

QRC

# submission

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**QRC submission to the QCA**

**Standard Connection Agreement**

**September 2012**

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In August 2011 the Queensland Resources Council (**QRC**) made a submission (**Initial QRC Submission**) to the Queensland Competition Authority (**QCA**) in response to QR Network's proposed Standard Rail Connection Agreement (**SRCA**). The Initial QRC Submission included the QRC's marked up changes to the proposed SRCA (**QRC mark-up**).

In June 2012, the QCA released its draft decision not to approve QR Network's proposed SRCA (**Draft Decision**), including the QCA's proposed amendments to the SRCA (**QCA mark-up**).

The QCA has invited submissions in relation to the Draft Decision.

The QRC supports the QCA's decision not to approve QR Network's SRCA. The QRC reiterates the reasons set out in the Initial QRC Submission, as supplemented by the following additional submissions:

## 1 Security (clause 20)

### 1.1 Acceptable Credit Rating

The QRC supports the QCA's view that an "Acceptable Credit Rating" (that is, below which security must be provided) be BBB+ (the QRC had previously suggested BBB).

The QRC further considers that the agreement should expressly acknowledge that a connecting party **not** be required to provide security where that party does not have a credit rating and QR Network is otherwise reasonably satisfied as to the party's financial capacity.

### 1.2 Security Amount

The QCA has suggested that the amount of security required to be provided (that is, specified in the reference schedule) be determined as *"the estimated reasonable and prudent costs of decommissioning and removing the Connecting Infrastructure (including a reasonable and prudent contribution for QR Network's internal costs related to such decommissioning and removal) upon the expiry of this Agreement so as to remove the connection between the Network and the Private Infrastructure and restore the affected section of the Network to a condition consistent with adjacent sections of the Network"*. The QRC is supportive of this position.

### 1.3 Revision of Security Amount

The QCA has sought submissions on the timing for review of the "Security Amount".

The QRC considers that a 6 monthly review period would be appropriate.

The QRC also notes that the QCA's current drafting of clause 20 does not oblige QR Network to return security where a party's credit rating increases to BBB+ or better. Such a provision should be inserted.

The QRC considers that QR Network should not be permitted to increase the Security Amount, except in circumstances where the calculation of the "Security Amount" (being the amount as described in 1.2 above) at the date of assessment would be materially higher than the actual security provided.



The QRC considers that a party who is not initially required to provide security should not subsequently be required to provide security unless that party ceases to hold an Acceptable Credit Rating or (in respect of a party who did not originally have an Acceptable Credit Rating) their financial position materially worsens.

#### **1.4 Giving notice before calling upon security**

The QRC considers that the security clause should oblige QR Network to give notice prior to calling upon the security. It would be appropriate for that notice period to be relatively short – say 2 business days.

### **2 Access to land (clause 26)**

Other than in one respect, the QRC supports the QCA's mark-up of clause 26.

The QRC does however suggest that clause 26 include a requirement that QR Network use reasonable endeavours to secure access rights for the Owner if QR Network does not have authority to authorise the Owner. The QRC considers that QR Network assistance may be important for enabling an Owner to secure relevant access.

### **3 Liability and liability cap**

The QRC supports the amendments to the liability provisions (clause 21) in the QCA mark-up.

The QRC supports the QCA's view that the liability cap should be reciprocal in favour of both parties.

The QRC propose that the liability cap amount be determined by reference to the value of the Connecting Infrastructure, with two exceptions. The QRC consider that it would be reasonable for the liability cap not to apply to personal injury claims, as well as claims for third parties for property damage.

### **4 Indemnities**

The QRC supports the amendments to the indemnities (clause 22) in the QCA mark-up.

### **5 Accreditation**

The QCA has sought submissions on the benefit of including a clause in the SRCA that seeks to ensure that nothing in the SRCA would require a Rail Infrastructure Manager to do something that was likely to result in it losing its accreditation, or having it suspended.

The QRC is broadly supportive of the philosophy of such a provision. However, the QRC suggests that the current wording might be too broad. For example, nothing requires the Accredited Rail Infrastructure Manager to "take any action which would be likely to result in the suspension or revocation of their Accreditation", might be interpreted as excusing the giving of notice or other advice about a breach or other failure on the grounds that might bring the breach or failure to notice of relevant authorities which could lead to the relevant



action. This would seem to be an undesirable result as it may preclude the disclosure of important safety information.

QRC suggests that the following wording may be preferable:

*“Nothing in this Agreement will be interpreted as requiring QR Network or the Accredited Rail Infrastructure Manager for the Private Infrastructure (whether or not the Owner) to, in the performance of their respective roles as Accredited Rail Infrastructure Managers for the Network/Connecting Infrastructure and Private Infrastructure take any action if the taking of that action would be:*

- (a) in breach of or otherwise contrary to requirements of their Accreditation; and*
- (b) likely to result in the suspension or revocation of their Accreditation.”*

## 6 Treatment of more complex connections

In the Initial QRC Submission, the QRC suggested that the SRCA should be able to accommodate the connection of Private Infrastructure involving more than one customer or more than one load point.

Following further consideration, the QRC understands that providing drafting within the Standard Connection Agreement to deal with the full range of more complex situations will be problematic. The QRC therefore submits that it is more appropriate to deal with complex connections by including a requirement in the Access Undertaking that, for such connections:

- The Standard Connection Agreement will apply as a template agreement and
- The parties must enter into negotiations in good faith to agree amendments to the Standard Connection Agreement which are reasonably required in order to reflect the circumstances of the relevant connection.

The QRC suggests that this is preferable rather than seeking to draft provisions in the SRCA to cover the many different possible scenarios.

## 7 Annual Service Charge

In the Initial QRC Submission, it was suggested that the Annual Service Charge only needs to be determined in circumstances (considered unlikely) where costs of operating and maintenance of Connecting Infrastructure were not considered by the QCA in the development of the relevant Reference Tariffs.

The QCA appears to have taken a somewhat different approach to the Annual Service Charge, in that it leaves open the possibility that QR Network should be entitled to determine and recover some level of Annual Service Charge even where an amount has been attributed to these operating and maintenance activities in the determination of the Reference Tariffs.

The QCA mark-up requires that the Annual Service Charge be determined irrespective of whether it is also considered in the Reference Tariff and the amount attributed in the



Reference Tariff is “deducted” to give the Annual Service Charge. Therefore, if the “actuals” (based on the definition of Annual Service Charge) are more than that included in the tariff or access charges, the Owner may be paying both an Annual Service Charge (albeit reduced) as well as the relevant tariff or other access charges.

For the reasons set out in its Initial QRC Submission, QRC suggests that the Annual Service Charge should only be determined where the operating and maintenance costs of the Connecting Infrastructure were not considered in the development of the relevant Reference Tariffs or access charges, not also where there is a difference in the tests for the amounts recoverable for operation and maintenance under the Reference Tariffs from that under the SRCA.

## 8 Connecting Infrastructure

### 8.1 Ownership of assets

Who owns the title to Owner constructed Connecting Infrastructure is unclear – For example, is there a “handover”/point of “gifting” of the assets? Or does QR Network own the assets while they are being constructed? This should be made clearer. There is a note, in 6.5(a), that “once constructed”, QR Network will own the Connecting Infrastructure. However, when this exactly will occur is not clear. Nor is any transfer of title or risk dealt with.

The tax and *Personal Property and Security Act* implications of a transfer of property needs to be considered further.

### 8.2 Information required where Owner is constructing the Connecting Infrastructure

The Initial QRC Submission proposed that the information required to be provided by QR Network under clause 6.1 (where the Owner is constructing the Connecting Infrastructure) should include “information referred to” in a schedule (entitled “Owner’s Network Information Requirements”). The QCA mark-up has not incorporated this type of schedule. The QRC considers that detailing this sort of information is important.

### 8.3 Construction of Connecting Infrastructure

The concern raised in the Initial QRC Submission that QR Network may seek to argue that “Connecting Infrastructure” was something more than necessary to the connection has not been addressed where QR Network constructs the Connecting Infrastructure.

The QCA has rejected the proposal in the QRC’s mark-up to include a schedule of key terms of the Construction Agreement. The mark-up provided that where QR Network is to undertake the construction, the standard of design and construction should be (and should not exceed) the standard set out in clause 8.3(a) of the Access Undertaking.

The QRC considers that this remains a matter of concern which should be addressed. For the reasons described below, the QRC considers that the mandating of key terms of the Construction Agreement is important, including the standard of design and construction by QR Network.



Further, where a connecting party makes comment on a QR Network design, QR Network should (acting reasonably and in good faith) be obliged to consider such comments and where QR Network does not propose to implement the comment provide written reasons.

## 9 Terms of Construction Agreement

The QCA has not accepted the QRC's proposal to include a new schedule setting out the key terms for a Construction Agreement (where QR Network is to undertake the construction of the Connecting Infrastructure).

The QCA acknowledges concerns raised as to the potential for dispute and delay around negotiating the terms of a Construction Agreement but does not consider the SRCA to be the "appropriate vehicle to address these concerns". Moreover the QCA considers that "it is always open for a private infrastructure owner to construct the connecting infrastructure itself".

The QRC reiterates its concerns that, in the absence of mandated essential key terms, there is real potential for lengthy and unnecessary disputes and delays for stakeholders seeking to negotiate a Construction Contract. The QRC's view is that:

- there is no other vehicle which appropriately addresses these concerns; and
- while theoretically it may be open for a stakeholder to undertake the construction, this does not recognise that there may be many instances where this is not a realistic option. For example, clause 8.3 of the Access Undertaking provides that QR Network reserves the right to construct the Connecting Infrastructure even if the Owner proposes to undertake the construction. Furthermore, where the construction requires access to third party land QR Network may be better placed to obtain necessary access such that the stakeholder is, in reality, not able to undertake the construction itself.

The QRC considers that uncertainty as to key terms of a Construction Contract poses a potential barrier for stakeholders which is inconsistent with the key objectives of the SRCA.

## 10 Insurances

The QRC suggests that the insurances listed in schedule 3 of the QRC mark-up represent a reasonable list of reciprocal insurances for each party.

The QRC does not consider the listing of "any other insurance which is required by law" to be contentious. On the contrary, it would seem surprising that parties would have an issue with stating that they would maintain an insurance if they are subject to a requirement at law to maintain that insurance.

This wording is common in commercial contracts and does not require more specific drafting or listing of such insurances. The intention is that this requirement can accommodate changes "required by law" from time to time during the term. It covers only those insurances required at law (for example, workers compensation) and is therefore a very specific requirement.

It does not cover other insurances, even if they might be otherwise seen as "prudent" or common.



The QRC suggests that an insurance amount of \$20 million is appropriate for public liability for both parties.

The QRC does not consider that it is necessary to deal with the situation where insurances become unavailable in the market (for reasonable commercial prices). If the insurance obligations are reciprocal, this would mean that in such a situation both parties will be similarly affected and incentivised to negotiate in good faith with each other. Therefore, the QRC suggests such a provision is not required.

## 11 Train control services/RIM services for Private Infrastructure

In the Initial QRC Submission, the QRC suggested that train control was a matter for Access Agreements and should be removed from the SRCA.

The QRC is supportive of the QCA's position that the provision of train control services by QR Network on Connecting Infrastructure for a reasonable fee can be achieved through the Access Undertaking.

However, following further consideration and for the reasons described below, the QRC submits that the SRCA should be amended to require QR Network to provide train control and/or Rail Infrastructure Manager (**RIM**) services for Private Infrastructure, for a commercially reasonable fee, where (and to the extent) requested by the owner.

To maximise competition it is important that train control and RIM services can be separated. The ability to separate train control and RIM services will assist (in part) in ensuring that QR Network's proposed fee for train control and RIM services is reasonable.

### 11.1 Train control services

The QCA mark-up does not address the issue of train control for Private Infrastructure. In the Draft Decision, the QCA states that it is not convinced it would be appropriate to require QR Network to provide these services for infrastructure that it does not own. The QRC submits that the following reasons demonstrate that it is appropriate and necessary:

#### **Removal of QR Network's anti-competitive ability**

If there is no such requirement, QR Network has the ability to exercise its market power in this area in an anti-competitive way, in that:

- (a) The SRCA expressly provides that the owner of Private Infrastructure may appoint itself or a third party as the RIM for that infrastructure. Given the linkage between train control and RIM services (particularly as regards Safety Management Systems), QR Network would have the ability and incentive to leverage its train control expertise and operations in order to also become the RIM for that infrastructure. This outcome subverts and potentially nullifies the policy setting that owners of Private Infrastructure should be free to appoint itself or a third party as the RIM for that infrastructure; and
- (b) Where QR Network is not the RIM for Private Infrastructure, QR Network has the ability (and hence it would seem, an incentive) to overcharge for the provision of train control services (assuming it is willing to provide them at all).



### **Competitive and efficiency benefits**

Such a requirement is likely to have the following competitive and efficiency benefits:

- increased competition in RIM services for Private Infrastructure through removing QR Network's current ability to leverage its train control expertise and operations to also secure RIM services for Private Infrastructure;
- option for owners to take advantage of efficiency benefits (eg. integration with the broader system, and alignment of train paths) that QR Network may be able to offer where it is the train controller for Private Infrastructure;
- provision of maximum flexibility to infrastructure owners to manage infrastructure however they wish, by enabling owners to require QR Network to provide train control services over only part of Private Infrastructure; and
- contribution to maximising utilisation of the Central Queensland Coal Network (CQCN) without detracting from the efficiency of the system. QR Network has considerable expertise and operational resources in relation to the provision of train control services, and is arguably best placed to provide train control services for Private Infrastructure. However, caution needs to be exercised to ensure that a monopolistic environment is not created.

### **No detriment to safety**

Provision of train control services will not detrimentally affect the safety of the CQCN. The QRC acknowledges the importance of ensuring Private Infrastructure connected to the CQCN meets Australian standards. QR Network operates a Safety Management System that it asserts is proprietary and intimately linked to the provision of train control services.

### **SRCA appropriate vehicle for requirement**

Train control for Private Infrastructure is most appropriately addressed in the SRCA rather than in an Access Agreement, as some Access Agreements will be between QR Network and parties that are unable or unlikely to construct Private Infrastructure (e.g. an Access Holder that provides coal haulage services to the potential owner of Private Infrastructure). However all SRCAs will relate to Private Infrastructure.

### **Pricing**

By enabling QR Network to charge commercially reasonable fees, QR Network will be compensated for its provision of train control services for Private Infrastructure, whilst removing its ability to recover supra-competitive returns from infrastructure owners where QR Network is not the RIM for that infrastructure or to leverage its train control expertise and operations in order to be appointed the RIM for Private Infrastructure.

Noting that the QCA endorsed the approach of a reasonable fee being charged for the provision of train control services for Connecting Infrastructure, the QRC submits that the same approach should be taken with respect to pricing of train control services for Private Infrastructure.

## **11.2 RIM services**

The QRC supports the flexibility in the SRCA for the infrastructure owner to choose whether to be the accredited RIM for that infrastructure, or to procure another person or entity to be accredited.





However, in order for this flexibility to be realised and maximised, the QRC submits that the SRCA should be amended to require QR Network to be the RIM for Private Infrastructure, for a commercially reasonable fee, where (and to the extent) requested by the owner.

The competitive and efficiency benefits identified by the QRC above in respect of train control are also applicable to RIM services. Similarly, for the reasons specified above for train control services, there will be no detriment to safety. In addition, if QR Network is viewed as already having an incentive to provide RIM services for Private Infrastructure where requested by the owner, then the requirement recommended by the QRC should not unreasonably affect QR Network.

Finally, with respect to pricing, the QRC submits that RIM services should be provided for a commercially reasonable fee for the reasons discussed above in relation to train control services.