Queensland Rail's response to the "*QCA Issues Paper on Queensland Rail's 2012 Draft Access Undertaking April 2012*"

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Introduction

On 30 March 2012 Queensland Rail Limited (Queensland Rail) submitted to the Queensland Competition Authority (QCA) a voluntary draft access undertaking (AU1) under section 136(1) of the *Queensland Competition Authority Act 1997* (Qld) (QCA Act). AU1 is Queensland Rail's first draft access undertaking in relation to the declared service under the QCA Act for which Queensland Rail is the owner and operator.

On 30 April 2012 the QCA released an issues paper seeking stakeholder responses to specific questions regarding AU1. Comments are due with the QCA no later than Friday 13 July 2012.

The QCA's issues paper poses a list of *"Questions for comment"*. Following is Queensland Rail's response to those *"Questions for comment"*.

Question 1 - Western System Reference Tariff Reset

Is Queensland Rail's proposal to extend the existing western system tariff until June 2013 reasonable? Is the proposed mechanism for putting in place a new tariff effective?

Queensland Rail has proposed to retain the current reference tariffs (with CPI adjustments) applying to the West Moreton System under *QR Network's Access Undertaking (2008) June 2010* (the Temporary Undertaking) subject to a reference tariff reset that is to be submitted by Queensland Rail to the QCA by 30 June 2013 (or such longer time as agreed with the QCA). Queensland Rail believes this to be a reasonable and effective approach for the following reasons:

- The reference tariffs applying to the West Moreton System under the Temporary Undertaking were developed based upon supporting information that was forecast out to June 2013.
- The approval of AU1 can progress while Queensland Rail consults with its customers and stakeholders to seek to establish an agreed new reference tariff.
- The reset will provide the time needed to seek to resolve the many complex matters that arise around the development and approval of a reference tariff, including the development of the requisite regulatory building blocks. These regulatory building blocks will provide both Queensland Rail and its customers with certainty and transparency.
- If Queensland Rail does not submit the proposed new reference tariff on time, then it will be taken to have submitted the current reference tariff (with escalations for CPI) for review by the QCA. While Queensland Rail is not seeking to rely on this provision, it provides certainty that the reference tariff review will occur.
- If the reference tariff was reset as part of AU1, then the QCA would have various powers under the QCA Act in connection with the approval or refusal to approve the reference tariff. To maintain that position, any submission or deemed submission of a new reference tariff will be treated as if it was a draft access undertaking submitted by Queensland Rail under the QCA Act in response to an initial undertaking notice given by the QCA. It is proposed that Queensland Rail and the QCA will act in accordance with the provisions of the QCA Act as though this were the case.
- Queensland Rail considers that it is desirable that Queensland Rail submits a new reference tariff to the QCA that has been agreed with its customers.

Question 2 - Ringfencing Trigger

Is it necessary to have a trigger in the undertaking for Queensland Rail to introduce ringfencing if competitors enter the market for above-rail passenger services?

It is not necessary to have a trigger in AU1 to introduce ringfencing if competitors enter the market for above-rail passenger services for the following reasons:

- Queensland Rail does not compete against third party operators of passenger train services and does not expect to do so during the regulatory period for AU1.[1] Practically, the lead time required for a third party to enter into the passenger train service market in competition with Queensland Rail precludes this occurring during the term of AU1.
- The characteristics of passenger train services are such that the business is not commercially viable without significant Queensland Government support in the form of transport service payments.
- There is no realistic prospect of the Queensland Government paying transport service payments to both Queensland Rail and a third party operator to establish competing passenger train services.
- Given the lack of commerciality of passenger train services in the absence of transport service payments, there will effectively be no competition as there will only be one operator for a passenger train service – whether Queensland Rail or a third party – during the regulatory period for AU1.
- Even if, despite it not being realistic, the Queensland Government was to consider facilitating a third party operator to establish passenger train services that competed with Queensland Rail, then the Queensland Government would be expected to take into consideration the current access regime and any changes that might be required including those in relation to AU1. If the Queensland Government chose to facilitate such a third party operator, it may decide to direct Queensland Rail to amend AU1.
- Queensland Rail also submits that its approach is consistent with relevant rail regulatory precedent.

[1] For more detail see sections 2.7, 2.8 and 3.3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

Question 3 - Pricing Principles and NMP

Do the amended network management principles and pricing principles retain the necessary protections for access seekers and access holders?

A. Pricing Principles:

Queensland Rail has chosen to keep the proposed pricing principles in clauses 3.1 to 3.3 of AU1 largely consistent with those in the Temporary Undertaking. Queensland Rail has taken this approach with AU1 as a transitional measure given the complex economic and competition arguments that may arise if substantial amendments were made to those pricing principles. Queensland Rail may review and submit amended or different pricing principles in future access undertakings.

Despite this, the proposed pricing principles do include some variations from those in the Temporary Undertaking based on Queensland Rail's intention to reflect the changed structure of Queensland Rail's business, and its desire to simplify and reduce unnecessary prescription and detail in the access undertaking, where this provides no real benefit to access holders/seekers.

Core elements of the pricing principles in AU1 are *fundamentally unchanged* from the Temporary Undertaking.

Pricing principles which have been changed by Queensland Rail in AU1 include:

1. *Removing the hierarchy of pricing principles*

   Queensland Rail has removed the hierarchy of pricing principles on the basis that the changed structure and nature of Queensland Rail's business means that there is little scope for direct conflict between the pricing principles. In any event, to the extent that there is no hierarchy of pricing principles, Queensland Rail would be obliged to comply with all of the pricing principles.

   The hierarchy of pricing principles set out in QR Limited's 2005 Draft Access Undertaking was introduced to remove uncertainty regarding which pricing principles should take precedence in the event that a conflict arises.[2] For example, the QCA reaffirmed the view that limits on price differentiation within a market should take precedence over revenue adequacy as a pricing principle and noted that "*limits on price differentiation within a market are critical to avoid distorting competition in above-rail or end-user markets.*"[3] The QCA had previously stated that:

   > *"The QCA accepted revenue adequacy as a legitimate pricing objective for QR to adopt, so long as it was to be pursued in a manner that minimises distortions to commercial activity in the above-rail market. Consequently, the QCA proposed revenue adequacy should be subject to the overriding requirement that in the event there is a conflict between QR pursuing revenue adequacy and non-discriminatory pricing in a particular market, then the latter objective would prevail, unless QR could justify the price difference to the QCA."*[4]

   The changes to the current business arrangements, including no longer operating above-rail freight trains, means there is now no incentive for the business to use price differentiation or higher access charges to prevent or hinder access to competing third party access seekers.

2. *Re-ordering the principles to place revenue adequacy first*

   Queensland Rail has not included a hierarchy of pricing principles in AU1. However, Australian regulators' primary focus tends to be the setting of a cost-based revenue/price cap, which is grounded in the concept of revenue adequacy. Revenue adequacy is a core and accepted

[2] QCA (July 2005) *Draft Decision – QR's 2005 Draft Access Undertaking*, p138.
[3] QCA (July 2005) *Draft Decision- QR's 2005 Draft Access Undertaking*, p135.
[4] QCA (July 2001) *Final Decision – QR's 1999 Draft Access Undertaking*, Volume 2 p126.

component of every cost-based regulatory framework in Australia, including those administered by the QCA for rail and other regulated services.

While the design of pricing frameworks, in particular, and other measures are informed by a desire to limit price discrimination and avoid cross-subsidisation, functionally these objectives are pursued *after* the objective of revenue adequacy has been addressed. In particular, with the changed business structure of Queensland Rail, the primacy given to price differentiation over revenue adequacy in the Temporary Undertaking is not appropriate. The core focus should be on ensuring that charges do not generate revenue in excess of the ceiling revenue limit.

A QCA-specific example where there is a listing of pricing objectives, but no hierarchy, is the Dalrymple Bay Coal Terminal Access Undertaking as approved by the QCA on 23 September 2010 (DBCT 2010AU). Clause 11.1 of the DBCT 2010AU details DBCT Management Pty Ltd's pricing objectives for the development of access charges, which are to:

*"(a) (**Achieve ARR**) achieve the ARR in each Financial year in accordance with this Undertaking, by way of the Revenue Cap plus any applicable Additional Tonnage Amount;*
*(b) (**Efficient utilisation**) provide incentives for efficient utilisation of Terminal Capacity by Access Holders;*
*(c) (**Equity**) ensure equitable treatment of Access Holders and Access Seekers;*
*(d) (**Efficient investment**) encourage efficient future investment in the Terminal;*
*(e) (**Recovery of Operating Costs**) ensure full recovery (but not over-recovery) from Access Holders of Terminal Operating Costs; and*
*(f) (**Efficient Operating Costs**) ensure efficient Terminal Operating Costs."*

In addition, clause 11.10 of the DBCT 2010AU set out limits on price differentiation that apply to DBCT Management Pty Ltd in the setting of access charges.

There is no hierarchy or merit order of these objectives, nor any guidance on how to deal with conflicts between the objectives.

This is similar to Queensland Rail's approach, where the pricing principles are now applied without a hierarchy, and with revenue sufficiency, equivalent to DBCT's "Achieve ARR" objective, presented first.

3. *Removing those provisions which preclude price differentiation as a basis for preventing or hindering access by a third party.*

The approach taken in AU1 recognises that Queensland Rail no longer has any capacity to benefit from such strategies. The provisions referred to in the Temporary Undertaking relate to the establishment of access charges for *"QR Train Services"* for the purpose of preventing or hindering access by a third party access seeker into any market for the provision of such *"QR Train Services"*.

Queensland Rail does not compete against third party operators of passenger train services and does not expect to do so during the regulatory period for AU1.[5]

B. <u>Network Management Principles:</u>

See sections 2.8, 3.2, 3.3.3 and 6 of *Queensland Rail's Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)* for details relating to the Network Management Principles.

[5] For more detail see sections 2.7, 2.8 and 3.3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

Question 4 - Approach to Operating Requirements

Are access seekers'/holders' rights adversely affected by moving the network diagrams, interface risk management plan, environmental investigation and risk management process, operating plan template and operating requirements manual from the undertaking to Queensland Rail's website? If so, why and what should be done to protect access seekers' and access holders' rights?

Queensland Rail made the decision to move many of the Temporary Undertaking's technical operational requirements to the website for the following reasons:

- The inclusion of such technical operational requirements in the Temporary Undertaking was due to the vertically integrated nature of the corporate group of which QR Network Pty Ltd forms a part. The QCA required that many operational requirements be prescribed in the Temporary Undertaking to avoid the perception that QR Network Pty Ltd or its related companies might use operational processes to hinder third party access to its network. It is not necessary to include those prescriptive technical requirements in AU1, as Queensland Rail does not compete with third party above rail operators and has no incentive to use the technical requirements to improperly prevent or hinder third party access to its network.
- Moving the documentation to the website rather than including it in AU1 will result in a more efficient, timely process for the updating of those requirements rather than Queensland Rail being required to lodge a draft amending access undertaking each time an operational change is required.
- This approach will assist Queensland Rail to ensure that the information is readily available for customers and remains up to date.
- The technical operational requirements will apply to all access seekers and access holders.

Question 5 - Investment Framework

Does the investment framework proposed by Queensland Rail in section 1.4 of the DAU offer sufficient protection for access seekers and access holders? Does it adequately set out the rights of users who fund or underwrite infrastructure required to provide their access? Is it reasonable and efficient that Queensland Rail construct, own, operate and manage all user-funded infrastructure? Why?

At this time Queensland Rail does not intend to provide further comments in relation to this matter in addition to those contained in *Queensland Rail's Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012*).[6] Queensland Rail will provide further submissions on this matter once Queensland Rail has a better understanding of any specific issues that the QCA or stakeholders may have.

[6] For details see section 3.5 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

Question 6 - Access Conditions and Pricing Limits

Is it reasonable for Queensland Rail to remove from its undertaking the provisions governing the use of access conditions? Are the pricing limits sufficient to protect access seekers/holders, or should the undertaking include some restrictions on access conditions? Why?

Queensland Rail does not intend to provide comments in relation to this matter at this time. Queensland Rail will provide submissions on this matter once Queensland Rail has a better understanding of any specific issues that the QCA or stakeholders may have.

Question 7 - Relinquishment and Transfers

Does the mechanism for relinquishing and transferring capacity provide sufficient safeguards of access holders'/seekers' rights?

Access holders can assign, novate or otherwise transfer their interest in an access agreement to a third party in accordance with the terms of that access agreement, with the prior written consent of Queensland Rail.[7] These provisions allow access holders to transfer surplus capacity rights, subject to the prior written consent of Queensland Rail. Under clause 20.2 of the Standard Access Agreement (SAA) in Schedule D of AU1, Queensland Rail's consent is not to be unreasonably withheld if Queensland Rail is satisfied that the assignee has the financial resources and capability to perform the obligations and the accreditation to operate the train services.

This position provides sufficient safeguards of access holders'/seekers' rights for the following reasons:

- Queensland Rail does not have a monopoly over transport services in relation to most of its rail network and competes with other modes of transport. Therefore, Queensland Rail is incentivised to allocate capacity efficiently.
- Like other similar rail access regimes around Australia, it is reasonable that Queensland Rail's prior consent be required prior to a transfer. The provisions in AU1 are consistent with rail access requirements in other States. The prior written consent of the rail manager prior to a transfer taking place is required in relation to:
  - Australian Rail Track Corporation's (ARTC) Interstate Access Agreement (2008);
  - V/Line's Standard Access Agreement (Freight Services);
  - Metro Trains Melbourne's (MTM) Standard Access Agreement;
  - DBCT's Standard User Agreement;[8] and
  - ARTC's Indicative Access Holder Agreement (Hunter Valley) except where it is for a period of less than 12 months.
- The ACCC's comments in its 2002 Decision on ARTC's access undertaking support the approach taken by Queensland Rail in relation to transfers. The ACCC advised that:

  *"ARTC has also proposed that an operator may cancel train paths or assign them to third parties (**subject to the approval of ARTC**).*

  The Commission accepts these provisions of the Undertaking and considers that it satisfies the legislative criteria in section 44ZZA(3) [of the *Trade Practices Act 1974* (Cth)]*."*[9] (emphasis added)
- The requirements in clause 20.2 of the Standard Access Agreement in Schedule D of AU1 are not unusual in the context of a commercial transaction.

In addition to the above, Queensland Rail has also set out:

- in clause 18.2, Schedule C of AU1 principles in relation to relinquishments (including where an access holder wishes to relinquish access rights so that the capacity created by that relinquishment can be used to grant access rights to an access seeker nominated by the relevant access holder); and
- in clause 19.2 of the Standard Access Agreement in Schedule D of AU1 a relinquishment provision consistent with the principle in clause 18.2, Schedule C of AU1.

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[7] Clause 2.7.6 of AU1; clause 20.2 of the Standard Access Agreement in Schedule D of AU1.

[8] Both the 2006 and 2010 Draft Access Undertaking Standard User Agreements included provisions for transfers with the prior written agreement of the infrastructure provider.

[9] ACCC's Decision on ARTC Access Undertaking (May 2002), p. xviii. On 1 January 2011 the *Trade Practices Act 1974* (Cth) was renamed the *Competition and Consumer Act 2010* (Cth).

Question 8 - Competing Capacity Requests (e.g. Queuing)

Would it be prudent to provide certainty to access seekers and protection to Queensland Rail, for the undertaking to indicate how Queensland Rail would select between multiple access seekers offering the same terms for capacity on Queensland Rail's network? Should this take the form of principles for selecting between those users, or a formal queuing mechanism? Why?

- Queensland Rail discusses matters relevant to the QCA's queries in section 4.3 of its *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)*.
- Queensland Rail has included in AU1 criteria upon which it will decide between competing access applications to determine the most favourable to Queensland Rail – subject to specific rights that AU1 sets out in favour of any existing access holder, i.e. where an access seeker seeks access rights that can only be granted on the expiry of that existing access holder's access agreement.[10]
- A key feature of AU1 is the commercial negotiation of access. This is consistent with the QCA's Final Approval of QR Limited's 2006 Draft Access Undertaking where the QCA stated:

  > *"The QCA Act makes it clear that commercial negotiation is to play a central role when an access seeker is seeking access rights."* [11]

- The introduction of queuing into QR Limited's 2006 Access Undertaking was a result of concerns by Pacific National that QR Limited may have been intentionally delaying the progress of access negotiations to protect QR Limited's above rail freight operations. Pacific National proposed a queuing mechanism as a remedy for this.[12] In response, the QCA considered in both its draft and final decisions for QR Limited's Draft 2005 Access Undertaking that to give some certainty for access seekers a queuing framework was needed to allow access seekers to effectively 'reserve' specific train paths during negotiations.
- Queensland Rail does not compete with third parties for access to capacity in its rail network. Rather, capacity allocation to Queensland Rail's regularly scheduled passenger services is determined through sections 266 and 266A of the *Transport Infrastructure Act 1994* (Qld) (TIA).[13]
- AU1 moves away from a queue-based to a principles-based approach to capacity allocation. Queuing imposes unnecessary administrative costs upon Queensland Rail for no clear competitive benefit.
- Queensland Rail's proposed capacity management framework is consistent with those put in place by other below rail providers in Australia, which allow capacity to be allocated to the access seeker which in the below rail provider's opinion, is most favourable or will best utilise the available capacity.[14]
- Underlying capacity allocation principles are to provide access seekers with certainty regarding the process and criteria for the allocation of capacity, and to ensure that all access seekers are treated fairly.
- The QCA issues paper made reference to the DBCT and Brookfield Rail queuing mechanisms where it stated:

  > *".....it is noted that Brookfield Rail, operator of a mixed-use rail network in Western Australia, specifies in its train path policy that, where two operators are competing for*

[10] See section 4.3 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012)* and clause 2.7.2 of AU1, for details.

[11] QCA's Final Approval of QR Limited's Draft 2006 Access Undertaking, p.16 (June 2006).

[12] QCA's Draft Decision of QR Limited's Draft 2005 Access Undertaking, p.109 (July 2005).

[13] For more detail on the application of sections 266 and 266A of the TIA see section 3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

[14] See Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012),* section 3.4 and Appendix A of Attachment 3 PWC Supporting Analysis – Capacity Allocation.

> *a train path, the path will be provided to the operator which first requested the path. Similar arrangements are included in the 2010 access undertaking for the Dalrymple Bay Coal Terminal."*

However, PricewaterhouseCoopers (PwC) note in their analysis that MTM, V/Line and ARTC, all of which share significant characteristics with Queensland Rail, do not have queuing in their access regimes.[15]

DBCT

DBCT has a formal queue mechanism in place, generally consistent with the principle of first-in-time, first-in-right, though subject to certain conditions.[16] Under the applicable access undertaking as the costs of access are the same for all users, including new/potential users, expansion costs are socialised across the total terminal customer base. A formal queue mechanism provides a transparent way to allocate capacity between different users with otherwise equal commercial terms (i.e. there is no way to meaningfully contrast the 'cost' or 'risk' of providing access to different access seekers as all access seekers face the same access charge).

Queensland Rail, by comparison, services a diverse mix of general freight and coal customers as well as varied commodities, origins and destinations. As such, there are material differences in commercial outcomes associated with cost and risk between customers. Being subject to time-based queuing arrangements would:

- not be in the best interests of Queensland Rail's business;
- not provide the most or a more efficient mechanism for managing and allocating capacity;
- result in the business continuously reviewing and, potentially, adjusting queues; and
- create an unnecessary administrative burden and cost for the business, whilst not providing any benefits for access seekers.

Brookfield Rail

WestNetRail's approved April 2009 Train Path Policy (TPP) relating to Brookfield Rail, specifies that:

> *"If two Operators request the same available Train Path and it is not possible to satisfy both requests by using alternative but similar Train Paths, the available Train Path will be provided to the Operator who first requested the Train Path and can establish that it has a requirement for the Train Path.*
>
> *Whether a requirement exists will be determined on the basis of the criteria set out in 2.2.1 of the T.P.P."* [17]

In approving this position, which was submitted by WestNetRail, the Economic Regulation Authority – Western Australia recognised that: *"that* [WestNetRail]*, as the railway owner, should have some discretion to determine what is in its best interests in running the network as long as the policies it proposes are not anti-competitive and treat all parties equally"*.

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[15] See Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012),* section 3.4 and Appendix A of Attachment 3 PWC Supporting Analysis – Capacity Allocation.

[16] For example, in the 2010 Draft Access Undertaking for DBCT, the queuing arrangements included the condition that where access seekers agree to provide feasibility funding for expansions, they will take priority in the queue at that point in time (however the overall sequence of the queue does not change). (Queensland Competition Authority. 2010. *Final Decision – Dalrymple Bay Coal Terminal: 2010 Draft Access Undertaking*. September 2010. p.22.)

[17] WestNetRail, 2009, *Train Path Policy*, April 2009, p,9. Available at: http://www.erawa.com.au/cproot/7522/2/20090430%20WestNet%20Rail%20Proposed%20Revised%20Train%20Path%20Policy.pdf. Accessed on: 6 July 2012.

However, subsequent to the publication of the QCA Issues Paper, Brookfield Rail has submitted a Proposed Revised TPP to the Economic Regulation Authority – Western Australia that does not include the abovementioned provision and instead sets out criteria for allocating train paths between competing access seekers. Specifically, Clauses 12 and 13 of the Proposed Revised TPP state that:

> *"12. If there is a competing demand for Network capacity at the time of proposal and negotiation, then in order to determine which entity receives an entitlement to Train Paths, Brookfield Rail will compare the relative compliance of the entities to the requirements in the Code with regard to the proposal and negotiation process and will determine the allocation of Train Paths to entities in such a way that:*
>
> *a) is fair, given the competing demand for limited Network capacity;*
>
> *b) maximises use of the Network; and*
>
> *c) satisfies Brookfield Rail's commercial objectives.*
>
> *13. In addition, Brookfield Rail may also consider the following aspects of each proposal/entity:*
>
> *a) arrangements or planned arrangements for the operation of freight or passenger Services;*
>
> *b) details of anticipated increased demand (which justifies the operations detailed in the proposal), including because of:*
>
> *i. an upgrade or expansion of production capacity with confirmation that it will progress (e.g. funding approved, public announcements etc);*
>
> *ii. estimated market growth based; or*
>
> *iii. committed new projects with agreed funding;*
>
> *c) historical use of the Train Paths;*
>
> *d) seasonal demand for a seasonal path based on the production or market characteristics of the freight;*
>
> *e) need for surge capacity based on demand or other constraints such as shipping;*
>
> *f) other relevant information as it is made available to Brookfield Rail."* [18]

The approach taken with these proposed clauses is broadly similar to that of Queensland Rail in AU1's proposed capacity allocation provisions, in that it reflects a departure from the time-based criteria, and Brookfield Rail is able to execute an agreement that is most favourable to the business, having regard to a number of specified factors. Such an approach provides flexibility and avoids unnecessary administrative and regulatory costs to the business.

This approach has not yet been approved by the Economic Regulation Authority – Western Australia. Although, it is notable that Brookfield Rail is seeking to move towards a capacity allocation methodology that is more consistent to the MTM, V/Line and ARTC access regimes by not including a formal queuing mechanism.

[18] Brookfield Rail, 2012. *Proposed Revised Train Path Policy*. May 2012. p.4 and 5. Available at: http://www.erawa.com.au/cproot/10345/2/20120305%20Brookfield%20Rail%20Train%20Path%20Policy.pdf. Accessed on: 27 June 2012.

Question 9 - Standard Access Agreements

Is the proposed standard access agreement for western system coal services consistent with the proposed undertaking and the QCA Act? Is it reasonable to provide standard access agreements for rolling stock operators, but not for end users?

The Standard Access Agreement (SAA) for Coal Carrying Train Services on the West Moreton System and the QCA Act

- Queensland Rail has subjected the SAA and AU1 to extensive internal and external regulatory and legal review prior to submission of those documents to the QCA.
- Queensland Rail considers that the proposed SAA is consistent with both AU1's provisions and the QCA Act.

End User Pro Forma Access Agreement for Coal Carrying Train Services on the West Moreton System

- Section 99 of the QCA Act requires Queensland Rail to negotiate with an access seeker for access to the declared service. Section 100(1) of the QCA Act requires that Queensland Rail and an access seeker negotiate in good faith.
- The absence of a QCA approved pro forma access agreement for end users does not impede the ability of Queensland Rail and an end user to negotiate an access agreement.
- In such circumstances Queensland Rail would negotiate an access agreement with the end user through the negotiation provisions specified in AU1. Ultimately, if the parties could not reach agreement, then the end user could refer the matter to the QCA for an access determination.
- Under the Temporary Undertaking there are no standard access agreements that apply to Queensland Rail's network.
- If there were sufficient demand for such an end user pro forma access agreement, then Queensland Rail should be engaged, or regularly engaged, in negotiations with end users in relation to such access agreements or there should be a reasonable expectation that it will be – but this is not the case. Indeed, the fact that none of the past rail access undertakings even included a standard access agreement for the Western System (now the West Moreton System) indicates that previously there wasn't a sufficient basis for a standard access agreement for operators, let alone for end users.
- All access agreements on Queensland Rail's network have been with rail operators not with end users. Queensland Rail is not aware of any reasonable expectation of there being sufficient demand from end users to warrant the development of a QCA approved pro forma access agreement for end users for coal carrying train services on the West Moreton System.
- Operators are the only access holders on the West Moreton System for coal carrying train services and there is not a realistic prospect that the predominance of such operators as access holders will change in the foreseeable future.
- Given the lack of sufficient demand for an end user access agreement and the considerable resources that would likely be required to develop such a pro forma access agreement, the development of an end user pro forma access agreement is not warranted.
- Despite there not having been a standard access agreement for the Western System (now the West Moreton System) in the past, Queensland Rail has voluntary developed, as part of AU1, the SAA for the operators of coal carrying train services on the West Moreton System. Queensland Rail has done so in recognition of the operators being the only access holders on the West Moreton System for coal carrying trains services and the expected future demand by operators for access rights.

Question 10 - Liability of Dangerous Goods

Does Queensland Rail's proposed treatment of liability for dangerous goods in the access agreement principles place the costs and liability in the hands of the party best able to manage the risks?

Attachment A contains the PwC analysis of Queensland Rail's approach to the treatment of liability for dangerous goods in AU1.

Question 11 - Queensland Rail's Structure

Will access seekers/holders be adequately protected, given Queensland Rail is vertically integrated with an above-rail passenger business (but not an above-rail freight business)?

- The level of prescription required in QR Limited and QR Network Pty Ltd past undertakings was largely a consequence of these undertakings having application to an integrated above-rail freight business, or a group of related companies that provided integrated rail services including both below and above rail functions.
- While Queensland Rail is a vertically integrated business with both above rail and below rail activities, Queensland Rail's above rail activities do not include freight train services,[19] and its passenger train services do not operate in competition with third party train services.[20]
- In relation to train path allocation, train paths for regularly scheduled Queensland Rail passenger services are allocated to Queensland Rail through sections 266 and 266A of the *Transport Infrastructure Act 1994* (Qld) (TIA) by the Director General of the Department of Transport and Main Roads (DTMR).[21] This means that there is no conflict of interest in the allocation of capacity by Queensland Rail to third party access holders through the negotiation or scheduling process.
- Queensland Rail is effectively acting as a non-vertically integrated access provider in respect of access to its rail network. The structure and operation of Queensland Rail's business means that many of the prescriptive provisions in previous undertakings for QR Limited and QR Network Pty Ltd that were aimed at an integrated rail business are not required in AU1.
- It is also important to note that AU1 does not replace the QCA Act and should be considered in the context of the protections in the QCA Act for access seekers (and access holders).

[19] For more detail see section 2.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

[20] For more detail see sections 2.7, 2.8 and 3.3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

[21] For more detail on the application of sections 266 and 266A of the TIA see section 3.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

Question 12 - Access to the Declared Service – Passenger Assets

Is it reasonable that parties seeking access to passenger stations and platforms for freight services apply through the provisions in the QCA Act, and not through a process detailed in an undertaking?

- Queensland Rail considers it unlikely that freight train services will require access to passenger related infrastructure.[22]
- There is no requirement in the QCA Act that a voluntary access undertaking must apply to all of a declared service. This is reflected in the QCA's 2000 Draft Decision on QR Limited's Draft Undertaking which stated:

  > *"It is clear that declared services need not be subject to an undertaking although the QCA is empowered under the QCA Act to request an undertaking from an access provider in relation to the provision of declared services. If access is sought to declared services not covered by an undertaking, the arbitration machinery contained in the QCA Act would be available."* [23]

- The approach taken in AU1 is consistent with past QCA approved rail access undertakings in Queensland.[24]
- Extending AU1 to providing an access seeker for a non-passenger train service with access to the parts of the rail network provided for the benefit of passengers and passenger train services and that are fit for purpose for passenger services will create unnecessary complexity in AU1 in respect of a scenario that is unlikely to arise.[25]
- This is more efficiently addressed during the term of AU1 on a case by case basis through Queensland Rail's negotiations with an access seeker, or, if necessary, by an access determination of the QCA, in accordance with the QCA Act.

[22] For more detail see section 3.4.2 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

[23] The QCA Draft Decision on QR's Draft Undertaking – Volume 2, December 2000' p. 141 in footnote 61.

[24] For more detail see section 3.4.3 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

[25] For more detail see section 3.4.4 of Queensland Rail's *Submission Accompanying and Explaining the Draft Queensland Rail Access Undertaking 1 – (March 2012).*

Attachment A - PwC Analysis of the Treatment of Liability for Dangerous Goods in AU1

whatwouldyouliketogrow.com.au

Queensland Rail

Treatment of dangerous goods

Queensland Rail

Supporting analysis for submission to the QCA

10 July 2012

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Contents

1 Introduction

1.1 Purpose and approach

Queensland Rail submitted its proposed Draft Access Undertaking 1 (Queensland Rail Access Undertaking 1 (AU1)) to the Queensland Competition Authority (QCA) in March 2012. AU1 seeks to provide an access undertaking that better suits the operations and requirements of Queensland Rail, while preserving the basic process for access seekers to negotiate access terms. AU1 also seeks to simplify the business' current access arrangements to be better understood by all parties.[1]

In April 2012, the QCA released an Issues Paper on Queensland Rail's AU1. The purpose of the paper was to assist stakeholders in preparing submissions on the proposed AU1.

One of the questions posed by the QCA in the Issues Paper was:

> *Does [Queensland Rail's] proposed treatment of liability for dangerous goods in the access agreement principles place the costs and liability in the hands of the party best able to manage the risks?*

This paper considers this question in light of Queensland Rail's intention with respect to a proposed indemnity regarding dangerous goods.

[1] Since separation from QR Limited on 1 July 2010, Queensland Rail has provided access to its below rail network under QR Network's (2008) June 2010 Access Undertaking (Temporary Undertaking) which applies to Queensland Rail in the manner, and for the period, set out in a transfer notice under the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld).

2 Queensland Rail's proposed arrangements

The transportation of dangerous goods on Queensland Rail's network creates risk for the business and this risk is directly related to the consequence, or potential costs, associated with an incident involving these goods.

Queensland Rail's proposed Access Agreement Principles include the following principle (Clause 10(c)) with respect to dangerous goods:

> *The Access Agreement must include specific provisions regarding the Access Holder's indemnity relating to the carrying of Dangerous Goods, if applicable.*

Queensland Rail's intent through the inclusion of this principle is to enable the business to negotiate an indemnity which limits the business' risk and liability, should there be an incident involving dangerous goods on Queensland Rail's network (including where Queensland Rail is at fault).

Specifically, the business proposes to limit its liability in such a situation to the amount the business would incur if the transported goods were not classified as dangerous goods. On this basis, an indemnity from the operator in relation to dangerous goods would extend to claims or losses where Queensland Rail is at fault other than claims or losses that would have arisen anyway if only non-dangerous goods where being carried.

For example, the consequence of train derailment where the goods being carried are inert products such as grain, or even coal, is very different to the consequence of a train derailment where the train was carrying dangerous goods, such as cyanide or explosives, in terms of the harm this can cause people, property and the environment.

An incident involving dangerous goods will typically result in higher remediation costs than an incident involving non-dangerous goods. The business is therefore proposing that for incidents where Queensland Rail is deemed to be at fault, responsibility for the additional or *incremental costs* that arises because the incident involves a dangerous good should fall with the access seeker or train operator on the basis that they are best able to manage this risk.

There is limited regulatory precedent for the treatment of liability relating to dangerous goods. Our review has not identified any definitive regulatory guidance on the matter. However, the QCA responded to a dangerous goods related proposal by QR Network in their 2009 voluntary draft access undertaking (2009 DAU) which does provide some relevant albeit limited guidance.

In 2008, as part of QR Network's 2009 DAU process, QR Network proposed a broader limitation with respect to dangerous goods. Clause 14, Schedule E (Principles for inclusion in the Standard Access Agreement) stated:

> *Each party is liable for, and is required to release and indemnify each other for, all claims in respect of personal injury, death or property damage caused or contributed to (to the extent of the contribution) by the wilful default or negligent act or omission of that party or its staff save and except that the Access Holder will be liable for, and is required to release and indemnify QR Network for, claims brought against QR Network relating to the carriage of dangerous goods (including explosives and radioactive material).*

The QCA's Draft Decision on the 2009 DAU did not agree with QR Network's proposal regarding the dangerous goods provisions. The QCA was of the view the allocation of risk is efficient when the risk is borne by the party that is in the best position to manage that risk and that the access holder was not in a position to manage risks associated with QR Network's negligence or wilful default.[2]

Further the QCA was of the view that these are risks that road transport operators do not bear and limiting QR Network's liability in this area would result in the transfer of dangerous goods from railways to roads, which would not be in the public interest.[3]

Importantly, Queensland Rail's current position is different to the 2009 QR Network position. Unlike QR Network, Queensland Rail proposes that it still be liable for the costs of an incident involving dangerous goods where the business is at fault; however, liability would be limited to the costs associated with carrying non-dangerous goods. Liability for any additional costs resulting due to the fact that the goods are 'dangerous goods' will remain with the access seekers/train operator.

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2 Queensland Competition Authority. 2009. *Draft Decision: QR Network 2009 Draft Access Undertaking*. Available online at: http://www.qca.org.au/files/R-2009DAU-QCA-QRN09DAU-DraftDec-1209.pdf. [Accessed on: 27 June 2012]. Pg. 138.

3 Queensland Competition Authority. 2009. *Draft Decision: QR Network 2009 Draft Access Undertaking*. Available online at: http://www.qca.org.au/files/R-2009DAU-QCA-QRN09DAU-DraftDec-1209.pdf. [Accessed on: 27 June 2012]. Pg. 138.

3 Discussion and findings

Managing risk and liability efficiently is a core part of operating any business. For regulated businesses, which deliver essential community services, it also is necessary that these businesses are not exposed to a level of risk, such that if an event occurred it would threaten the continuity and financial viability of the businesses, or impact on their ability to raise finance and deliver new infrastructure.

Regulated businesses also should have an incentive to invest efficiently to decrease risk. However, where risk mitigation activities generate costs or result in businesses bearing additional risk, they should be compensated for this. This includes passing costs through to access holders via access charges in accordance with each access holder's contribution to generating these additional costs.

Queensland Rail's proposed Access Agreement Principle regarding dangerous goods seeks to allow the business to effectively manage its risk exposure with respect to the carriage of dangerous goods.

For incidents involving dangerous goods where Queensland Rail is deemed to be at fault the business is proposing that it will still be liable for a portion of the costs of an incident. However, responsibility for the additional or incremental costs that arise because the incident involves the carriage of dangerous goods will fall with the access seeker or train operator on the basis that they are best able to manage this risk.

There are a number of limitations on Queensland Rail's ability to fully manage the risk associated with the transportation of dangerous goods. Queensland Rail is limited in its ability to manage the consequence of an incident involving dangerous goods (i.e. potential damage to people, property and the environment) as this is a function of the products being hauled by the above-rail operator, and this is outside the control of Queensland Rail as an infrastructure provider.

There are also information asymmetries which exist at the time of negotiating access arrangements with access seekers/train operators. These mean that the business may not have complete knowledge, at the time of negotiations, of the specific attributes of the dangerous goods (volume, type, frequency etc) being transported on its network at any time as this can vary by train.

The business has limited efficient options to manage this risk. For example, Queensland Rail currently maintains its network to the standard required for the carriage of goods on its network, and while in theory maintenance expenditure could be increased to further reduce the likelihood of an incident this may not be efficient, and may be questioned by the QCA.

Alternatively, the business could seek to manage the risk associated with the transportation of dangerous goods through insurance. Where this activity generates additional costs, these costs should be passed through to users in accordance with their contribution to the generation of these costs, assuming that as a regulated business these costs are allowed to be passed through. However, in light of the information asymmetries the business may be limited in its ability to effectively price this risk into access charges and this may have equity implications.

3.1 Managing Queensland Rail's risk exposure

As a general principle the consequences of an incident on Queensland Rail's network involving dangerous goods will typically be higher than an equivalent incident involving other types of goods.

A key business objective of Queensland Rail is to manage all risk, including the risk associated with the transportation of dangerous goods, having regard to consequence and likelihood of an incident for which Queensland Rail is deemed to be at fault. Queensland Rail, however, is limited in its ability to manage the consequence of an incident involving dangerous goods as this is a function of the products being hauled by the above-rail operator, decisions on which sit outside the control of Queensland Rail as an infrastructure provider.

Accordingly, with respect to the carriage of dangerous goods, potential risk mitigation options for the business include:

- reducing the likelihood of occurrence, such as by increasing track maintenance expenditure on Queensland Rail's network
- reducing the impact of an incident on the business, such as through insuring externally or self-insuring against potential damage caused by dangerous goods.

Both risk mitigation options will involve additional costs for the business, and these costs should be passed on to customers in accordance with their contribution to generating these costs.

Alternatively, if the business is not able to be adequately compensated for bearing the risk of carrying these goods, a business may reasonably seek to avoid this activity, particularly where the impact of the risk is seen to be material. In a commercial environment this could involve introducing a prohibition on the transportation of dangerous goods on Queensland Rail's network. However, this is not a realistic option for Queensland Rail under the provisions of the *Queensland Competition Authority Act 1997* (QCA Act).[4]

3.1.1 Efficient maintenance expenditure

Queensland Rail undertakes on-going maintenance of its below-rail network, and as a regulated business, it is necessary to ensure that this maintenance expenditure is efficient and appropriate for meeting the requirements of Queensland Rail's operations and customers.

Maintenance activities can provide a method for managing, but not completely eliminating, the risk of an incident. The business, therefore, may be able to increase its maintenance expenditure in order to reduce the potential likelihood of an incident for which Queensland Rail is deemed to be at fault.

[4] Sections 99 and 100(1) of the QCA Act oblige Queensland Rail to negotiate with access seekers in good faith and this is likely to restrict Queensland Rail's ability to refuse to negotiate for access.

For each additional dollar the business spends on maintenance this is likely to provide a proportional (or more than proportional) reduction in the likelihood of an incident. Over time, however, due to diminishing returns, for each additional dollar there is expected to be a less than proportional reduction in the likelihood of an incident. This indicates that there is an efficient maintenance expenditure point. This efficient maintenance expenditure point should balance the cost of undertaking additional maintenance to reduce the likelihood of an incident against the benefit in avoided incident costs (subject to the regulatory and commercial ability of the business to pass through these costs).

It is not feasible to completely eliminate the likelihood of an incident on Queensland Rail's network as the costs of doing so would be prohibitive. This is consistent with the findings of recent research paper prepared for the QCA.[5] This paper found that the socially optimal level of supply security of infrastructure services is unlikely to be a standard of perfect reliability and that while there are benefits to the community from reducing the probability of an interruption to zero, it is recognised that doing this would entail prohibitively high costs.[6]

Queensland Rail currently maintains its network to a standard which it considers is appropriate for the carriage of goods on its network, including dangerous goods. Queensland Rail believes that increasing maintenance expenditures from current levels, as a mechanism to reduce the likelihood of an incident involving dangerous goods and therefore the risk to Queensland Rail under current liability allocation arrangements, is unlikely to be the most efficient strategy. Each incremental unit of maintenance expenditure would deliver a disproportionately smaller reduction in risk.

Further, for systems which carry a mix of both dangerous and non-dangerous goods, the requirement to expend on a 'whole of system' strategy, where the benefit accrues to only a fraction of total cargoes carried, is unlikely to be efficient.

There also are equity considerations with respect to the allocation of efficient maintenance expenditure. As the level of maintenance expenditure is a consequence of the carriage of dangerous goods on Queensland Rail's network, this additional expenditure should be reflected only in access charges paid by users transporting dangerous goods. The access charges paid by customers transporting non-dangerous goods should be determined based on the level of maintenance expenditure that would be required for non-dangerous goods.

There are limitations, however, for accurately determining these amounts and to effectively passing these costs through to the relevant access seekers. Accurately pricing this risk depends on the attributes of the dangerous goods carried on Queensland Rail's network. This information is not typically available at the time of negotiating access terms, particularly for mixed trains which carry a range of goods, including differing volumes and types of dangerous goods, which can vary by train.

Further discussion regarding pricing and risk is provided in Section 3.2 below.

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5 Gans, J and King, S. 2003. *Pricing Principles for Investment Made Under Extraordinary Circumstances. A report on behalf of the Queensland Competition Authority.*

6 Gans, J and King, S. 2003. *Pricing Principles for Investment Made Under Extraordinary Circumstances. A report on behalf of the Queensland Competition Authority.*

3.1.2 Insuring against potential damage involving dangerous goods

Queensland Rail has limited capacity to reduce the consequence of an incident as this is directly related to the nature of goods being transported on its network. Accordingly, to limit any potential liability arising due to an incident involving dangerous goods where the business is deemed to be at fault, the business could secure appropriate insurance.

Determining the appropriate level of insurance to protect the business from the risk of transporting dangerous goods, however, is complex. For example, mixed freight trains carry a range of goods, both dangerous and non-dangerous. At any time these trains could be carrying any combination of dangerous goods, from a single drum of chlorine, to a number of carriages containing drums of chlorine. As the type, quantity and frequency of dangerous goods varies, this also varies the potential risk exposure to Queensland Rail.

Queensland Rail, therefore, is not well positioned to understand the level of risk associated with the transportation of dangerous goods on its network at the time of negotiating access. This is because Queensland Rail is only made aware of the types of goods, including the attributes of any dangerous goods, carried on its network fifteen minutes prior to departure of the operator's train. Short lead times are integral to the competitiveness of rail over alternative transport modes.

Using these efficient lead times means that the business is not able to determine the appropriate level of insurance to manage this risk or price this risk effectively in an access charge. Further, while the business could still insure for this risk, this could lead to a situation where the business over-insures (or under-insures), resulting in increased costs (or potentially exposing the business to uninsured loss should an incident occur where Queensland Rail is at fault, which it may have limited capacity to manage).

Some access seekers/train operators, by comparison, would have a better understanding of the attributes of dangerous goods (type, quantity, frequency) to be carried on Queensland Rail's network and could ensure that insurance arrangements were specifically tailored to their requirements. This would, arguably, lead to a more efficient outcome than assigning this responsibility to Queensland Rail and would address the potential for Queensland Rail to over-insure (or under-insure) in the absence of sufficient information.

Further, similar to efficient maintenance expenditure, where the business does incur additional insurance costs or carry an additional level of risk, it should be adequately compensated for this risk. Any additional costs should be passed on to network users in accordance with their contribution to generating these costs. In practice, however, this process is complex due to information asymmetries regarding the attributes of goods transported by above-rail operators. Further discussion regarding pricing and risk is provided in Section 3.2 below.

3.1.3 Prohibiting the transportation of dangerous goods

Risk associated with the transportation of dangerous goods could be managed through introducing a prohibition regarding certain goods. This would provide the most effective means for the business to manage the risk associated with transporting dangerous goods, particularly in the instance that it is not sufficiently compensated for the additional level of risk associated with the transportation of dangerous goods.

The introduction of a dangerous goods prohibition on Queensland Rail's network would lead to an increase in the volume of dangerous goods carried by road transport providers, which may not be in the public's best interests. This change of transportation mode may also impact on economic efficiency, by leading to higher transportation costs for these goods. It could also harm the competitiveness of Queensland Rail's non-dangerous goods traffic, by requiring a higher share of fixed network costs to be recovered from these users.

Further, while this may be possible in a purely competitive environment, it may not be possible under the QCA Act. In particular:

- the declared service under section 250(1)(b) does not exclude the transportation of dangerous goods
- sections 99 and 100(1) of the QCA Act require an access provider to negotiate with an access seeker and to do so in good faith.

An outright prohibition on the carriage of certain products could be deemed to be inconsistent with the declared service and Queensland Rail's obligation to negotiate in good faith obligation.

3.2 Reflecting risk in access charges

The QCA indicated in its Draft Decision regarding QR Network's 2009 DAU that the allocation of risk in relation to dangerous goods is efficient when the risk is borne by the party that is in the best position to manage that risk.[7] There should also be incentive for the business to invest efficiently to decrease risk, and where risk mitigation activities generate costs or results in the business bearing additional risk, the business should be compensated for this.

Queensland Rail's options for managing its risk with respect to the carriage of dangerous goods, as discussed above, are likely to generate additional costs for the business (with the exception of the dangerous goods prohibition). Queensland Rail should be able to pass these costs through to access holders via the access charge in accordance with each access holder's contribution to generating these additional costs.

However, effectively reflecting risk in access charges is highly complex. This is because the level of investment in maintenance expenditure and the risk exposure of the business (as managed through appropriate insurance/self-insurance arrangements), would require detailed information from the train operator and access seeker/holder regarding:

- the nature/type of the dangerous good being carried
- the quantity of the dangerous good being carried
- the level of risk or potential damage associated with an incident involving the dangerous goods (people, property and environment)

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7 Queensland Competition Authority. 2009. Draft Decision: QR Network 2009 Draft Access Undertaking. Available online at: http://www.qca.org.au/files/R-2009DAU-QCA-QRN09DAU-DraftDec-1209.pdf. [Accessed on: 27 June 2012]. Pg. 138.

- the frequency of the transportation of the dangerous goods on Queensland Rail's network.

This information is not always available at the time of negotiating access arrangements, particularly as Queensland Rail provides access to a number of mixed freight trains, transporting both dangerous and non-dangerous goods in varying volumes and frequencies.

If the business is not able to pass on the increased costs associated with managing this risk of transporting dangerous goods in accordance with each access holder's contribution to generating these costs, the business may be left in a situation where it must socialise these costs by increasing access charges for all users. This approach is unlikely to be acceptable by access seekers/holders which are highly price sensitive and have a limited capacity to pay.

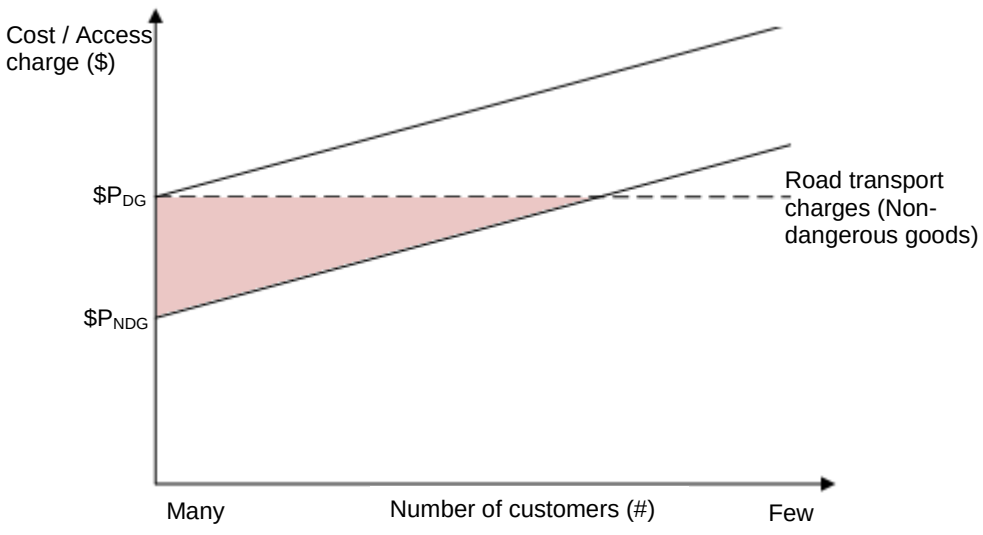
Further, if all access seekers are required to pay a higher access charge, due to increased expenditure required to manage the risk associated with the carriage of dangerous goods, this may have unintended consequences.

Figure 1 provides a graphical representation of the potential access charge where the business is required to incur additional costs for managing the risk associated with the carriage of dangerous goods ($\$P_{DG}$) compared to the potential access charge where the network only carried non-dangerous goods ($\$P_{NDG}$). It illustrates that access charges increase where there are fewer users on the network, each carrying a higher share of fixed network costs. Provided there are sufficient network users, access charges for non-dangerous goods are favourable in comparison to competing transport modes, as indicated by the shaded area.

There would also be a corresponding road transport charge for dangerous goods (which is not depicted in Figure 1) that is expected to be higher than that relating to non-dangerous goods.

If the business is unable to differentiate charges between access seekers, this would mean that all access seekers would incur the higher access charge, reflecting the cost of Queensland Rail carrying liability for dangerous goods. This could directly impede the competitiveness of Queensland Rail, as higher charges for all access seekers could compel some non-dangerous goods customers to switch to road freight transport where this is less expensive.

Figure 1 – Passing through costs to access holders/seekers



3.3 Conclusion

The proposed Access Agreement Principle allowing for an indemnity for the incremental liability relating to the carriage of dangerous goods provides a reasonable means for Queensland Rail to manage its risk exposure.

There are a number of limitations on Queensland Rail's ability to fully manage its risk exposure with respect to the carriage of dangerous goods.

Information asymmetries which exist at the time of negotiating access impact on the ability of Queensland Rail to efficiently manage the risk associated with the transportation of these goods, as this can impact on the business' ability to determine the efficient level of insurance coverage.

Without a clear understanding of the attributes of the dangerous goods carried on its network at the time of negotiating access, the business is unable to pass these costs through to customers in accordance with their contribution to generating these costs. This could lead to the socialisation of these costs across all users, which would impact the competitiveness of rail transport relative to road transport.

Where there are information asymmetries, therefore, regarding the attributes of dangerous goods carried on Queensland Rail's network, there may be instances where the access seeker is better placed to manage this risk and the proposed Access Agreement Principle allows for this to occur.

The proposed Access Agreement Principle provides a means for the business to negotiate an indemnity for the carriage of dangerous goods, but it still provides scope for the access seeker and the business to negotiate an alternative risk allocation where this is appropriate.

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