



AUSTRALIAN RAIL TRACK CORPORATION LTD

Ref No:

21 August 2008

Queensland Competition Authority
GPO Box 2257
Brisbane QLD 4001

QR NETWORK'S 2008 DRAFT ACCESS UNDERTAKING

ARTC COMMENTS ON THE QCA POSITION PAPER

ARTC notes the proposed restructure of QR Ltd. into five separate Corporations Law subsidiaries wholly owned by QR Ltd., and the change of name to the network subsidiary from QR Network Access to QR Network Pty. Ltd. It is intended that QR Network would hold all assets that it manages and that all internal access agreements with QRNational will be formalised as legally enforceable contracts. Ownership of below rail assets is to be transferred from QR Ltd. to QR Network on 1 September 2008 (presumably a delay from the previously advised date of 1 July 2008).

ARTC acknowledges the previous stakeholder consultation undertaken by the QCA in relation to QR Network's preliminary draft access undertaking in May 2008, which has resulted in some modifications to the preliminary draft, and further comment by QR Network (as part of its application) as a response to stakeholder submissions. It is noted that QR Ltd. intends to withdraw the 2005 Access Undertaking to take effect from 1 September 2009, and that it is QR Network's intention for the proposed 2008 Access Undertaking to have effect from 1 September to 30 June 2009, at which time it is intended that a new revised 2009 Access Undertaking will come into effect.

As such the 2008 Access Undertaking is intended as a temporary arrangement largely extending the requirements of the 2005 Access Undertaking (but recognising the re-structure), until a revised 2009 Access Undertaking can be assessed by the QCA.

ARTC has no issue with QR Ltd's and QR Network's proposed approach.

ARTC owns or manages through lease a substantial part of the interstate rail network connecting the Queensland border, through to Sydney, Melbourne and Adelaide, to Perth. ARTC has recently obtained Australian Competition and Consumer (ACCC) approval for its 2007 Interstate Access Undertaking covering the

interstate rail network it owns or leases.

In its previous submission, ARTC argued that although the re-structure would create separate independent subsidiaries of QR Ltd., these subsidiaries were still related through QR Ltd.'s ownership and guarantee, and that it would still seem plausible for decision making of QR Network to be influenced by the parent, with the potential for anti-competitive outcomes. It also argued that it would be unlikely that the confidence of third parties to seek to access to the network to compete with QR Ltd's above rail subsidiaries would be substantially enhanced as a result of the restructure.

To this end, ARTC considered that the QCA's objective to ensure that the regulatory principles as they currently apply to QR should be preserved in the proposed undertaking is appropriate. ARTC maintains this view, and as yet has still not seen any compelling evidence to suggest that measures to address the relationship between QR Ltd. And QR Network, sufficient to deliver market confidence, should not be maintained in the 2009 Access Undertaking.

QR Network has proposed a number of amendments to the preliminary draft 2008 Access Undertaking that, in the main, seek to address concerns raised by the QCA and stakeholders. In the main, the proposed amendments seem reasonable.

Potentially the most contentious proposal is that relating to compliance with QR Network's confidentiality and ring-fencing obligations being facilitated by way of a confidentiality deed between QR Network and QR Ltd., as opposed to these being included in service agreements and a deed of cross guarantee, as was proposed in the preliminary draft. ARTC has not seen this document and is therefore unaware of its contents. As such, ARTC cannot make any comment in relation to the appropriateness of the proposed arrangements, and will rely on the QCA to satisfy itself in this regard.

In relation to QR Network's response to concerns raised by stakeholders in the previous consultation, QR Network's responses seem reasonable in many cases, although comments in relation to the new access agreements that will result from the replacement of existing internal access agreements are unable to be confirmed in the absence of the new agreements. ARTC understands from the correspondence that these agreements will not be published.

In relation to concerns raised by Asciano with regard to QR Network's proposal to amend the indemnity and liability clauses in 2008 Operator Standard Access Agreement presumably in order to ensure equivalent arrangements as provided for under the 2005 Access Undertaking following the re-structure, ARTC has not been able to undertake any detailed legal assessment of the proposed amendments to confirm Asciano's or QR Network's claims. At a broad level, ARTC does not consider it unreasonable that QR Network Access should seek to amend

arrangements such that its exposures as an entity following the re-structure are substantially the same as whilst part of the larger QR structure.

On the other hand it would be of some concern if QR's re-structure gave rise to increased cost to the industry, or created a circumstance of inequitable treatment between QR above rail entities and third parties. Whilst QR Network has responded to Asciano's concerns in its submission to the QCA, it is not readily apparent from the response that these concerns have been adequately addressed. To this end, ARTC would support greater transparency by QR Network by demonstrating the impact on industry cost and equity of its proposals in relation to clauses 14 and 15.

These comments contain no information considered 'commercial-in-confidence'. A copy of the submission has also been forwarded to your office via email.

For further information regarding the preparation of these comments, could you please contact Mr. Glenn Edwards, (08)82174292 (Ph), (08)82174578 (Fax), gedwards@artc.com.au (Email).



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