



Draft Decision

**QR Network 2008 Draft Access
Undertaking**

September 2008

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SUBMISSIONS

This report is a draft only and is subject to revision. Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (the Authority). Therefore submissions are invited from interested parties concerning the Authority's assessment of QR Network's 2008 draft access undertaking. The Authority will take account of all submissions received.

Written submissions should be sent to the address below. While the Authority does not necessarily require submissions in any particular format, it would be appreciated if two printed copies are provided together with an electronic version on disk (Microsoft Word format) or by e-mail. Submissions, comments or inquiries regarding this paper should be directed to:

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The **closing date** for submissions is 3 October 2008.

Confidentiality

In the interests of transparency and to promote informed discussion, the Authority would prefer submissions to be made publicly available wherever this is reasonable. However, if a person making a submission does not want that submission to be public, that person should claim confidentiality in respect of the document (or any part of the document). Claims for confidentiality should be clearly noted on the front page of the submission and the relevant sections of the submission should be marked as confidential, so that the remainder of the document can be made publicly available. It would also be appreciated if two copies of each version of these submissions (i.e. the complete version and another excising confidential information) could be provided. Again, it would be appreciated if each version could be provided on disk. Where it is unclear why a submission has been marked "confidential", the status of the submission will be discussed with the person making the submission.

While the Authority will endeavour to identify and protect material claimed as confidential as well as exempt documents (within the meaning of the *Freedom of Information (FOI) Act 1989*), it cannot guarantee that submissions will not be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997* (the QCA Act), the Authority must take all reasonable steps to ensure the information is not disclosed without the person's consent, provided the Authority is satisfied that the person's belief is justified and that the disclosure of the information would not be in the public interest. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of an FOI request.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact the office (07) 3222 0555.

PREAMBLE

Queensland Rail Ltd (QR Ltd) has undertaken a corporate restructure involving the creation of a new independent subsidiary responsible for its network business. That new business, QR Network Pty Ltd (QR Network), was incorporated on 11 July 2008 and commenced operations on 1 September 2008.

In order to reflect this changed corporate structure, on 29 July 2008, the Authority received formal applications from QR Ltd to withdraw its approved 2006 undertaking and from QR Network to approve its 2008 draft access undertaking (DAU) in replacement.

QR Network's 2008 DAU

The Authority's draft decision is to not approve the 2008 DAU as it has identified material deficiencies in both the 2008 DAU and in the proposed implementation arrangements, in particular:

- (a) the proposed amendments to the indemnity provisions in the operator standard access agreement may expose access seekers to risks that they are unable to manage at this time;
- (b) the definition of major yard managed by QR Network should be amended to include Pring;
- (c) the QR Ltd Chief Executive Officer's undertaking to ensure QR Ltd's cooperation to enable QR Network to fulfil its access obligations requires revision; and
- (d) the proposed deed, between QR Network and QR Ltd, to manage the confidential information of access seekers requires revision.

The Authority also encourages QR Network to rectify a range of other, non-material deficiencies that have been identified in the 2008 DAU and in the supporting implementation arrangements.

QR Ltd's Application to Withdraw the 2006 Access Undertaking

The Authority's draft decision is to not approve QR Ltd's request to withdraw the access undertaking the Authority approved on 29 June 2006, and as subsequently amended, as it has not approved QR Network's 2008 DAU and access arrangements must continue to be in effect.

QR Ltd will need to ensure that QR Network or, where relevant, one of the other QR subsidiaries or business groups manages the declared services pursuant to the terms of the existing undertaking

Way Forward

The Authority seeks submissions in relation to these draft decisions. Submissions must be received by no later than 3 October 2008.

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1. INTRODUCTION

QR Ltd has undergone a corporate restructure resulting in the creation of a new subsidiary, QR Network Pty Ltd, that is responsible for owning and operating the majority of the below-rail assets covered by Queensland's third party access regime. QR Ltd has sought to withdraw its approved 2006 access undertaking and QR Network Pty Ltd has submitted a 2008 draft access undertaking in replacement. The majority, but not all, of the differences between the 2006 undertaking and the 2008 draft access undertaking reflect the changing legal responsibilities within the QR group resulting from the corporate restructure.

1.1 Declaration of Third Party Access

The use of rail transport infrastructure managed by QR Ltd has been declared under Part 5 of the *Queensland Competition Authority Act 1997* (the QCA Act), and is therefore subject to the third party access provisions of the QCA Act. These provisions require QR Ltd to allow other train operators to use its intrastate rail infrastructure on agreed terms and conditions.

While Part 5 of the QCA Act imposes broad obligations on an access provider, it also provides for the development, and the Authority's approval, of an access undertaking. The approved QR Ltd access undertaking sets out the terms and conditions under which QR Ltd will provide access to the parts of its rail infrastructure that are covered by the undertaking.

In particular, the access undertaking sets out a negotiation framework for new access seekers and, in the case of coal carrying train services, sets out conditions of access including reference tariffs and standard access agreements.

A significant proportion of the detail of the current access undertaking addresses matters associated with the vertical integration of above- and below-rail activities within QR Ltd. For example, the handling of access seekers' confidential information and the transfer to QR Network of declared assets managed by other QR business groups.

1.2 QR Ltd's Proposed Restructure

QR Ltd has undertaken a corporate restructuring involving the creation of two new Corporations Law subsidiaries, each wholly owned by QR Ltd, encompassing QR's network and passenger businesses.

The network subsidiary has changed its name from QR Network Access (QRNA) to QR Network Pty Ltd (QR Network). QR Network was incorporated on 11 July 2008 and commenced operations on 1 September 2008.

QR Network has advised that substantially all of the assets and contracts associated with QR Ltd's below-rail services have been transferred to it, with QR Ltd retaining ownership of those rail transport infrastructure rail assets not transferring QR Network (e.g. stations and platforms).

1.3 Access Implications of the Proposed Restructuring

The existing declaration for third party access is defined in terms of rail transport infrastructure where QR Ltd, or a successor, assignee or subsidiary of QR Ltd, is the railway manager. Accordingly, the scope and affect of the existing declaration is not impacted by QR's restructuring.

Until now, the undertaking has been submitted by QR Ltd as the access obligations have rested with QR Ltd as the relevant corporate entity. In practice, however, these obligations have generally been met by one of its internal business groups, QRNA, as the majority, but not all, of the management responsibility for the assets covered by the declaration has rested with QRNA.

The QCA Act requires the undertaking to be provided by the ‘owner or operator’ of a declared service. The QCA Act is, however, silent on what occurs when an entity ceases to be the owner or operator of a declared service such as in the current case where QR Ltd is not be the owner or operator of the majority of its rail transport infrastructure from 1 September 2008.

It would, nevertheless, seem prudent for QR Ltd to seek to withdraw the current undertaking and for QR Network to submit a replacement undertaking reflecting the change in the ownership of the declared rail transport infrastructure.

1.4 QR Network’s Draft Access Undertaking

QR Ltd has advised the Authority that it has adopted a two-stage process to revising its access undertaking to reflect its corporate restructuring, namely:

- (a) withdrawing the current undertaking and submitting a new undertaking:
 - (i) to give effect to changes in the ownership of assets;
 - (ii) to resolve the easiest of the amendments to the undertaking; and
 - (iii) to address the more complex issues through an interim set of transitional provisions; and
- (b) using the 2009 access undertaking, due to take effect from 1 July 2009, to resolve any outstanding, more complex issues.

The majority of changes between the 2006 access undertaking and the 2008 DAU are typographical in nature involving a name change to reflect the transfer of obligations from QR Ltd to QR Network. Some other amendments are not so straight forward but are amenable to relatively simple solutions while other amendments are more complex as they involve services by QR entities other than QR Network. These amendments are explained in detail in section 2 and include the following:

- (a) control and management of yard services;
- (b) financial reporting;
- (c) ring-fencing;
- (d) provision of access to land and electricity; and
- (e) standard access agreements.

In considering these matters, the Authority has sought to ensure that the new undertaking does not result in a dilution of QR Ltd’s current obligations (or impair the enforceability of those obligations) while adequately reflecting the changes in its corporate structure.

1.5 The Authority’s Assessment Process

The Authority has actively engaged with QR and stakeholders on amendments to QR’s undertaking with a view to facilitating the timely consideration of formal applications to withdraw QR Ltd’s 2006 access undertaking and to approve QR Network’s 2008 DAU.

In March 2008, Authority staff commenced discussions with QR to identify the key regulatory implications of QR Ltd’s proposed organisational restructure. The purpose of those discussions

was to identify and seek to resolve issues associated with QR's restructure and its access undertaking.

Drawing on those discussions, QR submitted a preliminary 2008 DAU in May 2008 – QR Network was unable to make a formal submission of a 2008 DAU as it had not been incorporated at that time. The Authority then commenced public consultation by publishing QR's preliminary 2008 DAU and requesting submissions from interested parties.

The Authority also published a position paper to assist stakeholders to prepare submissions, by providing them with the Authority's initial views on QR Network's preliminary 2008 DAU. The Authority indicated at that time that it was minded to accept QR's preliminary 2008 DAU subject to the comments of stakeholders and the satisfactory resolution of a number of outstanding matters.

The Authority received three submissions on QR's preliminary 2008 DAU, from Asciano, Australian Rail Track Corporation (ARTC) and Queensland Resources Council (QRC).

On 29 July 2008, the Authority received formal applications from QR Ltd to withdraw its approved 2006 undertaking and from QR Network to approve its 2008 DAU. The submission of these formal applications was enabled by the incorporation of QR Network on 11 July 2008.

The arrangements proposed in relation to QR Network 2008 DAU contains a number of amendments to the arrangements as they were understood at the time of QR's May 2008 'preliminary' submission, including:

- (a) amendments to the definitions of 'private facility' in subparagraph 2.2(g) and (h) and 'private infrastructure' in clause 10.1;
- (b) amendments to clause 2.2 to clarify that QR Network will obtain ownership, and not simply responsibility, for declared assets that are currently owned by a related QR party;
- (c) the transfer of ownership of declared assets to QR Network will be facilitated by an undertaking from the QR Ltd Chief Executive Officer and not by a formal agreement between QR Network and QR related parties;
- (d) a change in the proposed commencement date to 1 September 2008 (with the proposed expiry date remaining as 30 June 2009); and
- (e) compliance with QR Network's confidentiality and ring-fencing obligations will be facilitated by a confidentiality deed between QR Network and QR Ltd rather than including these in wider service agreements.

The Authority published QR Ltd's and QR Network's formal applications and invited submissions from interested parties. In response to that request, the Authority received five submissions (from Asciano, ARTC, Bowen Central Coal Management, QRC and Vale Australia).

1.6 The Authority's Considerations

While it may be prudent for QR Ltd to seek to withdraw its undertaking as it is no longer the owner and operator of the below-rail assets, the QCA Act requires that the withdrawal of an approved access undertaking can only occur with the Authority's written approval (s 148 QCA Act). The QCA Act does not stipulate a process or assessment criteria for considering a withdrawal application. Nevertheless, the Authority is obliged to follow the requirements of natural justice when considering such an application.

In relation to QR Network's submission of its 2008 DAU, s136 (4) of the QCA Act requires the Authority to consider, and to approve or refuse to approve, that draft access undertaking. The Authority can only approve a draft access undertaking if it has published the undertaking, invited persons to make a submission and considered the submissions received (s138(3)). In approving an undertaking, the Authority can have regard to the interests of stakeholders (i.e. the owner of the service, access seekers and the public) and any other issues the Authority considers relevant.

Until such time as the Authority has approved a 2008 DAU, QR Ltd's 2006 undertaking will continue to be enforceable by the Authority against QR Ltd (s158A of the QCA Act) as the Authority has decided not to approve the withdrawal of the 2006 undertaking until the 2008 DAU has commenced. In turn, QR Ltd will need to ensure that QR Network or, where relevant, one of the other QR subsidiaries or business groups continues to manage the declared services pursuant to the terms of the existing undertaking.

2. ASSESSMENT OF QR NETWORK'S PROPOSAL – DRAFT ACCESS UNDERTAKING

In considering QR Network's 2008 DAU, the Authority has sought to ensure that the amendments do not dilute QR Ltd's current access obligations. The Authority's assessment has focused not only on the proposed amendments to the undertaking, but also on the arrangements that seek to give effect to QR Network's 2008 DAU. For example, the new access agreements between QR Network and QR Ltd and QR Ltd's Chief Executive Officer's undertaking in relation to the management of declared assets and confidential information.

The Authority considers that, in general, the proposed amendments to the undertaking and the associated enforcement arrangements are reasonable. Nevertheless, the Authority has concerns with QR Network's proposed changes to the indemnity provisions in the operator standard access agreement and with aspects of the enforcement arrangements.

2.1 QR Network Restructure Interpretive Provisions

QR Network's proposal

In its 2008 DAU submission, QR Network sought to preserve the regulatory principles contained in the approved 2006 access undertaking in its proposed 2008 DAU until 30 June 2009; that is, for a term equivalent to the remainder of the 2006 undertaking.

To give effect to this objective, a number of interpretive provisions (cl. 2.5.2) were proposed. These interpretive provisions covered a number of matters including: seeking to ensure a smooth transition from the 2006 undertaking to the 2008 undertaking and converting existing internal access agreements into formal access agreements with QR Ltd and its newly created separate corporate entities. In relation to this, QR Network stated that the new access agreements will be:

- (a) on the same terms and conditions as the existing internal access agreements, other than consequential amendments which are required to give effect to the corporate restructure; and
- (b) consistent with the relevant standard access agreement (as at the date of execution of the internal access agreement being converted).

In addition, the proposed cl. 2.5.2(h) allowed QR Network to recover the likely difference between any proposed backdated reference tariffs, and the access charges QR Ltd has been charging prior to 1 July 2008. For example, the Minerva coal train service has been operating on the Blackwater system since the December quarter 2005. While the Minerva service has been levied an access charge, this has not been an approved reference tariff. This amendment to the undertaking provided scope for QR Network to seek to backdate a reference tariff, once submitted and approved, to the commencement date of the Minerva train service in late 2005.

Stakeholders' comments

In its June 2008 submission, the QRC indicated it supported QR's proposed approach of preserving in the 2008 undertaking the access rights contained in the 2006 approved undertaking. Nevertheless, the QRC indicated it was concerned that the undertaking could not remedy any issues that might arise in the execution of access agreements between QR Network and a related party (e.g. QR National).

The QRC noted that, while its specific concerns (e.g. transfer provisions for access rights) appear to have been addressed, it believed that the 2008 undertaking should provide for the

Authority to approve any variation to an access agreement between QR Network and a related party (e.g. QR National).

The QRC's August submission reiterated its earlier position and encouraged the Authority to thoroughly review the new access agreements and to make them publicly available to ensure a transparent regulatory process – Bowen Central Coal Management and Vale Australia also supported these views.

Authority's Analysis and Draft Decision

The Authority has reviewed the proposed interpretive provisions and considers that they seek to preserve the principles from the 2006 undertaking in the proposed 2008 undertaking.

In considering this, the Authority particularly notes that cl. 2.5.2(f) provides for QR Network to convert its existing internal access agreements into access agreements and that the only amendments to those agreements will be those necessary to give effect to this conversion and to reflect the restructure of QR Ltd.

The Authority believes that these limitations are necessary because, in seeking to roll-over the existing internal access agreements, QR Network is seeking to preserve the access rights that were in place at the time the internal agreements were settled. In doing so, QR Network is not seeking to introduce into the new agreements any of the rights or obligations that have been subsequently introduced into, say, the 2001 or 2006 undertakings or standard access agreements (e.g. revised take-or-pay obligations).

In order to be satisfied that QR has complied with these provisions of the 2008 DAU and its statements in its accompanying submission, the Authority reviewed QR Network's coal access agreements with QR Ltd. In conducting this review, the Authority found that, in practically all cases, the new access agreements are consistent with the earlier internal access agreements.

Nevertheless, a number of amendments were made to the access agreement for the coal carrying train service from Coppabella and Moorvale to Abbot Point that do not appear to be necessary to give effect to the corporate restructure, for example:

- (a) the termination date was extended – QR Network have advised that the extension was to a UT2 agreement that was agreed prior to the restructuring; and
- (b) the clauses in schedule 8 relating to routine and major inspections have been amended with the effect that the train operator, and not QR Network, will be responsible for conducting routine inspections – this amendment will make this agreement consistent with the other internal access agreements and QR Network has advised that this amendment was made to bring the inspection arrangements into line with national practice.

Accordingly, the Authority accepts that, in converting the internal agreements into access agreements, the changes made reflect the restructuring of QR Ltd with the exception of the two matters identified which are relatively minor and administrative in nature.

The Authority notes the QRC's request for these agreements to be made public and QR Network's acknowledgement that the access agreements may be published in accordance with paragraph 5.4(a) of the undertaking. The Authority engaged in a lengthy process to secure the publishing of the existing agreements, and is prepared to engage in a similar process again. Nevertheless, the Authority encourages QR Network to take this opportunity to publish the new access agreements.

2.2 Ring-fencing and Complaints Handling

QR Network's proposal

QR Ltd's access undertaking establishes a set of obligations and procedures governing QR Ltd's treatment and disclosure of an access seeker's / access holder's confidential information. These arrangements go beyond normal arrangements for the treatment of commercially confidential information as their primary purpose is to ensure that QR Ltd's above-rail groups do not get access to any information in relation to an access seeker / access holder from QR Network except under the circumstances provided for in the 2006 access undertaking.

The 2006 access undertaking places the information ring-fencing obligations on QR Ltd. Consequently, actions to remedy a breach of the ring-fencing obligations can be taken against QR Ltd, including the non-QRNA business units. This will not be the case when the access undertaking is the responsibility of QR Network.

To address this matter, the amendments to clause 3.3 (d) (ii) of the 2008 DAU provides for an enforcement mechanism against QR Network if QR Network is in breach of the access undertaking while also providing for the enforcement of a breach of confidentiality by any other QR related party. Amendments to clause 3.1 (b) and (f) and clauses 4 and 5 under schedule B further ensure that QR Network will be responsible for enforcing a breach by a QR related party and, where appropriate, be liable for any liquidated damages.

These arrangements are to be supported by a confidentiality deed between QR Network and QR Ltd and an undertaking to the Authority from the QR Ltd Chief Executive Officer.

Amendments to clause 3.5.1(a) enable third party access holders to lodge a written complaint with QR Network if it considers that QR Network, QR Ltd or a related party of QR has breached the confidentiality deed with QR Network pursuant to which the confidential information was disclosed.

Authority's Analysis and Draft Decision

The Authority is of the view that the effectiveness of information ring-fencing arrangements should not be diluted by the changes in QR's corporate structure.

The amendments in the 2008 DAU ensure that the current ring-fencing and confidentiality arrangements adequately deal with any unauthorised disclosure of information by QR Network or other QR entities. In the event of a breach of the confidentiality deed by QR Network or QR Ltd, QR Network will be:

- (a) accountable for its compliance with ring-fencing provisions;
- (b) liable to enforce these obligations on QR Ltd by way of confidentiality provisions;
- (c) subject to a complaints mechanism by an access holder;
- (d) liable to access seekers/holders for liquidated damages, or claims for loss or damage;
- (e) in breach of the undertaking; and
- (f) liable to inform the Authority of any breach of these provisions (including by other QR entities) and the actions taken to remedy the breach.

However, the effectiveness of these arrangements relies not only on the terms of the proposed 2008 DAU but also on the terms of the arrangements between QR Network and QR Ltd.

QR Network provided the Authority on 11 August 2008 with a draft of the confidentiality deed between QR Network and QR Ltd, covering QR Network's ring-fencing obligations under Part 3 of the 2008 undertaking. The confidentiality deed covers the handling of confidential information between QR Network and QR Ltd but excludes QR Passenger or any other QR subsidiary.

The Authority has reviewed that deed and it is generally satisfactory. However, the deed should enable QR Network to fulfil its obligations under clause 3.3(d)(ii) of the 2008 DAU by including a notification provision to ensure that, if either party becomes aware of a breach of the deed, they must notify the other party of that breach and the circumstances in which that breach occurred. The Authority's review has also identified a number of other amendments which the Authority believes will improve the clarity of the deed and which QR should take this opportunity to implement.

In addition, the QR Ltd Chief Executive Officer (CEO) provided the Authority with an undertaking that, for the 10 months following 1 September 2008, QR Ltd and QR Ltd's subsidiaries will, as necessary, comply with clause 3.1 of the 2008 undertaking relating to the management of confidential information.

The CEO undertaking is different from the enforceable agreements the Authority understood would be implemented between QR Network and related QR entities at the time the Authority prepared its position paper. Nevertheless, the Authority accepts that an undertaking of this type is a legally enforceable agreement, on the basis that it has been given by an appropriate person who has authority to bind QR Ltd in a manner that indicates an intent to accept a binding obligation.

Despite this, the Authority is of the view that the CEO undertaking in relation to information ring-fencing is deficient in a material respect, in particular that it should also include reference to clause 3.5.1(c) of the undertaking that deals with complaint handling.

In particular, clause 3.5.1 sets out the process if a third party considers that QR Network or a related party has breached a confidentiality deed or confidentiality provision contained in an agreement, with clause 3.5.1(c) relating to QR Network conducting an investigation of those complaints. If QR Ltd and its subsidiaries were the subject of those investigations but not required to assist QR Network's investigations, QR Network is likely to encounter difficulties in conducting a proper investigation.

Decision 1**The Authority requires QR Ltd to:**

- (a) alter the terms of the Chief Executive Officer's undertaking to**
 - (i) include reference to clause 3.5.1(c) of the 2008 undertaking; and**
 - (ii) amend the term of the CEO undertaking to expressly apply for the duration of the 2008 undertaking (including any future extensions);**
- (b) amend the confidentiality deed:**
 - (i) to include a notification of breach provision which states that "If either party becomes aware of a breach of any provisions of this Deed, they must promptly notify the other party of the fact of that breach and the circumstances in which that breach occurred"; and**
 - (ii) to address a number of relatively minor matters to improve the clarity of the confidentiality deed as advised to QR Network separately.**

2.3 Transfer of Assets

The overwhelming majority of QR Ltd's declared below-rail assets have been managed by QRNA. The delineation of the declared assets managed by QRNA and QR's other business groups are pictorially represented in the line diagrams that form part of the 2006 access undertaking. The most significant of the below-rail facilities that have remained outside of QRNA's management responsibility have been the Mayne Control Centre and all stations and platforms.

As part of its July 2008 submission, QR Network advised that substantially all of the assets associated with QR Ltd's below-rail services will transfer to QR Network. These assets include:

- (a) rail infrastructure (i.e. the "red roads" in the line diagrams) including the following asset categories:**
 - (i) the permanent way on which the rail corridor is located;**
 - (ii) electrification infrastructure;**
 - (iii) signalling on the rail corridor and within yards and sidings;**
 - (iv) buildings and other facilities; and**
 - (v) plant such as wayside fault detection equipment, weighbridges, rolling stock and office equipment;**
- (b) yards and sidings;**

- (c) land holdings on which rail infrastructure forms a substantial part;¹
- (d) QR's telecommunications backbone; and
- (e) assets required for management and control of all train services (including assets associated with the Mayne Control Centre).

QR Network's advice on the asset transfers contained in its July 2008 submission was augmented on 10 September 2008, when QR Network advised that rail transport infrastructure assigned to QRNA, inclusive of all 'red' roads identified in schedule A of the 2008 DAU, was transferred to it on 1 September 2008. That is, all assets previously under the control of QRNA were transferred to QR Network:

- (a) with the addition of the assets required for the management and control of trains through the Brisbane metropolitan network and associated with the Mayne Control Centre; but
- (b) with the exclusion of:
 - (i) *assets under construction* – all assets associated with QRNA capital projects were transferred to QR Network, with the exception of the Jilalan Yard Upgrade Project where the majority of the capital costs are associated with the above-rail component of the project. Once completed, the assets will transfer to QR Network.
 - (ii) *freehold land* – QR Ltd has retained ownership of all freehold land, including land for possible future rail corridors; and
 - (iii) *Acacia Ridge land holdings* – land under 'red' roads identified as narrow gauge rail infrastructure was not transferred as no separate sub-lease existed at the time of the transfer. The relevant land will be transferred to QR Network once that sublease is created.

Authority's Analysis and Draft Decision

A key matter for the Authority in considering the 2008 DAU is whether there has been any significant dilution in QR Network's management responsibility of the declared service.

One of the more intractable matters for the Authority in considering the 2008 DAU has been to obtain a degree of confidence in the scope of the assets being transferred to QR Network. QR Network's descriptions of the assets being transferred tended to be equivocal. In addition, the accounting information, whether it was detailed or in summary form, did not always align with the descriptions of the asset transfers provided by QR Network.

However, to a very large extent, these concerns were addressed in QR's September 2008 supplementary submission. In that submission QR Network provided unequivocal advice on the nature of all exclusions, both in terms of their scope and duration, including, that two of the most significant exclusions, being the Jilalan marshalling yard works and land at the Acacia Ridge yard, will be transferred to QR Network.

On this basis, the Authority is satisfied that the creation of QR Network will not dilute the management responsibility for the declared service. Indeed, given the transfer of the Mayne

¹QR Network advised that the only location where land that holds rail infrastructure will not transfer to QR Network is at the Willowburn yard (coal and freight) on the western system. QR advised that the rail infrastructure at this location is managed by QR Freight.

Control Centre assets to QR Network, there is probably now an even greater concentration of management responsibility for the declared services within QR Network.

2.4 Provision of Yard Control Services

Marshalling yards are part of the declared service. However, marshalling yards are often co-located with other facilities that are not part of the declared service (e.g. rolling-stock maintenance and freight terminals). While the management responsibility for operating the marshalling yards is a QRNA responsibility, control of train movements around these co-located facilities can be performed by QR Ltd entities other than QRNA.

The argument has often been that, at many of the yards, activity levels have been insufficient to justify the separate provision of yard control services for the declared and non-declared parts of the co-located facilities. As a result, yard control services have generally been provided on behalf of QRNA by other QR Ltd entities pursuant to yard management agreements.

QR Ltd's 2006 access undertaking indicates that yard control services are only provided by QRNA at Callemondah (Gladstone), with the services being provided by non-QRNA entities at the remainder of the yards.

Since the 2006 undertaking was prepared, QR Network has gained responsibility for providing yard control services at a number of other marshalling yards in Queensland, namely: Acacia Ridge, Fisherman Islands, Rockhampton, Jilalan, Coppabella, Paget (Mackay), Townsville and Portsmith (Cairns).

The 2008 DAU therefore proposes to amend clauses 3.1(b)(vii) and 3.1(c)(iv) to reflect the changes to responsibility for managing yard control services.

Authority's Current Position

The proposed drafting for yard control services replicates the existing provisions in the 2006 undertaking except that it now expands the number of yards under the direct operational responsibility of QR Network. There are of course still a number of yards in Queensland where yard control services will not be provided by QR Network (e.g. Mt Isa).

In considering this matter, the Authority was particularly interested in ensuring that responsibility for providing train control services at marshalling yards was concentrated in the hands of QR Network. In addition, where train control services are to be provided by a business unit of QR Ltd, the Authority was interested to ensure that a mechanism existed to facilitate the transfer of this responsibility to QR Network where the circumstances justified such a move.

In this respect, the Authority took significant comfort from the fact the QR Network was responsible for all major yards in Queensland. Also, for the remaining yards, yard management agreements are currently 12-month rolling agreements with a six-month notice period on termination and where there are responsibilities on both parties to ensure that any transfer of control is managed smoothly, particularly with respect to safe working.

Despite this, and consistent with the issues associated with the transfer of declared assets to QR Network, the Authority found it particularly difficult to gain a degree of confidence with the arrangements associated with the future management of the marshalling yards.

For example, the 2008 DAU states that QR Network will be responsible for providing train control services at all major yards in Queensland including all yards in the central Queensland coal region and at Rockhampton. However, in considering this matter, the Authority identified a number of anomalies in the information provided by QR Network.

First, the 2008 DAU's list of major yards did not include Pring (near the Abbot Point coal terminal). While the Pring yard is currently a relatively small facility, it could be expected to expand significantly in line with the development of the "northern missing link" and the expansion of the Abbot Point coal terminal.

QR Network subsequently advised that Pring is not a yard but rather a main line passing loop and two holding roads. QR Network accepted that its control of the 'red' roads at Pring is critical as it is the last opportunity to pass trains before the port. In this respect, QR Network advised that:

- (a) QR Network controls all traffic on the main line, on the two 'red' lines and into and out of the adjacent QR National depot; and
- (b) QR Network does not control train movements within the QR National depot.

Whether or not QR Network considers Pring to be a yard, the facility serves the same function as a marshalling yard and QR Network has acknowledged that its control of the "red roads" is critical – a factor that will only become more important over time as the Abbot Point terminal expands.

For purposes of clarity, therefore, the Pring facility should be included in the undertaking's definition of major yards.

Second, the 2008 DAU provides for QR Network to be responsible for managing train movements at the Rockhampton yard. However, upon reviewing the relevant yard management agreement, it was apparent that QR Network shared this responsibility with QR Freight. In relation to this, QR Network advised that, at the Rockhampton yard, some of the track is:

- (a) signalled, and this track is managed by QR Network; and
- (b) not signalled, and this track is managed by QR Freight.

While these matters caused the Authority a degree of concern, the Authority is nevertheless satisfied with the current arrangements and that the issues identified at Rockhampton are likely to be relatively minor at the current time.

Nevertheless, as the Authority is proposing to formally reject QR Network's 2008 DAU for other reasons, this should provide a reasonable opportunity for the undertaking to be amended to more accurately describe the provision of train control services at the Rockhampton yard.

Decision 2**The Authority requires QR Network to:**

- (a) **amend clause 3.1(b)(vii) and 3.1(c)(iv) of the undertaking to accurately reflect the existing arrangements with regards to the provision of train control services; and**
- (b) **amend the definition of 'major yards' in the undertaking to include Pring and any other yards in CQCR.**

2.5 Access to Infrastructure, Land and Supply of Electricity

The 2006 undertaking requires QR Ltd to provide access to declared services managed by QRNA. It also provides for QR Ltd to provide access to services essential to the use of the declared services such as the supply of electricity to electric locomotives and the entry to land, walkways and crew change over points.

The 2006 undertaking also recognises that most, but not all, of the declared services are managed by QRNA. In some circumstances, the declared services not provided by QRNA are relatively obvious (e.g. stations and platforms).

However, it may be less clear whether other services provided by a non-QR network entity are part of the declared infrastructure. In particular, infrastructure of interest to an access seeker may be co-located with infrastructure that is clearly not part of the declared service (e.g. freight centres and maintenance facilities). In these circumstances, it may not be clear whether the services of the infrastructure in question are part of the declared service.

Reflecting this, the undertaking provides a mechanism for the management of the infrastructure in question to be transferred to QRNA. Failing agreement on this matter, the undertaking also provides for binding dispute resolution.

These arrangements are effective in the 2006 undertaking as the obligations are on QR Ltd, which has the ability to transfer infrastructure from one of its business units to another.

However, as the 2008 undertaking will be from QR Network, it will not bind other QR parties.

To address these matters, the proposed 2008 DAU includes:

- (a) a right for third parties to access land, walkways and crew change-over points essential for the operation of rail services, even if the land is held by other QR Ltd related entities;
- (b) an obligation on QR Network to acquire the transfer of assets that are the subject of the declaration but are managed by a non-QR Network entity; and
- (c) arranging for the supply of electricity to other access seekers to an equivalent extent as is provided to QR National (or other QR operational business groups) in connection with access, irrespective of whether that supply occurs by QR Network or another QR entity.

To give effect to these arrangements, the QR Ltd Chief Executive Officer has provided the Authority with an undertaking that, for the 10 months following 1 September 2008, QR Ltd and QR Ltd's subsidiaries will, as necessary, comply with the relevant paragraphs of the 2008 undertaking, namely:

- (a) paragraphs 2.1(c) and (f) regarding access to land;
- (b) paragraphs 2.1(h) regarding supply of electric charge; and
- (c) paragraphs 2.1(d) to (i) regarding transfer of rail infrastructure.

The standard access agreements have also been amended to give effect to these provisions.

Authority's Analysis and Draft Decision

The effectiveness of the provision of access to the declared service will be enhanced if it is managed by an entity that is not a commercial rival of access seekers. It is also important that

access to the declared service is not diminished by a lack of access to land, electricity or ancillary services essential for the use of rail transport infrastructure.

However, these matters are not definitive given the uncertainties surrounding the scope of the declaration and the allocation of management responsibilities amongst the various QR Ltd entities.

The Authority is satisfied that the 2006 undertaking dealt with these matters in a reasonable manner. It is also satisfied that the 2008 DAU seeks to deal with these matters in a similar fashion.

However, the effectiveness of these arrangements relies not only on the terms of the 2008 DAU but also on the terms of the arrangements between QR Network and other QR entities.

The CEO undertaking is different from the enforceable agreements the Authority understood would be implemented between QR Network and its related QR entities at the time the Authority prepared its position paper. Nevertheless, the Authority accepts that an undertaking of this type is a legally enforceable agreement on the basis that it has been given by an appropriate person who has authority to bind QR Ltd, in a manner that indicates an intent to accept a binding obligation.

Despite this, the Authority is of the view that the CEO undertaking in relation to the transfer of rail infrastructure is deficient in a material respect in that it refers to the wrong clauses in the undertaking. In particular, the CEO undertaking should be amended to refer to clauses 2.2(d) to (i) and not clauses 2.1(d) to (i).

Decision 3

The Authority requires QR Ltd to alter the terms of the Chief Executive Officer undertaking in relation to the transfer of rail infrastructure so that it refers to clauses 2.2(d) to (i) and not clauses 2.1(d) to (i).

2.6 Financial Reporting

QR Ltd's 2006 access undertaking requires QR Ltd to produce regulatory financial statements each year, using the methodology and format set out in a costing manual approved by the Authority. The purpose of the costing manual is to establish the methodology by which QR's below-rail costs will be separated from its other costs and published in financial statements separately for central Queensland coal region and the rest of the network.

QR Ltd's costing manual was first approved by the Authority in 2002 and, upon its expiry; a replacement costing manual was approved in July 2006 for the period 2006-07 to 2008-09.

Currently, it is unclear whether it is proposed that QR Network will publish its own financial statements or whether QR Ltd will publish consolidated statements.

QR Network's relationship with other QR entities will be governed by a deed of cross guarantee. Accordingly, the subsidiaries will apply for a class order relieving them of an obligation to prepare and lodge audited financial statements under Chapter 2M of the *Corporations Act*.

If the order is not granted, QR Network will be required to develop on an annual basis general purpose financial statements for its below-rail services. QR Ltd has advised that these financial statements will separately identify the central Queensland coal region from the rest of the network.

If the order is granted, the existing arrangements will continue to apply.

Accordingly, the 2008 DAU seeks to amend the relevant clause of the undertaking (cl.3.2.1), such that QR Network will prepare financial statements of the type currently produced, irrespective of whether QR Ltd prepares consolidated statements or whether QR Network prepares its own financial statements.

Authority's Current Position

In the absence of any certainty regarding whether or not QR Network will prepare financial statements, the proposed amendments in the 2008 DAU appear reasonable. The undertaking will continue to impose obligations on QR Network to separately report on the central Queensland coal region and the rest of the network.

It is evident that the costing manual will need to be amended to reflect the changes in QR Ltd's corporate structure. In particular, it can be anticipated that overheads and service costs are no longer attributed or allocated to QR Network but are accrued on the basis of a supply contract. Changes to the costing manual will take some time to develop and are not the subject of this application. Nevertheless, the Authority is satisfied that the changes to the costing manual can be considered in a separate process at a later date.

To the extent that the financial statements contain existing defined cost categories with appropriate splits between the central Queensland coal region and rest to the network, the proposed amendments seem appropriate.

Accordingly, the Authority accepts the proposed amendments to the obligations to prepare financial statements for regulatory purposes.

2.7 Standard Access Arrangements

While access agreements can be negotiated on a case-by-case basis, the 2006 undertaking includes two standard access agreements for coal carrying train services, namely:

- (a) *operator agreement* – where the operator of a train contracts directly with QRNA to acquire access rights;
- (b) *access holder agreement* – where the end customer (i.e. coal mine) contracts directly with QRNA to acquire access rights, and then sub-contracts with a train operator to haul their coal.

The purpose of the standard access agreements is two-fold. First, by establishing a template agreement, it seeks to facilitate the timely negotiation of access agreements by limiting the number of areas of dispute. Second, in the event of a dispute, it provides a fall back position to the arbitrator.

Both of the standard access agreements seek to limit QR Ltd's liability for negligence and default to direct costs and exclude liability for consequential losses. The access holder agreement specifically limits QRNA's liability from any claims for consequential loss from either the end customer or the train operator. The operator agreement specifically limits QRNA's liability from any claims for consequential loss from the train operator but does not include clauses that specifically refer to the end customer.

To date, QRNA has been protected from any claims for consequential loss from end customers under the operator agreement as similar limitations of liability have been included in QR National's haulage agreements with the end customer. QRNA has had the benefit of this

limitation of liability in the haulage agreement as it has been part of the same legal entity as QR National, i.e. QR Ltd.

However, QR Network will not get the benefit of the limitations of liability in QR National's haulage agreements following the restructure as QR Network Pty Ltd and QR Ltd will be separate legal entities.

Specifically, it is proposed to amend the operator agreement (clauses 14 and 15, particularly clauses 14.3 and 14.10), to ensure that:

- (a) if there is a limitation of liability between QR Network and the operator, then the operator must extend this limitation to its customer so that the customer cannot take common law action against QR Network in those cases; and
- (b) if there is a limitation of liability between the operator and its customer, then the operator must extend this to QR Network.

The proposed amendments to the operator standard agreement seek to mirror the arrangements that already exist in the access holder agreement.

Further, it is proposed to amend the definition of infrastructure and land in the definitions clause and to amend clause 22.18 in the standard access agreements to maintain consistency between the provisions of the undertaking and the standard access agreement.

Stakeholders' comments

Asciano argued that it was inappropriate for the 2008 DAU to seek to alter the indemnity clauses in the operator agreement on the basis that:

- (a) QR Network had argued that it was seeking to limit the changes to the undertaking to those necessary to accommodate QR Ltd's revised corporate structure; and
- (b) more fundamentally, Asciano argued that the changes substantially alter the relationship between QR and third party operators rather than issues associated with QR's corporate restructure.

Asciano noted that it already has in place coal haulage agreements with customers, but does not have a relevant access contract. Asciano argued that it would not be able to manage this obligation without seeking the voluntary acceptance of amendments to the existing haulage agreement – something that there is no reason to expect would happen.

As a result, Asciano argued that this created an uneven playing field as the amendment would not affect QR's existing haulage contracts but would affect a new entrant.

Finally, Asciano argued that the changes do not provide QR with the protection from consequential loss that it is seeking; that is, to overcome an exposure to consequential loss that has until now been covered through the QR Ltd haulage contracts.

Asciano argued that, if the restructure creates an exposure for QR Network, this would not have occurred if QR Ltd had not chosen to restructure at this time. Moreover, this exposure will not be addressed by the proposed change as it will not affect the existing access contracts between QR Network and QR National.

Authority's Analysis and Draft Decision

The Authority accepts QR Network's argument that the proposed amendment seeks to bring the term of the operator agreement into line with the existing standard access holder agreement; that is, QR Network is liable for direct loss, but not consequential loss, in respect of contracted parties.

However, the Authority also accepts Asciano's argument; that is, in finalising haulage agreements, third parties may have relied upon the terms of the approved access undertaking, which includes the operator and access holder agreements. As a result, third parties may be exposed to a risk they are unable to manage if the terms of the operator agreement are amended now.

The Authority believes it is reasonable for access seekers to anticipate that the terms of an approved undertaking will not vary significantly, or unpredictably, during the term of an approved undertaking; in particular, in relation to the affected clauses in the operator agreement which have remained in the same form since that agreement was first approved in October 2002.

While it might be accepted that QR Ltd has not been exposed to the risk of claims for consequential loss by virtue of the terms of QR National's haulage agreements, QR has been exposed to this risk in relation to third party access seekers since the operator agreement was first approved in October 2002.

Accordingly, the Authority does not accept QR Network's proposed amendments to clauses 14 and 15 of the operator agreement.

Amendment to clause 22.18 seeks to extend the reference from 'QR' to 'QR or a Related Body Corporate of QR'. This change will reflect the existing provisions of the undertaking where it has been agreed that QR will arrange access to certain assets held by its related parties. This amendment to the standard access agreements is reasonable as it is consistent with the amended provisions of the undertaking and is necessary given that clause 1.2(e) of the standard access agreements provides that the terms of the agreement prevail over the undertaking to the extent of any inconsistency.

The amendment to the definition of infrastructure seeks to extend the definition so that it covers all rail transport infrastructure as defined in the *Transport Infrastructure Act* for which QR Network is the Accredited Railway Manager and infrastructure which QR Network can be required to obtain responsibility for pursuant to the undertaking. The amendment to the definition of land has a similar purpose, extending the definition to land which QR Network does not own but is required to provide entry to pursuant to the undertaking.

These amendments to the standard access agreements seem reasonable as they seek to ensure that the agreements are consistent with the amendments to the undertaking.

Decision 4

The Authority requires QR Network to retain the existing provisions in the operator standard access agreement relating to clause 14 and 15.

2.8 Multiple Train Services within a Single Access Agreement

The 2006 access undertaking includes a number of provisions that are enlivened by the expiry date in an access agreement. In the time since the 2006 undertaking was finalised, it has

become apparent that many of these provisions will not operate as intended as a single access agreement can cover a number of different train services (i.e. different origin-destination pairings).

For example, a customer or an access holder can seek to renew an access agreement within two years of an access agreement's expiry date. If that agreement covers a number of different train services, the expiry date for individual train services are likely to vary with some concluding earlier than others. As a result, relevant parties may not be able to use the undertaking's provisions to seek to renew the access rights upon the imminent expiry of an individual train service. Rather, the undertaking's provisions may only be enlivened in relation to the train service whose expiry date is furthest into the future.

The 2008 DAU addresses this matter by including words to the effect that the rights or obligations associated with the cessation of an access agreement will be enlivened by the cessation of an individual train service. This amendment has been made to cl. 10.1 in the definition of 'Access Agreement'. The specific clauses in the undertaking to which this amendment refers to are:

- (a) cl. 5.1(h) – execution of an access agreement two years prior to the start of the train service;
- (b) cl. 7.4.1(g) – QR Ltd can re-order a queue of access applications on the basis that one access application is for a term of at least 10 years and other access agreements are for terms of less than 10 years;
- (c) cl. 7.4.2 – capacity resumption where an access holder has not utilised their access rights to the extent required;
- (d) cl. 7.5.1 – renewing of access rights in an existing access agreement; and
- (e) cl. 10.1 – definition of 'Evaluation Period'.

It has also been specifically identified that this amendment does not apply to the assessment of any deduction to the revenue cap due to the non-provision of access due to QR Network's default or negligence beyond a threshold defined as 10% of train services in an access agreement (i.e. the definition of System Allowable Revenue under subparagraph (iii) of the definition in cl. 5.2 of part A, schedule F).

A process has also been included to add to the clauses to which this amendment refers if the Authority deems it necessary.

Authority's Analysis and Draft Decision

The proposed new drafting seeks to clarify the interpretation of provisions in the current undertaking to ensure that they work as originally intended. While these amendments have not been made as a result of the restructure of QR Ltd, it does however seem an appropriate time to amend these provisions.

Accordingly, the Authority accepts the proposed amendments to the undertaking in the circumstances where an access agreement provides access rights to a number of train services.

2.9 Other Minor Amendments

The Authority has also identified a number of other relatively minor amendments, largely of a typographical nature. These proposed amendments are as follows:

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- (a) QR Network's 2008 DAU:
- (i) Definition of Total Actual Revenue (schedule F, part A, clause 5.2 and Part B, clause 2.2.6(b)): References to 'the undertaking or the 2001 undertaking' should be amended to 'the undertaking, the 2005 undertaking or the 2001 undertaking' As these provisions need to include agreements executed during the 2005 undertaking period as well.;
 - (ii) Schedule B: references to 'QR Services Australia' should be amended to 'QR Services'; and
 - (iii) Schedule F, part B: all references to 'commencing date' need to be amended to '30 June 2006';
- (b) Access Holder and Operator Standard Access Agreements:
- (i) Definition of infrastructure (clause 1.1): references to 'obtain responsibility for' should be amended to 'obtain ownership of' (to ensure consistency with amendments made in 2008 DAU);
 - (ii) Clause 22.9 (d): QR Network to insert address for service; and
 - (iii) Schedule 10 part 4.1: QR Network to insert details of delegate;
- (c) Train Operations Management Agreement:
- (i) Clause 9(b): QR Freight's representative should be defined in clause 1.1 in the same way as QR's representative is defined;
 - (ii) Clause 16 and 18: For consistency, QR Network should be referred to as QR;
 - (iii) Clause 19: For consistency reasons 'QR National Intermodal and Regional Freight' should be referred to as 'QR Freight';
 - (iv) Clause 19: An appropriate confidentiality arrangement to form Schedule A (referred to but not currently included) or alternative provision for appropriate confidentiality terms;
 - (v) Schedule 3: QR Network to insert phone details of its representatives and relationship manager;
 - (vi) Schedule 4, clause 1: The definition of 'passenger priority' should be reinserted; and
 - (vii) Schedule 4: Reference to 'operator' in clause 3 should be amended to 'railway operator';
- (d) Internal Access Agreements:
- (i) Schedule 10, part 4: QR Network to insert nominated delegates