



## **Decision**

# **Standard Rail Connection Agreement**

**December 2012**

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## PREAMBLE

This Preamble should not be read as a substitute for the detail contained in the body of the decision.

### Background

On 1 October 2010, the Queensland Competition Authority (the Authority) approved Aurizon Network's<sup>1</sup> 2010 access undertaking. The access undertaking sets out the terms and conditions under which Aurizon Network will provide access to the relevant parts of its rail infrastructure.

At the time the access undertaking was approved, a number of matters remained unresolved, including requiring Aurizon Network to develop a standard rail connection agreement (SRCA) to be submitted to the Authority for approval. The access undertaking included processes to allow for the SRCA to be finalised and approved during the undertaking period.

On 30 June 2011, Aurizon Network submitted a proposed SRCA for the Authority's approval. The Authority has considered Aurizon Network's proposal in accordance with the requirements of clause 8.4 of the 2010 access undertaking. In particular, the Authority may only approve a proposed SRCA if it:

- (a) is satisfied that the proposed SRCA is consistent with the 2010 access undertaking;
- (b) considers it appropriate to do so having regard to the matters listed in s. 138(2) of the *Queensland Competition Authority Act 1997* (the QCA Act); and
- (c) has published the proposal, invited comments on it and considered submissions received in response.

### Stakeholder Consultation

The Authority published Aurizon Network's proposal, invited submissions on it and initially received submissions from four stakeholders.

On 27 June 2012, the Authority released its draft decision to not approve Aurizon Network's proposal and provided Aurizon Network and other stakeholders with the opportunity to respond to matters raised in the draft decision. The Authority received a further ten submissions in response to its draft decision, including further information from Aurizon Network to support its original claim, particularly in relation to the charges and payments, interface issues and coal loss management.

### Outline of Decision

The Authority's final decision is to not approve Aurizon Network's proposed SRCA. In arriving at its decision, the Authority considered Aurizon Network's proposal and supporting claims, stakeholders' initial responses to the proposal and submissions provided in response to the draft decision. The Authority notes that stakeholders generally accepted the principles identified in the draft decision or did not otherwise provide any further information which convinced the Authority to depart substantially from these (on most matters).

In addition, the Authority notes the broad acceptance by stakeholders other than Aurizon Network of large parts of the Authority's proposed alternative approach.

That said, despite general stakeholder support for the Authority's initial position in respect of the proposed Coal Loss Mitigation Provisions (CLMPs), the Authority has revised its position on the

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<sup>1</sup> On 3 December 2012, QR Network Pty Ltd changed its name to Aurizon Network Pty Ltd. Hereafter, this decision refers to Aurizon Network Pty Ltd.

proposed CLMPs on the basis of new information provided by Aurizon Network. However, the Authority has not accepted Aurizon Network's proposed provisions and schedule. Instead, this final decision provides for the SRCA to incorporate CLMPs as included in Aurizon Network's access undertaking from time to time.

The Authority has also refined its position (and the supporting drafting) on a number of matters to address stakeholders' concerns, including those matters on which the Authority specifically sought comments from stakeholders (and on which the Authority has thereby now formed a finalised view).

The Authority requires Aurizon Network to amend the proposed SRCA as set out in Appendix A of this decision in order for the Authority to approve it.

The Authority's decisions, and reasons for those decisions, are set out in the main body of this decision. For the most part, the Authority's reasoning and conclusions are consistent with the draft decision and have not necessarily been repeated in this final decision. Accordingly, this final decision should be read in conjunction with the Authority's June 2012 draft decision.

This decision focuses primarily on those matters where:

- (a) the Authority has now formed a different position to that set out in the draft decision;
- (b) the Authority sought comments from stakeholders and has now formed a finalised view on these matters; and
- (c) the Authority sees benefit from providing a more detailed explanation of the reasons for its decision, especially for those matters on which stakeholders made substantive responses to the draft decision.

Key elements of the Authority's decision include:

- (a) providing for private infrastructure owners to have greater input into the design, construction, upgrade, modification and replacement of connecting infrastructure;
- (b) ensuring that parties' rights regarding termination and suspension are better balanced and further clarified;
- (c) ensuring that security requirements better reflect the level of risks faced by the parties;
- (d) placing reasonable and reciprocal obligations on the parties to share information on safety and interface matters;
- (e) capping parties' liability to an amount, negotiated on a case-by-case basis, but proportional to the traffic that is anticipated will use the connection;
- (f) ensuring that an accredited rail infrastructure manager is in place for all pieces of track;
- (g) providing greater certainty over allowed charges and payments, including ensuring charges are not payable where the relevant costs are otherwise recovered through reference tariffs or other charges;
- (h) obligating Aurizon Network to provide private infrastructure owners with greater certainty over standards required for infrastructure built by a private owner;
- (i) specifying the types and amounts of insurances to be held by both parties; and

- (j) accepting the incorporation of CLMPs in the SRCA to the extent they are provided for in Aurizon Network's approved access undertaking from time to time.

The Authority has included detailed drafting to implement its approach, which can be found in Appendix A.

## Way Forward

This decision provides Aurizon Network with written notice of the Authority's decision for the purposes of clause 8.4(c) of the 2010 access undertaking. It states the reasons for the Authority refusing to approve Aurizon Network's SRCA and the ways it should be amended. In accordance with clause 8.4(c) of the 2010 access undertaking, Aurizon Network is required to:

- (a) amend its SRCA in the way set out in Appendix A; and
- (b) resubmit the amended SRCA to the Authority no later than 8 February 2013.

If Aurizon Network complies with this notice, the Authority will approve the resubmitted proposal if it considers it appropriate to do so having regard to the requirements of clause 8.4(e) of the access undertaking.

If Aurizon Network does not comply with the notice, or if the Authority decides not to approve Aurizon Network's resubmitted proposal, the Authority may prepare its own SRCA pursuant to clause 8.4(d) of the access undertaking. Under these circumstances, the Authority is currently minded to publish any such proposal and conduct public consultation before it prepared a further final decision.

The SRCA will apply from the date of approval, or at a later date determined by the Authority. Once approved, while Aurizon Network and a private infrastructure owner may agree to terms and conditions that differ from the SRCA, in the event that negotiations fail, the Authority will rely on the SRCA in resolving a dispute in accordance with clause 8.4(j) of the access undertaking.

## Submissions

Submissions are **not** invited on this final decision.

However, the Authority is currently minded to invite submissions prior to approving another version of the SRCA (whether an amended SRCA submitted by Aurizon Network or a proposed SRCA prepared by the Authority). At that time, interested parties may wish to comment on aspects of this decision to the extent that it contains the Authority's analysis of matters relevant to the content of the proposed SRCA.

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**GLOSSARY**

2010 access undertaking	Aurizon Network's 2010 access undertaking
Aurizon Network	Aurizon Network Pty Ltd (prior to 3 December 2012 named QR Network Pty Ltd)
Authority	Queensland Competition Authority
BMA/BMC	BHP Billiton Mitsubishi Alliance (BMA) and BHP Billiton Mitsui (BMC)
CDMP	Coal Dust Management Plan
CLMPs	Coal Loss Mitigation Provisions
CPI	Consumer Price Index
IRMP	Interface Risk Management Plan
MCI	Maintenance Cost Index
QCA Act	<i>Queensland Competition Authority Act (1997)</i>
QRC	Queensland Resources Council
SRCA	Standard Rail Connection Agreement
TFL	Transfer Facilities Licence

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## 1. BACKGROUND

*Aurizon Network has submitted a standard rail connection agreement for the Authority's approval as provided for in its 2010 access undertaking.*

*The Authority has considered Aurizon Network's proposal in line with the criteria contained in the 2010 access undertaking, taking into account the information provided by Aurizon Network supporting its proposal, stakeholders' comments, submissions and alternative drafting and submissions provided in response to the draft decision.*

*The Authority has made a decision to not approve Aurizon Network's proposal. In accordance with cl. 8.4(c) of the 2010 access undertaking, the Authority requires Aurizon Network to amend its SRCA in the way described in this decision and resubmit the amended SRCA to the Authority by no later than 8 February 2013.*

### 1.1 Context

Access to the central Queensland coal network (comprised of the Blackwater, Goonyella, Moura and Newlands systems) is a declared service for the purposes of Part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act) – see s. 250 of the QCA Act for details of the declaration. This includes access to extensions to the network, with the exception of extensions:

- (a) to other coal basins; and/or
- (b) that are not owned or leased by Aurizon Network or a related body corporate.

Regulation of the declared service applies as the rail network exhibits natural monopoly characteristics associated with the economies of scale and scope involved in its operation and expansion. While regulation can be relied on to address the (potential) use of monopoly power, a more effective means may be to rely on competition and contestability in another market.

A focus of Aurizon Network's 2010 access undertaking is to set out the terms and conditions under which Aurizon Network will provide access to its rail network, that is covered by the undertaking, with a view to promoting competition in the above-rail market.

In addition, the access undertaking (cl. 8.3) provides for the interconnection of the regulated network with private infrastructure (i.e. rail infrastructure not owned or leased by Aurizon Network). In doing so, clause 8.3 of the 2010 access undertaking seeks to limit Aurizon Network's ability to expand its monopoly power beyond the current geographical limits of its declared service by:

- (a) allowing other parties to construct, own and operate an elongation to the network; and
- (b) imposing obligations on Aurizon Network for the connection of private infrastructure to the network.

While these requirements place very specific obligations on both Aurizon Network and the access seeker/holder, it was deemed necessary to develop a standard rail connection agreement (SRCA) to further specify the various rights and obligations of the respective parties to ensure the timely and efficient connection of private infrastructure.

The SRCA will set out standard terms and conditions for the connection of private infrastructure. Parties can agree to other terms and conditions on a case by case basis – but in the event that negotiations fail, the Authority will rely on the SRCA in resolving a dispute.

The finalisation of a SRCA was one of a number of matters that remained unresolved at the time the 2010 access undertaking was approved. Reflecting this, clause 8.4 of the 2010 access undertaking required Aurizon Network to develop and submit a SRCA for the Authority’s approval.

On 30 June 2011, Aurizon Network submitted a proposed SRCA for the Authority’s approval.

## 1.2 Aurizon Network’s Proposal

Aurizon Network has proposed a SRCA to ‘cover the connection of private rail infrastructure to the declared facility for the purpose of loaded coal trains entering into the relevant individual coal system’ (Aurizon Network 2011, p.3). It provides a right to connect and addresses the operational and maintenance requirements associated with the connection.

The proposed SRCA is based on connection agreements that Aurizon Network has offered to, and executed with, customers in the past, but also includes coal loss mitigation provisions (CLMPs) (Aurizon Network 2011, p.6). It includes terms and conditions that seek to:

- (a) provide a safe connection, built, and upgraded over time, to a suitable standard, including: allowing Aurizon Network to inspect and require upgrades, modifications or replacements of the connecting infrastructure (cl. 6) and private infrastructure (cl. 7); and detailing the requirements regarding conduct of an interface risk assessment, and the subsequent development and operation of an Interface Risk Management Plan (IRMP) and Emergency Response Plan (cl.10);
- (b) provide reimbursement for providing connection services so there is no incremental cost to Aurizon Network for the connection, now or in the future – including an annual service charge (cl. 3, cl. 14 & Sch. 5), payments to reflect specified modifications, upgrade or replacement costs and the cost of decommissioning and removing the connecting infrastructure (cl. 3 & cl. 6); and
- (c) ensuring trains are loaded to appropriately manage risk on the network – by binding private infrastructure owners to undertake coal loss mitigation strategies and providing both Aurizon Network and the private infrastructure owners with a ‘clear and defined pathway’ through verification, monitoring, reporting and rectification to ensure compliance (Sch. 7, cl. 7.4(e), 7.8(b), 11.3, 12.2), and through the IRMP (cl. 10) and train control and planning services (cl. 11).

The proposed SRCA also includes provisions relating to insurance (cl. 16, Sch. 3), security (cl. 20), liability, indemnities and consequential loss (cl. 21 & cl. 22), disputes (cl. 17) and termination (cl. 18).

The proposed SRCA provides for Aurizon Network to be the rail manager of the connecting infrastructure to ‘enable the smooth operation of entry onto (the network) in a way that maximises capacity throughput due to QR Network’ (Aurizon Network 2011, p.9).

Aurizon Network said that the SRCA will not be available for the connection of major new rail expansions (Aurizon Network 2011, p.3) – and is intended to cover customer specific branch lines only.

### 1.3 Process for Considering Aurizon Network's Proposal

The Authority has considered Aurizon Network's proposal in accordance with the requirements of clause 8.4 of the 2010 access undertaking.

The Authority is required to either approve or refuse to approve the draft SRCA within 60 days of its submission, or such longer period as advised in writing by the Authority. The Authority extended the time within which it must make its decision to 31 December 2012.

Consistent with cl. 8.4(f) of the access undertaking, the Authority published Aurizon Network's proposal on its website, invited stakeholders to comment and provided Aurizon Network with an opportunity to respond to those comments. The Authority received five submissions on Aurizon Network's proposed SRCA, including proposed drafting for an alternative SRCA.

On 27 June 2012, the Authority released a draft decision to not approve Aurizon Network's SRCA. That draft decision:

- (a) proposed a number of substantial amendments to Aurizon Network's proposal – and included detailed drafting to reflect the proposed changes;
- (b) identified several matters that the Authority considered should be addressed in the SRCA, but in respect of which it was seeking further comments from stakeholders, before making its final decision; and
- (c) invited submissions from interested parties.

In response to a request from Aurizon Network and a number of stakeholders, the Authority provided additional time for submissions on its draft decision. The Authority received ten submissions in response to its draft decision, including a 'revised' SRCA as an attachment to Aurizon Network's response (Aurizon Network 2012c).

### 1.4 The Authority's Approach

In considering this issue, the Authority has had regard to the assessment criteria contained in the 2010 access undertaking (see section 1.4.1), the information provided by Aurizon Network supporting its proposal and stakeholders' comments, submissions and alternative drafting.

#### 1.4.1 Assessment Criteria

The factors affecting the Authority's consideration and approval of Aurizon Network's proposed SRCA are set out in the 2010 access undertaking. The Authority may only approve a proposed SRCA if it:

- (a) is satisfied that the proposed SRCA is consistent with the 2010 access undertaking (cl. 8.4(e)(ii));
- (b) considers it appropriate to do so having regard to the matters listed in s. 138(2) of the QCA Act (cl. 8.4(e)(iii)); and
- (c) has published Aurizon Network's proposal, invited stakeholders to comment on it and considered any submissions received (cl. 8.4(e)(iv), 8.4(f)).

## The 2010 Access Undertaking

The Authority must be satisfied that the proposed SRCA is consistent with the 2010 access undertaking. The parts of the 2010 access undertaking that are particularly relevant to the SRCA:

- (a) provide for Aurizon Network to connect private infrastructure to its regulated network in the following manner:
  - (i) Aurizon Network can design, project manage, construct, commission, maintain, upgrade and in any other way manage the connecting infrastructure provided the standard of works are appropriate and that the access seeker/holder is given a reasonable period to comment on design and construction matters (cl. 8.3(c));
  - (ii) where Aurizon Network does not construct the connecting infrastructure, it will:
    - (A) consent to the connection, provided the connecting infrastructure: meets Aurizon Network's technical specifications, has been constructed to a standard appropriate to the nature of the traffic and the current service standard of the adjoining regulated network, will not adversely impact on safety, will not reduce capacity by virtue of its existence, and is paid for by the access seeker/holder (provided neither the private infrastructure nor the connecting infrastructure is required to be of a standard or condition exceeding the standards and condition of any Aurizon Network infrastructure) (cl. 8.3(a));
    - (B) ensure that the connecting infrastructure is physically connected to its network in a timely manner and will facilitate the movement of trains between the connecting infrastructure and its infrastructure (including offering to provide train control and planning services for the connecting infrastructure) (cl. 8.3(b));
  - (iii) Aurizon Network will include operating and maintenance costs of the connecting infrastructure in the cost build up for reference tariffs and not through separate agreements with the private infrastructure owner (cl. 8.3(f)); and
  - (iv) disputes about the matters listed in clause 8.3(e) of the access undertaking (including any aspect of a rail connection agreement) can be resolved through the dispute resolution processes contained in part 10 of the access undertaking (cl. 8.3(e)); and
- (b) provide that any rail connection agreement entered after the SRCA has been approved must be consistent with the terms of the SRCA (unless otherwise agreed by Aurizon Network and the proponent of the private infrastructure to be connected) (cl. 8.4(j)).

## The QCA Act

The Authority may approve the proposed SRCA only if it considers it appropriate to do so, having regard to the matters mentioned in section 138(2) of the QCA Act, being:

- (a) the object of Part 5 of the QCA Act, which is:

*to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets (s. 69E).*

- (b) the legitimate business interests of the owner or operator of the service;
- (c) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (d) the interests of persons who may seek access to the service;
- (e) the effect of excluding existing assets for pricing purposes;
- (f) the pricing principles in s. 168A of the QCA Act including, among other things, that the price of access to a declared service should:
  - (i) 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;
  - (ii) allow for multi-part pricing and price discrimination where it aids efficiency;
  - (iii) not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider, except to the extent the cost of providing access to other operators is higher; and
  - (iv) provide incentives to reduce costs or otherwise improve productivity; and
- (g) any other issues the Authority considers relevant.

#### **1.4.2 Implications for the Authority's Assessment**

In making its assessment of Aurizon Network's proposed SRCA, the Authority has had regard to the information provided by Aurizon Network supporting its proposal and stakeholders' comments and submissions on the proposed SRCA and on the Authority's draft decision.

On this the Authority notes the number and significance of issues raised regarding Aurizon Network's original proposal. For example, Anglo American argued that the structure of the proposed SRCA is 'fundamentally flawed' and fails to address basic issues that leave significant scope for disagreement, and so does little to reduce the scope for disputes relating to interconnection and is 'not effective in constraining the market power of QR Network' (Anglo American 2011a, p.2). The Queensland Resources Council (QRC) sought 'substantial' amendments to make the proposed SRCA agreement 'fair and workable' (QRC 2011, p.2). In its draft decision, the Authority indicated it shared many of the stakeholders' concerns.

In response to the draft decision stakeholders, with the exception of Aurizon Network, generally agreed with the draft decision and supported the Authority's alternative proposal, as it was 'a positive step forward for industry' (BMA-BMC 2012, p.2) that results in a 'substantially improved connection agreement which clarifies certain issues and is more even handed in its treatment of all parties' (Asciano 2012, p.1). As Aurizon Network did not support all of the Authority's draft decision, its response included a revised SRCA which sought to implement aspects of the Authority's draft decision or to 'reach a reasonable compromise' on the issues raised where possible (Aurizon Network 2012a, p.15; Aurizon Network 2012c).

In making its decision, the Authority has sought to weigh the arguments and information provided, paying particular attention to whether the SRCA:

- (a) appropriately balances Aurizon Network's and users' interests (s. 138(2)(b), (c) & (e), QCA Act) – by, among other things, ensuring responsibilities are appropriately allocated between Aurizon Network and private infrastructure owners;
- (b) promotes efficient operation of, use of, and investment in, the network and private rail infrastructure (s. 138(2)(a), QCA Act) – by addressing Aurizon Network's ability to use the negotiation process to delay interconnection or otherwise undermining the ability of users to connect private infrastructure to the existing network;
- (c) promotes effective competition in upstream and downstream markets (s. 138(2)(a) & (d), QCA Act) – in particular as the benefits of competition in the markets for construction and management of private rail infrastructure will only be realised when such infrastructure can be connected to the network on reasonable terms irrespective of whether Aurizon Network (or its related bodies corporate) or a third party provides those services;
- (d) provides incentives to reduce costs or otherwise improve productivity (s. 138(2)(g) and 168A(d), QCA Act); and
- (e) is consistent with the 2010 access undertaking.

This decision outlines the reasons why the Authority has decided not to approve Aurizon Network's SRCA and the ways it should be amended.

Chapter 2 sets out the Authority's consideration of an appropriate balance of Aurizon Network's and users' rights and commercial interests in relation to infrastructure standards, termination and suspension clauses, security, the interface risk assessment and emergency response plan, access to land, liabilities, indemnities and accreditation.

Chapter 3 outlines the key amendments required to simplify and speed up the process of negotiating connection to the network by focusing negotiations and clarifying the points of issue around the scope of the SRCA and the definition of connecting infrastructure and also in relation to the arrangements for charges and payments, infrastructure standards, train control, insurance and disputes.

Chapter 4 addresses issues around coal loss management.

Appendix A includes detailed drafting that is consistent with the Authority's approach and shows all of the amendments required by the Authority. Appendix A includes a number of amendments that are not discussed in detail, but are nonetheless consistent with the Authority's approach. For example, Appendix A includes specific amendments that improve the transparency and clarity of the SRCA – including using drafting that is consistent with the drafting included in other agreements developed under the 2010 access undertaking, such as the existing standard access agreements.

## 1.5 Written Notice

This decision provides Aurizon Network with written notice of the Authority's decision for the purposes of cl. 8.4(c) of the 2010 access undertaking. It states the reasons for the Authority refusing to approve Aurizon Network's proposed SRCA and the ways the proposed SRCA to be resubmitted by Aurizon Network should be amended.

**The Authority requires Aurizon Network to amend its SRCA in the way described in Appendix A of this decision and resubmit the amended SRCA to the Authority by no later than 8 February 2013.**

## 2. NEED FOR BETTER BALANCE

*The approved SRCA will guide negotiations between Aurizon Network and private infrastructure owners seeking to connect private infrastructure to the network. While a negotiated connection agreement may differ from the SRCA, the conditions in the SRCA will be relied upon by the Authority in resolving a dispute if negotiations fail.*

*All stakeholders raised concerns that Aurizon Network's proposed SRCA exhibited a serious imbalance between the rights of Aurizon Network and the rights of the private infrastructure owner.*

*Aspects of the SRCA are based on terms and conditions that have been used in negotiations for connections to the network over the past two years. However, this is not necessarily a useful indicator of the nature and content of an agreement that strikes an appropriate balance between Aurizon Network's and users' interests. While Aurizon Network's revised SRCA has gone some way to address this imbalance, the Authority considers that serious deficiencies remain that could undermine the ability of users to construct and connect private infrastructure to the network. As such, the Authority requires the SRCA be amended to better balance Aurizon Network's and users' rights and commercial interests.*

*This chapter sets out the Authority's consideration of an appropriate balance of rights and obligations for Aurizon Network and the private infrastructure owner, in particular relating to infrastructure standards, termination and suspension clauses, security, the interface risk assessment and emergency response plan, access to land, liabilities, indemnities and accreditation.*

### 2.1 Infrastructure Standards

Clauses 6 and 7 of the proposed SRCA contain provisions that seek to ensure that infrastructure connected to the below-rail network provides a safe connection, both as built and upgraded over time. In particular, that the infrastructure meets a standard that 'will not impede safety or performance of the below rail network' (Aurizon Network 2011, p.6).

#### 2.1.1 Connecting Infrastructure

Clause 6 of the proposed SRCA provides for Aurizon Network to inspect, maintain and upgrade connecting infrastructure. In particular, Aurizon Network may:

- (a) inspect connecting infrastructure constructed by a private infrastructure owner to determine whether it is 'suitable' and require modifications, upgrades or replacement, at the private infrastructure owner's cost (cl. 6.1);
- (b) design, construct and commission the connecting infrastructure, at the private infrastructure owner's cost (cl. 6.1);
- (c) maintain and repair the connecting infrastructure to a 'standard required to maintain the connection between the network and the private infrastructure' (cl. 6.4); and
- (d) require upgrades, modifications or replacements to the connecting infrastructure in particular circumstances (cl. 6.5).

Under these provisions, private infrastructure owners bear the costs of any works required by Aurizon Network. For connecting infrastructure, the private infrastructure owner can dispute the amount of the costs payable but not the scope of the work or who Aurizon Network chooses to carry out the work (cl. 6.6).

## 2.1.2 Private Infrastructure

Clause 7 of the proposed SRCA provides for Aurizon Network to have the right to require upgrades, modifications or replacements to the private infrastructure in particular circumstances, including:

- (a) in the interests of safety or operational efficiency (cl. 7.1(a)); and
- (b) to bring connecting sections of private infrastructure to a standard consistent with other comparable parts of the network or connecting infrastructure (cl. 7.1(c)).

Required modifications and upgrades would be carried out at the private infrastructure owner's cost and must comply with minimum technical and safety standards as determined by an independent, appropriately qualified person acceptable to both Aurizon Network and the owner (cl. 7.2).

Private infrastructure owners also must ensure that private infrastructure is designed, constructed and maintained so it:

- (a) satisfies the minimum technical, engineering and safety standards (cl. 7.4(a));
- (b) enables trains to run onto / depart from the network at the speed the relevant sections of the network were originally designed (cl. 7.4(b));
- (c) maintains the integrity of all electrical, signalling and telecommunications interfaces (cl. 7.4(c));
- (d) maintains the integrity of any weighbridge or overload detector on the private infrastructure (cl. 7.4(d)); and
- (e) complies with the coal loss mitigation provisions (cl. 7.4(e)).

### Draft Decision

In its draft decision, the Authority proposed a number of amendments to better align the infrastructure standards required by the SRCA with the 2010 access undertaking, including by:

- (a) requiring the infrastructure standards for connecting infrastructure reflect the related requirements in cl. 8.3(a)(i)-(iii) of the 2010 access undertaking;
- (b) limiting Aurizon Network's involvement in the standards of private infrastructure to the extent that the private infrastructure may affect Aurizon Network's infrastructure (e.g. safety) or the operation of train services on Aurizon Network's network; and
- (c) providing private infrastructure owners with greater input into the design, construction, upgrade, modification and replacement of connecting infrastructure, including through the dispute resolution mechanism (Draft Decision 2.1).

These amendments sought to address stakeholders' concerns that Aurizon Network's proposed infrastructure standards were unclear and overly broad and that Aurizon Network might require private infrastructure owners to build and maintain infrastructure to a standard beyond what is required by the 2010 access undertaking or what Aurizon Network applies to its own infrastructure.

These amendments were in addition to the further proposals to improve the transparency and clarity of the associated inspection and assessment processes for the initial design, construction and commissioning of connecting infrastructure (discussed in detail in section 3.3).

### **Stakeholder Comments on Draft Decision**

In response to the draft decision, stakeholders did not generally object to the proposed amendments requiring the infrastructure standards for connecting infrastructure to reflect the related requirements in cl. 8.3(a)(i)-(iii) of the 2010 access undertaking.

Bandanna Energy and Cockatoo Coal said that the requirements under cl.8.3(a)(i)-(iii) of the 2010 access undertaking provide an ‘appropriate check’ on Aurizon Network’s ability to dictate an unreasonable standard for connecting and/or private infrastructure (Bandanna Energy and Cockatoo Coal 2012, p.2).

While Aurizon Network agreed that the requirements under cl.8.3(a)(i)-(iii) of the 2010 access undertaking should apply to the standard of connecting infrastructure, it argued that such provisions should ‘be interpreted as broad guidelines’ that are applied in a ‘reasonable, prudent and non-restrictive way’ (Aurizon Network 2012a, p.6). In doing so, Aurizon Network sought to ensure that the connecting infrastructure has no impact on safety or efficiency of the mainline and that it is built to a standard that meets customer demands on the infrastructure over time, including of the private infrastructure owner and of all other users of the mainline (Aurizon Network 2012a, p.6).

Aurizon Network did not support the Authority’s proposal to provide private infrastructure owners more input into the upgrade, modification and replacement of connecting infrastructure. It argued that it should be ‘solely responsible’ for determining any requirements because it owns, manages and maintains the connecting infrastructure – but accepted that private infrastructure owners will be concerned by the costs of such changes (Aurizon Network 2012a, p.6). In contrast Bandanna Energy and Cockatoo Coal noted the importance of including an explicit right for private infrastructure owners to dispute the scope and cost of works that Aurizon Network might require (Bandanna Energy and Cockatoo Coal 2012, p.2).

Aurizon Network largely accepted the Authority’s proposal that private infrastructure be built and maintained to meet minimum technical, operational and safety requirements, but only to the extent that a failure to meet any of these requirements would have an impact on the safety or operation of the connecting infrastructure or the network. In doing so, Aurizon Network highlighted the importance of the private infrastructure being built and maintained so that trains can fully exit (or enter) the network in a safe manner and at a speed that does not impact the safe and efficient operation of the mainline (Aurizon Network, 2012a, p.6).

### **Authority’s Analysis and Final Decision**

The Authority has not changed its conclusions regarding the infrastructure standards required by the SRCA. The Authority notes the broad acceptance of its proposals that the infrastructure standards for connecting infrastructure should reflect the related requirements in cl. 8.3(a)(i)-(iii) of the 2010 access undertaking. The Authority does not accept Aurizon Network’s proposition that the requirements of clause 8.3 of the 2010 access undertaking should be ‘interpreted as broad guidelines’. In particular, the Authority expects that infrastructure would be built to meet the requirements in the 2010 access undertaking, which the Authority considers are quite specific (and clause 8.4(e)(ii) of the access undertaking provides the Authority can only approve the SRCA if it is satisfied it is consistent with the access undertaking).

The Authority does not accept Aurizon Network’s proposal that it be ‘solely responsible’ for determining any requirements to modify, upgrade or replace connecting infrastructure – and that the matters that private infrastructure owners may take to dispute be limited to the costs payable.

Instead, the Authority maintains the view that it is desirable that the SRCA provide private infrastructure owners with greater input into the design, construction, upgrade, modification and replacement of connecting infrastructure, including through the dispute resolution mechanism. This recognises the operational importance to miners of maintaining their private infrastructure and connections to the network. It will also constrain the potential ability of Aurizon Network to use its existing monopoly position in relation to the provision of access to exert control over the nature, type and costs of works allowed. In particular, the Authority agrees with Asciano (2011, p.8) that if a private infrastructure owner is required to pay for such costs, it should have the ability to discuss such matters with Aurizon Network and to take matters, where there is disagreement, to dispute resolution. This is consistent with the 2010 access undertaking that provides for: Aurizon Network to receive comments on design, construction and project management matters (cl. 8.3(c)(ii)); and parties to resolve, among other things, issues around the standards of works through the access undertaking dispute mechanism (cl. 8.3(e)).

The Authority also notes that Aurizon Network has broadly accepted that it should only become involved in the standards of private infrastructure to address issues such as safety and the operation of train services on the network.

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### **Final Decision 2.1**

- **The Authority requires Aurizon Network to amend Parts 6 and 7 of the SRCA such that:**
    - (a) **the infrastructure standards for connecting infrastructure reflect the related requirements in cl. 8.3(a)(i)-(iii) of the 2010 access undertaking;**
    - (b) **Aurizon Network’s involvement in the standards of private infrastructure is limited to the extent that the private infrastructure may affect Aurizon Network’s infrastructure (e.g. safety) or the operation of train services on Aurizon Network’s network; and**
    - (c) **private infrastructure owners have more input into the design, construction, upgrade, modification and replacement of connecting infrastructure, including through the dispute resolution mechanism.**
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## **2.2 Consequences of Failing to Perform**

The proposed SRCA includes measures to manage failure to perform including through termination and suspension, and by requiring the provision of security (where the private infrastructure owner’s credit rating is worse than that of Aurizon Network’s parent company, Aurizon Holdings Limited).

### **2.2.1 Termination and Suspension Clauses**

Clause 18.1 of the proposed SRCA provides for Aurizon Network to terminate the agreement by notice to the private infrastructure owner in certain defined circumstances. For instance termination can be:

- (a) immediate for cases of termination of operation of the private infrastructure, of insolvency, of environmental harm, of permanent closure of the connecting section of

track, of suspension under the coal loss mitigation provisions (CLMPs), or of the termination of any other agreement between Aurizon Network and the private infrastructure owner;

- (b) within 14 days for material matters related to overdue amounts, security amount or insurance; and
- (c) within 30 days to remedy default of ‘any other material obligation’ under the agreement.

Aurizon Network can also terminate the agreement if it has given the owner of the private infrastructure a suspension notice for failing to carry out an obligation under the CLMPs (set out in Schedule 7 of the proposed SRCA).

By comparison, clause 18.2 provides for the private infrastructure owner to terminate the agreement only if Aurizon Network is in default of material obligations and has not remedied the default within 30 days.

### Draft Decision

The Authority was concerned that some of the consequences for failing to perform contained in the proposed SRCA are neither reciprocal nor symmetrical – i.e. they would result in the owner of the private infrastructure facing potentially serious consequences for non-performance of obligations while Aurizon Network would face much less consequences for similar failings.

In its draft decision, the Authority proposed a number of amendments to better balance Aurizon Network’s and users’ commercial interests relating to the consequences of failing to perform their respective contractual obligations. Specific amendments included:

- (a) increasing, from 14 days to 30 days, the time provided to rectify defaults prior to termination (Draft Decision 2.2(a)); and
- (b) providing that Aurizon Network may not terminate an agreement on the basis of a matter that is the subject of a bona fide dispute unless and until the dispute is resolved in favour of Aurizon Network having the right to terminate (Draft Decision 2.2(b)).

The Authority also proposed a number of other amendments to the termination rights, including providing Aurizon Network could exercise termination rights when private infrastructure is abandoned, in the event no one held access rights or was seeking access which would utilise the connection or when connecting infrastructure or the network infrastructure has been damaged or destroyed by a force majeure event and repair or replacement is not economic or being paid for by the private infrastructure owner (Draft Decision Appendix A, cl. 18.1; cl. 18.8).

### Stakeholder Comments on Draft Decision

Aurizon Network supported the Authority’s proposed approach to increase the rectification timeframes and proposed using 20 business days in the interests of clarity and consistency (Aurizon Network 2012a, p.7).

Aurizon Network did not support the Authority’s proposed approach to delete the provision for termination should Aurizon Network permanently close the section of network that the connecting infrastructure connects to. Instead, Aurizon Network wanted to retain its original drafting.

Aurizon Network supported the Authority's proposed approach that there should be no termination right if there is an ongoing dispute resolution process, provided unfettered suspension rights in respect of safety and environmental issues were retained (Aurizon Network 2012a, p.7).

Aurizon Network argued that it could not accept safety or environmental risk arising on the Network (Aurizon Network 2012a, p.7) and accordingly proposed that a number of new provisions be included in the SRCA, including:

- (a) a right to suspend instantly and indefinitely until the issue is resolved if a safety or environmental issue led to the suspension; and
- (b) recognition of a separate suspension process in the CLMPs which would operate to suspend rights under the SRCA until the cessation of the suspension under the CLMPs.

Vale and Anglo American did not support the Authority's proposed approach to provide for Aurizon Network to terminate an agreement where it considers that the costs to repair infrastructure that has been damaged or destroyed by a force majeure event are not economic, unless the private infrastructure owner pays for the repairs. Vale and Anglo American argued that this clause is too broad as it is applied to the network, opening the opportunity for Aurizon Network to seek to have this 'apply to a part of the Network which is more than 100km away from the Connecting Infrastructure' (Anglo American 2012a, p.3; Vale 2012, p.4). Vale and Anglo American also argued that this provision does not, in fact, need to deal with the network, because the 2010 access undertaking already makes specific provision in respect to the damage and replacement of the network. Accordingly, Vale and Anglo American wanted the network excluded from this clause.

Aurizon Network did not support the Authority's proposed approach that requires it to transfer ownership of the connecting infrastructure back to the private infrastructure owner (if requested) upon expiry or early termination of the connection agreement. Instead, Aurizon Network provided that it may, in its absolute discretion, remove the connecting infrastructure upon expiry or early termination of the connection agreement (Aurizon Network 2012c, cl. 21.4).

### Authority's Analysis and Final Decision

The Authority has further developed and clarified its conclusions regarding suspension and termination clauses, based on the responses to the draft decision from Aurizon Network and other stakeholders.

First, the Authority has accepted, as a reasonable compromise, Aurizon Network's proposal to provide 20 business days to rectify defaults prior to termination – this is longer than the 14 days included in the proposed SRCA but is generally going to be shorter than the 30 days in the Authority's draft decision.

Second, the Authority has maintained its position on the circumstances when termination rights may be exercised by Aurizon Network where the private infrastructure is abandoned or is not contracted to be utilised or sought to be utilised. The Authority considers the costs to Aurizon Network to maintain the connecting infrastructure are likely to be minimal (and reimbursed by the private infrastructure owner through reference tariffs or the annual service charge under the SRCA) compared to the potential costs of removing the infrastructure and reconstructing it later if the private infrastructure owner re-sought connection.

Third, the Authority accepts Aurizon Network's argument that it should have the right to suspend immediately and indefinitely for serious safety or environmental issues (but rejects Aurizon Network's extension of these principles to non-serious issues). However, in recognition of the importance of these matters and the need to resolve them quickly, the Authority requires the dispute resolution mechanism in this case to be by immediate expert resolution, whereby the private infrastructure owner would propose an expert and Aurizon Network would have two business days to approve the choice, or failing approval the expert would be appointed by an independent party.

Fourth, the Authority has accepted Vale's and Anglo American's argument that Aurizon Network's 2010 access undertaking already makes specific provisions in respect to damage and replacement of the network. On that basis, the Authority requires that the SRCA provide for Aurizon Network to terminate an agreement where it considers that the costs to repair connecting infrastructure (not the network) that has been damaged or destroyed by a force majeure event are not economic, unless the private infrastructure owner elects to pay, and does in fact pay, for repairs.

Fifth, the Authority still considers that it is appropriate for Aurizon Network to transfer ownership of the connecting infrastructure to the private infrastructure owner (if requested) upon expiry or early termination. This will ensure that a private infrastructure owner could maintain the infrastructure to a suitable standard, following the expiry or early termination of an agreement, to allow recommissioning of the connection if the owner has a need to do so in the future. In the event that a private infrastructure owner does not request ownership of the connecting infrastructure, Aurizon Network can remove the connecting infrastructure.

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### Final Decision 2.2

- **The Authority requires Aurizon Network to amend clause 18 of the proposed SRCA to**
    - (a) **increase the timeframes to rectify defaults prior to termination, from 14 days to 20 business days;**
    - (b) **provide that Aurizon Network may suspend immediately (and not have the suspension lifted upon a bona fide dispute being initiated for serious safety or serious environmental issues, subject to immediate expert dispute resolution where the suspension is disputed);**
    - (c) **provide for Aurizon Network to terminate the agreement where it considers that the costs of repairing connecting infrastructure (but not the network) that has been damaged or destroyed by a force majeure event are not economic, unless the private infrastructure owner pays for the repairs; and**
    - (d) **provide that Aurizon Network may not terminate an agreement on the basis of a matter that is the subject of an ongoing dispute resolution process.**
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### 2.2.2 Security

Clause 20 of the SRCA proposes that Aurizon Network can request, prior to the commencement of the agreement, security from a private infrastructure owner in the form of a bank guarantee. Clause 20.2 specifies that Aurizon Network will review annually the amount of the guarantee and can decide whether it needs to be increased or decreased.

## Draft Decision

In its draft decision, the Authority proposed a number of amendments to better balance Aurizon Network's and users' commercial interests relating to the consequences of failing to perform their respective contractual obligations. Specific amendments included:

- (a) requiring that any security provided should better reflect the level of risks undertaken by both parties entering into the agreement, including capping security from the private infrastructure to the estimated reasonable and prudent costs of decommissioning and removing the connecting infrastructure (Draft Decision 2.3);
- (b) limiting Aurizon Network's ability to unilaterally review and impose conditions and amounts of security by providing that the security amount be indexed with reference to a relevant inflation index (Draft Decision Appendix A, cl. 20.2); and
- (c) allowing Aurizon Network to request security at any time after the commencement of the agreement where the owner does not have an acceptable credit rating (Draft Decision Appendix A, cl. 20.1).

The Authority also sought stakeholders' input on the amount of security and its revision.

## Stakeholder Comments on Draft Decision

Aurizon Network did not support the Authority's proposed approach to security, arguing the security requirement should not be treated in isolation, as there are 'still residual risks that QR Network must bear that should be reflected in the price charged for rendering services under this agreement, if they are not recovered elsewhere' (Aurizon Network 2012a, p.7). For example Aurizon Network argued that paying the annual service charge in arrears is not appropriate, as it increases Aurizon Network's risk exposure (Aurizon Network 2012a, p.8).

### *Acceptable Credit Rating*

Bandanna Energy and Cockatoo Coal supported the Authority's proposed approach to set an objective threshold such as an "acceptable credit rating", arguing that it provides greater certainty. They also proposed that this should not be higher than Aurizon Network's own credit rating (Bandanna Energy and Cockatoo Coal 2012, p. 4).

While Anglo American and Vale accepted the Authority's proposed approach to set an objective threshold, they were concerned with the level of the threshold. Accordingly, they argued that a BBB- credit rating is sufficient to protect Aurizon Network's interests, being 'generally considered to be investment grade' and having been accepted in a number of previous agreements (Anglo American 2012a, p. 4 and Vale 2012, p.4).

While the QRC supported the Authority's proposed approach that an "Acceptable Credit Rating" be BBB+ (below which security must be provided) (QRC 2012a, p.2), the QRC argued that the SRCA should expressly acknowledge that a connecting party not be required to provide security where that party does not have a credit rating and Aurizon Network is otherwise reasonably satisfied as to the party's financial capacity (QRC 2012a, p.2).

### *Amount of Security*

While Bandanna Energy and Cockatoo Coal accepted the Authority's proposed approach to limit security to the cost of decommissioning and removing the connecting infrastructure, they said this should be an upper limit. Bandanna Energy and Cockatoo Coal suggested that the exact quantum of security is probably a matter best determined on a case-by-case basis (Bandanna Energy and Cockatoo Coal 2012, p.4).

The QRC supported the Authority's proposed approach to the security cap (QRC 2012a, p.2).

Aurizon Network supported the Authority's proposed approach that the costs of removing and decommissioning the connecting infrastructure should be the primary risk to be covered under any SRCA security arrangement (Aurizon Network 2012a, p.8).

Bandanna Energy and Cockatoo Coal argued that security should be returned 'as soon as reasonably practicable, and at the latest within three months' after expiration or termination of the agreement (Bandanna Energy and Cockatoo Coal 2012, p.4).

Bandanna Energy and Cockatoo Coal said, if security is provided in cash form, the SRCA should provide for interest to be payable (Bandanna Energy and Cockatoo Coal 2012, p.4).

#### *Revision of the Security Amount*

Aurizon Network did not support the Authority's proposed approach to index the security amount, arguing that will cause a significant deviation from the actual costs to be paid over time, given the long term nature of the SRCA, the observed variation in steel, cement, heavy machinery, and labour costs and changing regulatory and safety requirements (Aurizon Network 2012a, p.8). Instead, Aurizon Network recommended that the security amount be periodically reviewed after the second year, on an annual basis, at Aurizon Network's option to better match the security amount to the cost of decommissioning, and that it be subject to dispute resolution (Aurizon Network 2012a, p.8).

Asciano argued the treatment of security under the 2010 access undertaking provides a 'previously approved template' to treat security (to the extent that it is relevant) – but noted that the issue is 'best left' to industry bodies or owners who are likely to be impacted by this clause (Asciano 2012, p.8).

The QRC argued that a six-monthly review period would be appropriate for the security amount (QRC 2012a, p.2).

Bandanna Energy and Cockatoo Coal argued that any review of security should be triggered by a change in the private infrastructure owner's financial performance or performance under the connection agreement, rather than on a regular basis (Bandanna Energy and Cockatoo Coal 2012, p.4).

The QRC argued that a party that 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 (QRC 2012a, p.3).

The QRC argued that Aurizon Network should be obliged to return security where a party's credit rating increases to BBB+ or better (QRC 2012a, p.2).

The QRC considered that Aurizon Network should not be permitted to increase the security amount, except in circumstances where the calculation of the security amount, at the date of assessment, would be materially higher than the actual security provided (QRC 2012a, p.2).

The QRC argued that the security clause should oblige Aurizon Network to give two business days notice prior to calling upon the security (QRC 2012a, p.3).

## Authority's Analysis and Final Decision

### *Acceptable Credit Rating*

On the basis of the matters raised by stakeholders in response to the draft decision, the Authority has further developed and clarified its conclusions regarding the use of Aurizon Holdings Limited's credit rating as the benchmark which the private infrastructure owner must meet in order not to provide security. The Authority considers the drafting should reflect this benchmark as it might vary from time to time and therefore proposes to remove the specific mention of BBB+ (Aurizon Holdings Limited's current rating, except to provide a reference point where Aurizon Holdings Limited is no longer rated or the ultimate holding company of Aurizon Network) (see Appendix A, Definitions). The Authority recognises that Aurizon Network's rating may vary from time to time, therefore the requirement to provide security may change during the life of the agreement.

The Authority notes that it is always at the discretion of both parties to diverge from the standard agreement and negotiate mutually agreeable arrangements on a case-by-case basis. This is particularly likely to occur in the case highlighted by the QRC where a connecting party does not have a credit rating and Aurizon Network is otherwise reasonably satisfied as to the party's financial capacity. In those circumstances, both parties could agree that security is not required (or is not required provided other specified financial metrics are met) and it is not necessary to include this option in the SRCA.

### *Amount of Security*

The Authority has kept the cap on the amount of security required by the private infrastructure owner as the estimated reasonable and prudent costs of decommissioning and removing the connecting infrastructure upon expiry of the connection agreement, consistent with stakeholders' general support of the nature of the cap in the draft decision.

### *Revision of the Security Amount*

However, the Authority has revised its proposed approach to indexing the security amount, to address stakeholders' comments. In particular, the Authority now considers that the security amount should be indexed annually to changes in the maintenance cost index (MCI) as defined in Aurizon Network's access undertaking or if MCI ceases to be used in future undertakings as defined in the most recent undertaking in which it was used, with the option to bring the security amount to the dispute resolution process if necessary. In designating the MCI for this purpose, the Authority is mindful that the consumer price index (CPI) may not accurately reflect the types of cost increases, and therefore the changes to the security amount necessary to reflect the costs of decommissioning and removal, which can be anticipated in central Queensland from time to time.

The Authority has also refined its conclusions relating to not needing security where a private infrastructure owner has an acceptable credit rating. In particular, the Authority considers that a new clause should be inserted into the SRCA requiring Aurizon Network to release or return the security if a change in circumstances means the private infrastructure owner's credit rating becomes acceptable (either by Aurizon Holdings Limited's falling or the private infrastructure owner's increasing).

This is counterbalanced by maintaining the Authority's draft decision that would allow Aurizon Network to request security at any time after the commencement of the agreement, where the owner does not have an acceptable credit rating (either by Aurizon Holdings Limited's increasing or the private infrastructure owner's falling).

The Authority has further developed and clarified its conclusions regarding when the security amount should be returned, given the matters raised by Bandanna Energy and Cockatoo Coal in response to the draft decision. The Authority now considers that security should be returned as soon as reasonably practicable and at the latest within three months after expiration or termination of a connection agreement.

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### **Final Decision 2.3**

- **The Authority requires Aurizon Network to amend clause 20 of the proposed SRCA to better reflect the level of risks faced by both parties entering into the agreement. This includes providing that:**
    - (a) **a private infrastructure owner (or a parent company offering a guarantee on its behalf) with an acceptable credit rating (no less than Aurizon Holdings Limited’s credit rating) does not need to provide security;**
    - (b) **the terms and conditions of security should not change and the amount should be indexed annually to changes in the Maintenance Cost Index (cl. 20.2);**
    - (c) **the indexation of the security amount should be subject to dispute resolution;**
    - (d) **the security should be released or returned as soon as reasonably practicable and at the latest within three months after expiration or termination of the agreement;**
    - (e) **the security should be released or returned if a change in circumstances means the private infrastructure owner’s credit rating becomes acceptable; and**
    - (f) **the amount of security required from the private infrastructure owner be capped at the estimated reasonable and prudent costs of decommissioning and removing the connecting infrastructure upon expiry of the connection agreement.**
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## **2.3 Interface Risk Assessment and Emergency Response Plan**

Clause 10 of the SRCA details the requirements regarding conduct of an interface risk assessment, and the subsequent development and operation of an interface risk management plan and emergency response plan. This includes a process for conducting an investigation following an incident arising on the private infrastructure that impacts the connecting infrastructure or the network.

### **Draft Decision**

In its draft decision, the Authority proposed a number of amendments to encourage greater co-operation in developing interface arrangements, including by providing a process and timeframes to exchange information. Specific amendments included:

- (a) requiring both parties to share information on safety and interface matters (Draft Decision 2.4) and to work collaboratively on safety and interface matters, including participating in reviews, meetings and planning activities (Draft Decision Appendix A, cl. 10);

- (b) requiring the SRCA to include an initial Interface Risk Management Plan and an Emergency Response Plan, that can be subsequently reviewed (Draft Decision Appendix A, Schedule 4); and
- (c) providing criteria for when Aurizon Network can determine who conducts an investigation into an incident and how it will be conducted (Draft Decision Appendix A, cl. 11.8).

Together, these amendments sought to provide greater certainty in developing interface arrangements and to address stakeholder concerns that Aurizon Network could use the negotiation process for interface arrangements to delay or hinder interconnection.

### Stakeholder Comments on Draft Decision

In response to the draft decision, stakeholders' comments focused on the Authority's proposals that sought to facilitate collaboration on safety and interface issues and on the circumstances when, or if, Aurizon Network will conduct investigations into incidents on private infrastructure.

### Facilitating Collaboration on Safety and Interface Issues

In response to the draft decision, Aurizon Network agreed that including relevant information sharing obligations to ensure a safe interface between the mainline and private infrastructure under the SRCA was desirable (Aurizon Network 2012a, p.8). However, it was concerned that the Authority's proposed drafting was 'wide ranging, ambiguous and inadequate for the protection of intellectual property' and resulted in considerable overlap with other contract provisions and agreements. Aurizon Network argued that:

- (a) information sharing obligations and other responsibilities of a third-party rail infrastructure manager of private infrastructure should be addressed under a separate interface agreement;
- (b) information sharing obligations and other responsibilities between the private infrastructure owner and Aurizon Network should focus on the exchange of safety information relevant to the operation and maintenance of the connecting infrastructure; and
- (c) Aurizon Network's safety management systems are valuable intellectual property that 'must be protected' (Aurizon Network 2012a, p.8).

Aurizon Network's revised SRCA provided drafting to this effect (Aurizon Network 2012c). Aurizon Network's revised SRCA also sought to impose a number of additional obligations on the private infrastructure owner that were not explained in its supporting submission.

The QRC opposed the concept of a separate interface agreement where a private infrastructure owner engages a third party rail infrastructure manager for the private infrastructure, arguing that:

- (a) a separate agreement is 'unnecessary and a further impediment to an efficient agreement'; and
- (b) Aurizon Network is adequately protected by obligations of confidence and intellectual property provisions in the SRCA — and to the extent that a contractor or the owner breaches the SRCA's confidentiality and intellectual property obligations, Aurizon Network will have a right against the owner (QRC 2012b, p.2).

## Responding to Incidents on Private Infrastructure

Stakeholders did not agree on who should conduct an investigation into an incident on private infrastructure and how any investigations should be conducted.

Bandanna Energy and Cockatoo Coal argued that the rail infrastructure manager is the appropriate party to determine who conducts an investigation into an incident and how it will be conducted. Therefore, if Aurizon Network is not the rail infrastructure manager for the private infrastructure, then it should not be entitled to be involved (although it may become involved by agreement) (Bandanna Energy and Cockatoo Coal 2012, p.4).

In contrast, Aurizon Network argued that it should remain responsible for all incidents which impact or have the potential to impact on the connecting infrastructure or the network:

*This enables a consistent and readily applicable approach across the Network, without requiring a potentially complex assessment of possible claims. ... Most importantly, the consequences of a failure are always significant for the mainline and other Aurizon Network customers, whenever the Network's ability to deliver capacity is compromised. (Aurizon Network 2012a, p. 8)*

Asciano argued that Aurizon Network should 'only be involved when Aurizon Network is materially impacted' and proposed a number of thresholds to reflect this, namely:

- (a) any incident that is preventing trains on the Aurizon Network's mainline from operating and will take greater than 24 hours to rectify;
- (b) any incident which impacts on more than 25 train services;
- (c) any incident that results in estimated damage to Aurizon Network's infrastructure of greater than \$100,000; or
- (d) any incident that may result in potential claims against Aurizon Network of more than \$1 million (Asciano 2012, p.7).

## Authority's Analysis and Final Decision

On the basis of the matters raised by stakeholders in response to the draft decision, the Authority has not changed its in-principle position on the desirability of facilitating collaboration on safety and interface issues. The Authority has, however, amended its proposed drafting to reflect the concerns raised by Aurizon Network over the provision of information to third-party rail infrastructure managers, in particular relating to the treatment of confidential information.

The Authority has also come to a view on appropriate thresholds to determine when Aurizon Network will conduct an investigation into an incident on private infrastructure and how it will be conducted.

## Facilitating Collaboration on Safety and Interface Issues

The Authority maintains that the SRCA should include reasonable and reciprocal terms around the exchange of information so that parties will share information in a timely manner and work collaboratively, including participating in reviews, meetings and planning activities.

The Authority notes Aurizon Network's concerns around the provision of certain information to a third-party rail infrastructure manager. However, the Authority considers that, on balance, it is appropriate for the SRCA to deal with these issues. The Authority is

not convinced that moving these matters outside the SRCA is necessary to deal with Aurizon Network's concerns regarding the treatment of interface information by third-party rail infrastructure managers. Further, the Authority is concerned that moving information sharing obligations and other responsibilities to a separate agreement creates uncertainty and leaves open the possibility for delays in negotiating and finalising a connection agreement.

Accordingly, the Authority has retained the provisions relating to the exchange of safety and interface information, including allowing a third-party rail infrastructure manager to request (or provide) documents and information that relate to safety and interface matters. That said, the Authority has refined its drafting to deal with the confidentiality issues related to information exchange between Aurizon Network and third-party rail infrastructure managers. In particular, the Authority requires that any provision of safety and interface information to a third-party rail infrastructure manager, if required by Aurizon Network, be subject to the third-party rail infrastructure manager first signing a confidentiality deed (which is included as a schedule to the SRCA) except to the extent that any information to be disclosed under clause 10 of the SRCA is already subject to confidentiality obligations under another agreement between these entities (including an interface agreement). The Authority also requires that a reciprocal obligation be imposed on Aurizon Network for information it receives from the third-party rail infrastructure manager.

The Authority's requirements now go beyond those in the draft decision. In doing so, the Authority has not accepted the QRC's claim that Aurizon Network was adequately protected by obligations of confidence and intellectual property provisions in the SRCA for information exchange between it and third parties.

### Responding to Incidents on Private Infrastructure

The Authority considers that it is appropriate for the rail infrastructure manager for private infrastructure to determine who will conduct an investigation into an incident on private infrastructure and how it will be conducted when the incident only impacts the private infrastructure. The Authority accepts that incidents on private infrastructure may also impact the connecting infrastructure or the network. In that event, a key issue is whether the impact on the connecting infrastructure or the network is sufficiently material to warrant Aurizon Network controlling the investigation. For example, the Authority is not convinced that it is appropriate for Aurizon Network to be involved in investigations of incidents on private infrastructure (or indeed why it would wish to be involved) should the effect of the incident on the network be small or immaterial.

Accordingly, the Authority considers that Aurizon Network's involvement should be limited to incidents on private infrastructure with a material impact on the network. Moreover, in the interests of clarity, the SRCA should include defined materiality thresholds to reflect this. The Authority considers that thresholds suggested by Asciano go some way to reflect this but has changed the threshold referring to 'impacting on more than 25 train services' to causing 'a failure to operate more than 25 train services'. In this way, Aurizon Network would only have rights to control investigations into incidents on private infrastructure that:

- (a) prevent trains on the Aurizon Network mainline from operating and will take greater than 24 hours to rectify;
- (b) cause a failure to operate more than 25 train services;
- (c) result in estimated damage to Aurizon Network infrastructure of greater than \$100,000; or

- (d) result or are estimated to result in potential claims against Aurizon Network of more than \$1 million.

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#### Final Decision 2.4

- **The Authority requires Aurizon Network to amend the SRCA to ensure reasonable and reciprocal obligations on both parties to share information on safety and interface matters.**
  - **The Authority requires Aurizon Network to amend the SRCA to include the threshold criteria (as outlined above) for incidents on private infrastructure for which Aurizon Network will determine who will conduct an investigation into an incident and how it will be conducted. In all other circumstances, the rail infrastructure manager for private infrastructure will make these decisions.**
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## 2.4 Access to Land

The SRCA provides for Aurizon Network (and relevant workmen and machinery) to enter and remain on the private infrastructure so Aurizon Network can exercise its rights and fulfil its obligations to maintain and repair connecting infrastructure (cl. 6.8).

Beyond this, the proposed SRCA excludes land issues from a connection agreement by requiring a private infrastructure owner and Aurizon Network (and, where relevant, a third party) to enter into a separate agreement:

- (a) when part of the private infrastructure is on land owned or controlled by Aurizon Network (cl. 26.1); and
- (b) so Aurizon Network can secure reasonably required rights to enter the land when some part of the connecting infrastructure is on land owned or controlled by the private infrastructure owner (and/or third party) (cl. 26.2).

#### Draft Decision

In its draft decision, the Authority proposed a number of amendments to provide reciprocal rights and obligations on land access issues, including requiring Aurizon Network to:

- (a) provide a private infrastructure owner with reasonable access to land to construct the relevant infrastructure and/or to operate the private infrastructure, where it has the power to do so; and
- (b) comply with the site and safety rules that apply to private land (Draft Decision 2.5).

Together, these amendments sought to balance Aurizon Network's and private infrastructure owners' rights and obligations in relation to land access. They also sought to bring the SRCA arrangements for land access into line with analogous requirements included in the 2010 access undertaking.

#### Stakeholder Comments on Draft Decision

Bandanna Energy and Cockatoo Coal supported the Authority's proposed approach saying that the SRCA is a 'more balanced' document when Aurizon Network is required to confirm obligations upon itself (Bandanna Energy and Cockatoo Coal 2012, p.2).

While the QRC accepted the Authority's proposed approach, it sought to include an additional requirement that Aurizon Network use 'reasonable endeavours' to secure access rights for the private infrastructure owner if Aurizon Network does not have authority to authorise access, arguing that this 'may be important' for enabling the private infrastructure owner to secure relevant access (QRC 2012a, p.3).

Aurizon Network argued that land access rights under the SRCA should only be permitted to the extent required to enable the parties to comply with the SRCA – that is, relating to the operation or maintenance of the connection (Aurizon Network 2012a, p.9). Given this, and the other amendments Aurizon Network proposed in response to the draft decision, Aurizon Network argued that:

- (a) land access for construction related purposes is unnecessary since the relevant (separate) construction agreement will have its own land access provisions;
- (b) land access to maintain the connecting infrastructure is unnecessary since maintenance is Aurizon Network's responsibility (and any out-sourcing would be addressed under a commercial maintenance contract); and
- (c) land access for other purposes would be governed by a separate licence to enter the rail corridor (Aurizon Network 2012a, p.9).

Aurizon Network argued that access to its land should be governed under a separate agreement: to facilitate its centrally managed approach to real estate and third party land access management (to encourage coordinated, consistent decisions); to provide a direct relationship with any third party that might seek access to its land (e.g. a private infrastructure owner's contractor); and to better reflect the different characteristics and operations at different sites (Aurizon Network 2012a, p.9).

Aurizon Network agreed that where it requires land access rights onto private land to comply with its obligations under the SRCA, then such access should be the subject of compliance with the owner's appropriate access protocols. Aurizon Network also argued that the SRCA should address access to private land by Aurizon Network in the case of an emergency (Aurizon Network 2012a, p.9) and included drafting to this effect (Aurizon Network 2012c, cl. 29.5).

### **Authority's Analysis and Final Decision**

On the basis of the matters raised by stakeholders in response to the draft decision, the Authority has further developed and clarified its conclusions regarding land access issues in the SRCA.

The Authority maintains its position that it is desirable that rights and obligations in relation to land access under the SRCA should be reciprocal to the extent that access to land is required to enable a party to comply with its obligations under the SRCA. It also considers this should extend to access to land required to enable a Party to comply with an interface agreement. In doing so, the Authority notes that this would include reciprocal rights regarding entering another party's land in the case of an emergency. The Authority has further developed its drafting on this matter to reflect this position (see Appendix A, cl. 26.5-26.6).

The Authority notes Aurizon Network's arguments that access to its land should be governed by a separate agreement. However, the Authority considers that, on balance, it is appropriate that access to land related to the operation of the SRCA should, where possible, be governed under the SRCA – to do otherwise would diminish the effectiveness of the SRCA. The key

concern here is that creating a separate agreement for land access could create more uncertainty, and possible delay, in negotiations.

The Authority has not accepted the QRC's proposal to require Aurizon Network to use 'reasonable endeavours' to secure access rights over land it does not otherwise have authority to authorise access. Rather, the Authority has maintained its position requiring Aurizon Network to:

- (a) provide access to land where it has the power to do so; and
- (b) provide information to assist the private infrastructure owner to obtain approval to access land where it does not.

This is consistent with the analogous provisions of the 2010 access undertaking in relation to provision of land access to access holders (cl. 2.4 (d), cl. 12.1, definition of 'Access' and Schedule D, Part B.2)).

The Authority notes that Aurizon Network accepted that access to private land should be subject to compliance with the owner's appropriate access protocols. Accordingly, the Authority has maintained its position that the SRCA be amended to require Aurizon Network to comply with the site and safety rules that apply to private land.

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#### **Final Decision 2.5**

- **The Authority requires Aurizon Network to amend the SRCA to provide private infrastructure owners with reciprocal rights to access land owned, or otherwise used by, Aurizon Network, to fulfil its obligations under the SRCA or any interface agreement between the parties.**
  - **The Authority requires Aurizon Network to amend the SRCA to require Aurizon Network to comply with the site and safety rules that apply to private land.**
- 

## **2.5 Liability**

Clause 21 of the SRCA provides that neither party will be liable to the other for any consequential loss arising from, under, or in connection with, the agreement. Neither party will have any claim against the other except as provided in the agreement (cl. 21.2). Clause 21.3 limits Aurizon Network's liability to a specific sum to be agreed between the parties, but not included in the SRCA. In clause 21.5, Aurizon Network requires the owner to indemnify Aurizon Network for the acts and omissions of the owner's operator.

#### **Draft Decision**

In its draft decision, the Authority expressly sought further submissions from stakeholders on the liability arrangements and indicated that there needed to be 'more realistic' liability obligations on the parties. Specific amendments to the SRCA (for which the Authority sought stakeholders' comments on, before making its final decision) included:

- (a) removing the restriction that claims for liability should be limited solely to items provided for in a connection agreement, as it would have the effect of inappropriately excluding claims not contemplated by a connection agreement, including claims relating to breaches of confidence;

- (b) providing for claims to be made within six months of the later of either the claim arising or becoming reasonably apparent to the relevant party, to cater for the circumstance where a party is not aware of a personal injury claim arising from an event until more than six months after the event occurring;
- (c) making the liability cap reciprocal for both parties;
- (d) including an explicit liability cap; and
- (e) deleting requirements relating to conduct by train operators, as it is a matter better dealt with in access agreements (Draft Decision 2.6).

Taken together, these amendments sought to better balance Aurizon Network's and users' rights and commercial interests.

The Authority also sought specific submissions on what the explicit amount or relevant formula or methodology of the liability cap should be.

### Stakeholder Comments on Draft Decision

The QRC supported the Authority's proposed amendments in regards to the liability provisions (QRC 2012a, p. 3).

#### Scope of Claims

Aurizon Network did not support the Authority's proposed approach to remove the restriction that claims be limited to items provided for in a connection agreement. It argued that such a restriction was a 'very standard approach to liability' and to the extent that there are specific types of risk (and so potential liabilities and claims) these would not be overlooked by parties negotiating with the benefit of legal and commercial advice (Aurizon Network, 2012a, p.10).

#### Six-month Limit on Claims

Aurizon Network supported the Authority's proposed approach to limit liability claims to six months after the later of the claim arising or becoming reasonably apparent, arguing that it was a reasonable approach for both parties (Aurizon Network, 2012a, p.10).

#### Liability for the Conduct of Train Operators

Aurizon Network did not support the Authority's proposed approach to delete the requirements relating to conduct by train operators, arguing that it will have no direct relationship with the operator for its conduct on private infrastructure (i.e. any access agreement will not cover its conduct on the private infrastructure, but only on the Network). Aurizon Network said that the key risks were that overloaded trains entered the network from the private infrastructure and: caused damage to the connecting infrastructure and mainline; stalled while on the network; and created safety issues if heavy trains travelled at unacceptable speeds (Aurizon Network 2012a, p.10). Instead, Aurizon Network wanted to reinstate its requirements relating to conduct by train operators, but limited the scope so that the private infrastructure owner is only liable:

- (a) for conduct on private infrastructure; and,
- (b) to the extent that the operator does not already indemnify Aurizon Network or have its liability to Aurizon Network limited by a separate agreement (e.g. an access agreement) (Aurizon Network 2012a, p.11).

## Exclusions to the Liability Cap

Anglo American proposed there should be exclusions from the liability cap where the loss has been incurred because of gross negligence, wilful misconduct, property damage, personal injury and fraud (Anglo American 2012a, p.4).

Asciano (2012, p.8) and the QRC (2012a, p.3) argued there should be no liability cap for death or personal injury. The QRC added that there should be no liability cap for claims by third parties for property damage (QRC 2012a, p.3).

Aurizon Network proposed the liability cap exclude liability for reckless or intentional breach of the agreement as well as for:

- (a) any loss of life or injury to any person whatsoever;
- (b) claims by third parties for any damage to any property whatsoever;
- (c) penalties for breach of Law; or
- (d) wilful misconduct and fraud (Aurizon Network 2012c, cl. 24 & 25).

## Explicit Amount of the Liability Cap

Stakeholders made a range of suggestions on what they considered should be the amount of the liability cap – all of which differed.

Anglo American proposed that the cap on liability should be a fixed figure inserted at the time of execution and proposed 150% of the fees expected to be payable under the agreement. Anglo American also proposed that both parties should have the ability to access any insurance claims in addition to the liability cap (Anglo American 2012a, p.4).

Asciano suggested there should be no liability cap between the private infrastructure owner and Aurizon Network (provided that any consequential and indirect losses are excluded) – this assumes that damage is likely to be lower than typical mainline operations as trains passing over the connection point will typically not be travelling at high speed (Asciano 2012, p.8).

Bandanna Energy and Cockatoo Coal said that an aggregate annual liability cap was preferable, but accepted that this would be difficult to quantify. Factors affecting the size of the cap would include: the significance of the connecting infrastructure in terms of its potential to cause disruptions to Aurizon Network's network, as well as the potential for it to disrupt the private infrastructure owner's operations (Bandanna Energy & Cockatoo Coal 2012, p.3-4).

The QRC said that the liability cap amount should be determined by reference to the value of the connecting infrastructure (QRC 2012a, p. ).

Aurizon Network said the liability cap should be set at \$1 plus any proceeds recoverable under policies of insurance effected by Aurizon Network, arguing that if the Authority's pricing approach remains, then 'there is no basis for Aurizon Network to accept any liability' (Aurizon Network 2012a, p.10).

## Reciprocity

Vale, Anglo American, Bandanna Energy and Cockatoo Coal supported the Authority's proposed approach to make the liability cap reciprocal.

Aurizon Network did not support the Authority's proposed approach to make the liability cap reciprocal arguing that a failure of a private infrastructure owner to comply with the provisions of the SRCA can have real and significantly greater costs to Aurizon Network and these must be reflected in the liability provisions (Aurizon Network 2012a, p.10). Instead, Aurizon Network wanted the liability cap to only apply to Aurizon Network's liability and not the liability of the private infrastructure owner.

### Authority's Analysis and Final Decision

In coming to a view on issues around the liability provisions to be included in the SRCA, the Authority has sought to ensure that parties are held responsible for the risks that they are best placed to manage. A key concern is to put in place arrangements that appropriately balance the interests of Aurizon Network and the private infrastructure owner. This is consistent with the approach the Authority has taken in its assessment of standard access agreements and in the appropriate allocation of risk more broadly.

### Scope of Claims

The Authority has further considered its position about the scope of claims, and has provided new drafting to this effect (see Appendix A, cl. 21), given the matters raised by stakeholders in response to the draft decision.

The Authority notes Aurizon Network's concerns over the scope of claims, but considers that, on balance, it is appropriate for the SRCA to provide for reasonable liability claims for matters that are not expressly provided for in the SRCA (particularly for negligent conduct). That said, this is not intended to provide an unlimited scope for claims. The Authority accepts that Aurizon Network wants to limit its liability. However, reinstating the wording as suggested by Aurizon Network is too restrictive and does not provide an appropriate balance of the interests of Aurizon Network and the private infrastructure owner. On that basis the Authority has maintained its proposed drafting (to not exclude reasonable liability claims for matters that are not expressly provided for in the SRCA).

### Six-month Limit on Claims

On the basis of the support by stakeholders in response to the draft decision, the Authority has not changed its conclusions that liability claims be limited to six months after the later of the claim arising or becoming reasonably apparent to the relevant party.

### Liability for the Conduct of Train Operators

The Authority has maintained the conclusion reached in its draft decision to remove the clause related to the conduct of train operators from the SRCA. The Authority notes Aurizon Network's argument that it will not have a direct relationship with the train operator for its conduct on private infrastructure. However, the Authority still holds the view that requirements relating to the conduct by train operators on the private infrastructure, and indeed on the network, are matters for access agreements. The Authority notes that if Aurizon Network believes these matters need to be addressed, then the better approach would be to appropriately redraft the standard access agreements as part of the upcoming approval process for Aurizon Network's next access undertaking.

### Exclusions to the Liability Cap

The Authority has further developed and clarified its conclusions regarding the exclusions to the liability cap, given the matters raised by stakeholders in response to the draft decision.

The Authority now holds the view that the following items should be excluded from the liability cap:

- (a) liability for fraud, criminal conduct or unlawful acts or omissions;
- (b) liability for wilful default, wilful damage, wilful misconduct or gross negligence;
- (c) liability for death or personal injury;
- (d) liability for third party claims including death, personal injuries or property damage; and
- (e) loss which is covered by an insurance policy in favour of a party, or which would have been covered by an insurance policy in favour of a party if that party had maintained in force the insurance policies that that party is required to maintain in force under the agreement.

### Amount of the Liability Cap

On the basis of the matters raised by stakeholders in response to the draft decision, the Authority has further developed its position that the liability cap in the SRCA should be an amount, negotiated on a case-by-case basis, but proportional to the traffic that is anticipated will use the connection.

As noted above (in relation to exclusions from the liability cap), the Authority accepts, in principle, Anglo American's proposal that parties should both have the ability to access any insurance claims in addition to the liability cap.

The Authority agrees with Bandanna Energy and Cockatoo Coal that the size of the liability cap should reflect the significance of the connecting infrastructure in terms of its potential to cause disruptions to the network and the private infrastructure owner's operations. The Authority considers that determining the significance of the connecting infrastructure (and so the size of the liability cap) will reflect a number of factors, which might well vary depending on the nature of the connection.

However, in the interests of certainty and to limit the scope of the negotiations, the Authority has required the SRCA to set out that the liability cap (in Schedule 1) must be proportional to the number of train services contracted to enter and/or exit the Network via the connecting infrastructure.

### Reciprocity

The Authority has not changed the conclusions from its draft decision regarding the reciprocity of the liability cap. The Authority notes Aurizon Network's objections to making the liability cap reciprocal. However, the Authority still holds the view that the private infrastructure owner's liability should also be capped at a certain amount in order to provide a more balanced SRCA. In addition, the Authority believes the reciprocity of the liability cap will encourage parties to negotiate in good faith to establish the level of the cap.

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### Final Decision 2.6

- **The Authority requires Aurizon Network to amend the liability clauses in the SRCA to provide more realistic obligations on parties, including:**
    - (a) **removing the restriction that claims for liability should be limited solely to items provided for in the connection agreement (cl. 21.2);**
    - (b) **providing for liability claims to be limited to six months after the later of the claim arising or becoming reasonably apparent to the relevant party (cl. 21.2);**
    - (c) **providing for liability in relation to certain matters (as outlined above) to be excluded from the liability cap;**
    - (d) **including a liability cap for both parties, which should be an amount, negotiated on a case-by-case basis, but proportional to the traffic that is contracted to use the connection;**
    - (e) **providing for both parties to have the ability to access any insurance claims in addition to the liability cap; and,**
    - (f) **deleting requirements relating to conduct by train operators (cl.21.5).**
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## 2.6 Indemnity

Clause 22 of the SRCA provides mutual indemnities in favour of the owner and Aurizon Network that apply to “acts and omissions” of the other party.

### Draft Decision

In its draft decision, the Authority proposed that the indemnities should be reciprocal and be limited to acts or omissions which are negligent or in breach of the connection agreement. Specifically, the Authority proposed that the SRCA be amended to:

- (a) provide for Aurizon Network to indemnify private infrastructure owners for loss or damage in respect of the connecting infrastructure; and
- (b) limit indemnities to acts or omissions that are negligent or in breach of the agreement (Draft Decision 2.7).

These amendments sought to better balance Aurizon Network’s and users’ rights and commercial interests.

### Stakeholder Comments on Draft Decision

The QRC supported the Authority’s proposed amendments to the indemnity clauses (QRC 2012a, p.3).

Aurizon Network said it agreed (in principle) to the Authority’s proposed approach to provide for Aurizon Network to indemnify private infrastructure owners for loss or damage in respect of the connecting infrastructure. However, in doing so, Aurizon Network sought to limit the circumstances in which this indemnity would apply. In particular, Aurizon Network’s revised SRCA proposed that this indemnity would only cover: loss of life; personal injury; property damage; penalties for breach of law; or wilful misconduct and fraud, except where the other party had acted negligently or in breach of the agreement (Aurizon Network 2012a, p.11). Aurizon Network also removed officers, employees, agents

and contractors of the indemnified party as entities which would receive the benefit of the indemnity (Aurizon Network 2012c, cl. 25).

### Authority's Analysis and Final Decision

The Authority notes that Aurizon Network's proposed new drafting for the indemnity clause seeks to narrow the scope of the circumstances in which the indemnity will apply as well as restricting who will receive the benefit of the indemnity. However, it is not evident that either outcome is desirable, or otherwise improves the Authority's proposal. Accordingly, the Authority maintains the drafting proposed in the draft decision.

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#### Final Decision 2.7

- **The Authority requires Aurizon Network to amend the indemnities clause to:**
    - (a) **provide for Aurizon Network to indemnify private infrastructure owners for loss or damage in respect of the connecting infrastructure; and**
    - (b) **limit indemnities to acts or omissions that are negligent or in breach of the agreement (with exclusions from each party's indemnity to the extent that the relevant claims occur as a result of a negligent or wilful act or omission of the indemnified party).**
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## 2.7 Accreditation

Part 9 of the SRCA requires the private infrastructure owner to be accredited as the rail infrastructure manager for the private infrastructure or to procure another person or entity to be accredited. The private infrastructure owner can reach an agreement for Aurizon Network to be the accredited rail infrastructure manager for the private infrastructure under a separate written agreement.

Clause 13 of the SRCA provides that the agreement will not restrict accredited rail infrastructure managers in the performance of their roles for the relevant infrastructure.

### Draft Decision

In its draft decision, the Authority said that both Aurizon Network and a private infrastructure owner should ensure that they, or another person or entity, hold appropriate accreditation over the track that they own (Draft Decision 2.8). The Authority also suggested that there may be some benefit to ensuring 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 (Draft Decision Appendix A, cl. 14).

These amendments sought to better balance Aurizon Network's and users' rights and commercial interests.

### Stakeholder Comments on Draft Decision

Bandanna Energy and Cockatoo Coal supported the Authority's proposed approach to require the SRCA to confirm accreditation obligations upon Aurizon Network as this made the SRCA a 'more balanced' document (Bandanna Energy and Cockatoo Coal 2012, p.2).

Aurizon Network also supported the Authority's proposed approach to require both Aurizon Network and a private infrastructure owner to ensure that appropriate accreditation is held

for the track they own, noting that it was critical there be no connection without accreditation (Aurizon Network 2012a, p.11).

While BMA-BMC accepted the Authority's proposed approach, it was concerned about the provision of rail infrastructure manager services on the private infrastructure. BMA-BMC argued that the SRCA should provide for the possibility that Aurizon Network could provide rail infrastructure manager services for private infrastructure (e.g. a rail spur to a mine loading facility) which has been built with the sole purpose of connecting a mine to the mainline (i.e. not for access to third parties) (BMA-BMC 2012, p.1).

Vale also supported the Authority's proposed amendments, including cl. 14 that ensured that nothing in the SRCA would require a rail infrastructure manager to do something that was likely to result in it losing its accreditation. Vale said this principle is important as the purpose of this infrastructure is to allow the transportation of coal to market (Vale 2012, p.6).

The QRC largely accepted the Authority's approach. However, it said the Authority's proposed drafting was too broad as it might preclude disclosing important safety information if a party thought that notifying the other party about a breach or failure would alert the relevant authorities to the breach or failure and that this could lead to suspension or revocation of the rail infrastructure manager's accreditation (QRC 2012a, p.3-4).

### Authority's Analysis and Final Decision

The Authority has maintained its position that parties be required to ensure that appropriate accreditation is in place over the track that they own, reflecting broad stakeholder support for such an approach (see Appendix A, cl. 9). In doing so, the Authority has not sought to require that the SRCA provide for Aurizon Network to provide rail infrastructure management services on private infrastructure as this is a matter at the discretion of the parties involved (see section 3.5).

The Authority also maintains that nothing in the SRCA should require an accredited rail infrastructure manager to take any action which would be likely to result in the suspension or revocation of their accreditation (see Appendix A, cl. 14). In doing so, the Authority has not taken up the QRC's alternative drafting because it is not evident that the alternative drafting provides any greater clarity than the Authority's proposal, and in fact could unnecessarily limit the application of the provisions.

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#### Final Decision 2.8

- **The Authority requires Aurizon Network to amend the SRCA to require both Aurizon Network and a private infrastructure owner to ensure that they (or, in the case of the private infrastructure owner, another person or entity) hold appropriate accreditation over the track that they own.**
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### 3. PROVIDING GREATER CERTAINTY

*An effective SRCA will simplify and hasten the process of negotiating connection to the network by focusing negotiations and clarifying the points of issue.*

*The Authority notes stakeholders' desire for greater certainty in the SRCA, including in terms of the ability to connect and to do so on reasonable terms and in a reasonable time.*

*The Authority requires the SRCA be amended to provide greater certainty for both Aurizon Network and private infrastructure owners over the default terms and conditions for connection. The Authority has also sought to provide sufficient scope to cover the different requirements of different connections.*

*Taken together, the Authority considers that these amendments will streamline the negotiation process and thereby allow connections to the network to be designed and developed more quickly and with greater certainty for all parties.*

#### 3.1 Scope and Coverage

Aurizon Network said that the SRCA would only apply to customer specific branch lines – being extensions that connect a single loading facility to the network. Aurizon Network said that the SRCA is not intended to apply to the connection of major new expansions as these may require varied terms and conditions (Aurizon Network 2011, p.3). Connection to the rail network for services other than coal services would also not be covered by the SRCA, but by other agreements (Aurizon Network 2011, p.3).

##### Draft Decision

In its draft decision, the Authority noted that the proposal for the SRCA to only apply to single mine spur lines is not consistent with the 2010 access undertaking. Accordingly, the Authority required Aurizon Network to broaden the application of the SRCA to include major connections, non-coal service connections and projects with multiple loading points (Draft Decision 3.1).

In doing so, the Authority noted that there might be circumstances where terms and conditions that are appropriate for a customer specific branch line may not be relevant for more complex connections, and vice versa. While the Authority proposed to require Aurizon Network address these issues in the SRCA, it nevertheless sought stakeholder comments on specific issues and remedies that might arise given the nature of the more complex connections.

##### Stakeholder Comments on Draft Decision

In response to the draft decision, stakeholders' comments focussed on how a SRCA might deal with more complex connections.

Aurizon Network said that the Authority's approach would 'radically expand' the scope of the SRCA. Aurizon Network was concerned that a SRCA would not deal with the 'highly specific' operational, commercial and safety issues associated with major connections (Aurizon Network 2012a, pp. 11-12).

*This is a very significant change, and in our view inappropriate. It is impossible to design a single vanilla agreement to cover the wide variety of railway connections. A one size fits all approach cannot deal with the many different risks and issues that different types of connection give rise to. ... we do not accept that the SRCA should include major connections, especially to other railway networks. (Aurizon Network 2012a, p. 11)*

While Aurizon Network said that a level of flexibility to accommodate more complex connections could be achieved through the schedules of the SRCA, it argued that the SRCA should exclude any major connection unless the parties, having assessed the future requirements and risks of services entering and exiting the private infrastructure, negotiate otherwise (Aurizon Network 2012a, p.11).

The QRC argued that providing drafting within the SRCA to deal with the full range of more complex situations ‘will be problematic’ (QRC 2012a, p. 4). It suggested that it is more appropriate to deal with complex connections by amending the access undertaking so that: the SRCA apply as a ‘template agreement’ for complex connections; and parties must enter into negotiations in good faith to agree amendments to the SRCA which are ‘reasonably required’ in order to reflect the circumstances of the relevant connection (QRC 2012a, p.4).

Bandanna Energy and Cockatoo Coal argued that while there may be a greater need for agreements for complex connections to vary from the SRCA, it was still preferable to have a ‘template from which to commence negotiations and to have as a line in the sand in the event of disagreement’ (Bandanna Energy and Cockatoo Coal 2012, p.1).

In contrast, Vale emphasised the importance of the SRCA to assist in developing the Surat and Galilee coal basins, as it is planned that new rail lines from these basins will connect with the existing CQCR Network (Vale 2012, p.1).

### **Authority’s Analysis and Final Decision**

The Authority has maintained its position that it is inappropriate for the SRCA to only apply to single mine spur lines.

Clause 8.4(a) of the 2010 access undertaking requires that a SRCA be developed and approved. There is no suggestion that the SRCA should be for some connections but not others. In fact, clause 8.4(j) of the 2010 access undertaking clearly indicates that the SRCA must be used for all rail connection agreements unless otherwise agreed by Aurizon Network and the relevant private infrastructure owner.

While it is conceivable that the terms and conditions for different types of connections should be different, there is no reason why negotiations for those different types of connections could not deal with those matters on a case by case basis. Indeed, the Authority agrees with the QRC and Bandanna Energy and Cockatoo Coal that it is important to have a ‘template’ to start from, even when it is likely that finalised agreements for more complex connections will need to move from the standard conditions. The Authority sees the SRCA as providing such a template.

If this approach proves to be unworkable, there is no reason why Aurizon Network could not develop, and submit for the Authority’s approval, a draft amending access undertaking including other SRCAs to deal with the types of issues that may arise with connection of private infrastructure other than single coal mine spur lines.

Accordingly, the Authority has concluded that the SRCA should apply to all connections between the network and private infrastructure.

## **3.2 Charges and payments**

Part 3 of the proposed SRCA outlines the arrangements for Aurizon Network to charge, invoice and be paid for meeting its obligations under the SRCA, including operating and maintaining the connecting infrastructure. In particular, the SRCA provides for:

- (a) an annual service charge (through a fixed base annual service charge that can be escalated or adjusted according to a formula defined in Schedule 5, and is open for review) (cl. 3.1(a));
- (b) ensuring that connecting infrastructure is modified, upgraded or replaced when required at the cost of the owner of the branch line associated with the connecting infrastructure (cl. 3.1(b));
- (c) recovering the costs of decommissioning and removing the connecting infrastructure at the expiry of the SRCA or earlier if the contract is terminated (cl. 3.1(c)); and
- (d) the costs of providing other services to the private infrastructure owners (cl. 3.1(d)).

The proposed SRCA provides for owners to dispute amounts claimed by Aurizon Network under the clause 17 dispute resolution provisions (cl. 3.4).

### Draft Decision

In its draft decision, the Authority sought to provide greater clarity over the allowed charges and payments so infrastructure owners would have a better understanding of the upfront and ongoing costs of connection and to ensure that costs recovered by access charges based on reference tariffs are not double counted. This included:

- (a) establishing the *annual service charge* as a ‘pass through’ of the direct costs actually incurred by Aurizon Network in meeting its obligations under the agreement (including maintenance and operations charges) that are not included in the reference tariffs or recouped through other charges (Draft Decision 3.2, Draft Decision Appendix A, cl. 1.1, 3.1(a), 3.3);
- (b) providing that a private infrastructure owner must pay ‘reasonable and prudent’ costs (Draft Decision Appendix A, cl. 3.1(b),(c));
- (c) providing that a private infrastructure owner will not be required to pay Aurizon Network’s profit or overhead (except overheads that directly arise from Aurizon Network performing its obligations under the SRCA) or amounts incurred as a result of a breach of contract or negligence by Aurizon Network (Draft Decision Appendix A, cl. 1.2(d)); and
- (d) providing for costs, fees or charges to be audited and adjusted to reflect the results of the audit (Draft Decision 3.2, Draft Decision Appendix A, cl. 3.2(b), 3.5).

These amendments sought to address stakeholder concerns that the SRCA provided infrastructure owners with insufficient detail over what costs will be recouped (and the legitimacy and prudence of those costs) through the allowed charges and payments.

### Stakeholder Comments on Draft Decision

Bandanna Energy and Cockatoo Coal said that the Authority’s proposed approach to charges and payments was ‘far preferable’ to Aurizon Network’s original proposal. They specifically supported:

- (a) the annual service charge being tied to actual costs, subject to a test of reasonableness and prudence, and explicitly excluding costs otherwise included in the build-up of reference tariffs; and

- (b) the use of a ‘reasonable and prudent’ check on the costs of designing, constructing, commissioning, decommissioning and removing connecting infrastructure, as well as an option for audit (Bandanna Energy and Cockatoo Coal 2012, p.1).

Bandanna Energy and Cockatoo Coal also said that the costs of a single annual audit should be shared equally between the parties and if further audits are requested within the same year, the cost should be borne by the requesting party (Bandanna Energy and Cockatoo Coal 2012, p.2).

BMA-BMC supported the Authority’s proposed approach to charges arguing that rail connection services provided under the SRCA must fall within the access undertaking and associated reference tariff charges framework to ‘ensure efficient pricing of access services as well as fair, transparent and impartial treatment of all access seekers and access holders’ (BMA-BMC 2012, p.1) – that is, so Aurizon Network cannot use its monopoly position to obtain above regulatory returns.

Aurizon Network supported the Authority’s proposed approach whereby “other costs” (e.g. training) may be claimed under the SRCA (Aurizon Network 2012a, p.13). Aurizon Network’s revised SRCA included drafting providing for reimbursement of Aurizon Network’s costs of performing its obligations under the SRCA (Aurizon Network 2012c).

Aside from this, Aurizon Network did not support the Authority’s proposed approach to charges and payment, arguing that it would be difficult to calculate the actual ‘direct costs’ associated with the connecting infrastructure given the current capabilities of its reporting systems. In terms of:

- (a) *operating costs* – Aurizon Network has said that these costs would be relatively small and it is prepared to absorb these until the next regulatory re-set (at which point it will seek to include them in the reference tariff calculations); and
- (b) *maintenance costs* – Aurizon Network said these costs are significant and specific to the individual connecting infrastructure and should, preferably, be recovered via an agreement with the owner. However, at the next regulatory re-set, it will also seek to include these costs in the reference tariffs (Aurizon Network 2012a, pp.12-13).

Aurizon Network noted that proposed pricing under the SRCA provides for Aurizon Network to pass through direct costs only, and so excludes insurance costs and deductibles (Aurizon Network 2012a, p.10).

In addition Aurizon Network proposed to include a jointly developed Asset Maintenance and Management Plan to detail planned and unplanned works and costs by maintenance year (Aurizon Network 2012a, p.12; Aurizon Network 2012c, Schedule 6).

The QRC (2012a, p. 4) argued that the Authority’s approach to calculating the annual service charge ‘leaves open’ the possibility that Aurizon Network could seek to recover some costs twice, by allowing Aurizon Network to determine and recover some level of annual service charge, even where some operating and maintenance costs have already been included in the reference tariff (so the owner of the branch line would still be required to pay an annual service charge and the access holder the relevant reference tariff).

Accordingly, the QRC suggested that the annual service charge should only be determined where the operating and maintenance costs of the connecting infrastructure were not already considered in the development of the relevant reference tariffs or access charges (QRC 2012a, p.5).

## Non-coal Traffics

With regard to non-coal traffics, Aurizon Network argued that it is best to negotiate the costs and charge them to the party directly as no non-coal costs are included in the reference tariffs.

## Authority's Analysis and Final Decision

### Annual Service Charge

The Authority has largely maintained its draft conclusions on the annual service charge given the matters raised by stakeholders in response to the draft decision, as:

- (a) cl. 8.3(f) of the 2010 access undertaking requires Aurizon Network to include the operating and maintenance costs for connecting infrastructure in the cost build up for reference tariffs and not through separate agreements;
- (b) the Authority is not convinced by Aurizon Network's arguments for requiring an owner to enter into an agreement outside of the SRCA to recover costs (e.g. operating and maintenance costs); and
- (c) the Authority's position has been broadly accepted by other stakeholders.

The Authority considers that Aurizon Network has taken a reasonable position with regard to the operating costs and, because they are likely to be minimal, its preparedness to absorb these costs over the remainder of the regulatory period.

The Authority also considers it reasonable for Aurizon Network to recover the maintenance costs associated with the connecting infrastructure. On this, the Authority notes the QRC's submission that if an owner was to pay a reference tariff as well as the annual service charge, there may be a possibility for double counting.

In order to address these concerns, and achieve consistency with clause 8.3(f) of the 2010 access undertaking, the Authority has refined its position so that if:

- (a) a reference tariff exists for all train services utilising the connecting infrastructure, an annual service charge will not apply to that connecting infrastructure (see Appendix A, cl. 3.2(c));
- (b) a reference tariff does not exist for any train services utilising the connecting infrastructure, an annual service charge will apply and this will equal the reasonable and prudent incremental and direct costs actually incurred by Aurizon Network in performing its operation and maintenance activities on the connecting infrastructure (see Appendix A, cl. 3.2 (d)); and
- (c) if there is a mixture of train services utilising the connecting infrastructure (i.e. reference and non-reference traffics), an annual service charge would apply and this would equal the proportion of the direct operating and maintenance costs incurred by Aurizon Network in respect of the connecting infrastructure which the number of non-reference train services bears to the total number of train services utilising the connecting infrastructure (see Appendix A, cl. 3.2 (d)).

How Aurizon Network decides to capture these costs in its data systems in order to recover them is a matter for it to decide. However, the Authority is confident that it will be possible for Aurizon Network to do so, particularly as Aurizon Network expects the maintenance

costs to be ‘significant’ and ‘highly specific’ to the individual connecting infrastructure (Aurizon Network 2012a, pp.12-13).

The Authority accepts that, under this approach, current reference tariffs may not include maintenance costs associated with connecting infrastructure that became operational in this regulatory period. However, given the next regulatory reset is fast approaching, the Authority considers this is an issue that is best dealt with at that time. Accordingly, the Authority will need to consider this issue further when it assesses Aurizon Network’s operating and maintenance costs in the next access undertaking to ensure that it is clear what connecting infrastructure related costs have been included in reference tariffs.

In respect of Aurizon Network’s request for reimbursement of costs for performing other obligations under the SRCA, the Authority considers this should be accepted only for those reasonable and prudent costs incurred in providing assistance to a private infrastructure owner designing and constructing the connecting infrastructure (see Appendix A, cl 6.1).

### Non-coal Traffics

In the draft decision, the Authority accepted that an SRCA could be entered into by owners for utilisation by coal and non-coal traffics. It also further clarified what the annual service charge would consist of.

The Authority has further developed and clarified its conclusions regarding the charging structure for non-coal traffics; in particular, that the direct costs (i.e. operating and maintenance) will be apportioned on a train number basis if there is a mixture of reference and non-reference tariff traffics utilising the connecting infrastructure. This approach is consistent with past practice (i.e. in allocating spur line asset costs between coal and non-coal users on the Gindie-Minerva line) and has the benefit of being simple to calculate and apply and, unlike other possible measures, is not dependent on train or product characteristics (e.g. gtk or nt).

In doing so, the Authority requires the SRCA to provide for Aurizon Network to individually specify the pro-rata calculation of the annual service charge when it invoices the owner in these circumstances.

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### Final Decision 3.1

- **The Authority requires Aurizon Network to amend the SRCA to provide greater certainty over the allowed charges and payments (as outlined above).**
  - **The Authority requires Aurizon Network to amend the SRCA to provide for an audit of any costs, fees or charges, at the private infrastructure owner's request and cost.**
  - **The Authority requires Aurizon Network to provide that:**
    - **where the connecting infrastructure is only used by reference train services, no Annual Service Charge is payable; and**
    - **where the connecting infrastructure is wholly (or partly) used by non-reference train services, the Annual Service Charge is the reasonable and prudent incremental and direct costs actually incurred in Aurizon Network performing its operation and maintenance activities on the connecting infrastructure (or a proportion of those costs related to usage). If there is any proportioning of costs, the invoice for such Annual Service Charges must include details of how the relevant proportion was calculated.**
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### 3.3 Infrastructure Standards

Clause 6 of the SRCA seeks to ensure that connecting infrastructure provides for a safe connection over time – both as initially built and any subsequent upgrades (see section 2.1 above). These arrangements provide for:

- (a) the initial design, construction and commissioning of connecting infrastructure by:
  - (i) *the private infrastructure owner* – is subject to Aurizon Network's inspection and assessment of whether it is 'suitable' for connection; or
  - (ii) *Aurizon Network* – in accordance with the terms of a separate construction agreement; and
- (b) Aurizon Network to have rights to require upgrades, modifications or replacements to the private infrastructure to meet certain standards, in accordance with particular processes.

Clause 7 of the SRCA sets out the private infrastructure's design, construction and maintenance standards and the circumstances when Aurizon Network may require modifications or upgrades (see section 2.1 above). It also provides for Aurizon Network (and relevant workmen and machinery) to enter and remain on the private infrastructure (see section 2.4 above).

In section 2.1 above, the Authority's assessment focussed on providing a better balance of the standards applied to connecting infrastructure and private infrastructure. The following section addresses the associated inspection and approval processes for:

- (a) inspecting connecting infrastructure constructed by a private infrastructure owner to determine whether it is either 'suitable' or requires modifications, upgrades or replacement, at the private infrastructure owner's cost; and

- (b) requiring upgrades, modifications or replacements of connecting infrastructure or private infrastructure, at the private infrastructure owner's cost, over the course of the agreement.

It also considers specific matters around the terms on which Aurizon Network undertakes to construct connecting infrastructure.

### Draft Decision

The Authority's draft decision sought to provide private infrastructure owners with greater confidence that proposed infrastructure (both private and connecting) will satisfy Aurizon Network's legitimate requirements. It included amendments that provided greater certainty and consistency with the provisions of the 2010 access undertaking on how Aurizon Network will determine whether or not infrastructure meets the required standards.

### Where the Private Infrastructure Owner Constructs the Connecting Infrastructure

The Authority proposed that where the private infrastructure owner constructs the connecting infrastructure, it should be considered 'suitable' if it:

- (a) complies with an approved design; or
- (b) meets the related requirements included in the 2010 access undertaking (Draft Decision Appendix A, cl. 6.3(b)).

Infrastructure will not be required to be built to a standard which exceeds the standard and condition of related parts of the network (Draft Decision Appendix A, cl. 6.3 (b)).

To facilitate this, the Authority proposed that the SRCA be amended to provide for:

- (a) Aurizon Network to provide requested information, advice and assistance to enable the private infrastructure owner to plan, design and construct the connecting infrastructure to meet the requirements relating to technical, engineering and safety standards (Draft Decision Appendix A, cl. 6.1);
- (b) a private infrastructure owner to submit a design for connecting infrastructure for Aurizon Network's approval and for Aurizon Network to advise a private infrastructure owner of any material change in circumstances that would mean that a previously approved design would no longer meet the suitability requirements (Draft Decision Appendix A, cl. 6.2);
- (c) Aurizon Network to inspect connecting infrastructure during construction, at the private infrastructure owner's request and cost (Draft Decision Appendix A, cl. 6.3(a));
- (d) any work required to make connecting infrastructure 'suitable' be undertaken in accordance with a detailed written plan, developed following consultation with the private infrastructure owner (Draft Decision Appendix A, cl. 6.3(c)); and
- (e) private infrastructure owners to dispute the scope of the work and who carries out the work to upgrade, modify or replace connecting infrastructure, not just the costs payable (Draft Decision Appendix A, cl. 6.3 (d)).

In this way, a private infrastructure owner is provided with adequate information regarding the possible connection, an early indication of the potential 'suitability' of its proposal (and timely, ongoing details of modifications required) and confidence to start construction. It

also improves the transparency of Aurizon Network's final assessment of whether the infrastructure is 'suitable' for connection.

### Where Aurizon Network constructs the Connecting Infrastructure

The Authority proposed that where Aurizon Network designs, constructs and commissions the connecting infrastructure, it will do so in accordance with the terms of a separate construction agreement. The Authority sought to ensure that Aurizon Network undertook construction to an appropriate standard and without undue delay, including by:

- (a) requiring Aurizon Network to give the private infrastructure owner:
  - (i) a reasonable period to comment on design, construction or project management issues;
  - (ii) written notice of completion of the construction and an estimate of the further time required for commissioning; and
- (b) providing that relevant disputes be resolved under the 2010 access undertaking dispute provisions (Draft Decision Appendix A, cl. 6.4).

### Private Infrastructure

The Authority proposed that private infrastructure should be designed, constructed and maintained in a manner largely consistent with Aurizon Network's proposal (Draft Decision Appendix A, cl. 7.4(a)-(d)), but only to the extent that a failure to meet any of these requirements could have an adverse impact on the safety or operation of the connecting infrastructure or the network (Draft Decision Appendix A, cl. 7.4(e)) – see section 2.1 of this decision for further details.

Taken together these amendments sought to increase the transparency of Aurizon Network's approval and assessment processes for connecting and private infrastructure, thereby reducing the potential for delay.

### Stakeholder Comments on Draft Decision

In response to the draft decision, stakeholders' comments focussed on the Authority's approach where a private infrastructure owner seeks to design and construct the connecting infrastructure. On this Aurizon Network argued that the SRCA should provide for it to either design and construct the connecting infrastructure or engage the private infrastructure owner to design and construct the connecting infrastructure on behalf of Aurizon Network (Aurizon Network 2012a, p.6).

### Where the Private Infrastructure Owner constructs the Connecting Infrastructure

Aurizon Network did not support the Authority's approach where a private infrastructure owner is seeking to construct the connecting infrastructure, arguing that operation and maintenance of the connecting infrastructure is 'distinctly different' to the construction of the connecting infrastructure:

*Infrastructure design and construction matters are properly addressed by a construction agreement. Such items are not intended to be part of the SRCA, which is concerned with the operation and maintenance of the connection. (p. 6)*

Accordingly, Aurizon Network argued that design, construction and commissioning should be undertaken under a separate construction agreement whether it be undertaken by a private

infrastructure owner or Aurizon Network, not the SRCA. Matters relevant to the negotiation of the construction of the connecting infrastructure should be dealt with under the dispute resolution and other relevant provisions of the 2010 access undertaking (Aurizon Network 2012a, p.7). On that basis, Aurizon Network said that the Authority's proposals regarding:

- (a) the information Aurizon Network needs to provide; and
- (b) the process Aurizon Network will follow to determine whether connecting infrastructure that has been built by a private infrastructure owner meets the standards, will lead to contractual conflicts.

In contrast, Bandanna Energy and Cockatoo Coal argued that the Authority's proposal for a 'sequential process' where a private infrastructure owner may submit a design and obtain ongoing indications from Aurizon Network regarding the suitability of design and construction works 'makes practical sense' (Bandanna Energy and Cockatoo Coal 2012, p. 2). Anglo American supported the Authority's proposal on the basis that it provides greater guidance around whether Aurizon Network is likely to consider the connecting infrastructure suitable and provide private infrastructure owners with the opportunity to dispute the scope of works (Anglo American 2012a, p.1).

Within the Authority's proposed framework, stakeholders also proposed amendments and new drafting to clarify:

- (a) that Aurizon Network should bear the cost of a design change if it was Aurizon Network's conduct that resulted in the material change in circumstances (Anglo American 2012a, p.1, Vale 2012, p.2);
- (b) Aurizon Network is required to undertake inspections within 10 business days of a written request to reduce delays in executing projects (Anglo American 2012a, p.1, Vale 2012, p.2); and
- (c) the information Aurizon Network must provide where the private infrastructure owner constructs the connecting infrastructure (QRC 2012a, p.5).

In addition, the QRC raised concerns over the 'handover point' of connecting infrastructure that has been built by private infrastructure owners, suggesting that the tax and *Personal Property Securities Act* (2009) (Cwth) implications of a transfer of property need to be considered further (QRC 2012a, p.5).

### Where Aurizon Network constructs the Connecting Infrastructure

Stakeholders said that the construction agreement was important when Aurizon Network constructs the connecting infrastructure as any uncertainty regarding the key terms could lead to 'lengthy and unnecessary' disputes and delays (QRC 2012a, p.6).

To address this, the QRC wanted to mandate key terms of the construction agreement (QRC 2011, QRC 2012a, p.5) – or, failing that, the SRCA should set out key principles for a construction agreement including that:

- (a) Aurizon Network will undertake, or procure the undertaking of, the works diligently and within a reasonable time;
- (b) the private infrastructure owner will reimburse (without mark-up) the costs reasonably and properly incurred by Aurizon Network in undertaking such works;

- (c) Aurizon Network will provide reasonable substantiation of such costs and not contract work to Aurizon Network related entities without prior approval;
- (d) Aurizon Network will construct to a standard of work which is consistent with the network, relevant laws and the private infrastructure;
- (e) the construction agreement will include a schedule and cost estimate for the works, with Aurizon Network providing monthly updates on progress (against cost and schedule) and notifying the owner of any material adverse change in the works;
- (f) Aurizon Network and the owner will coordinate any interface works; and
- (g) Aurizon Network will not materially vary the works without notifying the private infrastructure owner (QRC 2012b, p.1).

Anglo American and Vale supported the Authority's proposal that the SRCA include key principles of the construction agreement. They also provided additional clarification on the Authority's proposed drafting to ensure that the construction agreement contained those principles (Anglo American 2012a, p.2; Vale 2012, p.3).

### **Authority's Analysis and Final Decision**

The Authority has clarified its proposals relating to information, inspection and approval processes for connecting infrastructure and private infrastructure, given the matters raised by stakeholders in response to the draft decision.

The Authority maintains its position that it is appropriate that the SRCA provides terms which apply in the circumstance that a private infrastructure owner is to design and construct the connecting infrastructure (including imposing requirements on Aurizon Network to provide information and undertake ongoing inspection and assessment).

The Authority accepts that there will need to be a detailed agreement between the owner of the private infrastructure and Aurizon Network to cover the construction of the connecting infrastructure. However, the Authority is still not convinced that matters relevant to the negotiation of the construction of the connecting infrastructure are entirely beyond the scope of the SRCA. Indeed, the Authority considers that including these matters in the SRCA adds to its effectiveness by:

- (a) providing greater guidance over the standards required of the connecting infrastructure and greater certainty over the inspection and approval process; and
- (b) providing private infrastructure owners with greater certainty that what they are constructing will ultimately be approved, which is appropriate given the different motivations, incentives and information available to each party.

Together these limit the possibility for delay and cost blow-outs.

The Authority is, however, not convinced that including a construction agreement as a schedule to the SRCA is the appropriate vehicle to address stakeholders' concerns. Accordingly, the Authority has maintained its proposal to include key principles of the construction agreement in the SRCA. The Authority has refined its drafting to address the issues raised by Anglo American and Vale (see Appendix A, cl. 6.4). The Authority also considered the additional principles proposed by the QRC and, while considering these to be generally somewhat overly prescriptive, has amended the drafting to reflect two of them, relating to the use of related entities by Aurizon Network and advising of material variations to the works (see Appendix A, cl. 6.4).

The Authority has also refined its drafting to provide greater certainty over who bears the costs of a design change required because of a material change in circumstances. In particular, the Authority considers that it is reasonable for Aurizon Network to bear the cost of any design change as a result of its wilful misconduct, wilful default or gross negligence (see Appendix A, cl. 6.2). It has also sought to incorporate Anglo American's and Vale's suggestion for inclusion of specified timeframes to limit the possibility for delay (see Appendix A, cl. 6.3).

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### Final Decision 3.2

- **The Authority requires Aurizon Network to amend the SRCA to provide private infrastructure owners with greater certainty over how, and whether, Aurizon Network will determine whether or not infrastructure meets required standards. This includes providing for:**
    - (a) **Aurizon Network to inspect the connecting infrastructure once built to assess whether it is suitable for connection and operation;**
    - (b) **Aurizon Network to provide information and advice relating to design specifications and required infrastructure standards when requested by the private infrastructure owner and within specified times;**
    - (c) **a private infrastructure owner (which is to design and construct the connecting infrastructure) to submit a design for connecting infrastructure for Aurizon Network's approval;**
    - (d) **Aurizon Network to advise a private infrastructure owner of a material change in circumstances which would mean that a previously approved design would no longer meet the suitability requirements (and bear the costs of such a design change where caused by Aurizon Network's wilful misconduct, wilful default or gross negligence);**
    - (e) **Aurizon Network to inspect connecting infrastructure during construction by a private infrastructure owner, at the private infrastructure owner's request and cost; and**
    - (f) **The Authority requires the Construction Agreement to be used where QR Network is designing and constructing the connecting infrastructure to include certain terms for the protection of the private infrastructure owner (see Appendix A, cl. 6.4).**
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## 3.4 Definition of Connecting Infrastructure

The proposed SRCA defined connecting infrastructure as:

*... infrastructure (including, without limitation, track, signalling and overhead traction electricity (if applicable)) managed, controlled or owned by Aurizon Network, which connects the Network to the Private Infrastructure as shown on the Plan detailed in Schedule 2, and as modified or upgraded from time to time.*

### Draft Decision

In its draft decision, the Authority proposed to refine Aurizon Network's proposed definition for connecting infrastructure to give precedence to the plan included in a schedule to the SRCA but also to include in 'connecting infrastructure' infrastructure that was not identified in that plan as part of the network, private infrastructure or connecting infrastructure, but fell within the general principles of what should constitute connecting infrastructure (Draft Decision Appendix A, Definitions).

These refinements sought to encourage parties to agree on the scope of the connecting infrastructure ‘up front’. In the event there was a dispute over the scope of the connecting infrastructure before an agreement was finalised, the dispute resolution provisions of the 2010 access undertaking would typically apply and thereby allow for the matter to be resolved effectively. When there is any ambiguity over infrastructure included in Schedule 2 (once a connection agreement had been entered into) the SRCA dispute resolution provisions would then apply.

### Stakeholder Comments on Draft Decision

In response to the draft decision, the QRC remained concerned that the definition was ‘very broad and may be difficult to apply’ – and that further guidance on what is and is not connecting infrastructure was warranted (QRC 2012b, p.2).

In contrast, Aurizon Network supported the Authority’s amendments to the definition of connecting infrastructure as they improved the ‘understanding’ of the definition (Aurizon Network 2012a, p.13). Aurizon Network also sought to refine the Authority’s proposed definition to address matters that they considered were an error (Aurizon Network 2012d, p.1).

In response to the QRC’s issues, Aurizon Network said that there can be ‘no one size fits all solution’ and, as a ‘starting’ point, connecting infrastructure should be considered to extend up to the interface point (where it meets the private infrastructure). For example, for:

- (a) *electrical works and equipment* – usually defined either by a neutral section and/or an isolation point generally located at the property boundary;
- (b) *signalling works and equipment* – usually is the ‘safe clearance point’ being at a minimum, a full train length from the mainline network;
- (c) *telecommunications* – usually is located at the rail corridor property boundary or at a dedicated location box provided for the interconnection; and
- (d) *track and civil works and equipment* – usually at the rail corridor property boundary, but potentially on private land given the physical or geographical characteristics of the particular connection.

Given this, Aurizon Network said that connecting infrastructure will be located both within the rail corridor and on private land (Aurizon Network 2012d, pp.2-3).

### Authority’s Analysis and Final Decision

The Authority has predominantly maintained its proposed definition of connecting infrastructure to be included in the SRCA (see Appendix A, cl. 1.1). The Authority accepts that it is important that there is clarity over what is, or is not, connecting infrastructure. However, it is appropriate for the definition to provide for some level of flexibility to reflect particular circumstances. This is consistent with the approach adopted in the 2010 access undertaking.

In particular, the Authority accepts Aurizon Network’s argument that a connection to the network will contain both physical and operational elements, and that this will reflect, among other things, land constraints, length and complexity of the private infrastructure, volume of traffic, electrical requirements, communications, signalling and operational requirements.

The Authority notes that the proposed definition relies on an agreed schedule (Schedule 2) and a set of principles, with precedence given to infrastructure identified in the schedule. In

the event there is a dispute over the scope of the connecting infrastructure, either the dispute resolution provisions of the 2010 access undertaking or of the connection agreement itself would apply.

In doing so the Authority has made some minor amendments to resolve the interpretation concerns raised by Aurizon Network.

The Authority has not required Aurizon Network to include in the SRCA further guidance demonstrating its intent for what might be considered connecting infrastructure. The Authority does not consider that it would be appropriate to include this type of information in a SRCA. Rather, for the type of guidance stakeholders are looking for, they should refer to Aurizon Network's supplementary information on this matter (Aurizon Network 2012d).

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### Final Decision 3.3

- **The Authority requires Aurizon Network to amend the definition of 'Connecting Infrastructure' to read:**

*Connecting Infrastructure means the rail transport infrastructure (including without limitation, track, signalling and overhead traction electricity (if applicable)):*

- (a) *that is identified as Connecting Infrastructure on the plan detailed in Schedule 2; and*
  - (b) *that:*
    - (A) *is not identified on the plan detailed in Schedule 2 as being Private Infrastructure, Connecting Infrastructure or part of the Network;*
    - (B) *is managed, controlled or owned by QR Network; and*
    - (C) *connects the Network to the Private Infrastructure,*
- as modified, upgraded or replaced from time to time.*
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## 3.5 Train control

Clause 11 of the SRCA specifies that Aurizon Network is responsible for the scheduling and control of all train movements to and from the private infrastructure.

### Draft Decision

In its draft decision, the Authority largely accepted Aurizon Network's proposal that it be responsible for scheduling and control of all train movements to and from the private infrastructure and to provide for it to not schedule trains in particular circumstances (Draft Decision, Appendix A cl. 12.1, 12.2).

The Authority also proposed a number of amendments to train control provisions in the SRCA (Draft Decision 3.4), including that:

- (a) Aurizon Network must use its best endeavours to schedule train movements to ensure train services enter and exit the connecting infrastructure so as to be able to utilise the corresponding access rights (Draft Decision, Appendix A, cl. 12.3); and
- (b) private infrastructure owners (or a contracted rail infrastructure manager) must cooperate with Aurizon Network to seek to achieve the scheduling outcomes (Draft Decision, Appendix A cl. 12.4).

The Authority identified that train scheduling and control could be expected to be more complex for multi-use, multi-mine connections and sought stakeholder comments on this matter.

### Stakeholder Comments on Draft Decision

BMA-BMC and the QRC did not support the Authority's proposed approach to limit Aurizon Network's requirement to provide train control to the connecting infrastructure, arguing that the SRCA should allow access to Aurizon Network's train control management services.

Instead, BMA-BMC wanted the SRCA to provide an option for access holders to integrate any private rail infrastructure into the Rockhampton train control centre (BMA-BMC 2012, p.1).

The QRC argued that it is appropriate to require Aurizon Network to provide train control services for infrastructure that it does not own because:

- (a) if there is no such requirement, Aurizon Network could exercise its market power in this area in an anti-competitive way (irrespective of whether Aurizon Network is or is not the rail infrastructure manager for the private infrastructure);
- (b) including such a requirement is likely to have a number of competitive and efficiency benefits, including: increased competition in rail infrastructure manager services for private infrastructure; efficiency benefits through integration with the broader system, and alignment of train paths; greater flexibility; and contributing to maximising utilisation of the network;
- (c) there is no detriment to safety (QRC 2012a, p.8);
- (d) it is not appropriate to include train control for private infrastructure in access agreements because some access agreements will be between Aurizon Network and parties that are unable or unlikely to construct private infrastructure (e.g. an access holder that provides services to the potential owner of private infrastructure); and
- (e) including such a requirement mirrors the approach adopted for providing train control services on connecting infrastructure (QRC 2012a, p. 8).

The QRC supported the flexibility in the SRCA for the infrastructure owner to choose whether to be the accredited rail infrastructure manager for that infrastructure, or to procure someone else to be accredited — but argued that provisions should also be included to require Aurizon Network to be the rail infrastructure manager for private infrastructure for a commercially reasonable fee where (and to the extent) requested by the owner (QRC 2012a, p.9).

Aurizon Network did not support the Authority's proposed approach to require Aurizon Network to use its "best endeavours" to align train paths, arguing that it is 'overly strong', unnecessary and would promote confusion and potential conflict with other users of the mainline (Aurizon Network 2012a, p.13). Aurizon Network also claimed that it would lead to a breach of Schedule G of the 2010 access undertaking (which is based on cyclic traffic and is not compatible with priority based scheduling) (Aurizon Network 2012a, p.13). Instead, Aurizon Network provided drafting to require Aurizon Network to use "reasonable endeavours", as well as including further circumstances where train services may not be scheduled to enter or exit private infrastructure (e.g. the rail infrastructure manager for private infrastructure ceases to be accredited, or has no interface agreement).

## Authority's Analysis and Final Decision

The Authority has maintained its position that Aurizon Network is responsible for scheduling and controlling all train movements entering and exiting the private infrastructure from or to the Network. While the Authority understands stakeholders' concerns regarding the competitive market for providing train control and rail infrastructure manager services on the private infrastructure, the Authority remains unconvinced that it would be appropriate to require Aurizon Network to provide these services for infrastructure that it does not own other than on commercially negotiated terms.

The Authority has further developed and clarified its conclusions regarding the requirement for Aurizon Network to use its "best endeavours" to align train paths, given the matters raised by Aurizon Network in response to the draft decision. It was not the Authority's intent to provide priority to traffic from private infrastructure over other cyclic traffic on the network. While the Authority is not convinced that its proposed drafting would result in that outcome (given its existing drafting already made the obligation subject to compliance with the network management principles in the access undertaking), it also considers that there is limited difference between the terms "best endeavours" and "reasonable endeavours". Therefore, the Authority accepts Aurizon Network's proposal to use "reasonable endeavours" to align train paths (see Appendix A, cl. 12.3).

The Authority has further developed and clarified its conclusions regarding train control given the matters raised by stakeholders in response to the draft decision. Refined drafting (see Appendix A, cl. 12.2) includes further circumstances where train services may not be scheduled to enter or exit private infrastructure (e.g. the rail infrastructure manager for private infrastructure ceases to be accredited, or has no interface agreement or there is an obstruction which would prevent such services reaching their origin or destination).

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### Final Decision 3.4

- **The Authority requires Aurizon Network to amend the SRCA to ensure that Aurizon Network uses reasonable endeavours (subject to compliance with the network management principles in the access undertaking) in train scheduling to enable train services utilising the connecting infrastructure to utilise corresponding access rights on the mainline network (so that train paths 'line up').**
  - **The Authority requires Aurizon Network to amend the SRCA to ensure that private infrastructure owners (or a contracted rail infrastructure manager) co-operate with Aurizon Network to seek to achieve the scheduling outcomes.**
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## 3.6 Insurance

Clause 16 of the proposed SRCA requires the private infrastructure owner to hold insurances as set out in Schedule 3 and provides that they are subject to review every three years. The private infrastructure owner must provide to Aurizon Network evidence of these insurances. Aurizon Network's proposal is incomplete as Schedule 3 in the proposed SRCA is blank, even though it is intended to provide details of the insurances required to be held by the owner.<sup>2</sup>

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<sup>2</sup> In its explanatory memorandum, Aurizon Network identified an insurance amount of \$100 million as commensurate with the general liability risk that is covered (Aurizon Network 2011, p.9).

## Draft Decision

In its draft decision, the Authority proposed a number of amendments to the SRCA to provide greater certainty over the types and amounts of insurance required (Draft Decision 3.5). These amendments included:

- (a) detailing the types and amounts of insurance required in a schedule to the SRCA (Draft Decision Appendix A, Schedule 3);
- (b) providing for the types and amounts of insurance, included in the SRCA at the time of the Authority's final decision, which would be indexed (using the consumer price index) to the date the connection agreement is signed (Draft Decision Appendix A, Schedule 3); and
- (c) requiring both parties to enter into good faith discussion over the types of insurances should certain insurances become unavailable in the market or the pricing of them becomes uncommercial (Draft Decision Appendix A, cl. 16(g)).

These amendments increase the transparency around the nature and types of insurance required and so reduce the potential for delay.

The Authority also proposed to require Aurizon Network to demonstrate that it too holds the appropriate insurances (Draft Decision Appendix A, Schedule 3) with a view to ensuring that the SRCA has a better balance of Aurizon Network's and users' rights and commercial interests.

## Stakeholder Comments on Draft Decision

Anglo American and Vale both supported the Authority's proposal that required Aurizon Network and the private infrastructure owner to take out insurance, arguing that it is 'important in enabling both parties to obtain a remedy for losses incurred above the liability cap' (Anglo American 2012a, p.5).

Bandanna Energy and Cockatoo Coal supported the Authority's proposed approach to require the SRCA to place obligations on Aurizon Network as this makes the SRCA a 'more balanced' document (Bandanna Energy and Cockatoo Coal 2012, p.2).

Aurizon Network also supported the Authority's proposed approach to insurance and provided new drafting to give effect to it, including listing specific insurance policies and amounts in Schedule 3 (Aurizon Network 2012a, p.14 and Aurizon Network 2012c, Schedule 3).

The QRC did not support the Authority's proposed provisions to deal with the situation where insurances become unavailable in the market, arguing they are unnecessary if the insurance obligations are reciprocal. In such a situation both parties will be similarly affected and incentivised to negotiate in good faith with each other (QRC 2012a, p.7).

Aurizon Network also did not support the Authority's proposed requirement for provisions that deal with the situation where insurances become unavailable in the market and did not include those provisions in their revised drafting.

## Explicit Amount of Public Liability Insurance

Stakeholders made a range of suggestions on what they considered should be the minimum amount of the public liability insurance – all of which differed.

Anglo American and Vale said that public liability insurance should be for an amount of \$20 million, to be indexed in accordance with CPI-all groups (Anglo American 2012a, p.5 and Vale 2012, p.5).

Asciano proposed \$50 million public liability insurance, arguing that the level of insurance for a connection does not need to be as high as for mainline running because “the chances of significant damage is not as great” (trains passing over the connection point will typically not be travelling at high speed) (Asciano 2012, p.8).

Aurizon Network argued that the proposal for a public liability limit of \$20 million was inadequate given the nature of the incidents which may occur and the potential damage and liability which may result from such incidents. Aurizon Network considers that \$100 million is a more reasonable and prudent level as a starting point (Aurizon Network 2012a, p.14).

The QRC suggests that an insurance amount of \$20 million is appropriate public liability insurance for both parties (QRC 2012a, p.7).

### Types of insurance

The stakeholders proposed a range of different types of insurance to be included in Schedule 3.

Anglo American (2012a, p.5) and Vale (2012, p.5) said the insurances should include:

- (a) professional indemnity insurance for an amount of not less than \$20 million per occurrence; and
- (b) third party property damage insurance of \$20 million.

Asciano proposed that insurances, other than public liability, should be set at the level in Aurizon Network’s access agreements (Asciano 2012, p.8).

Aurizon Network provided for Motor Vehicle (non-Act) insurance of \$20 million (Aurizon Network 2012c, Schedule 3).

Vale (2012, p.5) also proposed to include:

- (a) workers compensation as per legislative requirements; and
- (b) property damage insurance covering physical damage to the rail line and/or works at replacement value.

The QRC argued that including “any other insurance which is required by law” is common in commercial contracts and does not require more specific drafting or listing of such insurances (QRC 2012a, p.6).

### Authority’s Analysis and Final Decision

The Authority has further developed and clarified its conclusions regarding the insurance arrangements to be included in the SRCA.

The Authority has not changed its conclusion regarding the inclusion of provisions to deal with the situation where insurances become unavailable in the market. The Authority notes the QRC’s argument they may not be needed given the reciprocity of insurance. Nevertheless, the Authority considers that including the proposed clauses in the SRCA will

provide a useful reminder to Aurizon Network of the need to consider whether the prescribed insurances remain available on commercially reasonable terms.

The Authority has not changed its decision to specify the types of insurance policies and amounts in Schedule 3 to achieve increased certainty for both parties to the SRCA.

The Authority has further developed and clarified its decision on the indexation of the insurance amounts. The Authority accepts that the CPI may not accurately reflect the types of cost increases, and therefore insurance claims, which can be anticipated in central Queensland. Rather, the Authority considers that the maintenance cost index (MCI), as defined in Aurizon Network's 2010 access undertaking (or a future access undertaking or if the MCI is no longer referred to in the current access undertaking, as defined in the last access undertaking in which it was defined), would better reflect cost increases into the future. Using the MCI to index insurance amounts in the SRCA is consistent with the Authority's proposed approach for indexing the liability cap in the SRCA – it is also consistent more broadly with the access undertaking.

### Explicit Amount of Public Liability Insurance

The Authority notes that there were considerable differences in stakeholders' views on the appropriate level of public liability insurance, ranging from \$20 million (Anglo American, the QRC and Vale) to \$50 million (Asciano) and not less than \$100 million (Aurizon Network). The Authority notes the public liability insurance for the train operator in the standard access agreement currently stands at not less than \$350 million.

The Authority accepts, in principle, Aurizon Network's argument that the nature of incidents which may occur and the potential damage and liability which may result from such incidents could justify a higher level of public liability insurance than the \$20 million suggested by a number of stakeholders. It also notes that Aurizon Network is required to provide for new connections at cost, and it is therefore reasonable that the private infrastructure owner be required to have insurances which provide an appropriate degree of protection for Aurizon Network.

Accordingly, the Authority proposes that the public liability amount to be included into the SRCA be not less than \$100 million (not to be indexed).

### Types of Insurance

The Authority has considered stakeholders' various suggestions for the types of insurances to be included in the SRCA.

The Authority found the stakeholders suggestions to be generally reasonable. In particular, it is noted that the types of insurance suggested by Aurizon Network were consistent with the insurances in the standard access agreements.

The Authority concluded the following types of insurance are to be included in Schedule 3 of the SRCA for both parties:

- (a) *professional indemnity insurance* – not less than \$20 million per occurrence and in the aggregate and indexed in accordance with the MCI;
- (b) *public liability insurance* – not less than \$100 million (as per Aurizon Network's drafting);

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- (c) *third party property insurance* – \$20 million and indexed in accordance with the MCI for the private infrastructure for the owner and for the connecting infrastructure for Aurizon Network;
  - (d) *workers compensation* – as required by law;
  - (e) *employees insurance* – covering such liability as may arise at common law or by virtue of any relevant workers compensation legislation in respect of employees of the party;
  - (f) *property damage insurance* – covering physical damage to the connecting infrastructure and/or works at replacement value;
  - (g) *motor vehicle (non-Act) insurance* – covering the legal liability of the insured arising out of, or in connection with, the use of all vehicles in the performance of the agreement by the party or the party’s staff and must include third party liability to a sum insured of not less than \$20 million;
  - (h) *motor vehicle (statutory liability) insurance* – covering the statutory liability for the owner/Aurizon Network for personal injury arising out of, or in connection with, the use by the owner/Aurizon Network or the Owner’s/Aurizon Network’s staff of all vehicles in the performance of the agreement; and
  - (i) *any other insurance* – that is required by law to be maintained by the party in connection with the Connecting Infrastructure, the Private Infrastructure or the agreement.
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### **Final Decision 3.5**

- **The Authority requires QR Network to amend the SRCA to reflect reciprocal insurance requirements.**
  - **The Authority requires QR Network to amend Schedule 3 of the SRCA to specify the types and amounts of insurances required for both parties (as outlined above).**
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## **3.7 Disputes**

Clause 17 of the SRCA contains processes to resolve disputes.

### **Draft Decision**

In its draft decision, the Authority largely accepted Aurizon Networks’ proposed approach for resolving disputes via the dispute resolution provisions of the SRCA – but also sought to clarify that matters already covered by the dispute resolution mechanism in Aurizon Network’s 2010 access undertaking should be resolved in accordance with the access undertaking (Draft Decision 3.6, Draft Decision Appendix A, cl. 17).

### **Stakeholder Comments on Draft Decision**

Aurizon Network supported the Authority’s proposed approach to disputes (Aurizon Network 2012a, p.14) and proposed to change the references to seven and 14 days to five and 10 business days respectively.

## Authority's Analysis and Final Decision

The Authority maintained its position on disputes and refined the drafting to business days as requested by Aurizon Network.

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### Final Decision 3.6

- **The Authority requires Aurizon Network to amend the SRCA to make clear that disputes relating to matters covered by the dispute resolution mechanism in QR Network's 2010 access undertaking should be resolved in the manner set out in the access undertaking.**
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## 4. COAL LOSS MANAGEMENT

*Aurizon Network has environmental obligations relating to the loss of coal from trains operating on its network, and has sought to implement these by using the SRCA to place requirements on private infrastructure owners.*

*The Authority's draft decision proposed that these requirements be removed from the SRCA, as it was considered that Aurizon Network had not satisfactorily demonstrated that including them in the SRCA was the most effective way to deal with coal loss issues.*

*In response to the draft decision, Aurizon Network presented substantial additional information, particularly regarding the environmental obligations and the rationale for including these requirements in the SRCA (in order to ensure that all mine load-outs are covered by the requirements).*

*As a consequence, the Authority has revised its position and has now decided that the SRCA should provide for the potential for coal loss mitigation provisions to be incorporated into the SRCA. However, the Authority has decided that these provisions should be able to vary over time to reflect changes in coal loss mitigation strategies and obligations rather than being fixed in a prescriptive schedule which would require agreement of both parties to amend. Consequently the Authority has provided for the SRCA to refer to coal loss mitigation provisions included in the access undertaking from time to time. Aurizon Network could seek to introduce such provisions either via amendments to the current undertaking or incorporation in a future Aurizon Network draft replacement access undertaking.*

### 4.1 Coal Loss Management

Aurizon Network's proposed coal loss management provisions (CLMPs) require the private infrastructure owner to have the primary responsibility to ensure wagons are loaded, profiled and veneered in accordance with required standards and also provide for Aurizon Network to investigate and verify the effectiveness of the private infrastructure owner's compliance with these obligations (Schedule 7).

#### Draft Decision

In its draft decision, the Authority proposed to delete the CLMPs from the SRCA (Draft Decision 4.1). In doing so, the Authority noted that coal losses affect the whole coal chain but questioned whether the CLMPs were relevant to the SRCA and whether including them in the SRCA was an effective way of preventing coal loss on the network. In particular, the Authority was not satisfied that Aurizon Network had clearly established that the SRCA would be an appropriate way to address CLMPs.

#### Stakeholder Comments on Draft Decision

Bandanna Energy and Cockatoo Coal supported the Authority's proposal to delete the CLMPs from the SRCA, arguing CLMPs are not relevant to the construction, maintenance or operation of the connecting infrastructure. That said, Bandanna Energy and Cockatoo Coal noted that a private infrastructure owner might agree to include these obligations in the agreement because they may not be party to the relevant access agreement, provided that Aurizon Network does not link them to unreasonable powers on its part (Bandanna Energy & Cockatoo Coal 2012, p.2).

Aurizon Network did not support the Authority's proposal to delete CLMPs from the SRCA. Aurizon Network argued that the CLMPs are within the scope of the SRCA since clause 8.3

of the 2010 access undertaking contemplates that standards applying to the private infrastructure could be included in connection agreements (Aurizon Network 2012a, p.14).

It also argued that including CLMPs in the SRCA was a ‘particularly effective’ way to implement the coal loss mitigation measures required under the Coal Dust Management Plan for those mine load-outs located on private infrastructure (Aurizon Network 2012a, p.14). For example, in their November 2012 supplementary submission, Aurizon Network showed that their Coal Dust Management Plan was developed in response to an Environmental Evaluation Notice under section 323 of the *Environmental Protection Act 1994*. Aurizon Network supplied the Authority with copies of the following documents setting out the approval process:

- (a) *Draft Transitional Environmental Program, Aurizon Network, 22 August 2008;*
- (b) *Decision to grant approval for a draft Transitional Environmental Program, Environmental Protection Agency (EPA), 3 September 2008;*
- (c) *Transitional Environmental Program certificate of approval number CA17384/MAN7995, EPA, 3 September 2008;*
- (d) *Transitional Environmental Program 2, Aurizon Network, 19 April 2010; and*
- (e) *Transitional Environmental Program certificate of approval number CA20859, Department of Environment and Resource Management, 20 May 2010.*

The May 2010 Transitional Environmental Program certificate approved the program to implement the Coal Dust Management Plan (February 2010) – this certificate remains in force until 31 December 2013. Key aspects of this program include:

- (a) installing veneering spray stations at 11 priority mines by December 2010, with all central Queensland mines to have veneering spray stations by 2013; and
- (b) negotiating or updating all Transfer Facility Licences (TFLs) by mid-2010 for all loading facilities to include coal dust mitigation and profiling measures.

Aurizon Network argued that including CLMPs in the SRCA would ultimately result in a consistent approach across all load-outs (Aurizon Network 2012d, p.7). Where the mine load-out is located on Aurizon Network’s infrastructure, the CLMPs will be included in the required TFL. Aurizon Network said that 22 of the 36 operating train loading facilities on its corridor already had TFLs including CLMPs, with a further six in “advanced stages of negotiations”. Including CLMPs in the SRCA seeks to cover off the circumstances where new load-outs are on private infrastructure (and where a TFL will therefore not apply).

Aurizon Network said that the CLMPs in a standard TFL were consistent with those proposed in the SRCA – Aurizon Network provided the Authority with a comparison document as evidence to support this claim.

In a further submission, Anglo American stated its view that the process which QR Network has followed in submitting an additional submission on 12 November 2012 has not allowed the coal producers sufficient time to respond to the detail of Schedule 7 (Anglo American 2012b, p.1).

### **Authority’s Analysis and Final Decision**

The Authority has reconsidered its draft decision to delete the CLMPs from the SRCA, based on the responses to the draft decision.

Particularly relevant to this are that the Coal Dust Management Plan has been approved by the Department of Environment and Resource Management and has already been implemented over the majority of the coal load-outs on Aurizon Network's below-rail network. Providing for the SRCA to incorporate appropriate CLMPs will give Aurizon Network the opportunity to seek inclusion in its access undertaking of obligations to reflect its existing environmental obligations.

While the QRC's, Anglo American's and Vale's objections to including CLMPs in the SRCA are noted, the Authority considers that it is in the interests of the coal supply chain that the Coal Dust Management Plan is implemented effectively – and that using the SRCA to do this is a convenient way to ensure that these obligations extend to all mines utilising the network. On this, the Authority agrees with Aurizon Network that no mine using the network should be excluded from its Coal Dust Management Plan obligations simply because they load on private infrastructure.

Based on the supplementary information provided by Aurizon Network, the Authority is satisfied that:

- (a) Aurizon Network has obligations to implement the Coal Dust Management Plan (following assessment of the Environmental Evaluation Notice); and,
- (b) the CLMPs proposed to be included in the SRCA are consistent with the similar clauses in the TFL.

The Authority has accepted the principle of incorporation of reasonable CLMPs in the SRCA in the interest of ensuring that trains running on the network have been appropriately loaded and to the extent that doing so is more likely to result in a consistent approach to coal loss mitigation across all load-outs, whether they are located on the network or on the private infrastructure.

However, at this time, the Authority has not accepted the proposed CLMPs contained in the original Schedule 7 of Aurizon Network's proposed SRCA.

The Authority notes the CLMPs proposed to be included in the SRCA have been shown to be consistent with the CLMPs already included in TFLs, but is concerned these provisions were implemented in a non-regulated environment and might reflect Aurizon Network's monopoly powers. The Authority also notes that coal loss mitigation strategies and obligations may vary over time and is concerned that fixing the parties' obligations in this regard by reference to a prescriptive schedule (which would require the parties' agreement to amend) will result in a disconnect between the SRCA and Aurizon Network's coal loss mitigation obligations. The Authority is also mindful that stakeholders had not commented at length on the exact content of the CLMPs as submitted by Aurizon Network, as the Authority had initially signalled its intention not to accept the CLMPs.

Instead, the Authority requires that the SRCA refer to CLMPs that have been incorporated in Aurizon Network's access undertaking (see Appendix A, cl. 1.1). Aurizon Network can achieve this by submitting a draft amending access undertaking to the (current) 2010 access undertaking or including CLMPs in a future draft replacement access undertaking. As noted above, in taking this approach, the Authority recognises that ways to mitigate coal losses and environmental requirements may evolve through time (e.g. to reflect changes in environmental legislation and/or changes in technology). This approach provides an opportunity for these provisions to change over time and the SRCA to become a living document in this respect. The Authority also notes that the proposed process will allow sufficient stakeholder consultation and regulatory oversight on the exact terms of the CLMPs (and future changes to those provisions).

To address Asciano's concerns, the Authority has required that the relevant drafting is clear that the CLMPs will only apply in circumstances where they are required by the nature of the private infrastructure. While the Authority has accepted Aurizon Network's additional information and rationale for including CLMPs in the SRCA, the Authority is conscious its decision will put an additional obligation on private infrastructure owners, while benefiting Aurizon Network in allowing it to meet its environmental obligations. The Authority notes that Aurizon Network must also contribute to managing coal loss itself, including by addressing train over-loading, the cleaning of fouled ballast and providing calibrated over-load detectors. The Authority is currently minded to take this into account in considering coal loss mitigation matters which are sought to be included in Aurizon Network's access undertaking in the future.

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#### **Final Decision 4.1**

- **The Authority requires Aurizon Network to provide for the SRCA to incorporate the coal loss mitigation provisions set out in its access undertaking from time to time (but exclude the application of these provisions when the private infrastructure is not related to a coal mine load-out).**
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