Chapter 3 - Ring-fencing Arrangements

KEY ASPECTS

Vertical integration - QR's vertical integration gives rise to actual and perceived conflicts that could undermine the efficacy of the Undertaking in areas such as scheduling, train control and confidentiality.

Ring-fencing - due to the vertically integrated structure, it is necessary for there to be appropriate ring-fencing arrangements that protect the legitimate business interests of all parties. Those arrangements should be the subject of external audit and provision should be made for penalties if breaches occur.

Train control - the scheduling and train control function should be under the exclusive auspices of Network Access and not left as a function under the control of the QR above-rail groups.

Confidentiality - information provided by access seekers must be appropriately protected within the QR organisation, including through confidentiality deeds and acknowledgment registers.

Internal access agreements - principles to guide the development of internal access agreements for existing services should be incorporated in the Undertaking in place of Schedule A.

Approved conduct - Internal access agreements for new train services developed in accordance with approved reference tariffs and a proposed standard access agreement applicable for coal haulage services should not be subject to the preventing or hindering access provisions of the QCA Act.

3.1 Introduction

As a vertically integrated enterprise, QR could potentially use its monopoly power in the below-rail market to gain an unfair competitive advantage in the above-rail market. For example, QR's monopoly arm could pass confidential information about third-party operators to its competitive arm providing its above-rail business with an inappropriate competitive advantage.

The QCA believes that third-party operators' perception of this potential problem could seriously undermine confidence in the above-rail market which would distort the evolution of this market. In the QCA's view, the perception problem underlines the importance of QR having credible ring-fencing arrangements in the eyes of third-party operators such that these operators have confidence that QR's capacity to exploit an unfair competitive advantage is appropriately constrained.

Broadly, ring-fencing is the separation of business functions within an enterprise for organisational and accounting purposes, with management of information flows between the separated business functions. It is based on the premise that the operation and management of the monopoly assets are placed on a stand-alone basis to be managed independently of any other business arms, in particular the competitive arm, of the enterprise.

Part 3 and Schedule B of the Draft Undertaking outline the measures QR has already undertaken, and proposes to undertake, to establish ring-fencing arrangements within the organisation. The proposed ring-fencing measures address organisational structure, accounting arrangements, internal access agreements and limitations on information transmission. The QCA's assessment of these proposed measures is discussed below, with the exception of accounting arrangements, which are discussed as part of cost allocation in Chapter 5.

Given their importance to QR's ring-fencing arrangements, the Authority has chosen to discuss the confidentiality provisions established in Part 4 of the Draft Undertaking in this chapter of the Final Decision.[1]

3.2 Organisational structure

Background

QR's assignment of management responsibility for scheduling and train control functions

The QCA argued scheduling and train control unequivocally should be a core function of Network Access and not one that is contracted out to one of QR's above-rail business groups. Stakeholders strongly supported the QCA's position. QR has subsequently decided to reassign the operational management of train control as part of an organisational re-structure.

Under the revised structure, train control (including short term scheduling) in all areas apart from the Brisbane Metropolitan region, will be functionally and operationally managed by Network Access. Train control for services in the Metropolitan region will continue to be managed as part of an integrated Citytrain service within the new Passenger Services Group. The scheduling and train control services provided in this regard will be specified in an internal service agreement between Network Access and Passenger Services Group. Network Access will continue to have functional management responsibility for daily scheduling and train control in the metropolitan region.

[1] Confidentiality is covered in cl 4.2 of the Draft Undertaking.

QCA's role in approving QR's organisational restructuring

The Draft Undertaking stated that QR had established its organisational structure to facilitate separation of the management of rail infrastructure from the operation of train services. In the event that QR varies its organisational structure during the term of the Undertaking and such variation has an impact upon the contents of cl. 3.2, QR would submit to the QCA a draft amending undertaking prior to the restructure being implemented. However, this would be at QR's discretion. Consequently, the QCA identified a number of functions within QR that it considered are sufficiently sensitive from a third-party access perspective that, if QR decides to reassign these functions during the life of an approved Undertaking, QR must submit a draft amending undertaking to the QCA for approval before implementing the reassignment. These are:

- Network Access is abolished;
- any of Network Access' current functions, including the scheduling and train control functions, are reassigned to any other QR business group;
- any construction, maintenance or associated functions performed by Infrastructure Services Group are assigned to the above-rail business groups;
- any functions performed by Technical Services Group associated with the processing of access applications are assigned to the above-rail business groups; and
- the Safety Executive is subsumed within an above-rail business group.

Stakeholder views

QR's assignment of management responsibility for scheduling and train control functions

QR - after consideration of the strength of concern expressed by stakeholders and, in particular, by the mining industry, which forms a critical part of QR's customer base, QR has decided to reassign the operational management of train control within its organisational structure.

Under the revised organisational structure, train control (including short term scheduling) in all areas apart from the Brisbane Metropolitan region, will be functionally and operationally managed by Network Access. Train control for services in the Metropolitan region, which is operationally managed through Mayne Control Centre, will continue to be managed as part of an integrated Citytrain service within the new Passenger Services Group. The scheduling and train control services provided in this regard will be specified in an internal service agreement between Network Access and Passenger Services Group. Network Access will continue to have functional management responsibility for daily scheduling and train control in the Metropolitan region.

QR intends to undertake a safety validation in respect of the new structure in order to identify risks and appropriate mitigation strategies. QR expects to be in a position to meet the QCA's recommended time-frame for implementation of these changes, but will not be able to confirm this until the finalisation of this validation. At that time, QR will also be able to advise of any cost impacts resulting from the change.

ARTC - supports the QCA's position that, with the exception of the Citytrain control centre, QR must assign management and operational responsibility for the performance of the scheduling function to Network Access. QR's estimate of the cost of the proposed re-organisation is very high based on our experience.

DBCT - supports the QCA's recommendations that train control and scheduling should be the responsibility of Network Access.

FreightCorp - supports strongly the structural requirements outlined by the QCA and the need for a review of the Undertaking should that organisational structure be changed.

A contractual provision of this kind should be drawn such that it allowed review of an access agreement whenever the QCA reviewed the Undertaking, including on a review by the QCA of any draft amending undertaking following any prescribed change to QR's organisational structure.

FreightCorp does not consider it necessary for the Undertaking to contain any transitional arrangements as these will have been completed prior to the Final Decision.

The QCA should clarify its intention to include management of all levels of train control and not just 'train controllers'. It would be FreightCorp's expectation that any person who has responsibility for the direction of trains with regard to their immediate movements on the infrastructure would be managed by Network Access. This would include, for example, signallers within major yards where these are responsible for train movements over tracks under the management of Network Access.

Pacific Coal - supports the QCA's recommendation that the management and operational responsibility for the performance of the train control and scheduling function should be assigned to Network Access. However, PC believes that the transfer of this organisational responsibility should occur immediately and that the QCA's proposal for a six-month delay is unnecessary.

QMC - welcomes QR's decision to assign the train control and scheduling functions to Network Access as recommended by the QCA.

RTBU - QCA states that it considers scheduling and train control functions to be a 'monopoly function within QR's network'. QCA's use of the term 'monopoly function' is curious. There is no separate market for 'scheduling and train control functions', nor is one proposed.

The QCA's Draft Decision on scheduling and train control functions does not explain what steps were taken by the QCA to assess the safety implications of this determination. Instead, the QCA justified this change to be imposed on QR's operations in terms of 'credibility of ring-fencing'.

The QCA should withdraw this requirement and then monitor the operation of the access regime for at least 12 months to assess whether train control and scheduling has become a source of complaint – and if those complaints were justified. It should assess the evidence before interfering with the way QR currently manages train control, scheduling and safety.

QCA's role in approving QR's organisational structure

QR - the QCA's recommendation on this issue is consistent with the intent of the current drafting of the undertaking. QR is prepared to clarify the undertaking, if required, to give effect to the recommendation that QR must submit a draft amending undertaking to the QCA prior to implementing any change to its organisational structure, if that change fundamentally alters QR's ability to meet its obligations, including its ring-fencing obligations, under the undertaking.

QCA's analysis

QR's assignment of management responsibility for scheduling and train control function

As noted above, QR has agreed to reassign operational responsibility for the scheduling and train control function to Network Access (with the exception of the Brisbane Metropolitan region) in accordance with the QCA's proposal in the Draft Decision.

The QCA considers that the reassignment of operational responsibility for the train control function entails the reassignment of train controllers, their shift supervisors, and train control centre management to Network Access. Staff managing the electrical overhead system, including co-ordinating maintenance work on it, would also be reassigned.

In response to FreightCorp's query, QR has advised the QCA that this reassignment includes all levels of train control and not just 'train controllers'. Consequently, it applies to signalmen and those directing trains in major yards. In relation to incident management, QR must ensure that Network Access controls the below-rail component of the incident management process wherever a third-party operator is involved in an incident.

The QCA considers that the reassignment of operational responsibility for the scheduling function entails the reassignment of all staff performing scheduling tasks from the preparation of the master train plan through to the daily train plan, including managing changes to the daily train plan.

RTBU has queried whether the QCA considered the safety implications of its proposed reassignment of the scheduling and train control functions. This issue is addressed at length on pages 89-91 of the Draft Decision. In this discussion, the QCA concluded that it is not possible to unambiguously endorse either the 'integrated with above-rail' and 'integrated with below-rail' train control models as having a sounder safety performance than the other. However, the QCA noted that the emergence of multiple rail operators in other jurisdictions has brought new pressures onto the train control function particularly with regard to priority allocation, but also in ensuring that commercial rail operators are not disadvantaged as a result of increased safety risk. Given this, the QCA believes that a train control centre integrated with the network management function is best suited to managing these pressures.

QCA's role in approving QR's organisational structure

Since the release of the Draft Decision, QR has undergone an organisational restructure. The major elements of the restructure are the formation of a Coal and Freight Services Group and Passenger Services Group. The train control function, excluding Citytrain, has been transferred from the current coal and freight operations area in QR to Network Access. In addition, the safety and environment functions have been brought together in a new Safety and Environment Group.

This restructure will affect the areas that the QCA identified in the Draft Decision as sufficiently sensitive from a third-party access perspective that, if QR decides to reassign these functions during the life of an approved Undertaking, QR must submit a draft amending undertaking to the QCA. In particular, the last dot point identifying the Safety Executive in the Draft Decision will need to be amended as follows:

> "the Safety and Environment Strategy Group is subsumed within an above-rail business group".

The basis of the QCA's recommendation identifying functions within QR that cannot be reassigned without QR submitting a draft amending undertaking to the QCA is to ensure that below rail functions are not reassigned to above rail groups. This is critical from a ring-fencing perspective, as it would ensure that QR's above rail groups are functionally separate from the below-rail groups and it is easier to control the flow of access seekers' confidential information. Any other changes would be at QR's discretion. As such, the QCA believes that under this approach, QR retains considerable flexibility with respect to organisational restructures. For example, QR's recent restructure would not have raised any ring-fencing issues requiring a draft amending undertaking as it did not involve the reassignment of any below rail functions to an above rail group.

QCA's position

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

1. **Network Access is assigned management and operational responsibility for the performance of the scheduling function and train control function with the exception of the Brisbane Mayne (Citytrain) centre;**

2. **if at any time during the life of an approved Undertaking, QR proposes to make any changes to its organisational structure which would adversely affect the capacity of Network Access to perform its functions, including if:**

   - **Network Access is abolished;**
   - **any of Network Access' current functions, including the scheduling and train control function, is reassigned to any other QR business group;**
   - **any construction, maintenance or associated functions performed by Infrastructure Services Group are assigned to the above-rail business groups;**
   - **any functions performed by Technical Services Group associated with the processing of access applications are assigned to the above-rail business groups;**
   - **the Safety and Environment Strategy Group is subsumed within an above-rail business group;**

   it must submit a draft amending undertaking to the QCA for approval.

3.3 Ring-fencing Guidelines

Background

The QCA argued that, while the principles and high level processes outlined by QR generally reflect desirable arrangements for protecting third-party operators' confidential information, the ring-fencing arrangements should establish enforceable obligations on, and rights of, QR and access seekers. Stakeholders generally supported the QCA's position.

The QCA argued that the areas of greatest sensitivity regarding enforceable rights and obligations are:

- the protection of confidential information;
- investigation and reporting of alleged breaches of the Ring-Fencing Guidelines; and

- compliance auditing

Stakeholder views

QR - the QCA has recommended an approach that QR considers to be very intrusive and onerous – and more likely to create undue administrative burdens for QR than address genuine ring-fencing concerns. QR's primary concern stems from the QCA's attempt to prescribe QR's internal ring-fencing procedures. The QCA should focus its recommendations for the Draft Undertaking on the key outcomes and principle objectives of ring-fencing. The question of how QR meets those outcomes and obligations should be left for QR to determine, although QR appreciates that the QCA and third parties have an interest in ensuring that these measures are effective. Such an approach is achievable without the prescription of procedural controls that do not, of themselves, address ring-fencing concerns.

FreightCorp - supports strongly the findings of the QCA that the Ring-fencing Guidelines should establish both enforceable obligations on, and rights of, QR and access seekers.

Agrees strongly with the QCA's assessment of the potential for QR, as a vertically integrated provider of rail services, to gain an unfair competitive advantage by the disclosure of confidential information.

PCQ - agrees with the QCA's emphasis that the 'ring fencing' arrangements must be pursued if QR is to remain in control of the below rail assets. Unless a satisfactory arrangement is put in place issues such as network access and scheduling will be a constant source of antagonism between QR and any new rail service provider.

RTBU - public sector reporting requirements have meant that QR has provided far more comprehensive statements of operating performance (profit and loss accounts) than have been required of private sector corporations subject to the Corporations Law and Australian Accounting Standards. QR would not be able to obtain similarly-detailed operational information from the published reports of its current major bulk freight customers, and any other potential 'access seekers'.

QCA could have sought to rectify this information asymmetry by proposing that access seekers be required, as a condition of applying for or obtaining access rights, to publish in their annual reports financial and operational information relating to the performance of access seekers consistent with that required of and provided by QR.

Instead, QCA has sought to further exacerbate the existing information asymmetry by proposing further restrictions on QR's conduct. These are coupled with threats of material financial penalties should QR disclose (even inadvertently) any information which may be regarded as 'commercially sensitive'.

The tough stance taken by the QCA to control information flows within QR contrasts with other decisions taken by the QCA which encourage access seekers (suspecting price discrimination) to actively share information. The QCA should reconsider its Draft Decisions in this area (and in relation to proposals for secondary trading in access rights), since in its efforts to regulate QR and promote a new dimension of competition through secondary trading may actually be creating a climate conducive to collusive conduct by access seekers.

Some of the detailed QCA proposals – such as those requiring the signing of confidentiality agreements and registers acknowledging access to certain information – simply seek to reinforce (albeit in a heavy-handed way) a standard of ethical business conduct, which workers in a range of industries would take for granted.

Other QCA proposals – such as the proposal that QR's Ring Fencing Guidelines (and presumably QR's ring-fencing practices) must be subject to a 'compliance audit', with the results of this audit published by the QCA at its discretion – will certainly impose additional costs on QR – both financially, and in terms of demands on management time.

It is difficult to avoid the conclusion that the QCA has gone out of its way to imply that QR can not be trusted to support competitive behaviour - whereas every third party operator can be trusted.

QCA's analysis

The QCA maintains its position about the importance of the Undertaking creating enforceable ring-fencing obligations. However, the QCA recognises QR's concerns about some of the detailed ring-fencing proposals, particularly those relating to the protection of confidential information. The QCA considers changes can be made without adversely affecting access seekers' interests. The proposed changes are explained in section 3.4.

3.4 Protection of confidential information

Background

QR's definition of confidential information

The Draft Undertaking defined confidential information as "any information, data or other matter marked confidential by a party when disclosed". The QCA expressed concern that QR's proposed definition was too narrow. To address this, the QCA proposed that confidential information be defined as "information which is not publicly available and the disclosure of which might reasonably affect materially the commercial affairs of a person". The QCA also proposed a number of other changes be made to the definition of confidential information, including inserting the word "lawful" before the word "possession" in para (iii) and extending the definition to cover 'derived' information.

An amendment to para 4.2(a) to refer not only to confidential information exchanged as part of the negotiation process, but also exchanged throughout the duration of an access agreement was proposed. In addition, the QCA proposed changes relating to the exclusion of certain information held by access seekers and providing that an access seekers' confidential information will only be used for a permitted purpose.

Enforceability of ring-fencing arrangements

As part of the ring-fencing procedures outlined in the Draft Decision, the QCA proposed the establishment of two acknowledgment registers within QR – one for confidential information disclosed in the context of a particular access application and another for written information marked confidential which is supplied by a third-party operator in the context of a particular access application. The purpose of the first register is to provide an ongoing record of those persons to whom confidential information is disclosed. The second register is for information marked confidential, and therefore its confidential status is beyond doubt.

The QCA argued that, in order to ensure legally enforceable obligations, the Undertaking should set out the rights that either party can expect of the other in relation to the disclosure and treatment of confidential information. As part of this objective, the QCA proposed that all QR staff likely to be disclosed third-party operators' confidential information sign an internal personal confidentiality deed which acknowledges the staff members' confidentiality obligation to QR.

Para 4.2(a) of the Draft Undertaking provided that, if required by QR or a third party, appropriate confidentiality arrangements could be entered into. However, it did not specify the nature of such arrangements.

Given the importance of protecting an access seeker's confidential information and the scope for dispute over such confidentiality arrangements, the QCA reserved the right to establish a confidentiality deed that either party could enter into at its discretion. The QCA argued that such a deed should be imposed only in the event that QR and the access seeker are unable to agree on its terms. The QCA would review the need for such a confidentiality deed over time,

reflecting upon the operation of the relevant confidentiality provisions of an approved Undertaking.

Disclosure of confidential information to internal advisers

Given its organisational structure, Network Access has to disclose an access seeker's confidential information to other segments within QR, such as the safety and environmental segments, to progress the assessment of an access application. The QCA argued that the Undertaking should define those segments of QR where disclosure could occur without an access seeker's consent. Nevertheless, the acknowledgment register process would operate for officers receiving that information. The QCA outlined the following persons and/or segments as the allowed segments where disclosure without consent could occur:

- Chief Executive Officer and Board;
- Group General Manager Technical Services Group;
- Rollingstock Engineering Unit within Technical Services Group;
- Environmental Unit within Technical Services Group;
- Safety Executive;
- Group General Manager Infrastructure Services Group;
- Corporate Counsel.

The QCA proposed that access seeker's approval for the release of confidential information to segments within QR, other than the identified areas of information convergence, cannot unreasonably be withheld in circumstances where:

- if Network Access intends passing the confidential information to an internal adviser to process an access application, it obtains the prior consent of the access seeker and agrees to execute a confidentiality deed in an agreed form – or failing agreement, in a form approved by the Authority from time to time – with the access seeker; or
- the internal adviser being disclosed the confidential information has no direct or indirect involvement in advising an above-rail business group on that or related matters.

With regard to legal advisers, it is conceivable that an in-house lawyer advising Network Access could be disclosed confidential information belonging to the third-party operator that may be commercially valuable to an above-rail business group if disclosed by that lawyer in the course of advising that group. QR advised that, as a general rule, it appointed different in-house lawyers to different business groups to avoid such potential conflicts. The QCA was concerned that this does not provide sufficient protection to a third-party operator's confidential information. To address this issue, the QCA proposed that Network Access appoint its own in-house legal team. In addition, a member of that team, if they subsequently moved on to work for a QR above-rail group, would be precluded from working for 12 months on a matter for that business group directly or indirectly related to a matter involving an access seeker that person dealt with whilst advising Network Access.

Disclosure of confidential information to external advisers

The QCA proposed an amendment to the definition of confidential information in the Undertaking that specifically recognises that information reasonably necessary to be disclosed

by a third-party operator to external advisers or potential customers in the course of and for the purpose of furthering its business is not confidential information.

The Draft Decision also proposed amendments regarding QR's disclosure of confidential information to external advisers. QR should engage different external advisers for its above and below-rail business groups in situations where there is a clear potential for a conflict of interest to occur. The Undertaking should specify that QR's contracts with external advisers to Network Access provide that the advisers will not disclose any information (confidential or otherwise) in respect of access seekers or users to other QR business groups. Network Access should be required to inform the access seeker before disclosing any information (confidential or otherwise) to its external advisers. Further, the access seeker should be entitled to require that such advisers execute a confidentiality undertaking in an agreed form before that disclosure occurs – or failing agreement, in a form approved by the QCA from time to time.

The QCA also proposed that the Undertaking specify that Network Access will not disclose any of an access seeker's information (confidential or otherwise) in relation to a particular access negotiation process to an external adviser engaged by an above-rail business group.

Stakeholder views

QR's definition of confidential information

QR - *Marking information 'confidential'* -. QR does not object to broadening the definition of confidentiality to include information 'not publicly available but reasonably expected to materially affect the commercial affairs of the owner of the information'. This is subject to the retention of the explicit provisions in the Draft Undertaking (see existing clause 4.2(c)) detailing 'how' confidential information may be dealt with in specific circumstances.

QR recognises that a third party's failure to mark information as confidential will not, in any event, release it from its general duties at law if it knew or ought to have known that information was confidential. However, QR believes that there are advantages associated with encouraging all parties to mark confidential information as such. This is particularly the case considering the test that the QCA has suggested for 'confidential information', which raises questions about when information will reasonably be expected to materially affect the commercial affairs of the owner, and when information is not publicly available. QR will incorporate processes into its access negotiations to encourage the appropriate marking of confidential information 'confidential'.

Derived information - QR considers it is critical the Undertaking makes it clear that information will not necessarily be confidential just because it is derived from confidential information. The overriding test of 'not being publicly available and materially affecting the commercial affairs of the owner' should continue to apply, such that to be considered 'confidential', information derived from confidential information must still satisfy these requirements.

QR is also concerned that the QCA's suggestion might place QR in a position of conflict regarding its obligations under the undertaking, and other legislation. For instance, the QCA is looking for QR to publicly report on certain issues, including operational performance, and this would require the legitimate use of information derived from confidential information. In addition, QR has obligations to its shareholding ministers to report certain information that could include information derived from confidential information.

In addition to these concerns, and as previously noted, QR accepts that even without the explicit reference to material 'derived' from confidential information, QR would not be relieved of its general law obligations regarding confidentiality. As a result, QR considers that the inclusion of the QCA's recommendation would possibly raise unnecessary concerns without adding anything of substance to both parties' obligations regarding confidential information.

Lawful possession - QR does not object to the QCA recommendation that the Undertaking be amended to add the word 'lawful' before the word 'possession' in paragraph (ii) of the definition of confidential information in Part 8 of the Undertaking.

Information exchanged during access agreement - QR does not object to the QCA recommendation that the definition of confidential information be altered to include not only information exchanged during access negotiations but also information exchanged during the course of an access agreement. This is subject to the information retaining its quality of 'not being publicly available and materially affecting the commercial affairs of the owner'. In other words, it will not necessarily be the case that all information marked confidential and provided during the course of an access negotiation will continue to be confidential throughout the course of an access agreement. Such information could, for instance, become publicly known, or lose its damaging quality. QR considers that the QCA's decision should make this clear. QR also considers that parties to an access agreement should be able to agree that certain information is no longer confidential once an agreement is signed, if this is appropriate.

Exclusion of certain information held by third party operators - the QCA recommendation that the definition of confidential information exclude information that a third party operator must reasonably disclose to its customers, or potential customers, in the course of, and for the purpose of, furthering its business is unreasonable. At the principle level, QR considers that this sort of information should be treated in the same way as any other confidential information, that is, on a case-by-case basis. QR has a right to know who a third party operator is providing QR's confidential information to, and to obtain necessary assurances from that party if it considers such to be required, including as to the purpose for which the information will be used by the access seeker's customer or potential customer. Where QR considers it appropriate and commercially viable, it should be able to require confidentiality.

Any concern the QCA may have in this respect can be adequately dealt with via the Undertaking's specification of 'how' confidential information is dealt with. For instance, the Undertaking currently provides that QR will not unreasonably refuse its consent to the disclosure of its confidential information in defined circumstances. In recognition of the likely need for access seekers to disclose QR's confidential information to their customers or potential customers in the course of access negotiations and access agreements, QR acknowledges that it may be unreasonable for it to refuse the passing of such information, if such disclosure is reasonably required in the course of and for the purpose of furthering its business and the customer in question has executed a confidentiality agreement in favour of QR.

This is the same approach that the QCA proposes for determining the reasonableness of a third party's decision to allow QR to disclose its confidential information. QR considers that a consistent approach is justified in these circumstances. Such an approach means that the mechanisms for dealing with confidential information are not changed, but more detail is provided in terms of how those mechanisms work – that detail being the specification of when it would be unreasonable for a party to refuse to allow another party to pass its confidential information

FreightCorp - a point of clarification arises in relation to the intended meaning of "to affect materially" in the definition of confidential information such that it is "not publicly available **and** the disclosure of which might reasonably be expected to affect materially the commercial affairs of a person"

It would be helpful if a definition could be provided. Given the suggested liquidated sum remedy of $10,000, it may be appropriate to define materiality by reference to this sum.

FreightCorp remains troubled about a definition (albeit not an exhaustive one) that anticipates the disclosure of what would otherwise be confidential information (and as such prohibited) if the disclosure of it might **not** reasonably be expected to affect materially the commercial affairs of a person.

Given this point of principle, FreightCorp considers that there should be no such qualification. If the recommendation suggested by FreightCorp is not implemented, FreightCorp considers that as a minimum the meaning of "affect materially" should be clarified. Schedule E should include a statement of what constitutes confidential information.

Enforceability of ring-fencing arrangements

QR - QR and the QCA are in agreement at the principle level regarding the benefit of including in the Undertaking an obligation to introduce procedures for handling confidential

information. However, QR considers that the approach recommended by the QCA is overly prescriptive in this regard.

Whilst QR accepts an obligation in the Undertaking to introduce procedures for handling confidential information, QR does not accept the need to be prescriptive in the Undertaking regarding those internal procedures. As QR has stated previously, its internal procedures and business instructions will reflect only one way in which QR could meet its obligations in relation to the ring-fencing principles in the Undertaking. What should remain critical is the outcome of those procedures and instructions – whether QR breaches its ring-fencing obligations in the Undertaking. Procedural breaches need not necessarily result in a breach of a ring-fencing principle. For the QCA to prescribe procedures, and enforce penalties where those procedures are not met, is entirely inappropriate when viewed in this light.

QR draws support for its approach from other access regimes.

In order to address the concerns of the QCA and stakeholders regarding ring-fencing, QR is prepared to extend the statement of its ring-fencing obligations in the undertaking as detailed below. In particular, QR will accept an obligation to establish and maintain appropriate internal procedures to ensure that QR complies with its ring-fencing obligations specified in the Undertaking. QR would also accept an obligation to advise the QCA what its internal procedures are, and to report annually to the QCA on its compliance with those procedures. This would be done as part of the annual audit discussed below.

The above outline of QR's position applies equally to each of the QCA's recommendations on 'The Protection of Confidential Information' section in the Draft Decision.

Registers - QR sees the establishment of a register as a useful tool, to be created and maintained in accordance with QR's own internal business processes in relation to the protection of confidential information. QR does not believe that it should have an obligation within the Undertaking to establish and maintain a register.

Documents marked "confidential" - In regard to the QCA recommendation to establish a separate register specifically for confidential information marked 'confidential', QR reiterates its views on the specification of such detail in an Undertaking. QR also queries the reasonableness of requiring multiple registers, which appears to be administratively burdensome for no distinguishable benefit.

Confidentiality Deeds - QR accepts that it must ensure that its staff complies with QR's obligations in dealing with confidential information. However, QR does not believe that it is necessary to make all QR staff sign confidentiality deeds, when the aims of the QCA can be addressed through other means.

QR will implement a compliance program throughout the organisation, as part of its obligation to implement internal policies and procedures aimed at ensuring QR complies with its ring-fencing obligations in the Undertaking. This program will target those people most likely to be dealing with third party access issues, and will educate those people on QR's obligations and exposures. QR would anticipate people attending such information sessions, signing off at the end of the session to acknowledge their understanding of the information provided and attending follow up sessions where necessary to ensure on-going compliance. In relation to promoting awareness and compliance on a broader basis throughout QR, an awareness program is being run within QR drawing particular attention to QR's ring-fencing obligations in the Undertaking. In addition, QR will ensure that each QR employee receiving confidential information is reminded of their ring-fencing obligations.

It is also worth noting that as a legally enforceable statement of QR's obligations, QR will develop a ring-fencing policy, reflecting its obligations in the Undertaking, and incorporate that as part of QR's corporate policies. QR employees have an obligation under QR's Employee Management System to comply with all QR policies and there are compliance and disciplinary processes available to ensure compliance by QR staff.

QCA required confidentiality deeds - The QCA has advised QR that the purpose of this recommendation is to cover off circumstances not envisaged by the Undertaking and which the QCA might subsequently consider should be subject to confidentiality obligations. QR considers that this intention is not clearly ascertainable from the recommendation or the discussion in the Draft Decision. In any event, QR questions what other circumstances could possibly arise that are not already covered by the Undertaking. QR notes that one of the aims

of the Undertaking, and the stated aims of the QCA, is to ensure certainty. In fact, in relation to other Undertaking issues the QCA has stated this aim. Therefore, QR is in favour of a consistent approach throughout the Undertaking with the provision of certainty for QR, access seekers and operators, and the QCA as a desired outcome.

Schedule E - QR does not object to an obligation to include a principle in Schedule E providing that QR will comply with the ring-fencing obligations in the Undertaking, as in force from time to time. In addition, QR considers that an access agreement will provide high-level principles concerning the maintenance of confidentiality. In particular, in recognition of the QCA's concern QR is prepared to include a provision in the access agreement that prohibits confidential information being disclosed to an area of QR that is responsible for the provision of above rail operations, except if and to the extent required for the purpose of facilitating scheduling and train control in the Metropolitan region.

FreightCorp - generally, the QCA has achieved a fine balance between addressing the very real concerns of rail operators and providing a workable regime for QR, including the confidentiality obligations and rights.

Pacific Coal - the Draft Decision accepts the vertically integrated structure of QR and focuses on the consequential organisational structure and ring-fencing arrangements. The Draft Decision places justifiably stringent requirements on QR to ensure that ring fencing is effective, particularly in the key areas of scheduling, train control and confidentiality.

Pacific Coal supports these recommendations from the QCA but suggests that the QR Board may wish to reconsider its insistence on maintaining a vertically integrated structure. PC suggests that the matter of QR's vertically integrated structure and its incompatibility with an acceptable access regime should be addressed by the QCA in its Final Decision. QCA should recommend the QR Board and the QR shareholding Ministers re-examine the question of QR's vertically integrated structure.

QMC - supports the QCA's approach to ring-fencing issues and measures to preserve the confidentiality of access seekers' information during negotiations. The stringency of these measures appropriately reflects the seriousness of the risks to even-handedness posed by QR's integrated structure.

Queensland Government – supports the QCA's requirements for strict ring-fencing arrangements to ensure a high degree of transparency and accountability in QR's operations relating to its declared services and its negotiations with third-party rail operators. The Government believes the strong ring-fencing requirements will foster public confidence QR will not be able to use its monopoly position in the below-rail market to gain an unfair competitive advantage in the above-rail market.

Disclosure of confidential information to internal advisers

QR - the QCA recommendation relating to the use of confidential information deserves particular attention. The Undertaking provides that confidential information will only be used for the purpose for which it was provided. The QCA has recommended that the Undertaking require confidential information belonging to an access seeker only be used for a defined permitted purpose, that is to respond to an access application, develop an indicative access proposal (IAP) or execute and administer an access agreement.

QR is concerned that the QCA's attempt to limit the 'purpose' for which confidential information is to be used, in its current recommended form, may tie QR up in knots in terms of other obligations under the Undertaking and/or access agreement. These other obligations include the reporting of operational performance statistics to the QCA and/or the public, and the provision of reports to QR's shareholders.

QR suggests that if a limitation were to be placed upon the use of confidential information, a more appropriate limitation might be that it is only used for the purposes of providing and managing access to QR's declared infrastructure and complying with QR's obligations in relation to the provision of access to that infrastructure.

In any event, QR considers that the current wording of the Undertaking is more appropriate in that it enables the owner of the information to define the purpose for which it has provided particular information.

QR believes the primary concern of the QCA and third parties is that confidential information does not get disclosed to QR's above rail operating groups. As a result, QR proposes inserting a provision in the Undertaking listing the areas within QR that Network Access must not provide confidential information to, rather than those areas that it may give such information to. Such an approach would be more efficient, less intrusive and would achieve the QCA's desired goals. Consistent with the QCA's recommendations in relation to train control and scheduling in the Metropolitan region, an exception would need to be made in relation to information required for the provision of scheduling and train control by Passenger Services Group (previously Metropolitan & Regional Services Group) at Mayne train control centre.

For disclosure of confidential information to segments within QR not listed as segments of information convergence, QR considers the QCA's recommendation is unclear. However, it understands the QCA's intention is to list the circumstances in which provided QR agreed to sign a confidentiality deed it would be unreasonable for an access seeker to refuse consent to the disclosure of its confidential information. On this recommendation, QR refers to its proposal to list areas within QR that Network Access must not provide information to, rather than those areas that it may give such information to.

To avoid a conflict of interest, QR notes the QCA recommends that no internal advisor be asked to advise Network Access and an above rail group on the same or related matter, with the exception of Corporate Counsel, Board members and the CEO. Where reasonably practicable, QR accepts such an obligation. However, the situation may arise where QR does not have the resources to source certain expertise from more than one employee, and in such situations the same person may be asked to advise Network Access and an above rail group on the same or a related issue. Furthermore, in some instances, it may be appropriate for the same person to be asked to advise in these circumstances. For instance, the Manager Rollingstock Engineering and the Executive Manager Safety are two positions that need to be across above and below rail issues in respect of operations on the QR network. However, any QR person in such a position will have an obligation to deal with any confidential information provided to them in accordance with the obligations in the Undertaking. This alone would prevent them from disclosing that information, either to a third party or to a QR above rail group.

QR recognises the potential for concern that this circumstance might create. As a result, QR will accept an obligation to advise a third party before providing confidential information to an internal advisor in these circumstances, notwithstanding the internal advisor is within one of the areas that Network Access can otherwise provide confidential information to without the consent of the information owner. This notification obligation will flag the potential conflict to a third party, and place the relevant advisor, and QR generally, under heightened scrutiny in the provision of advice to both Network Access and an above rail operating group.

Legal advisors - QR questions the QCA singling out lawyers for special treatment in this regard. QR's proposed approach to dealing with internal advisers, previously outlined, should apply in relation to lawyers in the same way as to other advisers. In recognition of the principle behind the QCA recommendation, QR accepts that no employee of Network Access will at the same time perform any functions for any other QR above rail group.

QR does not accept a restraint on transferring personnel from Network Access to any other QR above rail group. All QR employees will be bound to comply with the confidentiality obligations in the Undertaking, including restrictions on the use of confidential information.

Debriefing Network Access employees - It should be recognised that the obligations of persons leaving Network Access to work for a QR above rail group will continue, as they are still QR employees subject to compliance with the Undertaking. However, for the purposes of education and awareness, Network Access will develop business instructions designed to emphasise the ring-fencing obligations to its staff prior to leaving Network Access (whether for another QR group or an external party). QR maintains that these procedures should not be included in the Undertaking, although it will consider including a reference to such procedures, as detailed above, to acknowledge the QCA's concerns.

FreightCorp - Does the QCA intend that permitted purpose should, as a starting point be defined as the execution and administration of the access agreement in which the confidentiality obligation is contained?

- The FreightCorp Mark-up approaches the definition of permitted purpose from a slightly different position, ie "not use that confidential information for any purpose other than the

exercise of rights or the performance of obligations in accordance with this Agreement". This may be regarded as narrowing what the QCA intends.

FreightCorp agrees with the QCA's finding that confidential information will converge given that QR is a vertically integrated provider of rail services. However, all those in whom convergence will occur must sign an acknowledgment as to the permitted purpose.

If the QCA does not accept that Schedule E should include a definition of confidential information, QR must notify all those in whom convergence will occur that they may only use confidential information for the permitted purpose.

FreightCorp notes where convergence occurs, it is likely to be difficult for any rail operator to demonstrate that confidential information has not been used other than for the permitted purpose. Consequently, if there is an issue as to whether confidential information has been used for a purpose other than the permitted purpose, QR must prove confidential information was used for the permitted purpose only.

Internal advisers - Does the QCA intend that the substance of its recommendation at the top of page 111 of Volume 2 should be reflected in access agreements? FreightCorp's view is that the substance is intended to relate to access seekers' applications only. In addition, FreightCorp considers that the rail operator should be entitled to require QR to demonstrate that an internal "adviser being disclosed the confidential information has no direct or indirect involvement in advising an above-rail business group on that or related matters".

Legal advisers - FreightCorp strongly supports the QCA's finding that QR's internal legal advisers may not work for the QR above-rail business groups for 12 months after leaving Network Access. It is entirely appropriate for non-legal personnel to be subject to the same requirement. Whilst FreightCorp recognises the rights of individuals to move within QR, these rights should not jeopardise the rights of rail operators to have their confidential information kept confidential.

The issue of proving a breach in these circumstances becomes ever more problematic for a rail-operator. A 12 month period allows the business of the rail-operator to move on and the currency of the confidential information to which people within Network Access have had access to cease to retain the character of confidentiality as a practical matter. All personnel subject to the 12-month constraint should be reminded at the end of the period regarding the treatment of confidential information.

RTBU - notes the QCA's proposals restrict the conduct of QR's staff and advisers without imposing comparable restrictions on 'access seekers' or their advisers. Also, penalties apply (liquidated damages) to QR but not to other parties, even if the release of commercially sensitive material was inadvertent, or the result of the improper conduct of disaffected employees.

The standards proposed by the QCA for the maintenance of confidentiality and security of information seem to be extraordinarily rigorous, in comparison with Australia's securities laws which contain only modest restrictions on the disclosure of commercially sensitive information by officers of listed corporations. The QCA appears to be setting new and higher standards for commercial conduct, but only for QR and Network Access.

Whatever standards QCA identifies as being appropriate in the rail industry, it is clear that the same standards should also be applied to access seekers and their advisers. If information about the plans and proposals of access seekers is to be protected to prevent any party having a competitive advantage, then particular attention needs to be directed at the risk of collusive behaviour through information sharing by access seekers.

Stanwell - legal advisers to Network Access who transfer elsewhere in QR must not act for 12 months on any matter involving an access seeker, without the access seeker's approval, which may be withheld for any reason. Why does this level of accountability apply to legal advisers but not other advisers, such as consultants, accountants, economists, engineers, or managers?

Disclosure of confidential information to external advisers

QR - in regard to the QCA recommendation that the Undertaking contain a requirement that Network Access not be permitted to provide external consultants working for an above rail group with information belonging to a third party operator on the same or a related matter, QR considers this is not unreasonable where the 'external consultant' in question is an individual; however, it loses its application where the 'external consultant' is a consulting group.

QR's position is that big law firms and consulting practices deal with such potential conflicts of interest daily, and as such, Network Access should not be prevented from dealing with a particular person within an external consulting organisation, just because another person within that same organisation may be advising a QR above rail operator on the same or related matter.

In recognition of QCA and third party concerns, QR has proposed the following procedure. In all circumstances where Network Access is seeking external advice and disclosing confidential information for the purpose of obtaining that advice, consistent with the provisions of the Undertaking, Network Access will obtain the consent of the information owner to the disclosure of the information to the nominated party. That consent must not be unreasonably withheld. QR considers that consent would be unreasonably withheld where QR undertakes to contract with an external consultant on the following terms:

- specifying the person/s who may have access to the information;
- specifying that those person/s must not speak or disclose information to any QR staff, other than those within Network Access (ie. indicating that confidentiality extends beyond just QR to groups within QR); and
- requiring them to execute a confidentiality deed in favour of the owner of the information (if required by the owner).

QR considers that the above process is consistent with its general obligations concerning the treatment of confidential information, and merely reflects how QR intends to ensure it satisfies its obligations in this regard.

The QCA has also recommended that Network Access' agreements with external consultants provide that Network Access will inform the third party operator before disclosing 'any' information (whether or not confidential) to an external consultant and that the consultant must not disclose confidential information to other QR groups. QR has an obligation in relation to confidential information, and the QCA has not rationalised the extension of this obligation to 'any' obligation. In addition, QR can see no justification for the QCA's 'special treatment' of third parties' information in this respect. There seems to be no justification for the absence of a similar requirement applying to QR operators' information or Network Access information.

As mentioned above, the terms of the Undertaking currently provide that QR will obtain the consent of the owner of confidential information (not to be unreasonably withheld) before disclosing such information to an external consultant. QR considers that this obligation, sufficiently deals with concerns regarding QR's disclosure of access seekers' and operators' confidential information to external parties. In particular, QR's proposed approach envisages QR contracting with an external party on the basis that the external party not disclose confidential information provided to them, to QR staff outside Network Access.

FreightCorp - agrees with the QCA's assessment in respect of the confidentiality obligations for external advisers.

Further, FreightCorp strongly supports the QCA's finding that before disclosing confidential information to an external adviser, QR must notify the rail operator of its intention to disclose confidential information. Such notice would specify the details of the confidential information that QR wishes to disclose (and the purpose of the disclosure) or that it wishes to disclose confidential information generally (and the purpose of the disclosure).

In either case, QR must not disclose the confidential information until the operator/third-party agrees or requires the execution of a confidentiality undertaking.

RTBU - to ensure consistency with the standard set out in the QCA Draft Decision, the following are proposed:

- Restrictions should be placed on any adviser who has acted for QR to act for an access seeker on any matter for a period of twelve months without the approval of QR. QR should be allowed to withhold consent for any reason.

- Restrictions should be placed on any individual or firm or partnership which has been appointed or selected by QCA to act as the 'auditor' of compliance with any Guideline or Manual, so that they are prohibited from acting for any access seeker (or entity already granted access) for a period of two years from the date on which they last performed that audit service.

- Legal advisers (both individuals, or any firm or partnership employing that individual) who have acted for one access seeker must be disqualified from acting for another access seeker, without the formal approval of the first access seeker, for a period of twelve months.

- Advisers to access seekers should maintain registers to record access to any information provided to them by clients, to ensure that this information is not made available to other clients at a later date.

- Arrangements for access to these records should be restricted and be undertaken in terms of Guidelines to be developed by those advisory firms and approved by the QCA. The firms should be subject to an annual compliance audit to ensure that these Guidelines have been followed. The results of that annual audit may be published by QCA at its discretion.

Access to confidential information in an electronic format

QR - considers that its obligations in the Undertaking in relation to the treatment of confidential information have the effect of requiring QR to preserve the confidentiality of confidential information (in all formats) of all parties with whom it deals.

With respect to this QR has no objection to an obligation in the Undertaking to preserve the confidentiality of confidential information of all parties with whom it deals, and for the application of this to extend to both the disclosure of confidential information within and external to QR. However, there is a timing issue with QR's obligations in relation to the maintenance of the confidentiality of operating and performance data.

QR has a long-term plan to achieve the separation of this data on an operator basis. FMS will become an above rail tool and Network Access will develop its own system to capture all operators' information and interface with all operators' information systems. If, prior to the implementation of this long-term plan, QR faces a situation where it is providing access to both QR operators and third party operators, it will ensure that it has procedures and systems in place to ensure its own operators do not gain access to third party operators' information, and vice versa.

Again, QR considers that the general provisions in the Undertaking concerning the treatment of confidential information will effectively ensure QR complies with the above processes in dealing with operational information systems.

FreightCorp -agrees wholeheartedly with the assessment and strongly supports the QCA's findings.

QR should have an obligation in access agreements and in the Undertaking to ensure that all confidential information, in whatever form, should be accessible by permitted personnel only and that systems must ensure confidentiality. A clear statement is required that confidential information must be stored on systems that ensure confidentiality and a timeframe by which this system integrity must be achieved.

Clarification is sought on whether the QCA sees network operational information as confidential in this context. FreightCorp is firmly of the view that all operational information should be made available to rail operators and that this information should not be viewed as confidential information.

QCA's analysis

The QCA received extensive comments from stakeholders regarding the proposed amendments to the ring-fencing provisions of the Draft Undertaking. As a result of these comments, the QCA has made a number of refinements to the proposed amendments to lessen the regulatory burden on QR and to address concerns, particularly from the RTBU, that more rigorous procedures were proposed to protect access seekers' confidential information compared to QR's confidential information.

The QCA accepts that, in principle, there should be symmetrical treatment in the handling of access seekers' and QR's confidential information. However, QR, as a provider of below-rail services to access seekers and also competing with them in the above-rail market faces actual and perceived conflicts of interest not faced by those access seekers. In certain situations this necessitates asymmetrical treatment in the procedures for handling the respective parties' confidential information. These situations are discussed in the relevant sections below.

The QCA considers the refinements to the Draft Decision's proposed ring-fencing amendments have not undermined its overriding objective that QR should have enforceable ring-fencing obligations derived from credible ring-fencing arrangements that provide confidence to access seekers that QR's capacity to exploit an unfair competitive advantage is appropriately constrained.

QR's definition of confidential information

QR has not objected to the QCA's proposed broadening of the definition of confidential information, provided the explicit provisions in the Draft Undertaking detailing how confidential information may be dealt with in specific circumstances are retained (para 4.2(c)).

FreightCorp has raised some concerns regarding the intended meaning of "to affect materially" in the QCA's proposed definition of confidential information. The QCA recognises that including this term in the definition introduces an unwarranted distinction between material and non-material confidential information. The QCA understands that, to place a materiality threshold on confidential information would be inconsistent with the definition of confidential information at general law, where it is merely required that a party suffer any detriment by disclosure of the information but does not impose a materiality threshold for that detriment. As such, the QCA agrees with FreightCorp's suggestion that the word "materially" be deleted from the proposed definition of confidential information.

QR has stated there are advantages associated with encouraging all parties to specifically mark confidential information as such and, accordingly, it will incorporate processes into its access negotiations to encourage the appropriate marking of confidential information. The QCA supports this approach as the appropriate marking of confidential information would put the status of this information beyond doubt. Nevertheless, the QCA understands that the failure to mark information as confidential should not exclude it from being considered to be confidential under the Undertaking. Further, as QR acknowledges, it does not exclude QR's general law duty to not disclose information which would be considered to be confidential at law. In addition, the QCA understands that merely marking information confidential does not automatically give it the necessary quality to be confidential information at general law.

In response to the QCA's proposal that the definition of confidential information include 'derived information', QR's view is that the overriding test of 'not being publicly available and materially affecting the commercial affairs of the owner' should continue to apply. As such, to be considered confidential, derived information must still satisfy these requirements. Further, QR expressed concern that the QCA's suggestion might place QR in a position of conflict regarding its obligations under the Undertaking and other legislation, for example, in regard to

QCA's reporting requirement on operational performance and obligations to report to shareholding ministers.

The QCA understands that, at general law, merely changing the form of information does not remove its confidential nature. The protection is afforded to the information itself, not the form of the information. The QCA considers that, to remove any doubt, the definition of confidential information should be amended to include information in any form. However, the threshold test of 'not being publicly available and affecting the commercial affairs of the owner' would still apply.

With regard to QR's concerns about possible conflicts between the inclusion of 'derived information' in the definition of confidential information and its external reporting obligations, the QCA considers that the circumstances outlined by QR are covered by the exemptions noted in sub-paragraph 4.2(c) (i) of the Draft Undertaking. This states that the confidentiality provisions in 4.2(a) and (b) will not apply in regard to 'any disclosure of confidential information required by law, the listing requirements of a stock exchange or the lawful requirements of any Authority'. This provision would cover reporting to shareholding ministers and reporting to the QCA under an approved Undertaking. However, for information flows of derived confidential information within QR, the general obligations outlined in the Draft Decision in regard to handling confidential information would apply.

QR has not objected to the QCA's proposed amendment that para 4.2(a) of the Draft Undertaking refer not only to information exchanged during access negotiations, but also exchanged throughout the duration of an access agreement. QR's support for this amendment is subject to the information retaining its quality of 'not being publicly available and materially affecting the commercial affairs of the owner'. The QCA considers that QR's views are consistent with its proposal as outlined in the Draft Decision. However, for the sake of clarity, the QCA proposes that the Draft Undertaking be amended to specify that the overriding test of confidentiality (as defined above) continues to apply and, further, the parties may agree in writing that specified confidential information is no longer required to be kept confidential.

The QCA stated in the Draft Decision that information reasonably necessary to be disclosed by a third-party operator to customers or potential customers in the course of and for the purpose of furthering its business is not confidential information. QR has expressed concerns that this exemption for third parties is unreasonable and that a consistent approach between requirements on QR and third-party operators should apply. The QCA considers QR's suggestion that it be informed where information is to be disclosed and appropriate confidentiality undertakings be secured is reasonable. The QCA accepts QR's suggestion that this information should be treated the same way as any other confidential information and that reciprocal confidentiality obligations should apply to third-party operators. This proposed amendment should help address RTBU's concerns about the ring-fencing obligations being imbalanced. This issue is addressed in the section below 'Disclosure of confidential information to external advisers'.

To reflect the amendments discussed above, the QCA proposes the definition of confidential information in the Draft Undertaking be amended as follows:

"Confidential Information means any information, data or other matter in any form whatsoever which:

(a) is not already in the public domain;

(b) does not become available to the public through means other than a breach of confidentiality;

(c) was not in the other party's lawful possession prior to such disclosure;

(d) is not received by the other party independently from a third party which is free to disclose such information, data or other matter; and

(e) the disclosure of which might reasonably be expected to affect the commercial affairs of a person or is marked confidential by a party when disclosed to the other party.

Such information, data, or other matter must be treated as confidential by the party receiving it."

Section 4.2 of the Draft Undertaking should be amended to read as follows:

(a) QR and the third party operator will, at all times, keep confidential and not disclose to any other person, any confidential information exchanged as part of the negotiation for access under this Undertaking or in the course of any access agreement, without the approval of the party who provided it, provided that such approval shall not be unreasonably withheld, except where disclosure is in accordance with paragraph (c) of this clause.

(b) Both QR and the access seeker/third party operator will ensure that all confidential information provided by the other party is used only for the purposes for which the information was provided.

(c) Paragraphs (a) and (b) of this Clause shall not apply to disclosure of confidential information in any of the following circumstances:

(i) any disclosure required by law, the listing requirements of a stock exchange or the lawful requirements of any Authority;

(ii) disclosure to the recipient's solicitors, barristers or accountants under a duty of confidentiality;

(iii) disclosure to the recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality undertaking in favour of the party who originally disclosed the confidential information (the "Information Provider");

(d) For clarity, information which was once considered to be confidential information, will only continue to be confidential information for as long as it retains its confidential nature as set out in the definition of confidential information in Part 8 of this Undertaking. In addition, the discloser and recipient of confidential information may agree in writing that specified confidential information is no longer required to be kept confidential.

(Sub-para 4.2 (c)(iv) in the Draft Undertaking is discussed in the forthcoming section on disclosure of confidential information to external advisers.)

Enforceability of ring-fencing arrangements

QR has maintained its view that the Undertaking should focus on outcomes and as such it should only contain ring-fencing principles and not be prescriptive regarding QR's internal procedures for achieving those outcomes. However, in recognition of stakeholders concerns, QR has proposed to extend its statement of ring-fencing obligations to include an obligation to establish and maintain appropriate internal procedures to ensure QR complies with its ring-fencing obligations in the Undertaking. QR would also accept an obligation to advise the QCA what its internal procedures are and to report annually on its compliance with those procedures.

The QCA maintains its position in the Draft Decision that, given the importance of ring-fencing to the integrity of the above-rail market, and the intensity of the interface inherent in rail

operations as comprehended by the Draft Undertaking, it is appropriate for detailed procedures to be set out in the Undertaking to establish enforceable ring-fencing obligations. Moreover, a key role of the Undertaking is to provide confidence to the market and to reduce the prospects of disputes occurring. QR has been given an opportunity to detail its ring-fencing arrangements and has not done so during the course of the two-year process of the assessment of the Undertaking, or indeed in response to the Draft Decision. Further, the Undertaking defines conduct which will be deemed not to hinder access and, it is in this context of defining 'safe harbour' conduct for QR that it is appropriate to outline ring-fencing arrangements with some prescription. Accordingly, the QCA does not accept QR's overall approach to this issue.

However, the QCA recognises QR's concerns regarding the administrative burden posed by having two acknowledgment registers for confidential information. It would be feasible to retain the integrity of the QCA's proposed procedures by having a single register for all confidential information exchanged in the context of each access negotiation. Such a register would provide an on-going record of those persons to whom confidential information is disclosed, providing a degree of transparency and accountability for the handling of access seekers' confidential information within QR.

The QCA considers the acknowledgment register for each access negotiation (including the application and, if relevant, agreement):

- record all marked pieces of (hard-copy) confidential information provided by an access seeker/third party operator; and

- be signed once by each receiving QR officer outside of Network Access to record the oral exchange of confidential information relating to that access seeker/third party operator. Network Access staff would not have to sign the register.

The QCA proposed in the Draft Decision that all QR staff likely to be disclosed third-party operators' confidential information execute confidentiality deeds which acknowledge the staff members' confidentiality obligation to QR. The purpose of this is to emphasise the importance of the confidentiality undertakings to the individuals concerned. QR considers this objective can be achieved through other means, primarily through a compliance program implemented throughout the organisation, including information sessions and ensuring that each employee receiving confidential information is reminded of their ring-fencing obligations.

The QCA considers that the key point is to ensure each QR employee receiving confidential information is reminded of their ring-fencing obligations, and accepts that this may be achieved through means other than requiring staff members to sign confidentiality deeds. However, awareness by staff of QR's ring-fencing obligations is clearly an urgent need and not one that can await an education process over some lengthy period of time.

The QCA acknowledges that QR intends to develop a ring-fencing policy reflecting its obligations in the Undertaking and that, under QR's Employee Management System, employees have an obligation to comply with all QR policies. Further, as noted above, QR intends to educate employees, targeting those most likely to be dealing with third-party access issues, on its ring-fencing obligations. On balance, the QCA considers that QR accepting an obligation to ensure that QR employees receiving confidential information are reminded of their ring-fencing obligations may meet this objective. However, information should not be disclosed to a person that has not undergone the education and acknowledgment process QR has proposed.

On the question of QCA reserving itself a right to develop a confidentiality deed parties could enter into at their discretion, the QCA now considers that this should be developed up-front rather than as a back-up as was originally envisaged in the Draft Decision. QR has indicated, and the QCA accepts that, for the parties to be subject to a liquidated damages provision to

ensure compliance with their confidentiality obligations, then a confidentiality deed with a liquidated damages provision must be signed by the parties. Such a deed would need to be signed at the stage in the access negotiation process where confidential information is exchanged – most likely when an access seeker submits an access application to QR. The confidentiality deed may either be agreed between the parties or, failing agreement, the deed as developed by the QCA would apply. The QCA will develop a deed as part of the Standard Access Agreement and, once developed, it will be a schedule to the Undertaking. Liquidated damages are discussed in section 3.5 below.

The QCA understands that because an undertaking is not enforceable as a contract between the access seeker and QR, it would be preferable for confidentiality deeds to contain liquidated damages provisions rather than have these arrangements set out inQR's Undertaking.

Consequently, the QCA has decided that confidentiality deeds entered into between QR and access seekers should contain liquidated damages provisions and QR's Undertaking should expressly require the deeds to contain them. In practice, this would mean that should QR enter into a confidentiality deed without a liquidated damages provision, the QCA would be able to request a court enforce that requirement as a provision of the Undertaking.

Alternatively, should QR breach a confidentiality deed that contained a liquidated damages provision, then it would be open to the access seeker itself to seek enforcement of the provision as a matter of contract.

Finally, QR has stated it does not object to an obligation to include a principle in Schedule E providing that QR will comply with the ring-fencing obligations in the Undertaking, as in force from time to time. It is also prepared to include a provision in the access agreement that prohibits confidential information being disclosed to an area of QR that is responsible for the provision of above-rail operations, except if and to the extent required for the purpose of facilitating scheduling and train control in the Metropolitan region. The QCA considers that Schedule E, as currently drafted, broadly reflects QR's proposals. Details of contractual confidentiality provisions will be addressed in the development of the standard access agreement.

Disclosure of confidential information to internal advisers

Use of confidential information

QR proposed in its Draft Undertaking that confidential information only be used for the "purposes for which the information was provided". The QCA suggested in the Draft Decision that QR's Undertaking should provide that a third-party operator's confidential information must only be used for a permitted purpose - that is, "to respond to an access application, develop an indicative access proposal or execute and administer an access agreement".

QR has expressed concern that the QCA's attempt to limit the purpose for which confidential information is to be used may cause problems for QR in terms of other obligations under the Undertaking and/or access agreement, such as reporting requirements. QR has stated that it considers the current wording as outlined in the Draft Undertaking is more appropriate as it enables the owner of the information to define the purpose for which it has provided particular information.

FreightCorp suggests an alternative approach to defining the permitted purpose. This is that the parties 'not use that confidential information for any purpose other than the exercise of rights or the performance of obligations in accordance with this agreement'. However, this would apply only after an agreement starts, and not before. FreightCorp also suggests that all of those in

whom information convergence will occur must sign an acknowledgment as to the permitted purpose of that confidential information.

The QCA acknowledges the validity of QR's comments regarding the definition of permitted purpose, in particular, that the purpose for which disclosure of confidential information to other parties is permitted should not be specified in the Undertaking as it would be difficult to definitively specify the permitted purposes. Accordingly, the QCA now considers that QR's original clause 4.2(b) in its Draft Undertaking - which provides that information may only be used for the purposes for which it was provided – should apply. The QCA understands that this formulation would be more closely aligned to that which applies at general law with respect to the use of confidential information. For these reasons, the QCA does not accept FreightCorp's proposed definition of permitted purpose.

In regard to FreightCorp's proposal that all those in whom information convergence will occur must sign an acknowledgment as to the permitted purpose, while the QCA recognises that this proposal has some merit, it may not be justifiable at this point in time to extend the acknowledgment procedures in this way. In its assessment of the confidentiality provisions of the Draft Undertaking, the QCA has been mindful of the fact that the relevant QR staff should be aware of their obligations. This is reflected in QR's obligation to ensure that employees receiving confidential information are reminded of their ring-fencing obligations and is supported by QR's education process.

FreightCorp also raises the issue of the onus of proof in the event of a breach. The issue of breaches is dealt with in section 3.5.

"Convergence" of confidential information within QR

In the Draft Decision, the QCA specified persons and/or segments within QR that are segments of "confidential information convergence". These identified segments cover those people/functions within QR that may need to be consulted in order to progress an access application. As such, approval from an access seeker is not required prior to disclosure of its confidential information.

Since the release of the Draft Decision, QR has undergone an organisational restructure which has implications for ring-fencing, particularly in terms of defining areas of confidential information convergence. To reflect the new structure, the Draft Undertaking should be amended to identify the following persons and/or segments of QR as segments of confidential information convergence:

- Chief Executive Officer and Board;
- Group General Manager Technical Services Group;
- Rollingstock Engineering Unit within Technical Services Group;
- Executive General Manager Safety and Environment Strategy Group;
- Safety and Environment segments within the Safety and Environment Strategy Group;
- Group General Manager Infrastructure Services Group;
- Corporate Counsel.

QR has proposed an alternative approach to defining areas of 'allowable' information flows, namely inserting a provision in the Undertaking listing the areas within QR that Network

Access must not provide confidential information to (above-rail groups) rather than those areas that it may give such information to. QR argues that this approach would achieve the QCA's objectives in a more efficient and less intrusive manner.

The QCA believes that its original proposal of defining areas of confidential information convergence is preferable to QR's proposed alternative of defining areas of 'allowable' information flows by exclusion. In developing its original proposal, the QCA ensured that any persons/functions that may need to be consulted on an access application are included in the identified group. QR has had opportunity to provide input into this process to ensure the identified group is as comprehensive as is reasonably possible.

Under QR's proposal, it is less clear to an access seeker where confidential information is flowing within QR and it is possible that such information could circulate more widely within QR, increasing the possibility of a breach of the ring-fencing guidelines. It would also reduce accountability as there would be less rigour in determining who within the 'allowable' areas should see the information and it would be less clear who is responsible for the information. Consequently, the QCA has not changed its position on this issue.

In its submission, QR accepted an obligation that, where reasonably practicable, no internal adviser be asked to advise Network Access and an above-rail group on the same or related matter. However, QR notes circumstances where this may be necessary, in particular, where resource constraints require it or, as in the case of Manager Rollingstock Engineering and Executive Manager Safety, a particular role requires the person to be involved in both above and below rail issues. To address this concern, QR has accepted an obligation to advise a third-party before providing confidential information to an internal adviser, notwithstanding the internal adviser is within one of the areas that Network Access can otherwise provide confidential information to without the consent of the information owner. The QCA supports QR's proposal.

For confidential information flows to internal advisers outside those identified as being in a segment of confidential information convergence, the QCA's position in the Draft Decision was that Network Access must obtain the consent of the owner of that information before disclosing it. The Draft Decision outlines the circumstances in which an access seeker's approval for the release of its confidential information cannot be unreasonably withheld – namely, that Network Access agrees to execute a confidentiality deed with the access seeker or that the relevant internal adviser has no involvement in advising an above-rail group on that or related matters. Internal legal advisers would be covered by this provision.

The QCA recognises that the wording of the first dot point on page 111 of the Draft Decision is not clear and should be amended. This dot point should read:

> "if Network Access intends passing the confidential information to an internal adviser, the access seeker's approval for the release of that information cannot unreasonably be withheld where Network Access executes a confidentiality deed in an agreed form – or, failing agreement, in a form approved by the Authority from time to time – with the access seeker".

For the process outlined above to function correctly, it would be necessary for QR to inform the access seeker whether the second condition applies. In other words, if an internal adviser has had involvement in advising an above-rail group on that or related matters, QR would need to inform the access seeker that this is the case in order for the access seeker to be able to determine whether it wishes to withhold its consent. As such, the QCA considers QR should accept an additional obligation to advise an access seeker if this is the case.

It may be that the situation arises where a 'stalemate' is reached. That is, QR insists that, in order to progress an access application, a particular piece of confidential information must be passed to a person/segment of QR outside the identified group of 'convergence', and yet the access seeker withholds consent on the grounds that either of the two conditions outlined (at the top of page 111 of the Draft Decision) have not been met. In this situation, the access seeker may refer the issue to the QCA for arbitration to make a definitive decision on the issue.

The QCA recognises that it has not proposed the same internal procedures be instituted by access seekers with respect to the protection of QR's confidential information. In response to concerns about this asymmetry, the QCA notes that if Network Access was a self-contained group within QR, the internal procedures proposed by the QCA would not be required. The asymmetry is driven solely by Network Access' reliance on other areas within QR to assist in the processing of access applications. The QCA has not proposed that access seekers should institute similar internal procedures because their overriding obligation to protect QR's confidential information is the key issue. The internal procedures adopted by access seekers to fulfil this obligation are up to them. Access seekers' staff do not face an equivalent conflict of interest as QR's staff advising both Network Access and QR's above-rail business groups.

The QCA remains of the view that its approach to the protection of access seekers' confidential information – namely defining allowable areas of confidential information flows where access seeker's consent is not required and defining those circumstance where, outside this group, consent for exchanging this information cannot be unreasonably withheld, is a comprehensive approach that balances the interests of QR and that of access seekers.

FreightCorp queries whether the substance of the proposed amendments at the top of p111 of the Draft Decision should be reflected in access agreements or whether it relates to access applications only. The QCA considers that, given its proposed amendment to 4.2(a) in the Draft Decision, this provision refers not only to information exchanged as part of the negotiation process but also exchanged throughout the duration of an access agreement.

Legal advisers

The QCA suggested in the Draft Decision that Network Access appoint its own in-house legal team. Further, it suggested that a member of that team be precluded from working for the next 12 months on an matter involving an access seeker that person dealt with whilst advising Network Access if they subsequently work for an above-rail group.

The QCA acknowledges that these proposals treat lawyers differently to other internal advisers and may be unduly restrictive for QR. As such, the QCA has removed these suggested restrictions applying to legal advisers. In forming this view, the QCA notes QR's acceptance that no employee of Network Access will at the same time perform any functions for any QR above-rail business groups. Further, internal legal advisers would be subject to the general confidentiality provisions and would fall within the same general ring-fencing processes as any other internal adviser. In other words, if there is an issue of an internal legal adviser having a dual role in advising Network Access and an above-rail business group on a matter involving an access seeker, QR would be required to inform the access seeker of this. The access seeker would then have the option of withholding consent to passing its information to that adviser. If this issue resulted in the access application being unable to be progressed, the access seeker would have the option of referring the issue to the QCA for arbitration.

The QCA is of the view that it is appropriate that there be some limitations on employees at the management level within Network Access, in terms of their involvement in matters they were involved in while with Network Access, if they subsequently move to an above-rail business group. The QCA considers this is important as management staff in Network Access would clearly face a conflict of interest in certain situations if they transferred to an above-rail business

group. Accordingly, the QCA proposes that the Undertaking state that management levels 2, 3 and 4 with Network Access cannot work on a matter they were directly or indirectly involved with in Network Access for three months after leaving Network Access. This is to ensure that they cannot influence decision-making on a matter where they may face a conflict of interest.

The QCA proposed in the Draft Decision that, when Network Access staff leave, there should be a debriefing process to remind them of their confidentiality obligations. QR has agreed to develop business instructions designed to achieve this. However, QR maintains that these procedures should not be included in the Undertaking, although it is prepared to include a reference to such procedures. The QCA maintains its position that there should be a debriefing process for all Network Access staff prior to their departure to another QR business group that should be provided for in the Undertaking. This would include a staff member being required to sign a separate acknowledgment that he/she had received third-party operators' confidential information, recognised the purpose for which the information had been disclosed and would not disclose it, whether directly or indirectly, in the course of their new duties.

Disclosure of confidential information to external advisers

The QCA recognises the apparent asymmetry in the effect of the Draft Decision's proposed amendments regarding the disclosure of QR's confidential information to access seekers' external advisers compared to the disclosure of access seeker's confidential information to QR's external advisers. This reflected the fact that for Network Access, protection of confidential information is a commercial matter only (Network Access has no competitors as such), whereas for access seekers it is both a commercial matter and a ring-fencing matter (QR's above-rail groups are access seekers' competitors). Nevertheless, the QCA accepts that its proposed amendments did not fully address the protection of Network Access' confidential information passed to access seekers' external advisers. Consequently, a number of changes have been made in this regard.

The QCA proposed that QR employ different external advisers for its above and below-rail groups where there is a potential for a conflict of interest to occur. QR makes the point that the QCA's proposed restriction on QR's employment of external advisers is not unreasonable where the external adviser in question is an individual, however, it loses its application where the external adviser is a consulting group. Further, QR has objected to the QCA's proposed amendment that Network Access will inform the third-party operator before disclosing any information – confidential or otherwise – to the external adviser, on the grounds that it has an obligation in regard to confidential information only. The obligation should be amended accordingly. The QCA accepts QR's suggestions on these points.

To address the possible concerns of stakeholders with regard to disclosing confidential information to external consultants, QR has proposed the following procedure. In all circumstances where Network Access is seeking external advice and disclosing confidential information for the purpose of obtaining that advice, Network Access will obtain the consent of the information owner to the disclosure of the information to the nominated party. That consent must not be unreasonably withheld. QR considers that consent would be unreasonably withheld where QR undertakes to contract with an external consultant on the following terms:

- specifying the person/s who may have access to the information;
- specifying that those person/s must not speak or disclose information to any QR staff, other than those within Network Access (ie. indicating that confidentiality extends beyond just QR to groups within QR); and
- requiring them to execute a confidentiality deed in favour of the owner of the information (if required by the owner).

The QCA accepts QR's proposal as it is consistent with the QCA's proposals outlined in the Draft Decision. This necessitates a re-drafting of sub-paragraph 4.4(c)(iv) of the Draft Undertaking. The QCA's proposals in the Draft Decision regarding employing different external advisers for above and below rail groups would still apply. However, as noted earlier, this would apply to individuals, but not to firms.

To protect Network Access' confidential information, the QCA considers the Undertaking should specify that an access seeker must obtain Network Access' consent before releasing its confidential information to another party, whether it is an external adviser or a customer. That consent cannot be unreasonably withheld where the access seeker undertakes to contract with the other party on the following terms:

- specifying the person/s who may have access to the information;
- specifying those persons must not disclose information to anyone else except on the same terms as the information was disclosed to them; and
- requiring them to execute a confidentiality deed in favour of the owner of the information (if required by the owner).

The QCA considers that its proposed amendments to QR's and access seeker's confidentiality obligations outlined above achieve a reasonable balance between the parties' interests. These amendments should address some of RTBU's concerns about an imbalance in the ring-fencing obligations in the Draft Decision.

Access to confidential information in an electronic format

QR's position that it achieve the separation of data on an operator basis in accordance with a long-term plan is disappointing given that QR has been aware of this issue for several years. However, the QCA accepts that the general obligations in the Undertaking concerning confidential information apply to information in all formats, including electronic information. The important distinction with electronic information is the availability of that information on an integrated system and, as such, it is appropriate that the Undertaking specifically refer to electronic information.

Consequently, the QCA has not changed its proposed amendment that the Undertaking should provide that only Network Access should have access to the confidential information of a third-party operator in the freight management system. The liquidated damages' provisions should assist in protecting confidentiality in this regard.

It should be noted that the QCA considers that network operational information is confidential.

QCA's Position

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

<u>Definition of confidential information</u>

1. **the following definition of confidential information is adopted;**

"Confidential Information is defined as any information, data or other matter in any form whatsoever which:

(a) is not already in the public domain;

(b) does not become available to the public through means other than a breach of confidentiality;

(c) was not in the other party's lawful possession prior to such disclosure;

(d) is not received by the other party independently from a third party which is free to disclose such information, data or other matter; and

(e) the disclosure of which might reasonably be expected to affect the commercial affairs of a person or is marked confidential by a party when disclosed to the other party.

Such information, data, or other matter must be treated as confidential by the party receiving it."

Confidentiality obligations on QR and access seekers

2. **section 4.2 of the Draft Undertaking is amended as follows:**

(a) QR and the access seeker/third party operator will, at all times, keep confidential and not disclose to any other person, any confidential information exchanged as part of the negotiation for access under this Undertaking or in the course of any access agreement, without the approval of the party who provided it, provided that such approval shall not be unreasonably withheld, except where disclosure is in accordance with paragraph (c) of this clause;

(b) both QR and the access seeker/third party operator will ensure that all confidential information provided by the other party is used only for the purposes for which the information was provided;

(c) paragraphs (a) and (b) of this Clause shall not apply to disclosure of confidential information in any of the following circumstances:

(i) any disclosure required by law, the listing requirements of a stock exchange or the lawful requirements of any Authority;

(ii) disclosure to the recipient's solicitors, barristers or accountants under a duty of confidentiality;

(iii) disclosure to the recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality undertaking in favour of the party who originally disclosed the confidential

information (the "Information Provider");

(Sub-para 4.2 (c)(iv) should be deleted. Provisions relating to the disclosure of confidential information to external advisers are outlined below.)

(d) for clarity, information which was once considered to be confidential information, will only continue to be confidential information for as long as it retains its confidential nature as set out in the definition of confidential information in Part 8 of this Undertaking. In addition, the discloser and recipient of confidential information may agree in writing that specified confidential information is no longer required to be kept confidential.

<u>QR's internal procedures for handling access seekers'/third-party operators' confidential information</u>

3. **provision is made for a confidentiality deed to be executed between QR and an access seeker in favour of the owner of the confidential information at the commencement of an access negotiation. The deed would be as agreed between the parties, or as otherwise developed by the QCA;**

4. **QR is obliged to establish an acknowledgment register for each access negotiation (including the access application and, if relevant, access agreement) to provide an ongoing record of those persons who are disclosed a third-party operator's confidential information outside of Network Access;**

5. **QR employees receiving confidential information are reminded of their ring-fencing obligations and that confidential information is not disclosed to a person that has not undergone the education and acknowledgment process QR has proposed;**

6. **a principle is inserted in Schedule E providing that QR will comply with the ring-fencing obligations in the Undertaking, as in force from time to time;**

7. **the following persons and/or segments within QR are specified as segments of 'confidential information convergence' ie. approval from an access seeker is not required prior to disclosure of its confidential information:**

   - **Chief Executive Officer and Board;**
   - **Group General Manager Technical Services Group;**
   - **Rollingstock Engineering Unit within Technical Services Group;**
   - **Executive General Manager Safety and Environment Strategy Group;**
   - **Safety and Environment segments within the Safety and**

Environment Strategy Group;

– **Group General Manager Infrastructure Services Group; and**

– **Corporate Counsel;**

8. **where reasonably practicable, no internal adviser be asked to advise Network Access and an above-rail group on the same or related matter;**

9. **where an internal adviser is advising Network Access and an above-rail group on the same or a related matter, QR is required to advise a third-party operator before providing confidential information to that adviser, notwithstanding the adviser is within one of the areas that Network Access can otherwise provide confidential information to without the consent of the information owner;**

10. **a provision is inserted along the lines that an access seeker's approval for the release of its confidential information cannot unreasonably be withheld where:**

– **if Network Access intends passing the confidential information to an internal adviser, it executes a confidentiality deed in an agreed form – or, failing agreement, in a form approved by the Authority from time to time – with the access seeker; or**

– **the internal adviser being disclosed the confidential information has no direct or indirect involvement in advising an above-rail business group on that or related matters;**

11. **QR is required to advise an access seeker if the internal adviser has had a direct or indirect involvement in advising an above-rail business group on that or related matters;**

12. **management levels 2, 3 and 4 in Network Access cannot work on a matter they were directly or indirectly involved with in Network Access for three months after leaving Network Access;**

13. **there is a debriefing process for all Network Access staff prior to their departure to another QR business group to remind them of their confidentiality obligations;**

14. **only Network Access has access to the confidential information of a third-party operator in the Freight Management System;**

<u>Protection of confidential information passed to external advisers</u>

15. **QR will employ different external advisers for its above and below-rail business groups where there is a potential for a conflict of interest to occur (when the adviser is an individual);**

16. **where Network Access intends to disclose an access seekers' confidential information to an external adviser (other than those specified in 4.2 (c)(ii) and (iii)), it must obtain the consent of the access seeker before disclosing confidential information to the adviser, that**

consent not to be unreasonably withheld. Consent cannot be unreasonably withheld where QR undertakes to contract with the external adviser on the following terms:

- **specifying the person/s who may have access to the information;**
- **specifying that those person/s must not speak or disclose information to any QR staff, other than those within Network Access; and**
- **requiring them to execute a confidentiality deed in favour of the owner of the information (if required by the owner);**

17. **where an access seeker intends to disclose Network Access' confidential information to an external adviser (other than those specified in 4.2 (c)(ii) and (iii)), or to a customer, it must obtain the consent of Network Access before disclosing the confidential information to the adviser or customer, that consent not to be unreasonably withheld. Consent cannot be unreasonably withheld where the access seeker undertakes to contract with the external adviser or customer on the following terms:**

- **specifying the person/s who may have access to the information;**
- **specifying those persons must not disclose information to anyone else except on the same terms as the information was disclosed to them; and**
- **requiring them to execute an appropriate confidentiality deed in favour of the owner of the information (if required by the owner).**

3.5 Breaches of ring-fencing guidelines

External review of breaches

The QCA argued that provision for external review of alleged ring-fencing breaches has merit on the grounds that access seekers are likely to have more confidence in an independent review process than one conducted by QR. However, the QCA accepted that an initial step of internal review by QR is reasonable if appropriate levels of accountability are incorporated and a protracted process is avoided. The QCA proposed the general process it believed should be followed in response to an alleged ring-fencing breach.

The issue of reporting requirements for alleged/actual breaches of the ring-fencing arrangements is discussed in section 2.6.

Implications of a breach of the Ring-fencing Guidelines

The QCA argued that most breaches of the Ring-Fencing Guidelines would likely be in relation to inappropriate disclosure of confidential information by individuals. The QCA considered those who suffered loss as a result of ring-fencing breaches should be compensated, however, quantification of that loss would be difficult. Consequently, the confidentiality obligations established in the Undertaking should include a liquidated damages clause.

The QCA proposed that a reasonable pre-estimate of damages for a relatively minor ring-fencing breach was $10,000. For serious ring-fencing breaches, the QCA proposed an access seeker/third party operator should have recourse to courts, with a reasonable threshold for such recourse being potential damages in excess of $100,000.

Stakeholder views

External review of breaches

QR - the QCA recommends that QR be obliged to report immediately to the QCA all actual or alleged breaches of ring-fencing, and any response by QR. QR believes that the QCA, through this recommendation, is effectively looking to impose a number of inappropriate obligations upon QR.

QR will develop internal procedures and business instructions to assist it to meet the ring-fencing principles stated in the Undertaking. However, these procedures will merely reflect the manner in which QR has chosen to address its requirement to comply with the ring-fencing principles. There are likely to be any number of ways in which QR could choose to manage its obligations in this regard, and as a result, a failure to comply with these procedures will, of itself, not necessarily lead to a breach of the ring-fencing principles.

As a result, QR does not support the QCA's suggestion that QR report actual or alleged breaches of its Ringfencing Guidelines, or any other internal ring-fencing documentation to the QCA. Any obligation to report must relate to QR's ring-fencing obligations as specified in the Undertaking.

In addition, QR does not consider that it should have an obligation to report alleged breaches of any kind to the QCA. Whilst there is nothing to stop a third party reporting a complaint of an alleged breach by QR of its ring fencing obligations to the QCA, QR questions the benefit in requiring QR to put in place an administrative process for doing this. If, upon examination, QR considers a breach is established, it will advise the QCA. If, upon examination, QR does not consider a breach to be established, the complainant will have another avenue through which to pursue its complaint: the avenue provided by the QCA Act. Requiring QR to advise the QCA of every instance in which it receives a complaint could provide very little useful indication of QR's conduct.

As a result, QR will accept an obligation to conduct an internal investigation in response to a third party complaint that QR has breached its ring-fencing obligations in the Undertaking. In addition, QR will accept an obligation to report to the QCA all actual breaches of the ring-fencing obligations set out in the Undertaking.

QR considers that any requirement for it to investigate breaches of ring-fencing obligations must relate only to the ring-fencing principles specified in the Undertaking.

QR accepts the inclusion in the undertaking of an obligation to conduct an internal investigation, within a 'reasonable timeframe', upon receipt of a complaint by a third party that QR has breached its ring-fencing obligations in the Undertaking.

The intent of the QCA's recommendation in relation to an external review of QR's investigation of its compliance with the ring-fencing principles in the Undertaking is not entirely clear. QR has proceeded on the assumption that the QCA is intending to give access seekers a right to seek an external review following an internal QR review of a ring-fencing complaint. It is unclear whether this right is intended to be in addition to any legislative rights of the QCA or any person to seek a court order to enforce the terms of an approved undertaking under section 158A of the QCA Act or in accordance with the terms of an access agreement. QR's review of other access regimes did not reveal any similar arrangements to those proposed by the QCA.

If the QCA were looking to create an additional right for third parties, QR would question the need for such an additional obligation in the Undertaking. QR believes that the Undertaking, the QCA Act, and the access agreement provide appropriate mechanisms through which a third party may obtain an external party's consideration of an alleged breach by QR of its ring-fencing obligations:

- if the complaint is made during an access negotiation, the dispute resolution procedures in the Undertaking (clause 4.9) will apply, and this will provide an access seeker with an external avenue for review of QR's decision. In addition, an access seeker could utilise s.158A of the QCA Act to enforce QR's obligations under the Undertaking through the courts; and

- if the complaint is made during the course of an access agreement, the agreement will detail a process for resolving the dispute concerning QR's ring-fencing obligations in the Undertaking.

In other words, where it exists, an access agreement will regulate the contractual rights and obligations of the parties. It will specify the process for resolving all disputes concerning a breach of QR's ring-fencing obligations in the Undertaking. In all other instances, the QCA Act and the Undertaking will regulate the parties' rights and obligations.

If the QCA is simply looking to remind third parties of their rights under the QCA Act in terms of enforcing QR's obligations, QR would argue that the Undertaking is not the correct forum in which to do so. In addition, QR considers that any restatement of rights could lead to confusion rather than clarification.

With respect to the onus of proof, QR states that, at law, the onus of proof does not fall on QR to prove a breach of confidentiality did not occur. QR does not consider it appropriate to use the Undertaking to reverse this onus of proof at law. QR's notes that its position on this point is supported by other access regimes.

FreightCorp - supports strongly the QCA's findings.

FreightCorp considers that it is critical that the onus of proof should be on QR to demonstrate that any disclosure of confidential information did not occur by reason of non-compliance by QR of its obligations to the rail-operators or for that matter any person that has an obligation to QR in respect of the confidential information.

Implications of a breach of the Ring-fencing Guidelines

QR - *Liquidated damages* - QR's first response to this recommendation is to reiterate its comments, to the effect that QR will accept enforceable obligations in the Undertaking only in relation to the ring-fencing principles in the Undertaking.

The remainder of QR's response varies depending on two different interpretations that may be placed upon this recommendation. On the one hand, the QCA appears to be seeking to provide liquidated damages of $10,000 to a party who has suffered damages estimated at less than $100,000, in addition to that party's right to apply to a court for actual damages. The QCA Act has a provision for dealing with QR breaching its approved Undertaking - section 158A. Under this provision the QCA or another person, such as an access seeker, could seek a court order to enforce the Undertaking obligations upon QR, or to seek to recover damages where a party suffered loss as a result of QR's breach of its obligations.

If this is the QCA's intention, QR would reject the recommendation on the grounds that a liquidated damages clause is a contractual clause that provides a genuine pre-estimate of the damage or loss flowing from a given circumstance, and the $10,000 lump sum could not be said to be a genuine pre-estimate of the loss or damage likely to flow from any given breach of the ring-fencing obligations. It should thus be interpreted as a penalty. In addition, QR does not consider that it should be made to pay for the same mistake twice – once through a penalty, and once through the QCA Act process in respect of actual damages.

However, the QCA could also be intending to provide a party with liquidated damages of $10,000 but excluding that party from applying to the courts for actual damages where the damage they have suffered is estimated at less than $100,000. In these circumstances, QR would argue that the inclusion of such a clause in the Undertaking is inappropriate. The Undertaking sets out QR's obligations to all parties seeking access to its infrastructure. A liquidated damages clause is only appropriate where both parties to a contract agree to accept a specified level of damages. As a result, a party's access agreement is the appropriate place for their rights against QR, in respect of a breach of obligations, to be specified.

QR's review of other access regimes has revealed that some regimes, such as The Gas Code, do not impose any penalties at all. Still other regimes have penalties, but these are specified in the relevant legislation. For example, the South Australian and Northern Territory rail access regime contains a $10,000 penalty provision for unauthorised disclosure or use of confidential information and a $100,000 penalty for use of confidential information for the purpose of securing an advantage for some other person in competition to the persons who provided the information. These examples demonstrate that had the legislature intended that penalty provisions should apply in circumstances where there had been a breach of the confidential information obligations placed upon the provider of a declared service, they would have been provided in the QCA Act. Part 5 of the QCA Act contains penalties for a range of matters, for instance, failure by the provider of a declared service to separate its accounting records for the declared service from other parts of its business. There is no such provision for penalty, however, in relation to compliance with an approved undertaking, or the ring-fencing principles specified in such an undertaking.

Normal damages - QR notes the QCA recommendation for inclusion in the Undertaking of advice that an access seeker be able to pursue normal damages through the courts for actual damages in excess of $100,000, and, where appropriate, injunctive relief against QR, where such damages have been caused through a breach of QR's ring-fencing provisions. QR considers that the rationale for this recommendation is unclear.

As noted above, the QCA could be restricting the right of a party to apply to the court for damages to those situations where their actual losses are in excess of $100,000. QR recognises such a clause could be to its own advantage in particular circumstances, but also acknowledges that the QCA has linked this provision to the $10,000 liquidated damages provision. As stated above, QR does not consider the $10,000 liquidated damages provision to be appropriate in the context of the Undertaking.

Alternatively, the QCA could simply be stating an existing legal right of parties, rather than restricting any such right. In other words, the QCA could wish to clarify the fact that, notwithstanding the $10,000 liquidated damages provision, a party can still sue QR for actual loss. Section 158A of the QCA Act sets out the rights that the QCA, access seekers and operators have against QR for breach of the Undertaking. These rights include damages. QR considers it inappropriate for the Undertaking to be used as the forum for the QCA to remind third parties of their rights at law.

ARTC - a breach could cause significantly more commercial damage than $100,000 and can be compensated, but there is a gap in allowing only $10,000 compensation of damages up to $100,000. ARTC considers this to be an imbalance.

FreightCorp - supports strongly the QCA's findings.

Clarification is sought whether the amounts payable under the compensation regime are inside or outside any limitation of liability provisions in the access agreement?

FreightCorp considers (and this has been its position in negotiation with QR throughout) that given the damage that can be done to the business of a rail-operator by breach of this principal obligation there should be no limitation on liability. Schedule E should include a clear statement as to the confidentiality obligations of QR and damages for breach of the confidentiality provisions should be recoverable according to the common law remoteness of damages test, ie. not limited by limitation of liability provisions.

FreightCorp strongly supports the compensation regime suggested by the QCA. There is a risk that a 'flat' $10,000 liquidated amount for any breach of the principal obligation could constitute a penalty, and as such be unenforceable. As a solution to this, the FreightCorp Mark-up provides that if either party proves that the actual loss suffered is less than $7,500 or greater than $12,500 the lesser amount or the greater amount may be recovered. This solution also allows a party to claim where the amount is less than $100,000 - the threshold level suggested by the QCA for the involvement of the courts.

Whilst this solution allows the courts to be involved in respect of any breach, FreightCorp considers that this is appropriate. The critical issue for FreightCorp is not when the courts become involved, but the amount that may be claimed if the courts do become involved.

It follows from the above that FreightCorp considers that the best means of ensuring confidentiality is providing that QR will not be able to impose any limitation of liability for breach of its principal confidentiality obligation.

Stanwell - assuming that "liquidated damages" is the appropriate terminology, why is this amount limited to $10,000?

It is unclear to SCL why this is a liquidated damages claim, rather than a civil penalty analogous to that utilised in s. 1317DA and associated provisions of the *Corporations Law*. A liquidated damages clause would appear to be more appropriate in a contract (eg. the standard access contract) between the third party operator and QR.

Where a breach of the ring-fencing provisions causes damages in excess of $100,000, third party operators can seek remedies available at law or in equity. What remedies are available under the Draft Decision, which are not already available at general law, if the damages are between $10,000 and $100,000? Or is there a typographical error that has been repeated, so that the "liquidated damages" amount of $10,000 is supposed to be $100,000?

Queensland Government – In regard to whether the results of any external review of a breach of the ringfencing guidelines should be able to be used as evidence in any subsequent legal action against QR, the Government considers this is a matter of law which is open to debate.

In regard to the QCA's proposed liquidated damages clause, while the rationale for including such a clause is understood and supported, the Government does not believe the QCA has the power under the QCA Act to nominate a pre-estimate of damages arising from minor breaches of the ring-fencing guidelines and to include the estimate in the terms of the Undertaking.

Given the QCA's liquidated damages clause in its current form, may in some circumstances be unlikely to be legally enforceable, it is suggested the QCA reconsider the wording of the clause. For example, unless the QCA can demonstrate $10,000 represents a genuine pre-estimate, it may be more appropriate for the QCA to recommend the inclusion of liquidated damages clauses in the confidentiality and ring-fencing provisions of the access agreement set out in section 8.4.18 of Chapter 8 of the Draft Decision (Schedule E – Summary of Standard Access Agreement). This could be referenced to a formula devised by the QCA to aid in the calculation of the damage likely to be suffered according to particular circumstances. Alternatively, if the QCA considers a pre-estimate in the Undertaking is necessary, then it should provide stakeholders with the opportunity to comment on the methodology it applied in determining the quantum for particular breaches.

QCA's analysis

External review of breaches

The QCA proposed in the Draft Decision that, in the event of confidential information falling into the hands of a person within QR who did not reasonably require access to it, the onus of proof should be on QR to demonstrate that this did not occur as a result of a breach of the Undertaking's confidentiality obligations. Both QR and FreightCorp have raised concerns regarding the onus of proof in the event of a breach of ring-fencing guidelines.

In summary, the QCA envisages the process of investigating a ring-fencing breach would be as follows. The access seeker would notify QR that it believed a breach had occurred. QR would initially undertake an internal investigation of the alleged breach and would report the findings within the appropriate timeframe. If QR found a breach had not occurred and the access seeker disagreed, the access seeker could refer the matter to the QCA for review.

If the dispute over whether a breach had occurred subsequently went to court, it would be then that the question of onus of proof arises. That is, the access seeker must establish a prima facie case that the information was truly confidential, a person who should not have access to that information in fact does and that the breach caused the access seeker some detriment. QR must then demonstrate that person did not receive that information as a result of a breach of its

confidentiality undertakings. In summary, the reversal of proof would only assist access seekers in establishing the source of the leak, it would not assist them in establishing the other elements of the breach of confidence.

This process only applies where the owner of the confidential information is enforcing the liquidated damages provisions of the confidentiality deed, not for any action taken under s158A of the QCA Act.

In the Draft Decision, the QCA proposed that QR report immediately to the QCA any actual or alleged breach of the ring-fencing guidelines and any response from QR. QR believes this imposes inappropriate obligations on it. It will accept an obligation to report to the QCA all actual breaches of the ring-fencing obligations.

The QCA understands that there is nothing in the QCA Act that would prevent the QCA from requiring the Undertaking to include an obligation that QR report alleged breaches. Given that QR will be required to conduct an internal investigation of any allegation, the QCA does not consider it would impose an unreasonable burden on QR to require that it notify the QCA of an allegation. It should be noted that no action would be taken unless and until the breach had been proven. Indeed, reporting to the QCA would send an important signal to those alleging the breach to ensure it has substance. Accordingly, the QCA has not changed its position on this matter.

QR proposes the inclusion of an obligation for it to conduct an internal investigation, within a 'reasonable timeframe', upon receipt of a complaint by a third-party that QR has breached its ring-fencing obligations in the Undertaking. The QCA does not support replacing its proposed time limit of 28 days outlined in the Draft Decision for QR to conduct its internal review as it is important to ensure that such investigations are conducted in a timely manner and to provide access seekers with greater confidence in the process.

QR also queries the QCA's purpose in allowing an external review of QR's investigation of its compliance with the ring-fencing obligations and whether it is appropriate to create such a right for third-parties which is in addition to the review process already provided by s158A of the QCA Act. The QCA understands that it is arguable that breaches of ring-fencing obligations may not be reviewable under the arbitration mechanisms available to the QCA. In addition, as the standard access agreement has not yet been finalised, and in any event will be open to negotiation between the parties, there is no guarantee that an access agreement will contain a process for resolving a dispute concerning a breach of QR's ring-fencing obligations. Furthermore, such a clause would only apply once the parties have finalised an access agreement.

Given this, there would seem to be considerable merit in the inclusion of an additional external review process with respect to breaches of ring-fencing obligations. It may also act as a deterrent for such disputes going to court. Nevertheless, the QCA understands the Authority's review findings would not bind a Court, which would require that any breach be reproved.

Implications of a breach of the ring-fencing guidelines

The overriding objective of the proposed $10,000 liquidated damages provision is to make QR's ring-fencing obligations effective and easy to enforce, but to do so without imposing a penal burden.

The QCA considers that the ring-fencing provisions of the Undertaking are akin to confidentiality obligations where proving actual damage in a monetary sense is likely to be very difficult. In recognition of stakeholder concerns regarding the range of damages, the QCA has amended the threshold to $50,000. It should be noted that should liquidated damages not work,

then ordinary rights prevail (ie. s158A of the QCA Act). The liquidated damages will be contained in the confidentiality deed to be established by the QCA.

With the exception of cases where an access seeker can prove actual damage in excess of $50,000, the QCA considers that normally it will be difficult to prove with any precision relatively small amounts. Moreover, the cost of attempting to prove them in a litigious situation could well outweigh the actual amounts established. Given the theoretical range of $1 to $50,000 that is covered by the proposed liquidated damages provision, the QCA has chosen a conservative fixed sum of $10,000.

The QCA understands that because the consequences of breaches of ring fencing provisions make precise pre-estimate of damages very difficult and almost impossible at the time of entering into the contract and because the sum of $10,000 could not be said to be unconscionable or extravagant, it is unlikely the proposed provision would be held to be a penalty.

QCA's position

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

1. **QR is required to report immediately to the QCA any actual or alleged breach of the ring-fencing provisions of the Draft Undertaking and any response by QR;**

2. **an initial internal review process for alleged ring-fencing breaches is established such that:**

   - **the internal review is completed and the access seeker notified in writing of the findings of the review within 28 days of the alleged breach being brought to QR's attention in writing;**

   - **an access seeker and QCA could refer a dispute over the findings of the internal review to the QCA at the end of the 28 day period; and**

   - **the results of the subsequent QCA review provide a basis for compensation;**

3. **a contractual liquidated damages clause of $10,000 is to apply where confidential information is disclosed to an above-rail business group in breach of the ring-fencing provisions of the Draft Undertaking;**

4. **an access seeker can seek recourse through the courts if it could demonstrate that an alleged breach of the ring-fencing provisions of the Undertaking had caused damage in excess of $50,000. In addition to any remedies available at law or in equity, the access seeker should also be able to seek injunctive relief against QR; and**

5. **in the event of confidential information falling into the hands of a person within QR who did not reasonably require access to it, the Draft Undertaking placed the onus of proof on QR to**

demonstrate that this did not occur as a result of a breach of the Undertaking's confidentiality obligations.

3.6 Auditing of QR's compliance with the Ring-fencing Guidelines

Background

The QCA argued that regular auditing of QR's compliance with the Ring-fencing Guidelines is a potentially important means of demonstrating QR's commitment to meet its ring-fencing obligations and provide accountability to stakeholders. While generally supporting QR's proposed processes, the QCA considered they do not provide sufficient detail to establish enforceable obligations on QR. To address this concern, the QCA outlined a number of proposals for QR's compliance auditing relating to the appointment of an auditor, the frequency of compliance audits, QR's commitment to provide information to the auditor within a required time frame and reporting of audit reports.

Stakeholder views

QR - *Annual compliance audits* - QR proposes to alter this provision so that it extends only to the audit of the ring-fencing obligations in the Undertaking. QR does acknowledge, however, that in practice such an audit will involve consideration of QR's detailed internal procedures implemented for the purpose of ensuring QR complies with its ring-fencing provisions in the Undertaking.

Choice of auditor - QR acknowledges that the QCA could require an external audit, and appoint the auditor, subject to consultation with QR on the auditor. However, QR considers that the QCA is questioning the integrity of an auditor in justifying its ability to choose the auditor. An auditor, by nature, must be independent. This should be sufficient to address the QCA's concerns. As a result, QR considers that if an external audit is required, and QR is to pay for the audit, it should be able to appoint the auditor. Where the QCA insists on appointing the auditor, it should pay the costs of the auditor.

Information to be provided to auditor - QR accepts an obligation to co-operate fully with the auditor, but takes issue with the recommendation to comply with timeframes set at the time of the auditor's appointment, as these may not be reasonable. Rather, QR would prefer an obligation similar to that recommended by the QCA in relation to the Cost Allocation Manual: that QR provide the information sought by the auditor within a reasonable timeframe.

QR also considers that the scope of the audit should be clearly defined in the Undertaking.

Audit report - QR has no objection to the audit report being provided to the QCA. With regard to the QCA recommendation that the Authority be able to publish QR's compliance audit reports, QR questions the need for such publication. The QCA has access to information and as the regulator can determine whether the reports reveal actionable breaches by QR. QR further notes that the Gas Code does not provide for publication by the regulator of reports by the service provider on ring-fencing compliance.

FreightCorp - supports strongly the findings of the QCA.

Whilst FreightCorp would prefer an external auditor at all times, we accept that, given the balance achieved in relation to the other ring-fencing obligations, viewing the ring-fencing obligations together as a package, the internal audit approach (with provision for external audit) is appropriate.

To ensure transparency and accountability, in addition to the publication of each audit, the process adopted in respect of each audit should be published.

QCA's analysis

QR appears to have accepted QCA's proposal that the Undertaking provide for annual compliance audits. However, QR notes this applies only to its ring-fencing obligations in the Undertaking, which it believes should be limited to principles and not detailed procedures. The QCA has addressed this issue in section 3.4.

QR's suggestion that it choose the auditor is inappropriate as there would at least be a perception that a QR-appointed auditor may not be as rigorous as a QCA-appointed auditor. This view is supported by regulatory experience in other jurisdictions.

Nevertheless, given QR will pay for the audits, the QCA considers it is possible to have a process that allows QR a greater role in the selection of an auditor to have some control over costs. This would be subject to the QCA overseeing the selection of the auditor and the matters the auditor will address and that the primary obligation of the auditor would be to the QCA. The process would be along the following lines:

- QR and QCA agree a list of three auditors. Failing agreement, QCA will nominate a number sufficient to constitute a panel of three;
- each auditor selected to the panel must – acknowledge that if appointed they are to act for the QCA; that they owe their duties to the QCA under the terms of the Undertaking; and that they will accept instructions on the subject matter of the audit from the QCA;
- QR then chooses the auditor to undertake the audit from the list. That auditor will undertake the audit and may be directed by the QCA as to matters that are to be looked at and reported on;
- the report of the auditor is to be given to the QCA with a copy to QR;
- QR commits to provide all information requested by the auditor within specified time frames determined at the time of the auditor's appointment; and
- QR commits to pay for the audit.

The QCA supports FreightCorp's suggestion that the process adopted in respect of each audit should be published along with the decision.

QR has stated it would prefer a requirement to provide information to an auditor within a 'reasonable' timeframe, rather than the QCA's proposal that QR comply with the timeframes set at the time of the auditor's appointment. QR cites the approach the QCA has adopted for the Cost Allocation Manual to support its proposal. The QCA considers this different approach is justifiable as ring-fencing information differs from cost allocation information in that the latter may require information that does not exist or is not easily recoverable from QR's systems. Accordingly, the QCA considers that the issue of timeframes is best left to the auditor's discretion – that is, the timeframes set out in the auditor's appointment would apply, or as the auditor otherwise allows.

The QCA accepts QR's suggestion that the Undertaking should set out the scope of the audit. The QCA is of the view that the scope of an audit would relate to QR's compliance with its ring-fencing obligations and associated procedures, including reporting on any inappropriate transmission of access seekers' confidential information.

QR questions the need for the audit report to be published as the QCA is in the position to determine whether the report reveals actionable breaches by QR. However, the publishing of

audit reports provides an important avenue for enhancing the credibility and transparency of the regime. Accordingly, the QCA has not changed its position on this issue.

QCA's position

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

1. **annual compliance audits of the ring-fencing provisions of the Draft Undertaking are provided for;**

2. **the QCA has the right to decide whether an internal or external compliance audit of the ring-fencing provisions of the Draft Undertaking should be conducted;**

3. **in the case of an external audit, the process would be as follows:**

   - **QR and QCA agree a list of three auditors. Failing agreement, QCA will nominate a number sufficient to constitute a panel of three;**

   - **each auditor selected to the panel must – acknowledge that if appointed they are to act for the QCA; that they owe their duties to the QCA under the terms of the Undertaking; and that they will accept instructions on the subject matter of the audit from the QCA;**

   - **QR then chooses the auditor to undertake the audit from the list. That auditor will undertake the audit and may be directed by the QCA as to matters that are to be looked at and reported on;**

   - **the report of the auditor is to be given to the QCA with a copy to QR;**

   - **QR commits to provide all information requested by the auditor within specified time frames determined at the time of the auditor's appointment; and**

   - **QR commits to pay for the audit.**

4. **the scope of an audit relates to QR's compliance with its ring-fencing obligations and associated procedures, including reporting on any inappropriate transmission of access seekers' confidential information is provided for;**

5. **the process adopted in respect of each audit is published with the audit reports;**

6. **QR is committed to provide compliance audit reports to the QCA; and**

7. **the QCA is allowed to publish, as appropriate, QR's compliance audit reports.**

3.7 Internal access agreements

3.7.1 Proposed framework for establishing internal access agreements for existing QR train services

Background

QR committed in its Draft Undertaking to develop internal access agreements between Network Access and the respective above-rail business groups for all its existing above-rail services. The QCA considered that the finalisation of internal access agreements for existing train services is an important element in the above-rail market in Queensland because of the potential for such agreements to serve as a barrier to third-party entry. To address this concern, the QCA proposed a set of principles that should be used to guide the establishment of terms for internal access agreements for existing train services.

Stakeholder views

QR - in general, accepts that the terms and conditions of internal and external access agreements, including term and rate review, should be consistent for like traffics. Therefore QR does not object at the principle level to the QCA recommendation that the standard access agreement for coal haulage services, once complete, will provide a benchmark against which internal agreements will be measured.

FreightCorp - the key elements to guard against the problems identified by the QCA are:

- disclosure: all internal access agreements must be disclosed; and
- equivalence: enshrining in Schedule E and the standard set of terms for an access agreement, a requirement that if QR affords itself or another third-party more favourable terms and conditions, that those terms and conditions must be available to the third-party operator under the access agreement.

FreightCorp agrees with the QCA's assessment on the term of internal access agreements. It considers the open access regime is flawed fundamentally, in that internal access agreements (or current external contracts for which QR does not intend to apply specific internal access agreements)are in a "safe harbour"; there is nothing that the QCA can do regarding this situation under the QCA Act. It may be possible to deal with this by different means, for example, issues associated with application of Section 46 (of the Trade Practices Act (1974)) may arise from that which QR has done or may do prior to the QCA having jurisdiction.

Creation and/or extension of access rights for internal access agreements

FreightCorp – agrees with the assessment of, and strongly supports the findings of, the QCA regarding QR's intention to create access rights where there are no existing contracts and to extend existing contracts.

FreightCorp notes possible Part IV (of the Trade Practices Act (1974)) implications.

Principles to guide the setting of internal access agreement terms

QR - has interpreted the QCA's recommendations as not preventing QR operators negotiating longer access agreements, consistent with the Undertaking, within the two-year period, where applicable. If this is the case, QR suggests that the QCA's Final Decision might clarify this point.

QR does not support the commencement of the relevant two-year period from the date of the release of the QCA's Final Decision. Legal advice QR has received is that the words of section 136(5)(b) of the QCA Act, in accordance with which the QCA's Final Decision will be made, are couched in terms of a recommendation rather than giving the QCA power to require certain amendments. As a result, QR does not consider the QCA's Final Decision will impose mandatory requirements to which QR must respond. QR's obligations under the

Undertaking will be enforceable once approved by the QCA, as a result, the two-year period should run from that date.

QR's above rail operating groups, particular Passenger Services, are concerned by the QCA's proposal to limit the term of their access agreements to the term of their Transport Services Contract with Government. On this basis, regional passenger services are likely to have access agreements of very limited duration. This may undermine the on-going provision of these services. QR would be interested in hearing Government's views on this issue.

ARTC - supports the first principle (that, for a service where an external contract exists, the internal agreement should be linked to the term of that contract).

With regard to the second principle, ARTC is not clear as to why internal access agreements associated with services operated on subsidised infrastructure (particularly freight lines) should extend to the term of the subsidisation. There is no reason why regional transport users should be locked into the incumbent operator for the term of the infrastructure support.

The third and fourth principles appear to be incorporated in order to recognise QR's prior financial commitments to its customers that are not supported by existing access agreements. QCA argues that this is the commercial decision of QR and that any such commitments should have been supported by contracts by now and any past investment decisions should have factored in the possibility of third party access for above rail services as a risk. Consequently, ARTC finds it difficult to come up with a supporting argument for not allowing those existing traffics (including new tonnages of bulk commodities) not underpinned by contracts to be made contestable.

The QCA's proposal to allow a maximum of two years for transitional internal access agreements is balanced more in the favour of QR's interests than those of access seekers or the public benefit.

QCA's analysis

Principles to guide the setting of internal access agreements

In the Draft Decision, the QCA outlined principles to guide the setting of internal access agreement terms. ARTC objects to the principle that, for a service covered by a GSA, the internal access agreement should be linked to the term of that GSA.

The QCA agrees with ARTC's point that regional transport users need not be locked into the incumbent rail operator for the term of the infrastructure support. Consequently, the QCA proposes that the reference to "government customers" in Amendment 7 should be clarified to refer only to government funded above-rail services. Moreover, unbundling of access agreements would allow the Government, as the purchaser of certain above-rail services, to buy sufficient train paths for the relevant period and subsequently choose a rail operator to deliver the services.

ARTC also criticises the proposed two-year transitional period for internal access agreements as being balanced in QR's favour. The QCA recognises ARTC's concerns, and notes that QR was given the benefit of a reasonable doubt regarding past financial commitments to its customers where no contracts exist. However, given that this was not an issue of concern to other rail operators, the QCA does not propose to change its position on this matter.

QR requests clarification as to whether the QCA's recommendations prevent QR operators negotiating longer access agreements within the two-year period. The QCA's view is that QR would not be prevented from negotiating longer agreements during this transitional period. QR's existing customers would be free to negotiate with either QR or a third-party operator regarding contracts commencing after the two-year provisional period ends.

QR disagrees that the two-year transitional period should start from the date of release of the QCA's Final Decision, but rather believes it should commence from the date on which its

Undertaking is approved. The QCA understands that it is up to the QCA to determine when this two year period begins as there is no legal requirement that the QCA adopt QR's suggestion.

Given that QR has been aware of the need to develop internal agreements for these services for a considerable period of time and, further, given the Undertaking does not apply to these existing services in any case, it seems unreasonable to extend the commencement date for the transitional period beyond what the QCA proposed, irrespective of how that period may be recognised (ie. the unelapsed time being recognised in an approved Undertaking).

QCA's position

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

1. **in developing internal access agreements for existing train services, the term of internal access agreements be the same as the term of the relevant external agreement between QR and its private customers;**

2. **in developing internal access agreements for existing community service obligation train services, the term of internal access agreements be the same as the term of the relevant external agreement between QR and Government for the above-rail component of the service;**

3. **for general freight and freight forwarding services, a maximum transitional term of two years for internal access agreements is applied unless there is a longer external agreement in place, and following this transitional period, internal access agreements would be set for a commercially realistic term; and**

4. **for new tonnages of bulk commodities not covered by an existing contract, the internal access agreement is linked to the term of the new contract.**

The two year transitional period would start from the date of release of the QCA's Final Decision on QR's Undertaking.

3.7.2 Rate review provisions in internal access agreements for existing marginal traffics

The QCA received two supportive stakeholder comments from ARTC and QR on its proposal. Consequently, the QCA has not added to the views it expressed on this matter in the Draft Decision.

3.7.3 Proposed framework for establishing internal access agreements for new or renewed train services

Background

Public disclosure

The QCA supported QMC's proposal that the below-rail component of all new access agreements - internal and external - in the coal sector should be publicly disclosed. This would

involve public disclosure of the access charge and non-price terms and conditions negotiated between Network Access and the rail operator. While acknowledging that disclosure may lead to standardisation of access agreements in the coal industry and reduced flexibility, the QMC believed that the benefits from increased transparency outweighed this possible cost.

However, the QCA did not support the public disclosure of above-rail aspects of agreements on the grounds that more efficient rail operators would be forced to disclose information that would reveal the source of their greater efficiency to other rail operators. The QCA did not believe that public disclosure of below-rail aspects of access arrangements in other sectors is warranted.

A QCA review process

The QCA accepted QR's proposal to make its internal access agreements for train services in non-coal sectors available to the QCA for review. The QCA considers this review mechanism should provide comfort to stakeholders that QR's above-rail business groups are not receiving more favourable terms and conditions. Stakeholders supported this position.

Greater use of reference tariffs

The QCA proposed that internal access agreements for new train services developed in accordance with approved reference tariffs and a proposed standard access agreement applicable for coal haulage services should be deemed to comply with s104 of the QCA Act. This would provide an incentive for QR to negotiate agreements with its above-rail groups in accordance with approved reference tariffs.

Stakeholder views

Public disclosure

QR - does not support the QCA's recommendation. QR understands the QMC's reason for requesting disclosure of access agreements to be that *all* coal access agreements would be disclosed, thus ensuring that all operators and/or end-users would receive consistent terms and conditions of access or, in the event that a specific deal was made, that this would be transparent to the industry. QR considers that the QCA's recommendation in this regard fails to satisfy QMC's objective, as it leaves the decision as to whether or not an access agreement is disclosed up to the end-user. Nevertheless, selective disclosure is still likely to create the costs associated with blanket disclosure. It is QR's view that the QMC objective will not be achieved without blanket disclosure of all access agreements for the coal sector.

However, QR considers that a requirement for blanket disclosure of access agreements is not appropriate. As the QCA has recognised, public disclosure of access agreements is likely to lead to standardisation, or rigidity, in access agreements. QR will be faced with the prospect of every concession it gives becoming standard practice in all agreements. As a result, QR is likely to become unwilling to accommodate the particular concerns of individual rail operators. The QCA has concluded that this is acceptable, as the costs of such rigidity will be borne by the coal industry. However, it is not clear that all operators and/or end-users fully support such disclosure, and the costs that will result from this. Additionally, it must be recognised that existing operators and end-users are not, in themselves, necessarily representative of the future industry participants.

Apart from the rigidity that will be imposed through public disclosure of these agreements, QR is concerned that this will inhibit innovation in the industry. In the event an operator has an innovative approach to matters addressed in the access agreement, such as train operations, risk management, etc, this will become public as soon as the agreement is signed (irrespective of whether train operations have begun), hence reducing or eliminating the "first mover advantage" that the operator would otherwise gain.

An alternate approach is for the QCA to take a role in reviewing access agreements in the coal sector to ensure that they remain consistent with the reference tariff schedule (i.e. that changes to the reference tariff are reflective of the change in cost or risk to QR associated with

changes in the reference train service, including the terms and conditions of access for the reference train service).

FreightCorp - notes the consideration that public disclosure might lead to standardisation of access agreements. Standardisation of itself is not a bad thing, but standardisation should not be something to which QR should be allowed to default and, as such, restrict change. Disclosure stands by itself as a mechanism for informing the market. It is by that mechanism that standardisation is achieved. Standardisation foisted on rail operators by QR allows QR to avoid the market. On balance, FreightCorp believes that the public disclosure of all below rail aspects of all access contracts has significant merit, indeed it is critical.

QMC - understands the QCA is not inclined towards mandating the disclosure of all access agreements. In light of this, the Authority's proposed amendment allowing disclosure of all below-rail aspects of new agreements must be preserved (although we note that in the present circumstances where QR will offer only bundled charges on new or renewed tonnage, the proposed amendment will not result in the disclosure of access terms to end-users).

A QCA review process

QR - given that the Draft Undertaking already places such an obligation upon QR through its requirement that the QCA be provided with copies of all internal agreements, QR accepts the QCA's recommendation that it be provided with all internal non-coal access agreements for review.

FreightCorp - agrees with the QCA's assessment, which emphasises the criticality of public disclosure and equivalence

QCA's analysis

The QCA recognises that the Draft Decision was unclear on the mechanism by which coal access agreements should be made public.

To clarify the situation, s137(2)(ba) of the QCA Act permits the inclusion of details of "information to be given to the Authority or another person". The QCA understands this provision is broad enough to include a requirement in QR's Undertaking that QR publicly disclose all coal access agreements.

To this end, the QCA proposes that the Undertaking should contain a provision requiring QR to publicly disclose "coal access agreements and internal access agreements between Network Access and the QR Business Group that operates coal train services". Such a disclosure requirement would ensure access agreements between QR and third parties, as well as internal access agreements between Network Access and QR's relevant above-rail business group, are covered.

This mechanism would deliver blanket public disclosure through the QCA being provided a copy of the internal and external coal access agreements once signed and the QCA would subsequently place the signed agreements on a public register.

The QCA understands that if QR were not to comply with the public disclosure provision proposed above, the Authority could request that a court enforce the requirements under s158A of the QCA Act.

QR argues it is not clear that all operators and/or end-users fully support such disclosure, and the costs that will result from it. In response, the QCA notes that in preparing the Draft Decision it sought and received written confirmation from all existing Queensland mine owner/operators that they supported public disclosure of coal access agreements.

In response to QR's argument that existing operators and end-users are not necessarily representative of future industry participants, the QCA notes the relatively concentrated

ownership interests in the Queensland mining sector. Consequently, the views of existing mine owners would likely provide a representative view of the mining industry at this point in time and for the three-year term of the Undertaking.

The QCA acknowledges not all rail operators support public disclosure of access agreements. The Draft Decision stated the views of Toll and National Rail in this regard. Given the general lack of support from stakeholders for public disclosure of access agreements in non-coal sectors, the QCA proposed against such disclosure.

QCA's position

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

1. **sub-clause 3.4.2 of the Draft Undertaking is removed;**

2. **following completion of the development of a standard access agreement for coal haulage services, internal access agreements for new or renewed train services that are developed in accordance with that standard agreement and approved reference tariffs are not subject to s104 and s125 of the QCA Act;**

3. **prior to the completion of the development of the standard access agreement for coal haulage services, internal access agreements for new or renewed train services will not hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act;**

4. **QR must disclose coal access agreements and internal access agreements between Network Access and the QR Business Group that operates coal train services; and**

5. **QR commits to provide its internal access agreements for non-coal train services to the QCA for review.**