations proposed are already captured by its existing obligations to negotiate in good faith. Accordingly, those types of obligations do not give rise to new or incremental costs.

If QR was prudently planning for the network, the regional master plans would not require any material additional costs to establish or maintain. The fact that QR seems to think additional costs will be incurred reinforces the points made in section 8.3 above regarding the need for network planning.

NHC infers that the cost allowances provided for in the Draft Decision would assume the undertaking reflected the Draft Decision. If any changes are made to the access undertaking that would reduce the costs to QR, then NHC would expect the cost allowance for QR to be decreased.

8.5 Application and scope

NHC has a number of comments on issues raised by QR regarding the application and scope of the access undertaking.[69] QR's comments in those sections appear to misunderstand that the QCA's role is to determine the appropriateness of the DAU submitted, and the issues which QR must address in order for the DAU to be in a form that the QCA will approve.

In particular:

(a) in relation to the application of the undertaking to third parties (be they related bodies corporate or successors or assigns of QR), NHC submits it is appropriate for QR to be subject to an obligation to procuring that such parties comply with the undertaking. The alternative would create significant uncertainty for access seekers and users if all or part of the QR network was to subsequently become privatised or operated by a third party (both of which were being actively pursued by the State Government during the term of the current access undertaking);

(b) in relation to the issues alleged to be problematic with the QCA's approach to line diagrams:

  (i) the dispute provisions to be included in an undertaking are a matter for determination by the QCA; and

  (ii) even if the line diagrams do not technically define the scope of the declared service or the undertaking, they represent in practical terms those parts of the network which QR acknowledges it is regulated in relation to, such that their continuing accuracy is an important feature in providing for information access

[69] QR December Submission at pp 87-91.

negotiations (on which the current negotiate-arbitrate model is critically dependent for its success); and

(c) in relation to the non-discriminatory treatment provisions:

(i) QR raises preserved passenger train paths as a reason it cannot accept the non-discrimination obligations proposed by the QCA (which is clearly inconsistent with its claims discussed in Volume 1 of this submission that there is in fact no cap on how many services can be contracted for coal services); and

(ii) there is no requirement in the QCA Act that the provisions on non-discrimination must be limited to the very minimal protections included in the QCA Act, such that the QCA is entitled to determine what additional or different measures are appropriate (as it has in both the context of the Aurizon and DBCT access undertakings which include non-discrimination provisions of a wider nature than appear in the QCA Act).

9 Operating Requirements Manual

NHC generally supports the proposed amendments in the Draft Decision as an appropriate re-balancing of the Operating Requirements Manual (***ORM***) proposed by QR.

9.1 QR Concerns and NHC's Comments

Below is a table summarising QR concerns and NHC's specific comments on those concerns.

QCA Clause	QR Concern	NHC Comment
1	That the QCA does not support any mechanism in the SAA to change the ORM as a schedule of the access undertaking. QR consider it should be able to update the ORM without submitting a DAU for approval.	NHC support the QCA Draft Decision to remove the process from the SAA to amend the ORM, but provide in the main part of the undertaking a mechanism for QR to *'amend the ORM from time to time for safety matters, typographical errors and to update people and positions'* (Draft Decision, section 4.26, p 88). The approval of QR's proposed approach only protects QR's interests and not those of Operators or end users. In the event there are other genuine reasons for change, agreement from stakeholders in advance is likely to expedite the QCA DAU approval process.
2.2 (b)	QR can't or won't update its safety management system to accommodate the requirements of individual Operators.	QR has an obligation to participate in joint risk assessments with Operators. It is conceivable that QR's safety management system may require amendment or augmentation as a result of this process. Safety is the objective rather than avoiding changes to QR's safety management system.

QCA Clause	QR Concern	NHC Comment
2.4	QR considers all environmental issues including noise issues to be the Operator's problem and it is uncommercial for QR to meet its responsibilities as rail manager.	Environmental management (including managing rail noise) is not solely an Operator problem. For example, wheel noise is generated by the interaction of wheels and rail and it is widely recognised as a joint responsibility. There are steps that QR as the manager can take to mitigate noise levels in sensitive areas without the expense of noise barriers. QR has no reasonable basis to avoid its responsibilities for environmental risks. The QCA clause is considered balanced and reasonable.
2.6	QR considers this clause to be an un-necessary duplication.	The process proposed by the QCA is quite specific to Environmental Risks. NHC consequently disagrees with QR's position.
2.6 (j)	QR considers that the QCA is not appropriately qualified to deal with environmental disputes.	The QCA can engage consultants to provide expert advice on matters such as this, so that it can determine disputes of varying nature. Consequently, if an Access Agreement has not been signed, dispute resolution in accordance with the relevant dispute resolution clause of the QR Access Undertaking remains appropriate. If an Access Agreement has been signed, NHC has no concerns with the, dispute resolution occurring in accordance with that Access Agreement
3.1	QR is concerned that it may not be able to comply with its obligations if it is required to act reasonably in issuing instructions to Operators.	Clause 3.1 states that: '*In addition to the Safeworking Procedures, Safety Standards and other requirements identified in any IRMP agreed with the Operator* (emphasis added), the Operator must comply with all *reasonable* instructions and authorities issued by Queensland Rail from time to time in relation to the safety of any person or property or protection to the environment. NHC considers QR is being un-necessarily concerned about exceptions in addition to 'Safeworking Procedures,

QCA Clause	QR Concern	NHC Comment
		Safety Standards and other requirements identified in any IRMP *agreed with the Operator*'.
4.3	QR is concerned that the QCA changes will limit QR's ability to issue directions.	Clause 4.3 states: 'For clarity, the Operator must comply with all *reasonable* directions given by Queensland Rail *during the Recovery and Restoration phase* (emphasis added) of a Network Emergency'. The most important part of responding to an emergency is the safety and security of persons and cargo and preservation of the site for investigation purposes. During the recovery phase, it is possible for QR to issue unreasonable instructions without consulting the Operator. This 'reasonable' clause provides an appropriate balance.
6.5(c)	QR doesn't wish to be responsible for a safe, controlled process to update Operators on changes to Network Control Radio Channel Maps.	This obligation ('If there are any changes to the Network Control Radio Channel Coverage or the associated maps QR will inform the Operator of the change as soon as reasonably possible') on QR is reasonable given they are the owner of the radio network. A controlled document distribution system would be an appropriate means of advising Operators.
6.8	As per clause 6.5(c), QR does not wish to be obliged to advise Operators of changes to Network Control Centres.	Clause 6.8 includes: 'Queensland Rail must notify the Operator of any changes to the online documents or the location of any of the Network Control Centres and/or Network Control Regions.' Similar to clause 6.5(c) this requirement is a reasonable obligation on QR. It is unreasonable of QR to expect Operators to trawl through web sites looking for potential changes made by QR. A controlled advice (either electronic or paper) is a reasonable expectation from a professional railway manager.
6.9	As per clause 6.5(c), QR does not wish to be obliged to advise	Clause 6.9 includes:

QCA Clause	QR Concern	NHC Comment
	Operators of changes to on-line documents.	'Queensland Rail must notify the Operator of any changes to the online documents or Network Interface Points.' As per clauses 6.8 and 6.5(c) this is a reasonable requirement on QR.
7.1.1	QR is concerned its ability to issue a safety alert has been limited by the QCA.	NHC considers clause 7.1.1 to be appropriate as is. It is entirely reasonable for QR to provide safety alerts to relevant Operators. This is in the interest of sharing safety experiences and emerging problems.
Definition of 'Safety Standards'	QR wants the 'Safety Standards' definition to be limited to those standards relevant to the Operator's activities on the network.	NHC acknowledge that the definition is quite broad and could be interpreted that the standards including industry practice which QR may not actually have.
Definition of 'Safeworking Procedures'	QR wants the 'Safeworking Procedures' definition to be limited to those internal QR procedures that are relevant to the Operator's activities on the network.	The definition is considered appropriately limited to protect QR's legitimate interests.

9.2 Further NHC Comments

QR lacks incentive to plan possessions well into the future. Consequently, NHC would like to reiterate our view that in section 7.3.1(e) Concerning Operational Meetings, 'reviewing any operational constraints' could be enhanced by including obligations for QR to:

(a) review a rolling program of possessions 12 months in advance;

(b) review proposed changes to the MTP 12 months in advance;

(c) consult on any changes to the rolling program of possessions within the next 6 months and assessment of Operator and end customer impacts; and

(d) act reasonably in locking down the MTP and program of possessions 6 months in advance taking into account Operator and end user customer business requirements such as the end user's coal shipping program.

Schedule 1

Memorandum of Advice from Mr Brian O'Connell QC dated 14 March 2016

LEVEL 17
239 GEORGE STREET
BRISBANE QLD 4000
AUSTRALIA

Telephone: 3221 3055
Facsimile: 3229 8510
bodonnell@qldbar.asn.au

ABN 50 938 100 832

Allens
Solicitors
Brisbane

MEMORANDUM OF ADVICE

Re: Queensland Competition Authority

Ex parte: New Hope Corporation Limited

I am asked to advise New Hope Corporation Limited in respect of several issues as to the proper interpretation of the *Queensland Competition Act* 1997 that have emerged from competing submissions of New Hope and Queensland Rail to the QCA.

Retrospective operation of the new access undertaking

A question raised by Queensland Rail is whether it is beyond the QCA's statutory power to approve an access undertaking that has retrospective operation. Queensland Rail argues that the QCA cannot, as a matter of law, approve an access undertaking which compels Queensland Rail to apply a retrospective reference tariff. Queensland Rail argues that the tariff must be prospective in nature, and cannot look backwards to a period prior to the commencement of the access undertaking. The basis of this argument is the principle against retrospective operation of legislation.

The draft decision on the new access undertaking published by the QCA proposes that the new access undertaking, as part of setting the price for access for the future, will also include an adjustment mechanism which will provide for what is effectively a refund to access holders for the difference between access charges paid since 1 July 2013 (under the expired access undertaking) and the access charges that would have been paid over that period if calculated on the basis of the reference tariff approved for the new access undertaking. In effect, the access charges to apply during the period of the new access undertaking will have built into them a discount commensurate with excessive access charges levied and paid since July 2013.

In my opinion, there is no principle against retrospectivity which would prevent inclusion of such an adjustment mechanism in the new access undertaking. I shall explain my reasons for this view.

There is a general (rebuttable) presumption against retrospective operation of legislation. Legislation is assumed to operate prospectively, and not retrospectively, unless the language used clearly expresses the contrary intention. Consequently, a statute will not normally be construed as changing rights or obligations that had accrued before the commencement of the legislation.[1] In my view, this presumption has no application to the present circumstances. The QCA legislation came into operation in mid-1997. The presumption against retrospective operation would (at most) operate to preclude an interpretation of the legislation such that it could affect rights or obligations that had accrued prior to mid-1997. But the new access undertaking has no conceivable operation prior to the commencement of the legislation. Consequently, the presumption against retrospectivity has no relevance to the present situation.

The only provision of the Act which constrains the time of operation of an access undertaking (relevantly for present purposes) is s.149. That provides:

> "149. **Period of operation of approved access undertaking**
>
> An approved access undertaking:
>
> (a) comes into operation at the time of approval; and
>
> (b) continues in operation until the earlier of the following:
>
> (i) the expiry date stated in the undertaking;
>
> (ii) the withdrawal of the undertaking."

The effect of s.149(a) is that when the QCA approves the new access undertaking, it will come into operation at the time of approval. It cannot come into operation at a time prior to its approval. That said, once it does come into operation, there is no impediment in the legislation to the access undertaking operating by reference to events that occurred prior to the time the undertaking commenced to operate. For example, if the QCA approved the new access undertaking on (say) 1 June 2016, the undertaking would operate from that day. But there is no obstacle in the legislation to the undertaking having operation (on and from 1 June 2016) by reference to events that occurred prior to 1 June 2016.

---

[1] *Halsburys Laws of Australia* "Statutes" at para.385 -500 and Pearce & Geddes *Statutory Interpretation in Australia* 8th ed., at para.10.4

So much has been decided by the Australian Competition Tribunal (which included Goldberg J. as a member) in respect of similar legislation in *Application Optus Mobile Pty Ltd & Optus Networks Pty Limited* (2007) ATPR 42-137. The issue arose as to whether an access undertaking by Optus infringed s.152BS(10) of the *Trade Practices Act* (which substantially corresponds with s.149 of the QCA Act), which provided that an undertaking commences to operate from the time of its acceptance by the TPC or a later time specified in the undertaking. Telstra argued that the undertaking was inconsistent with that section in that, once the undertaking came into effect, the terms of the undertaking would operate by reference to a time prior to approval by the Commission. The Tribunal rejected that argument, saying:

> "We do not consider that the undertaking offends s.152BS(10). A distinction is to be drawn between the point of time at which an undertaking comes into effect, that is to say the point of time at which it becomes operative and legally binding, and the operation of particular terms and conditions after that point of time is reached. The fact that a term or condition may operate in respect of a period of time prior to the undertaking becoming operative does not mean that the term or condition has been expressed to come into effect prior to the undertaking being accepted by the Commission. Put shortly, **once an undertaking has been given legal effect and has become operative, it can contain provisions which apply to a point of time earlier than the point of time at which it comes into effect** without offending s.152BS(10)."[2]
>
> (emphasis added)

In my opinion, that is correct. The same interpretation applies to s.149. That is, an approved access undertaking cannot commence to operate prior to the time of its approval. But once approved, the terms of the access undertaking can regulate matters between the access provider and the user by reference to events that occurred prior to the time of the approval. Consequently, I do not see that s.149 (or any other provision of the QCA legislation) would preclude approval of an access undertaking which contains an adjustment mechanism of the kind contemplated in the draft decision.

Adherence to the pricing principles in s.168A

In its draft decision, the QCA identified that incorporation of the proposed adjustment mechanism would result in the net rate applicable pursuant to the proposed undertaking returning to the access provider something less than sufficient to meet the efficient costs of providing access to the service and a return on investment commensurate with the risks involved. Nevertheless, the QCA was minded to take a view that, in light

---

[2] See [53]

of other matters it was required to take into account pursuant to s.138(2), the inclusion of the adjustment mechanism was appropriate.

Queensland Rail rejects that approach. It argues that that approach is not permissible under the legislation, properly construed. In particular, Queensland Rail argues that compliance with the pricing principles in s.168A is a "cornerstone requirement" of the legislation, and that the statute precludes the QCA from approving an access undertaking unless it achieves compliance with the pricing principles.[3]

I disagree with Queensland Rail's interpretation of the legislation. The critical words of the Act are in s.138(2) as follows:

> "138(2) The authority may approve a draft access undertaking only if it considers it appropriate to do so **having regard to** each of the following:
>
> (a) …
>
> (b) …
>
> (g) the pricing principles mentioned in s.168A;
>
> (h) …"
>
> (emphasis added)

The phrase "having regard to" requires the QCA to take the nominated matter into account when deciding whether or not to approve an undertaking. But it does not require more than that. In particular, it does not make achieving an outcome which satisfies the pricing principles a pre-condition to approval.

There are many authorities that have considered the phrase "… having regard to …". The expression is construed as requiring the decision maker to take the matter into account, and to give weight to the matter, as part of its deliberative process.[4] Moreover, the process of consideration must involve an active intellectual process directed at the nominated subject matter.[5]

Some of the cases have added a further gloss, namely that the decision maker must give the nominated matter weight as a fundamental element in making the decision.[6] But in the circumstances of the present legislation,

---

[3] Queensland Rail's submissions made 2015, pp.4 – 5

[4] See *R v Hunt; ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329, *Origin Energy Electricity Ltd v Queensland Competition Authority* (2014) 1 Qd.R. 216 at 83 – 90, *Sino Iron Pty Ltd v Secretary of Department of Infrastructure* (2014) 312 ALR 648 at [124], *Commissioner of AFP v Courtenay Investments (No.3)* (2014) WASC 383 at [16], *National Retail Association v Fair Work Commission* (2014) FCAFC 118 at [56]

[5] *Sino Iron* at [124]

[6] For example, see *R v Hunt; ex parte Sean Investments* at 329, *Sino Iron* at [124], *National Retail Association v Fair Work Commission* at [56] and *Dalian Steelforce v Minister for Home Affairs* (2015) FCA 885 at [105], cf *Origin Energy* at [90]

I do not think that adds anything substantial to the active intellectual consideration which the legislation requires the QCA to give to each of the matters enumerated in s.138(2).

More important is the recognition in the authorities that giving active consideration to a matter does not equate to slavish adherence to that matter. An example is *R v Hunt; ex parte Sean Investments*. That case considered a statutory provision which allowed a Minister for Health to determine the scale of fees in relation to a nursing home. The relevant sub-section provided:

> "The Permanent Head shall, in determining the scale of fees in relation to a nursing home for the purposes of sub-paragraph (i) of paragraph (c) of the last preceding sub-section, have regard to costs necessarily incurred in providing nursing home care in the nursing home."

Mason J. (with whom Gibbs J. agreed), said that the legislation required the Minister to take into account the costs necessarily incurred in providing nursing care in the nursing home, but recognised that other considerations might lead the Minister to arrive at a scale of fees which was below those costs. At p.329, Mason J. said:

> "The Permanent Head is entitled to have regard to other considerations which show or tend to show that a scale of fees arrived at by reference to costs necessarily incurred, with or without a profit factor, is excessive or unreasonable. It may be that the rent paid by the proprietor of a nursing home, though a cost necessarily incurred, exceeds the prevailing rental which is paid for comparable premises and that the determination of a scale of fees by reference to that rent would result in a scale of fees which is unreasonably high. The Permanent Head would be entitled to take this factor into account in making his determination."

It of particular importance that s.138(2) requires a number of matters to be taken into account, and that the pricing principles are only one of those matters. The different considerations listed in s.138(2) may pull in different directions. For example, the interests of access seekers may favour a price of access which is lower than the application of the pricing principles would otherwise suggest. On the other hand, the legitimate business interests of the owner or operator may favour a price which is higher than the pricing principles would indicate. It is apparent that in arriving at a decision which takes into account all of the matters listed in s.138(2), the QCA will be required to balance a number of considerations, some of which may be competing, and to give more weight to some matters over others (depending on the circumstance of the particular situation under consideration). The authorities recognise that in such situations, it is a matter for the decision maker as to what is the appropriate weight to give

to the various matters that the legislation requires to be taken into account. It was said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41:

> "… in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account."

To similar effect, see also Telstra Corp Ltd v ACCC (2008) 171 FCR 174 at [118] and [121] and Origin Energy at [87].

In my opinion, there is no indication in the legislation that any single matter listed in s.138(2) is to dominate over other matters. In my view, it is a question for the QCA as to what weight to give to the particular matters enumerated in deciding to approve a particular undertaking.

In summary, in my view the proper interpretation of the legislation is:

1. In deciding to approve an access undertaking, the QCA is required to give careful consideration to the application of the pricing principles in s.168A;

2. In taking into account each of the matters enumerated in s.138(2), the QCA may give different weighting to different considerations (depending on the circumstances of the particular case), and the task of giving greater weight to some considerations rather than others is a matter for the QCA, not for the Court.

3. It is not a requirement of the legislation that the access undertaking achieve compliance with the pricing principles;

4. Provided the QCA gives active consideration to the application of the pricing principles in deciding whether or not to approve an undertaking, the QCA may approve an undertaking that sets a price for access below that indicated by the pricing principles;

Consequently, it is my view that for the QCA to proceed as proposed in its draft decision would not be acting contrary to the legislation.

With compliments,

BRIAN O'DONNELL

Chambers
14 March 2016