Chapter 4 - Negotiation Framework

KEY ASPECTS

Vertical integration - QR's vertical integration gives rise to a conflict of interest if access seekers are required to negotiate access with QR's above-rail business groups and then compete with them. An effective negotiation framework requires that Network Access alone must negotiate with access seekers regarding declared services.

Rail infrastructure - principles to guide the assignment of management responsibility for QR's rail infrastructure and associated line diagrams should be incorporated as a schedule to the Undertaking.

Parties to access agreements - both accredited and non-accredited organisations should be able to execute access agreements with QR, provided an appropriately accredited rail operator delivers the train services.

Schedule D - should include detailed cost information where no reference tariffs apply and where requested by access seekers. Schedule D does not limit QR's statutory obligation to provide information to access seekers - in particular, information associated with QR's capacity assessments.

Dispute resolution - QR can propose a nominee in place of the Chief Executive under the three-tier dispute resolution process, however, an access seeker/third-party operator should have the right to proceed straight to arbitration if it considers the nominee is unacceptable.

4.1 Introduction

Under the QCA Act, commercial negotiation is to play a central role in the securing of third-party access by an access seeker. Commercial negotiation is particularly important in the context of access to rail infrastructure due to the varying nature of the service required by a user, including frequency and timeliness. This requires an effective negotiation framework be established.

The QCA believes that if QR is to establish such a negotiation framework, a fundamental principle underpinning the assignment of management responsibility for QR's rail infrastructure is that Network Access alone must negotiate with access seekers. This is because, under QR's vertically integrated structure, an access seeker has to both negotiate access to declared services and, if successful, potentially compete with QR's above-rail business groups.

The QCA is strongly of the view that access seekers should not be expected to negotiate with potential competitors regarding any declared services. This is because the inherent conflict of interest would have the potential to seriously undermine the development of a contestable above-rail market in Queensland.

Key features of an effective negotiation framework include:

- provision of adequate information to access seekers in a timely manner;
- clearly defined negotiation procedures, including time frames for action by QR;
- clearly defined boundaries to negotiation;
- effective dispute-resolution procedures, including fair and timely resolution of disputes; and
- clarification of the respective responsibilities of QR and access seekers concerning the negotiation process.

A negotiation framework that omits or insufficiently develops any of the above features may become a barrier to entry to access seekers. On the other hand, QR is entitled to protect itself against becoming engaged in negotiations with non-genuine access seekers. Therefore, one of the key objectives of the negotiation framework must be to strike a balance between QR's legitimate business interests and the interests of access seekers.

4.2 Management responsibility for QR's infrastructure

Background

Scope of declaration

The QCA outlined its understanding of the scope of the rail transportation declaration, which extended beyond the mere facilitation of point-to point operation of trains to include services such as short-term storage. As outlined in the Draft Decision, the QCA understands that the scope of the declaration extends to the use of QR's rail transport infrastructure for the following rail transport functions:

- mainline running, including the use of passing loops;
- loading and unloading at facilities other than freight centres and depots, undertaken as part of the normal operational cycle;

- train queuing and staging for the following activities so long as they are undertaken as part of the normal operational cycle:
  - loading and unloading;
  - transit;
  - 'on track' maintenance, provisioning and crewing activities;
- train marshalling and shunting:
  - in preparation for transit;
  - in preparation before or after train loading or unloading;
  - in preparation before or after maintenance and provisioning.
- short term train storage
  - in a breakdown situation;
  - for short periods where product flow has been disrupted;
  - for short periods where the timetable does not allow use.

Guiding principles for assignment of management responsibility

The QCA developed a set of guiding principles in respect of QR's assignment of management responsibility for its infrastructure and proposed they be incorporated as a schedule to an approved Undertaking. Recognising the potential for disputation between QR and third-party operators regarding such an assignment, one of the principles reserved the QCA's right to resolve such disputes.

The guiding principles were applied to QR's line diagrams for its infrastructure from Gladstone northwards. Subject to stakeholder comment on the proposed assignment, the QCA proposed the amended line diagrams be included as a schedule to an approved Undertaking.

Stakeholder views

Scope of declaration

FreightCorp - there is a strong case for the further extension of the declaration:

Kwik Drop Door (KDD) triggers **–** triggers used in conjunction with the KDD mechanism should be included as they form part of the services at unloading facilities that are clearly included in the declaration. It would be a potential barrier to entry for the KDD system to remain with the above rail operator.

Positioning or repositioning of trains – includes when a train is moved from one location to another in order to meet some changed market requirement; balancing of motive power requires the movement of locomotives unattached to a train; or the train requires a modification in consist. FreightCorp asks the QCA to clarify the position with regard to this activity.

Bad order sidings **–** the QCA is asked to clarify that it intends for "bad order sidings" to be included in the declaration.

Medium term stowage – the need to accumulate trains over a period of time will require rail infrastructure to allow this to proceed. This is a below rail service provided by the infrastructure and should therefore be included in the scope of declared services and managed by Network Access. The QCA should set prices for the use of medium term storage that applies to all parties (including QR) and discourage unnecessary consumption of network capacity. Exclusion of this might frustrate the entry of new operators or the expansion of an existing operator.

PCQ - DBCT and Abbot Point Coal Terminal utilise a proprietary train unloading system called Kwik Drop Door (KDD). This is an automated system to unload rail wagons in lieu of manning to manually open the coal wagon doors. DBCT's systems are set up to detect wagon types and to open wagon doors at the right time to provide even unloading of the trains. If a new service provider does not have KDD, manning costs at DBCT will escalate dramatically. If a new service provider uses a different automated unloading system, PCQ may have to invest significant capital to install and commission the system. If a new service provider uses KDD on different wagon types, PCQ will need to invest time and money to modify the existing software and operation. This is expensive and time consuming - the original system took some 12 months to complete.

Queensland Government – The Government supports the QCA's interpretation of the scope of the declared service for third party access. To adopt a narrower view of "transportation by rail" (ie. it did not include activities or functions directly and intrinsically bound up with the actual point to point movement of goods and persons) would erode the effectiveness of the Government's declaration from a practical perspective, and would frustrate the purpose of the QCA Act in establishing a State based third party access regime.

Guiding principles for assignment of management responsibility

QR - expects line diagrams for southern Queensland will be included in the Undertaking once finalised. Once QT has provided QR with its feedback on the diagrams, QR will provide a full set to the QCA. As such, the Undertaking will include a full set of QCA endorsed line diagrams for QR's infrastructure.

The inclusion of these line diagrams within the Undertaking will remove any need for the creation of an additional schedule incorporating the QCA's proposed assignment principles, including a dispute resolution process.

The QCA's proposal to provide an avenue through which the line diagrams developed and approved by the QCA can be challenged and infrastructure currently outside the Undertaking potentially brought within that coverage during the term of the Undertaking is inappropriate for the following reasons:

- an undertaking's fundamental role is to provide certainty for the period of its application. The QCA approach provides QR operators who manage the remaining elements of the network with no certainty about their infrastructure either during the term of the Undertaking or into the future. As a result, line diagrams agreed prior to inclusion in the Undertaking should continue to apply throughout its term;

- it is QR's prerogative to determine how its infrastructure should be managed. Consistent with its legal advice, QR considers the role of the QCA is to ensure arrangements for effective negotiation of access to declared services are in place, however, this role does not extend to specifying the details of QR's organisational structure; and

- the dispute resolution process proposed by the QCA integrates what is declared, what is subject to the undertaking and what Network Access manages. There is not any requirement for these three issues to be definitively linked in the manner suggested by the QCA. For instance, it is not essential for the undertaking to cover the entirety of the declared service. Although QR recognises the advantages of such a position, the QCA has acknowledged that the scope of QR's declared service will depend on individual circumstances, and as a result, may alter from time to time. Simply because a service is not subject to the undertaking does not mean that an access seeker cannot seek access under the terms of the QCA Act.

QMC - The QCA's proposed changes to QR's negotiating and interface procedures, including the assignment of marshalling and storage areas to Network Access, will aid the development of effective competition.

Queensland Government – Whether or not an item of rail transport infrastructure (eg storage line or piece of track) is within the scope of the declaration, and not excluded from the declaration by virtue of falling within the definition of "other rail infrastructure", is a question of fact in each particular case. The Government believes the guiding principles proposed by the QCA are the most appropriate means to resolve this question of fact. In particular, the overarching principle of the QCA, which is to ensure access seekers are not required to negotiate with QR's above rail business groups for access to declared transportation services, is supported by Government.

Accordingly, the Government supports the amendments made to QR's line diagrams (of rail transportation infrastructure from Gladstone northwards) based on the QCA's guiding principles.

The Government agrees the third party access regime needs to contain sufficient flexibility to ensure the declaration remains relevant as the rail services market develops in Queensland. The Government believes the question of whether a piece of rail infrastructure falls within the scope of declared service can only be dealt with on a case by case basis. A process whereby the QCA may review this question of fact from time to time is therefore supported by Government.

However, this needs to strike a balance between the protection of the interests of access seekers and the commercial interests of QR's above rail businesses. The reassignment of track infrastructure throughout the course of the Undertaking period could impose significant operational difficulties for QR's above rail businesses and place them at a competitive disadvantage to their competitors. In order to balance the interests of QR and access seekers, the Government proposes the QCA examine QR's line diagrams at the beginning of each new Undertaking (say every three years) to ensure the line diagrams are up to date and reflect potential changes in network utilisation over the period of the new Undertaking.

QCA's analysis

Scope of declaration

FreightCorp and Ports Corporation of Queensland have argued that the opening trigger associated with the Kwik Drop Door (KDD) mechanism at the coal port terminals should be covered by the Undertaking as it forms part of the services at unloading facilities that are included in the declaration. It could be a potential barrier to entry if control of the opening trigger remained with QR's above-rail groups.

The QCA understands the opening trigger associated with the KDD mechanism is a declared service because it forms part of an unloading facility necessary for operating a railway and is not an element of 'other rail infrastructure' expressly excluded from coverage by the declaration of QR's rail transport infrastructure.[1] While there are alternative unloading systems available, the relevant point is that it is necessary to have a method of unloading wagons for coal train

[1] The *Transport Infrastructure Act 1994* defines "rail transport infrastructure" as facilities necessary for operating a railway, including –

(a) railway track and works built for the railway, including, for example – cuttings; drainage works; excavations; land fill; track support earthworks.

(b) any of the following things that are associated with the railway's operation – bridges; communication systems; machinery and other equipment; marshalling yards; notice boards, notice markers and signs; overhead electrical power supply systems; over-track structures; platforms; power and communication cables; service roads; signalling facilities and equipment; stations; survey stations, pegs and marks; train operation control facilities; tunnels; under-track structures; but does not include other rail infrastructure.

"Other rail infrastructure" means (a) freight centres or depots; or (b) maintenance depots; or (c) office buildings or housing; or (d) rolling stock or other vehicles that operate on a railway; or (e) workshops; or (f) any railway track, works or other thing that is part of anything mentioned in paragraphs (a) to (e).

services. The fact that QR has chosen to install a 'premium' mechanism, such as KDD, does not preclude it from being a declared service. The cost of the service provided by the opening trigger of the KDD mechanism will be reflected in the charges applicable to its use.

Another issue regarding the coverage of the declaration is the storage of rollingstock as it is progressively delivered to a third-party operator prior to its train services commencing. If facilities that come within the definition of 'other rail infrastructure' are used to store the rollingstock, the associated services will not be subject to the declaration (eg. maintenance facilities). Subject to this test being satisfied, the QCA understands the key consideration is whether the facilities used for storing rollingstock as it is progressively delivered are necessary for operating a railway. A new entrant to the above-rail market is operating a railway when it commences taking delivery of rollingstock. Consequently, the storage service provided by QR's rail transport infrastructure for this rollingstock would be declared.

With regard to the storage of wagons for seasonal traffics, the QCA understands that rail infrastructure that falls outside the definition of 'other rail infrastructure', used for the storage of wagons for seasonal traffics in the "off-season" is necessary for operating a railway. As such, the storage service provided by this rail infrastructure falls within the declaration.

FreightCorp has sought clarification as to whether the positioning and repositioning of trains, where a train is moved from one location to another to meet a changed market requirement, is covered by the declaration. The QCA considers that this activity is necessary for operating a railway and is similar to shunting. The QCA considers this activity is covered by the declaration.

The QCA considers that bad order sidings are covered by the declaration. In its Draft Decision, the QCA proposed that short-term train storage, including in a breakdown situation, is a rail transport function covered by the declaration. Further, QR has already included bad order sidings in the infrastructure assigned to Network Access in the line diagrams for its infrastructure from Gladstone northwards. However, the QCA accepts that the extent of the declared service should be clarified in the Final Decision.

Guiding principles for assignment of management responsibility

QR has raised three issues in relation to the guiding principles for assignment of management responsibility – whether it is QR's prerogative to determine how its infrastructure is managed; whether the line diagrams should apply throughout the term of an approved Undertaking; and the dispute resolution process proposed by the QCA.

QR has argued that it is QR's prerogative to determine how its infrastructure is managed. However, s137(2)(ea) of the QCA Act permits the inclusion of "details of arrangements to be made by the owner to separate the owner's operations concerning the service from other operations of the owner concerning another commercial activity". If having regard to the factors in s138(2) (which includes the legitimate business interests of QR, the public interest, the interest of access seekers and any other relevant matter), the QCA considers that it is necessary that such arrangements include the assignment of management responsibility for declared services to different business units, then it is open to the QCA to refuse to approve an undertaking which does not include such requirements. Accordingly, the QCA does not accept QR's view on this matter.

QR has argued that the QCA's proposed inclusion in the Draft Undertaking of a process allowing the QCA's proposed assignment of management responsibility for particular infrastructure to be changed during the term of an approved Undertaking is inappropriate as it fails to provide certainty to QR's business groups. As such, QR considers that the line diagrams

approved by the QCA for inclusion in the Undertaking should continue to apply throughout its term.

QR's argument overlooks the fact that some assignments of rail infrastructure may become contentious during the term of the Undertaking. It is impossible to have full knowledge of the particular operations associated with potential third-party operators' future traffic tasks. As such, assigning management responsibility for rail infrastructure at this stage without a mechanism to change this during the term of the Undertaking has the potential to unduly hinder a third-party operator in the conduct of its operations. Moreover, questions of fact could well arise concerning the scope of the declaration in relation to a particular operational assignment.

In addition, the QCA understands that, although QR's proposal would result in only the infrastructure contained in those diagrams being subject to the Undertaking during its term, QR would still have an obligation to negotiate with access seekers for access to all services which fall within the declaration, regardless of whether they are subject to the Undertaking. Therefore, allowing further infrastructure to become subject to the Undertaking during its term, where appropriate, would assist in increasing certainty with respect to access to those services. The QCA accepts that QR has a legitimate business interest in seeking for the Undertaking to provide certainty to QR during its term. The QCA acknowledges that the proposed review process will provide less certainty to QR's above rail groups about the infrastructure they manage. However, the Authority considers that the lack of certainty to QR by allowing for such a process is justified on account of the potentially anti-competitive impacts of not having such a process. The only reason why the provision would be triggered during the term of the Undertaking would be that access to the relevant infrastructure is sufficiently important to a third-party operator (and the fact that it was not able to resolve the matter satisfactorily with QR).

Accordingly, the QCA disagrees with QR's proposal as it could hinder competition by effectively locking in an arrangement that may become inappropriate during the course of the Undertaking and it could in fact reduce certainty about access to declared services.

QR has expressed the view that the dispute resolution process proposed by the QCA unnecessarily integrates three elements - what is declared, what is subject to the Undertaking and what Network Access manages. Moreover, QR argues that it would not be hindering access by not having a particular service subject to the Undertaking as it does not mean that an access seeker cannot seek access under the terms of the QCA Act. The QCA considers that this overlooks the overall role of the Undertaking, which is to reduce uncertainty in relation to access to the network and minimise the risk of parties instigating dispute resolution procedures to resolve disputes. A process to change the assignment of management responsibility for infrastructure during the term of an approved Undertaking as proposed by the QCA would help to achieve this objective. Accordingly, the QCA has not changed its position on this matter.

QR has advised that its line diagrams for south of Gladstone will be included in the Undertaking once finalised. As with the diagrams covering Gladstone northwards, there would need to be a public consultation process before such diagrams could be approved.[2]

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **management responsibility for QR's infrastructure is assigned**

[2] The QCA has been advised by QR that QT is currently assessing the southern line diagrams.

in accordance with the attached line diagrams; and

2. **the following principles for the assignment of management responsibility for QR's rail infrastructure are incorporated as a schedule to the Undertaking:**

Principles

The overall objective of the assignment process is to ensure that access seekers are not forced to negotiate with QR's above rail business groups for access to declared rail transportation services. This objective requires the following outcomes from the assignment process:

1. **Network Access should operate as a stand-alone provider of declared rail transportation services. The onus of proof in justifying a departure from this principle rests with QR.**

2. **Existing market shares of QR's above rail business groups should not be a factor in the assignment of management responsibility for declared services.**

3. **Network Access should provide access - using its own infrastructure - to any private siding.**

4. **Network Access should provide access to: any end-user's facility not owned or leased by a rail operator; a facility where there is joint use by end-users.**

5. **Network Access should provide access to declared rail transport services that assist normal mainline operations. These operations include the following rail transport functions:**

    - **mainline running, including the use of passing loops;**
    - **loading and unloading at facilities other than freight centres and depots, undertaken as part of the normal operational cycle;**
    - **train queuing and staging for the following activities so long as they are undertaken as part of the normal operational cycle:**
        - **loading and unloading;**
        - **transit;**
        - **'on track' maintenance, provisioning and crewing activities;**
    - **train marshalling and shunting:**
        - **in preparation for transit;**
        - **in preparation before or after train loading or**

unloading;

- **in preparation before or after maintenance and provisioning.**

- **short term train storage**
  - **in a breakdown situation;**
  - **for short periods where product flow has been disrupted;**
  - **for short periods where the timetable does not allow use.**

6. **Disputes between an access seeker and QR with respect to a request for a re-assignment of management responsibility for a part of QR's rail infrastructure from an above rail business group to Network Access should be referred to the QCA for resolution. The QCA would adopt the following four step dispute resolution process:**

   - **the access seeker would write to QR seeking a re-assignment of management responsibility;**
   - **QR would be required to respond in writing within 30 days, providing an explanation of its decision;**
   - **if the access seeker did not accept QR's decision, the matter would be referred to the respective Chief Executive Officers of the two parties within 7 days for resolution. The Chief Executive Officers would have a further 14 days to resolve the dispute; and**
   - **if there were no resolution after 14 days, the access seeker or QR would give notice to the QCA about the dispute and the QCA would then resolve the matter.**

4.3 Assignment of management responsibility for stations and platforms

Background

QR argued its above-rail business groups would manage stations and platforms because these facilities provide mainly above-rail services. The QCA supported QR's assignment of management responsibility for the track adjoining stations/platforms across QR's network to Network Access, as this would mean, in practice, access seekers would negotiate with Network Access for arrival/departure times for its trains at the station/platform. Such negotiations would be conducted within the framework of an approved Undertaking.

Access to declared services within a station is likely to be more complex. The QCA was concerned a third-party operator planning to run passenger services should not have to negotiate with an above-rail business group for access to declared services within the station, as they would likely be a direct competitor to the third-party operator. As a result, in addition to

signalling the third-party operator's intention to enter the market, the above rail group would have little incentive to negotiate commercial terms and conditions for such services.

However, the QCA recognised many services performed within stations are not declared and, furthermore, for the majority of QR's stations, QR's above-rail business groups are the only user and are likely to remain so under current Queensland Government policies. Consequently, the QCA accepted QR's above-rail business groups being assigned operational management responsibility for stations and platforms, subject to Network Access being responsible for access negotiations regarding declared services.

Stakeholder views

> **QR** - it is not possible to fully implement the QCA's proposed ring-fencing arrangements because QR's above rail groups' manage stations and platforms. To ensure there is no conflict of interest, Network Access has agreed to negotiate with access seekers for access to the declared service element of stations and platforms on behalf of the above rail groups. However, the QCA's recommendations assume the relevant infrastructure is managed by Network Access, and preclude, or make difficult, the negotiations that Network Access would need to undertake to ensure the terms of access to stations and platforms are reasonable given the current use of those facilities. QR intends to extend the scope of the Undertaking and address any inconsistencies in relation to this in the revision of the Draft Undertaking.

QCA's analysis

The QCA recognises QR's concerns regarding its ring-fencing obligations and management of stations and platforms.

The QCA proposed that Network Access would conduct negotiations with access seekers for access to stations and platforms. Network Access would have to discuss the access proposal with the relevant above-rail group for this purpose. Such a discussion would breach the QCA's proposed confidential information flow process. For example, if the access seeker wanted to place a ticket office/machine within a station, Passenger Services Group would have to be consulted by Network Access given that it operates the station. The management of passenger flows within the station may also be an issue. It is unavoidable that such negotiations would signal to Passenger Services Group that an access seeker was investigating the possibility of running train services in competition with it.

On balance, the QCA accepts that it would be impractical for QR to fulfil its ring-fencing obligations regarding the protection of confidential information flows associated with access to stations and platforms. Consequently, the QCA proposes a partial exemption from this element of the Undertaking's ring-fencing obligations for access negotiations regarding passenger services that would utilise stations and platforms. Specifically, an access seekers' approval is not required prior to Network Access passing its confidential information to the above-rail group. However, all other provisions of the Undertaking would continue to apply and Network Access should be responsible for all access negotiations regarding declared services for the track and within these facilities under the framework provided by the Undertaking.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **management responsibility, including access negotiations, for track adjacent to all platforms/stations is assigned to Network Access;**

2. **responsibility for access negotiations regarding declared**

services within stations and platforms is assigned to Network Access. Such negotiations should occur within the framework of the Undertaking; and

3. **Network Access is exempted from the requirement to obtain access seeker's approval prior to passing its confidential information to an above-rail group for access negotiations regarding passenger services that utilise stations and platforms. All other protections for access seekers' confidential information provided for in the Undertaking will apply.**

4.4 Access seekers' right to sign access agreements with QR

Background

The Draft Undertaking does not state access agreements will only be entered into with third-party operators, however, it provides a framework for access agreements restricted to third-party operators. In practice, while an end-user could participate in access negotiations, only an accredited rail operator would be able to enter into access agreements with QR.

The QCA understands if QR refused to sign an access agreement with respect to declared services, the Undertaking would not constrain a determination by the QCA of an access dispute instigated by that end-user.

In light of supportive stakeholder views, the key issue for the QCA in proposing its amendment was end-users should have the discretion to choose between an unbundled or integrated access agreement. This way, the market would be able to determine the most desirable contractual structure for the holding of access rights.

Stakeholder views

QR - accepts the QCA's proposed amendment. However, QR does not envisage accommodating the creation of multiple access agreements for the same access.

Neither does QR intend to accommodate three-way agreements, where an access agreement would be split into two parts, one dealing with operational issues, and the other with the allocation of capacity, with two different parties (contractually committed to each other through a haulage agreement), each committing to a different set of obligations associated with its respective part of the whole access.

Multiple agreements or three-way agreements, enhance the possibility of matters falling through the cracks when parties are negotiating an agreement, particularly in terms of liabilities and indemnities for certain actions. QR considers the additional complexity associated with multiple or three-way agreements, would create an unnecessary burden on QR for what it considers to be no perceivable benefit.

QR considers one party should bear the entirety of the purchaser's obligations in the access agreement with QR. As a result, where an end-user signs an access agreement, they may choose to subcontract the performance of the train services to an accredited operator and establish a back to back agreement with the operator regarding the access agreement provisions. If obligations are not met under the agreement, QR will pursue the party with whom it has the access agreement, the end-user. If the fault lies with the operator of the train services, and the end-user has appropriate arrangements in place, the end-user may then pursue the operator.

Finally, QR does not consider the QCA Act requires it to negotiate with an access seeker for the purpose of entering into multiple agreements. In particular, sections 99 and 100 of the

QCA Act refer to an 'access agreement' rather than 'access agreements'. QR does not intend to place an obligation upon itself, through the Undertaking, to enter into such an arrangement.

ARTC - Supports the QCA's proposed amendment.

FreightCorp - supports strongly the QCA's findings. However, while in principle contracts could be unbundled into capacity and haulage components, without the benefit of the details of how such contracts might work, we remain to be convinced that this is the best approach.

An alternative is for the end-user to hold a complete access contract, and to sub-contract the operation of trains to an accredited operator (the model contemplated in the NSW regime). This has the benefit of clearly aligning the parties with the contractual relationships and avoids a potential mis-match where an operator has certain rights to run trains that might be compromised by a contractual difficulty between QR and the capacity holder.

QCA's analysis

The key issue from the QCA's perspective is that the market should resolve the most efficient contracting structure, and that a contractual structure should not be imposed on the industry through the Undertaking. As such, it is up to the contracting parties to establish the most appropriate arrangements, including the allocation of risk. The QCA's position has not changed on this issue.

With regard to multiple or three-way agreements, the QCA recognises that QR's legitimate business interests must be protected. However, the QCA understands that no greater exposure would arise with a tripartite contractual relationship than with integrated agreements, so long as they are properly drafted. The objective behind the Undertaking is to give access seekers the flexibility to allow both accredited and non-accredited organisations to separately enter into access agreements with QR, while allowing QR's legitimate business interests to be protected.

QR has argued that as s99 and s100 of the QCA Act refer to access agreement (singular), there should not be two agreements for one access. However, this is inconsistent with the legal advice the QCA has received.

Section 99 of the QCA Act provides "that an access provider of a declared service must, if required by an access seeker, negotiate with the access seeker for making an access agreement relating to the service". Section 100 of the QCA Act requires that the parties negotiate in good faith. An access seeker is defined in the Act as a "person who wants access, or increased access, to the service". The QCA understands that both accredited and non-accredited users fall within this definition. An access agreement is defined as an "agreement between an access provider of a declared service and another person providing for access to the service by the other person". Both an end user and an accredited operator can negotiate a separate access agreement under s99 and s100 of the QCA Act. There is no provision preventing each separate access agreement applying to the same access. Should QR refuse to negotiate with one of these parties it would be open to an access seeker (either an end user or an accredited operator) to give notice to the QCA under Division 5 of the QCA Act that an access dispute existed.

The QCA accepts that FreightCorp's proposal (also supported by QR) whereby the end-user holds a complete access contract and sub-contracts the operation of train services to an accredited rail operator is one possible contracting option and one which may well hold advantages to the parties. However, it is up to the contracting parties to sort out the most appropriate arrangement.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that both accredited and non-accredited organisations could execute access agreements with QR, provided that an appropriately accredited rail operator performs the train services.

4.5 Discretion to refuse to negotiate – prudential requirements

Background

Irrespective of whether the Undertaking sets out the conditions on which QR may refuse to negotiate with an access seeker, QR has a obligation to negotiate under s99 of the QCA Act. Nevertheless, the QCA recognised there may be circumstances in which QR would be entitled to refuse to enter into an access agreement to protect its legitimate business interests.

In light of this, the QCA argued it would not object to an Undertaking that required QR to enter into negotiations with an access seeker to establish whether the circumstances for a refusal to enter into an access agreement were met. The QCA's proposed amendment placed the onus on QR to justify its refusal to enter into an access agreement by demonstrating that the access seeker was not capable of meeting the terms and conditions specified in its proposed access agreement in a material way.

The QCA raised no objection to QR establishing a solvency requirement as one of the circumstances for a refusal to enter into an access agreement. The QCA proposed minor amendments to QR's proposed solvency definition. The other consideration in establishing whether an access seeker is incapable of fulfilling its contract in a material way is default of its other access agreements.

Sub-para 4.1.2(d)(i) of the Draft Undertaking provides that QR will prepare an indicative access proposal where a third-party operator:

- seeks access to already committed capacity; and/or
- seeks access that is required for carrying bulk consignments of commodities, when it is of the reasonable belief that these commodities will be otherwise carried by services under an existing access agreement.

Sub-para 4.1.2(d)(iv) provides, however, that QR will not be obligated to enter into further negotiations for access rights unless and until it is apparent there is an access arrangement in place to make the committed capacity available, or to ensure QR only has one access agreement for services carrying the relevant bulk consignments.

The QCA proposed the removal of para 4.1.2(d) because of its potential to stifle competition by entrenching an incumbent operator in the above-rail market. To protect QR's legitimate business interests when negotiating in relation to committed capacity, the QCA proposed QR be entitled to recover its costs if it could demonstrate the access application was frivolous or vexatious.

Stakeholder views

QR - does not object to the principle behind the QCA's recommendations regarding the definition of 'solvent'.

The QCA has not justified QR being required to justify a refusal to enter into an access agreement. In any event, if such a recommendation were to be accepted, the QCA would also no doubt consider ensuring QR had the right to require an access seeker to provide QR with relevant information relating to its solvency and material breaches of relevant agreements.

On the issue of material breaches of relevant agreements, QR maintains that it is quite legitimate for QR to take into account the 'track record' of an access seeker in contracts with third parties. The access seeker may have no existing agreements with QR of any kind, but may have a track record of breaches under contracts (including access agreements and other agreements) with third parties.

With respect to the QCA's proposed removal of clause 4.1.2(d), QR has discussed this issue as part of a package of arrangements dealing with managing volume risk.

FreightCorp - endorses the QCA's definition of solvent and the QCA's view it is inappropriate for QR to judge the merits of a dispute between a rail operator and another access provider.

Stanwell - the QCA's proposal for QR to recover its costs for frivolous or vexatious access applications would appear reasonable if both negotiating parties had similar market power and an ability to fund the negotiation process. This is unlikely to be the case. In practice, QR could use its market power (and 'deep pockets') against many potential access seekers in the negotiation process and ultimately the courts, to force one-sided negotiated settlements. For example, QR might be able to increase an access seeker's costs by placing as many obstacles as possible in the way of the access application.[3]

Accordingly, the QCA's proposed amendment should be deleted, or better still, rephrased to reflect the general practice in the courts in relation to such matters (ie. the ultimate 'winner' will be awarded its costs of fighting the matter).

Regarding committed capacity, the QCA states, in frivolous or vexatious access applications, "QR may seek *acknowledgement* of an access seeker's liability for costs in such a negotiation". It is unclear why the Draft Decision does not allow for the cash payment of a 'performance bond', akin to a 'security for costs' payment into court, by both QR and the access seeker in such circumstances. Whereas an acknowledgement of a 'debt' may be difficult to enforce in practice, a cash payment of the 'performance bond' kind is more likely to discourage frivolous and vexatious claims that might hold up the dispute resolution process for other, meritorious claims.

QCA's analysis

Prudential requirements: solvency

Stakeholder comments are supportive of the QCA's proposed amendment to the definition of 'solvent'. Therefore the QCA has not changed its position on this matter.

Prudential requirements: material default

QR maintains that it is legitimate for it to take into account the 'track record' of an access seeker in contracts with third parties. The test the QCA proposed in the Draft Decision was that QR demonstrate that the access seeker is not capable of meeting the terms and conditions specified in its proposed access agreement in a material way. The QCA had proposed that default of access agreements with QR should be brought within a list of factors relevant to QR demonstrating this.

[3] This assumes that Network Access will act to protect the above-rail arm of QR.

The QCA remains concerned about QR judging the merits of disputes between a third-party operator and rail access provider in another jurisdiction. Nevertheless, the QCA cannot stop QR making such judgements and persistent breaches that lead to termination of a sufficient number of agreements with access providers other than QR could be relevant to the demonstration by QR that the access seeker is not capable of meeting the terms and conditions specified in its proposed access agreement in a material way.

Discretion to refuse to negotiate

Given the consequence of a refusal to negotiate is that an operator is prevented from entering the Queensland market, the QCA considers that a requirement on QR to justify its decision not to negotiate with an access seeker is reasonable. However, the QCA accepts QR's point that it is reasonable QR have the right to require an access seeker provide QR with relevant information relating to its solvency. Accordingly, the QCA proposes that such a right be included in the Undertaking. Given the QCA's position in relation to material default outlined above, there is no need for an access seeker to provide information other than in relation to solvency (QR will have information about breaches of agreements with it).

QR has addressed the QCA's proposal to remove para 4.1.2(d) regarding QR's obligation to negotiate and prepare an indicative access proposal where access is being sought to committed capacity, as part of its proposals relating to managing volume risk. This is discussed further in Chapter 10. However, the QCA has not changed its position that 4.1.2(d) should be removed, because of its potential to stifle competition by entrenching an incumbent operator in the above-rail market, to be replaced with a principle for negotiating in respect of committed capacity.

Stanwell's comments in regard to the QCA's proposal overlook the fact that arbitration arrangements are available for those who are frustrated by QR's process and the fact that the arbiter will determine the allocation of costs as a consequence of this process. The QCA considers that an up-front payment of a 'performance bond' as suggested by Stanwell would be an inappropriate barrier to entry to the above-rail market.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **QR is required to enter into negotiations with an access seeker in order that it could establish whether the circumstances for a refusal to enter into an access agreement are met;**

2. **the onus is on QR to justify its refusal to enter into an access agreement by demonstrating there was no reasonable likelihood of the access seeker meeting the terms and conditions specified in its proposed access agreement in a material way;**

3. **where QR established the circumstances for a refusal to enter into an access agreement, it must provide written reasons for its refusal to the access seeker within 14 days; and**

4. **the following definition of solvency is adopted;**

"Solvent means none of the following events have happened in relation to the third party operator:

(a) the access seeker operator is unable to pay all its debts as

and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the Corporations Law;

(b) a meeting is convened to pass a resolution to place it in voluntary liquidation or to appoint an administrator, unless the resolution is withdrawn within 14 days or the resolution fails to pass;

(c) an application is made to a court for it to be wound up and the application is not dismissed within one month;

(d) the appointment of a controller (as defined in the Corporations Law) of any of its assets, if that appointment is not revoked within 14 days after it is made; or

(e) the access seeker resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement;"

5. **clause 4.1.2(d) is removed and replaced with the following principle for negotiating in respect of committed capacity:**

– **if QR can establish that an application is frivolous or vexatious, it is entitled to recover its costs. QR may seek acknowledgment of an access seeker's liability for costs in such a negotiation.**

4.6 Access application process

4.6.1 Information required by QR

Background

The QCA clarified with QR that paras 4.3(c) and (d) of the Draft Undertaking envisaged a process whereby the access seeker could seek Schedule D preliminary information from QR before it was required to provide the Schedule C information. The QCA proposed the Undertaking provide access seekers with an explicit right to this effect.

The QCA also proposed access seekers be allowed to revisit the Schedule C information they provide as the negotiation process proceeds.

Stakeholder views

QR - accepts the QCA's proposed amendment.

FreightCorp - in general, agrees with the level of information required by QR, however, some of the details are in excess of those necessary for QR to make an informed assessment of the proposal. For example, it is not necessary to be advised of "nominal gross mass of wagons, tare mass of each wagon…average proposed load per wagons; maximum proposed gross tonnes per wagon; …gross tonnes per train service". Information such as axle load/spacing is a detail that most operators will not know until they have designed their

rollingstock. For coal that might be serviced on a continual cycle basis, time of departure and arrival cannot be specified.

QCA's analysis

With regard to FreightCorp's argument that certain information requested by QR is excessive, the QCA acknowledges that some of the information requested by QR is fairly detailed and may not be absolutely necessary at the early stage of an access inquiry. However, the QCA considers that the critical information would be readily available to the access seeker and providing it to QR would not be unduly onerous.

FreightCorp's concerns regarding information such as axles load/spacing not being known to operators until they have designed their rollingstock is recognised. However, this is unlikely to be a critical parameter in access negotiations (apart from its impact on train length). Accordingly, the QCA considers that this concern is most effectively addressed by the inclusion of a requirement in the Undertaking that access seekers be allowed to revisit the Schedule C information they provide during the negotiation process.

As such, the QCA does not propose to change its position outlined in the Draft Decision on the content of Schedule C.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **access seekers have the opportunity to revisit the Schedule C information that they provide as the negotiation process proceeds; and**

2. **QR has an obligation to provide Schedule D preliminary information before it requires Schedule C information, provided the costs of provision are met.**

4.6.2 Information provided by QR

Background

S101 of the QCA Act states an access provider must make all reasonable efforts to try to satisfy the reasonable requirements of an access seeker. Ss101(2) lists the information an access provider must give the access seeker. Ss101(3) provides some protection to the access provider with respect to disclosure of potentially sensitive information.

In response to stakeholder concerns, the QCA proposed that for rail systems where there are no reference tariffs applying, Schedule D preliminary information should include price and costing information consistent with ss101(2) and ss101(3). The QCA considered QR's commitment to provide reference tariffs as part of Schedule D would meet its commitment under ss101(2) regarding price information for its coal systems.

Stakeholder views

FreightCorp - there are two omissions from the Information Packs: the provision of capacity information and signalling diagrams. These are essential to understanding the operating environment in which the access seeker must operate, in preparing detailed operating plans and in greater precision in predicting train performance including sectional running times.

In addition, FreightCorp recommends that:

- the QCA impose on QR a requirement to advise an access seeker the expected delay in the provision of information where this is beyond two weeks of receipt of the request;
- the nominated delay to be justified;
- QR be required to report to the QCA instances where information is not delivered within the nominated period; and
- the number of instances and/or length of delays be reported as a performance indicator to the general public.

QCA's analysis

In response to FreightCorp's concerns, the QCA acknowledges that capacity information and signalling diagrams are necessary for an access seeker to conduct its own capacity assessment. However, the question is whether this information needs to be provided at the initial inquiry stage as part of QR's Information Packs, or whether it should be provided later on in the access negotiation.

In terms of capacity information, QR has agreed to provide the Master Train Plan (MTP) to access seekers as part of its Information Pack. The QCA considers that this information is sufficient at the initial inquiry stage. However, more detailed capacity information should be provided to access seekers as the access negotiation process proceeds. The public availability of capacity information is discussed in section 6.2 of Chapter 6.

Signalling diagrams provide a detailed layout of the location, operation and sequencing of each of the signals on a particular system. The QCA recognises that these diagrams may be useful for an access seeker to make a more detailed assessment of its proposed operations. However, the QCA considers that, at the initial inquiry stage, this level of detail is unnecessary and not consistent with the purpose of the Information Packs provided by QR. However, the QCA considers it would help access seekers if the Information Packs include a brief outline of any unusual signalling features on a particular system. An access seeker could request more information, such as detailed signalling diagrams, from QR at a later stage in the process if required.

With respect to FreightCorp's proposed amendments, para 4.3(d) of the Draft Undertaking provides that QR will make reasonable efforts to make preliminary information available to third-party operators within 14 days of receiving a request if the information has been previously compiled, or otherwise within 30 days. The QCA considers that the important factor is the commitment to provide the information within a specified time frame, however, it would seem reasonable that QR advise the access seeker of the expected delay if it is beyond 14 days and to provide reasons for the delay.

FreightCorp has also suggested that delays in information provision be publicly reported as a performance indicator. This has already been partially addressed in the proposed performance indicators regarding QR's compliance with its Undertaking, to be reported to the QCA. The relevant indicator requires QR to report to the QCA the number and percentage of requests for preliminary information responded to within the nominated time frame. To address FreightCorp's concerns, the QCA has added to these reporting requirements the additional days taken when QR fails to meet the specified timeframes for each access inquiry. Compliance reporting is discussed in section 2.6 of Chapter 2.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **for rail corridors where no reference tariffs apply, the Schedule D preliminary information incorporates price and costing information consistent with ss101(2) and ss101(3) of the QCA Act;**

2. **the Information Packs provided by QR include an outline of any unusual signalling features on a particular system;**

3. **QR is required to advise the access seeker of the expected delay in the provision of preliminary information if it is beyond 14 days and to provide reasons for the delay.**

4.6.3 QR's obligation to provide accurate and up-to date information

No stakeholder comments were received on this matter. Consequently, the QCA has not added to the views it expressed on this matter in the Draft Decision.

4.6.4 Appropriateness and basis of fees for information provision by QR

One stakeholder commented the level of fees nominated is reasonable. There was no other stakeholder comment. Consequently, the QCA has not added to the views it expressed on this matter in the Draft Decision.

4.6.5 Time frames for action

Background

The Draft Undertaking outlined the time frames QR wished to apply to various stages of the access application process. Where a prospective third-party operator was not satisfied with QR's response to the concerns it raised regarding an indicative access proposal (IAP), including any revision to the proposal, a limit of 30 days for a prospective third-party operator to trigger the dispute resolution process applied.

Stakeholder views

QR - the 30 day limit on an access seeker triggering dispute resolution negotiation (para 4.6(c)) relates only to an IAP not a general constraint on access seekers' right to dispute resolution concerning an access negotiation. Importantly, the IAP only has a life of 90 days. The 30 day limit was intended to facilitate a faster resolution of any concerns within the life of the IAP. Consequently, the QCA's concern about an access seeker being forced to trigger a dispute early in an access negotiation to avoid losing such a right for the rest of the negotiation process is unfounded.

The removal of the time restriction on the right of an access seeker would appear to have little effect, and the QCA should reconsider its recommendation in this regard.

ARTC - an opportunity to negotiate an alternative set of time frames where the circumstances support this may be warranted and should therefore be specifically provided for.

QCA's analysis

In proposing the 30-day time frame for triggering dispute resolution in para 4.6(c) be removed, the QCA was primarily concerned to ensure that there would be no restrictions on an access seeker's recourse to dispute resolution. QR advised that the rationale for the 30-day limit is to provide certainty to QR and to facilitate faster resolution of any concerns within the life of the IAP.

The QCA acknowledges QR's point that its proposed 30-day time limit relates only to an IAP, which has a life of only 90 days in any case, and therefore does not limit an access seekers' right to dispute resolution concerning an access negotiation. However, the QCA is of the view that 30 days is too short a period to enable access seekers to consider an IAP and respond to QR. Consequently, the QCA proposes that the time limit in para 4.6(c) be extended to 60 days. This extension would not harm QR's legitimate business interests and yet still gives access seekers sufficient time in which to trigger dispute resolution in relation to an IAP if it considers this is necessary.

The QCA notes ARTC's comments on the possibility of negotiating different time frames. The QCA considers this to be a reasonable point that can be accommodated within the context of the Undertaking by inserting the words "or as otherwise agreed" after each of the applicable time frames in clause 4.6.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that:

1. **the time frame in paragraph 4.6(b) is extended to 60 days;**

2. **paragraph 4.6(c) reflects that QR will respond to concerns including, where appropriate, the making of revisions to the indicative access proposal, within a period of 30 days, under normal circumstances. If the required response is more complex, QR will advise the access seeker within 7 days of receipt of its written concerns regarding the time required to respond, consistent with the indicative access proposal process in paragraph 4.4(c);**

3. **paragraph 4.6(c) states, if an access seeker is satisfied with the response received from QR, including any revisions to the indicative access proposal, it must notify QR of its intent to proceed with negotiations within 60 days of receiving QR's response;**

4. **paragraph 4.6(c) states the third-party operator must commence dispute resolution within 60 days on receiving QR's response; and**

5. **the words "or as otherwise agreed" are inserted after each of the time frames in clause 4.6.**

4.7 Dispute resolution

Background

The QCA accepted QR's proposed three-tier approach to dispute resolution, subject to QR specifying, where it utilises a 'nominee' in the Chief Executive resolution process, that nominee be the General Manager Network Access. This position reflected the QCA's concern that a 'nominee' from any other area of QR would face a conflict of interest.

Stakeholder views

> **QR** - in principle QR supports the concept that where a nominee is appointed to act on behalf of QR's Chief Executive, that appointment should not breach any of QR's ring-fencing obligations. The QCA's role is to ensure ring-fencing provisions are maintained, and not to restrict the holder of the position of Chief Executive 'nominee' to one person. QR will clarify this principle in the revised Draft Undertaking.
>
> **ARTC** - with regard to the three-tier process, ARTC would still expect the industry to perceive the QR CEO as having a possible conflict of interest. The involvement of this office would not be seen as overly productive, and could be counter-productive. The QCA appears to recognise this by emphasising the short time frame for this step as not being too onerous on the parties.

QCA's analysis

QR has informally raised with the QCA that the General Manager, Network Access may already become involved informally in attempting to resolve disputes prior to resolution under the formal three tier mechanism. Therefore there may be a problem with that person being the 'nominee' under the three-tier dispute resolution process. The QCA accepts this is a reasonable point. It would be too intrusive to insist the General Manager Network Access keep out of informal disputes in the event that he be required to engage in a formal dispute resolution role.

The QCA considers disputes have the best chance of being resolved prior to the commencement of an arbitration process by having the Chief Executive involved in the first tier of the dispute resolution process. There are likely to be significant difficulties in finding an appropriate nominee other than the Chief Executive who is also likely to have had no direct involvement in the dispute to date. The key issue is that the involvement of the Chief Executive demonstrates a commitment on QR's part to resolving the issue and provides credibility to the whole dispute resolution process. Moreover, direct involvement of the Chief Executive does not seem unreasonable given that such disputes are unlikely to occur regularly. The QCA notes that Chief Executive involvement in the early stages of a dispute is the practice adopted by both ARTC and RAC.[4]

On balance, the QCA accepts QR's view that the appropriate focus should be avoiding a conflict of interest rather than limiting the nominee role to a particular person and, consequently, accepts QR's position that the appointment of a nominee should not breach any of QR's ring-fencing obligations. It is important, however, that access seekers' interests in the dispute resolution process are protected. Accordingly, the QCA accepts QR's position that the Chief Executive can put forward a nominee, provided an access seeker has the right to go straight to arbitration if it considers the nominee is unacceptable.

[4] ARTC's standard access agreement specifies that, in the event of a dispute, if it is not settled within 21 days, it is referred in the first instance to the CEO of the parties who will attempt to resolve it, including by informal mediation, and thereafter, if not resolved within 14 days, to formal mediation. RAC's access agreement specifies that representatives of each party will meet within 10 days of receipt of notice of a dispute to attempt resolution. Failing resolution within 5 days, the CEOs of each party must meet to discuss and attempt to reach resolution. If the issue is not resolved at this stage it is referred to mediation, and failing resolution, the dispute is then referred to IPART.

QCA's position

The QCA accepts the proposed three-tier approach to dispute resolution, subject to an access seeker/third-party operator having a right to go straight to arbitration if QR puts forward a nominee in place of the Chief Executive that is unacceptable to the access seeker/third-party operator.