Chapter 7 - Interface Considerations

KEY ASPECTS

Interface requirements - QR's vertical integration gives rise to a conflict of interest because of its ability to use rolling stock, safety and environmental requirements in the Undertaking to hinder access to its below-rail services, thereby protecting its above-rail business groups.

Interface risk management plan - all rolling stock interface, safety risk and relevant training matters should be agreed between QR and a third-party operator during the interface risk management process.

Suspension - QR should not be able to exercise a contractual right to suspend a third-party operator's rolling stock or its train services in any way contrary to s104 and s125 of the QCA Act and should bear the onus of demonstrating the reasonableness of any suspension action.

Mediation - the Rail Safety Accreditation Unit (RSAU) of Queensland Transport should provide non-binding advice to the parties regarding safety-related interface disputes.

Environmental management - to ensure consistency with Queensland's environmental regulatory framework, a third-party operator's environmental management system should be based on a risk assessment of its proposed train services and the identification of appropriate control measures to manage those risks. Accreditation under international standards is not necessary under the framework.

Environmental audits - QR and a third-party operator should provide each other with copies of the relevant parts of their respective internal audit reports.

Non-compliance - a third-party operator should be obliged to inform QR of non-compliance with its environmental management system and to take the necessary steps to address the non-compliance.

Adjoining infrastructure - the Undertaking should establish the scope of the interface to clarify the rights of QR and third-party operators regarding the design and construction of adjoining infrastructure.

7.1 Introduction

The strong interdependency between the rail infrastructure and delivery of above-rail services raises a range of interface issues associated with the interaction between QR, as network manager, and third-party operators. Key interface issues include the establishment of safety, technical, operational and environmental standards.

QR's proposed interface standards are important because they establish key non-price parameters within which Network Access will allow third-party operators to access QR's below-rail services. The QCA agrees with QR that in order to retain the integrity of the rail infrastructure, QR has an interest in ensuring that the interface is closely managed on a consistent basis. Nevertheless, the QCA is mindful that QR, as a vertically integrated provider, faces a conflict of interest in its ability to use the interface standards to hinder access to its below-rail services, thereby protecting the revenues of its above-rail operations. Consequently, in considering the interface provisions of QR's Draft Undertaking, the QCA has carefully balanced these competing interests.

The first part of this chapter discusses rail safety, rollingstock and operational interface requirements. Environmental requirements are discussed in the second part of the chapter.

Rail safety, rolling stock and operational requirements

Background

The QCA discussed at length in the Draft Decision the rail safety regulatory framework operating across Australia and explained the relationship between this national framework and the administration of rail safety within Queensland. Queensland's rail safety regulator, the Rail Safety Accreditation Unit within Queensland Transport, endorsed the QCA's position on the rail safety provisions of QR's Draft Undertaking as balanced and reasonable.

Stakeholder views

QR - is in broad agreement with the QCA's objectives for interface management. Nonetheless, at a detailed level, QR cannot agree with all of the QCA's recommendations, particularly concerning QR's role as railway manager. QR's position on interface management is based on legal and technical advice concerning QR's obligations and exposures, and in this regard, QR is concerned the QCA's recommendations do not fully reflect QR's obligations and responsibilities, particularly in relation to the management of the rollingstock/infrastructure interface. These concerns are set out below.

Transport Infrastructure Act

The provisions of the Transport Infrastructure Act (the TIA) do not clearly define the respective responsibilities of the Rail Safety Accreditation Unit, the railway manager or the railway operator as regards the management of the interface between rollingstock and rail, nor does the TIA explain who has overall network management responsibility.

Clearly, the TIA does not negate QR's responsibility, and thus liability, for incidents occurring on its infrastructure. However, the TIA provisions lack a clear allocation of responsibility. Consequently, it is indeterminate how legal responsibility would be apportioned between the RSAU, QR and the operator were an incident to occur on infrastructure in respect of which QR is railway manager. The TIA does not specify who would be liable for any loss or damage (whether to person or property) resulting, for example, from an operator's failure to comply with its safety management system or with one of the interface standards specified in its access agreement. QR cannot assume that other parties will bear the responsibility for such loss or damage.

QR's role as railway manager requires it to retain an ability to take a pro-active approach to the management of interfaces on its infrastructure. As a result, QR does not consider that it should refer all safety issues that arise during operations to the RSAU for resolution. In

particular, QR must be able to act in circumstances where it perceives a commercial or safety risk resulting from a breach of the relevant rollingstock interface standards. One example that QR has discussed with both the RSAU and the QCA is that of a driver presenting in an intoxicated state. There appears to be a consensus that in such a situation, the only reasonable course of action available to QR would be to refuse to allow the driver to operate rollingstock on QR's network. From QR's perspective, it would not be discharging its duty as a responsible railway manager if it failed to act in such circumstances.

Australian rail safety standard AS 4292

QR questions the enforceability of what the QCA believes to be a requirement for an accredited railway operator in Queensland to have a safety management system consistent with the Australian Standard for rail safety management: AS 4292. The QCA notes that in addition to the provisions of the TIA, parties seeking accreditation in Queensland must develop a rail safety management system consistent with this Australian Standard, and in accordance with Queensland Transport's 'Rail Safety Management within Queensland' manual (the manual).

QR appreciates the connection between the Inter-Governmental Agreement, the provisions of the TIA and the manual, but is concerned that the result is a discretionary power, on the part of the RSAU, rather than a mandatory legislative requirement for all accredited railway operators to develop and maintain a safety management system consistent with AS 4292. QR is currently seeking legal advice on this issue and will advise the QCA of its outcome as soon as it is available.

QR's safety management system

QR's safety management system influences QR's approach to managing safety and rollingstock issues, including the interface between different operators and between operators and QR infrastructure. QR's safety management system is one component of its accreditation application accepted by the RSAU, which means the RSAU has endorsed QR's safety management system in terms of achievable safety levels, and consistency with generally accepted risk management principles, amongst other things. QR's safety management system requires QR to ensure that overall safety risk will not be increased through the operation of a third party operator to a greater extent than if a QR operator were to undertake the operation. One aspect of the process for ensuring that this is achieved is the interface risk assessments conducted jointly by QR and an access seeker. Furthermore, QR must ensure that third party operators have access agreements in place, which include an IRMP consistent with the outcomes of the interface risk assessment.

Consistent with QR's safety management system, QR's proposed approach to managing interface risks focuses on the same outcomes for both QR operators and third party operators. Principal amongst the conditions attached to QR's accreditation as a railway manager, is the requirement for QR to comply with all aspects of its accreditation application and approved safety management system (unless the RSAU is formally notified and agrees to any significant amendments). Accordingly, if the QCA requires QR to change the processes detailed in its safety management system it may place QR in the position of either breaching the conditions of its accreditation or being forced to change its safety management system (assuming that the RSAU agrees to any such change).

FreightCorp - generally considers the QCA has struck a fine balance in relation to the key interface issues of safety, technical, operational and environmental standards.

The findings of the QCA in relation to the roles of the RSAU are key in overcoming very serious concerns that Freightcorp had as an access seeker about the regulatory role that QR was seeking to reserve for itself. This role allowed QR to impose standards on new entrants that may act as a barrier to entry.

QMC - believes the QCA's proposed changes to QR's negotiating and interface procedures, including the quasi-regulatory functions in QR's safety and environmental requirements, will aid the development of effective competition.

RTBU - it is astounding that a government agency (QCA) would chide another government agency for having excessively high standards on safety and environment protection. QCA proceeds to amend QR's Draft Undertaking, which would have the effect of watering down

all aspects of safety and environment issues to the advantage of third parties and disadvantage of QR.

Queensland Government – The Draft Decision implicitly recognises the RSAU (by the delegation of the Chief Executive of Queensland Transport) is the rail safety regulator in Queensland and responsible for administering the rail safety framework set down in the Transport Infrastructure Amendment (Rail) Act 1995. The Government agrees with this position and would like to have it made explicit by the inclusion of an additional recommendation to this effect in the Final Decision.

QCA's analysis

In developing the Final Decision, the QCA has avoided reproducing large extracts of the Draft Decision and has rather focussed on responding to stakeholder comments on the latter document. However, because QR has raised serious matters regarding the administration of rail safety in the State, some repetition of the Draft Decision is unavoidable, in particular, regarding the rail safety regulatory framework applying in Queensland and Australia.

In summary, the QCA considers that QR's comments in response to the Draft Decision regarding rolling stock authorisation and safety audits are inconsistent with the intent of the Australian rail safety regulatory framework and question the role of the Rail Safety Accreditation Unit within that framework. This is puzzling given QR's positive contribution to the development of that regulatory framework. It should be noted, however, that in criticising QR's comments, the QCA recognises QR has a commendable safety record.

The QCA notes that the Queensland Government's submission endorses the QCA's position that the RSAU (by the delegation of the Chief Executive of Queensland Transport) is the rail safety regulator in Queensland and responsible for administering the rail safety framework set down in the *Transport Infrastructure Amendment (Rail) Act 1995.*

Finally, the QCA considers the RTBU's general criticism of the Draft Decision's proposed rail safety amendments represents a fundamental misunderstanding of the Australian rail safety regulatory framework. The QCA's proposed amendments were made in the context of, and were consistent with, that regulatory framework. Specific RTBU criticisms have been addressed in the relevant sections of this chapter.

Australian rail safety regulatory framework

The Australian rail safety framework is based on the principles of co-regulation, with rail safety being managed jointly by government and industry.

Individual State and Territory Governments have autonomy in rail safety regulation, administered in accordance with relevant legislation in each jurisdiction. In 1996, Australian governments signed an Inter-Governmental Agreement (IGA) which provided that legislation would be passed making AS 4292, representing a uniform rail safety standard, the basis for rail safety accreditation. The IGA also provided that the parties would make provision under existing or new legislation for accreditation by an accreditation authority and for mutual recognition.

The accreditation authorities that were subsequently established - generally within State Transport Departments – have developed National Guidelines for Rail Safety Accreditation (April 1999), which are aimed at achieving consistency in processing applications and simplifying mutual recognition requirements.

The Rail Safety Committee of Australia (RSCA), established in 1998, is responsible for the development of nationally harmonised administrative and operational requirements for rail safety. The RSCA is chaired by the Commonwealth Department of Transport and Regional

Service and includes representatives from the State accreditation authorities, an interstate and intrastate operator, a track manager and the Australian Railway Association. The RSCA reports to the Standing Committee on Transport, which in turn reports to the Australian Transport Council of Ministers.

Assignment of roles and responsibilities

The assignment of roles and responsibilities between accreditation authorities, track managers and rail operators for the management of safety within the Australian rail sector has received considerable attention by RSCA. The lack of uniform structures and procedures within the sector has required a heavy emphasis on co-operation from all sections of the industry if harmonisation and consistency in operation and regulation is to be achieved.

Under the co-regulatory framework, the performance of the accreditation function is separated from the performance of above-rail operations and below-rail infrastructure management. Track owners and rail operators, not the regulator, are responsible for the safety of their activities. The regulator must be satisfied that track owners and rail operators have in place, and can demonstrate, an appropriate safety management system.

This separation of regulatory and commercial functions is consistent with the Competition Principles Agreement. If a track manager and/or rail operator played a dual role of safety regulator and commercial train service provider, it would face a potential conflict of interest between advancing its commercial interests and advancing the wider public interest in rail safety through the exercise of its regulatory powers. This would present an opportunity for it to misuse control over regulatory standards to frustrate the actions of actual or potential competitors or to advantage its own operations.

Nevertheless, potential and practical overlap in the respective roles of the track manager (including its role as access provider) and accreditation authority has been an ongoing area of debate. RSCA has spent a considerable period attempting to clarify the respective roles of the accreditation authority and track manager so any overlap is minimised in practice. To this end, a key principle of co-regulation has been that an accreditation authority and track manager should not duplicate roles in regulating the safety of a rail operator. A complementary principle has been that the track manager and rail operator should rely on the accreditation process to ensure each party is applying an effective safety management system.

The QCA considers that the thrust of QR's arguments in its submission disregards the efforts of RSCA to minimise areas of overlap between the accreditation authority and track manager. Specific instances where the practical effect of QR's proposals would be to create such an overlap are discussed in the relevant sections of this chapter.

Glenbrook Inquiry[1]

The Final Report of the Glenbrook Inquiry raised a number of pertinent matters regarding the assignment of roles and responsibilities between accreditation authorities, track managers and rail operators in NSW. Given NSW's third party access arrangements have been in place for a number of years, and notwithstanding a different industry structure to Queensland, the QCA considers that there are important lessons to be learned from NSW in developing appropriate rail safety arrangements in an open access environment.

Justice McInerney found that under the NSW rail safety legislation, infrastructure owners could impose conditions in relation to access that the rail operator regards as discriminatory or

[1] Special Commission of Inquiry into the Glenbrook Accident - Final Report, Justice Peter McInerney (April 2001)

unreasonable and could ultimately decline access rights if the operator did not agree to the conditions. He argued that this was not intended to be part of the open access regime in NSW. In addition, nor was it intended under the *NSW Rail Safety Act* that the infrastructure owner could become a de facto safety regulator.

As a result, Justice McInerney recommended that the NSW rail safety legislation should be amended to make it clear that rail safety accreditation is the exclusive responsibility of the Rail Safety Inspectorate (RSI) and not a matter for the indirect control or influence of the infrastructure owner. The rights of contracting parties should be governed by the contracts between them and where safety issues arise that are not governed by those contracts, the public safety should be protected through the legislative power conferred on the RSI.

Queensland rail safety regulatory framework

Legislative provisions

The Queensland rail safety framework is established in the *Transport Infrastructure Act 1994* (the TI Act), as amended by the *Transport Infrastructure Amendment (Rail) Act 1995.* The Chief Executive of Queensland Transport (QT) is responsible for administering the rail safety provisions under Part 4 of the Act. Rail safety policy, accreditation and performance monitoring have been delegated to the Rail Safety Accreditation Unit (RSAU) within QT.

Under ss84(3) of the TI Act, QT is required to accredit an applicant as a 'railway operator' to operate rollingstock on a railway if satisfied as to the following criteria:

- the applicant is accredited in another State to operate rollingstock on a railway for a similar type of service or has the competency and capacity to operate rollingstock on the railway safely; and
- the applicant has an appropriate safety management system; and
- the applicant has the financial capacity or public risk insurance arrangements to meet reasonable potential accident liabilities for the railway; and
- the applicant has an agreement with the railway's manager to operate particular rollingstock on the railway, and the agreement includes appropriate arrangements for the safe operation of the rollingstock, unless the applicant is applying for accreditation as a railway manager and operator.

The establishment of an appropriate safety management system is also a requirement for accreditation of a railway manager (to manage rail transport infrastructure).

In considering a safety management system, ss84(4) requires QT to consider:

- the applicant's rail transport proposal; and
- the appropriateness of the safety management system for the proposal; and
- the safety levels achievable, consistent with the nature of the proposal, at a reasonable cost; and
- the need for efficient and competitive rail transport services; and
- consistency with generally accepted risk management principles; and

- the levels of safety proposed relative to the levels of safety of competing transport modes.

The TI Act allows QT to consider other matters at its discretion.

Finally, the Act establishes a range of procedures once accreditations are granted including, the imposition of conditions or amendments, the grounds for suspension or cancellation and provision of an opportunity for surrender.

RSAU's administration of legislative provisions

In addition to the provisions of the TI Act, applicants seeking accreditation must develop their rail safety management systems in a manner consistent with the Australian Standard for rail safety management, AS 4292, and QT's 'Rail Safety Management within Queensland' manual, to RSAU's satisfaction.

The manual aims to assist railway managers and railway operators to develop safety accreditation applications in accordance with the TI Act. The manual translates the requirements of the TI Act and the AS 4292.1 standard into accreditation acceptance requirements, and provides guidance notes where necessary.

Structure of accreditation documentation - the manual states that accreditation applications must cover three main areas:

- the activities being undertaken;
- the risks associated with those activities; and
- the means applied to control the risks.

RSAU requires that applicants must be able to demonstrate they fully understand the safety risks of their operation and how the risks are managed through:

- an effective safety management system;
- clear assignment of safety responsibilities;
- competent staff undertaking safety activities;
- effective control of interfaces; and
- arrangements for monitoring and reporting safety performance.

In the context of third-party entry on QR's network, in order to satisfy itself of the effective control of interfaces, RSAU requires a third-party operator to provide a copy of a joint risk assessment it has undertaken in conjunction with the railway manager and the controls which are to be put in place to manage the identified risks.

Content of accreditation documentation - RSAU's manual provides that the content can best be depicted under the following three areas:

- organisational aspects of the railway operations including the organisation's details, purpose and scope, description of operation, assets, financial capacity, previous rail history, right of access, safety policy and safety performance levels;
- risk management processes for identifying risks; and

- safety management system, including controls used to manage the identified risks.

The RSAU Manual notes the risk assessment section of an accreditation application is likely to be a major part of the required documentation and will in many regards be a key driver of the safety management system. The safety management system will consist of controls documented and implemented to manage risks, derived from the following four sources:

- the control measures identified and required to control the organisation's major risks;
- controls required being incorporated within the safety management system and meeting the intent of AS 4292.1;
- controls needed to meet any conditions set by RSAU; and
- additional controls self-imposed by the organisation.

For each control mechanism within the safety management system (for example, document control, emergency planning) RSAU is looking for the railway manager/railway operators':

- policy - for each given subject in the safety system;
- organisation – the person(s) responsible to discharge the policy and the training/competencies this person(s) requires;
- plan – as to how the policy will be achieved;
- monitoring – of what and how to ensure the plan is being enacted; and
- review – how and when the effectiveness of the policy, results and control mechanisms will be reviewed.

Compliance audits - the manual provides for compliance audits of accredited railway managers/operators. Audits will generally be conducted approximately six months after an organisation becomes accredited and subsequently as determined by RSAU based on the scope of the operations, safety performance and/or concerns and any significant operational changes.

Audits are planned in consultation with railway managers/operators and are generally conducted in two stages – desk top and on site.

Implementation of the safety management principles requires compliance with a range of operational, infrastructure and rollingstock aspects, and recognition of the responsibilities of interfacing parties in respect of other transport modes.

Applicants also need to demonstrate that access rights to the rail network have been obtained before accreditation will be granted, and stipulate to the RSAU any requirements that need to be met as part of the access right, although in practice the two procedures proceed in parallel.

<u>QR's criticism of Queensland's rail safety legislative framework</u>

The QCA is concerned QR has raised criticisms that the TIA does not clearly define the respective responsibilities of the RSAU, the railway manager or the rail operator regarding management of the interface, and who has overall responsibility for network management, at this late stage of the assessment process. This concern applies equally to QR's query about the enforceablity of the Australian rail safety standard AS4292 within Queensland. The QCA notes

that it has not been provided with the supporting legal advice referred to by QR, nor has the RSAU.

The QCA recognises that the Inter-Governmental Agreement on National Rail Safety, the TIA and AS4292 do not provide extensive explanations of the roles and responsibilities of the main parties involved in rail safety. Nevertheless, QR's comments would imply that the RSCA process has not been taking place and accreditation authorities, track mangers and rail operators have not been working towards establishing clear lines of responsibility. The QCA has spoken to the RSAU regarding QR's comments. It is of the opinion that QR is exaggerating the uncertainty regarding both the rail safety responsibilities of parties under the TIA and the enforceability of AS4292.

While recognising AS4292 is not referred to in the TIA, its place in the Australian rail safety regulatory framework is clear. In accordance with the 1996 rail safety IGA, all accreditation authorities have adopted AS4292 as the standard against which safety management systems must be consistent to receive accreditation. As discussed above, AS4292 is clearly identified in the RSAU's Manual. The QCA questions QR's concern that compliance with the standard is not legislated. Given RSAU's commitment to accredit track managers and rail operators in accordance with AS4292, one can only understand QR's concern if RSAU is likely to approve safety management systems that are deficient with respect to the standard or it is unable to enforce the standard. QR has not provided evidence to support either position.

Finally, QR argues if the QCA requires changes to the processes detailed in QR's safety management system, it may place QR in the position of either breaching the conditions of its accreditation or being forced to change its safety management system (assuming that the RSAU agrees to any such change). The QCA rejects this assertion. None of the QCA's proposed amendments regarding rail safety would deliver such an outcome. As noted earlier, the RSAU endorsed the positions taken in the Draft Decision. The QCA would not expect to have received such an endorsement if QR's accreditation was put at risk.

7.2 Establishment of rollingstock interface standards

Background

Proposed minimum rollingstock interface standards

In assessing QR's proposed rollingstock interface standards (RIS), the QCA considered that the key test is the level of prescriptiveness of the RIS and the extent to which they address matters beyond the wheel-track interface. The QCA expressed concern in the Draft Decision that QR's proposed RIS are too prescriptive and go beyond purely interface issues, possibly stifling innovation in third-party operator's train services and serving as a barrier to entry to the above-rail market. Consequently, the QCA recommended that the reference in the Draft Undertaking to the development of RIS and the requirement that only rollingstock and rollingstock configurations complying with the RIS may operate on that infrastructure be removed. The QCA also considered that the Undertaking should incorporate a schedule providing a non-exhaustive list of minimum interface requirements to guide negotiations regarding rollingstock standards.

The QCA recognised in the Draft Decision that, once a third-party operator is running its train services, QR should be able to vary the agreed rollingstock interface standards at any time on safety grounds, after consultation with the third-party operator. However, changes to standards on any other grounds should be negotiated with the third-party operator.

System-wide changes to minimum rollingstock interface standards

The QCA's proposed Schedule E principles also included the following:

- "QR may, acting reasonably, vary the agreed rollingstock interface standards at any time on safety grounds, after consultation with the third-party. Otherwise, QR may, acting reasonably, negotiate any other changes with the third-party. Where any changes in the standards necessitate modification of the third-party's rollingstock, the costs of such modifications are to be borne in the manner agreed by the parties or, failing agreement, as determined by an expert."

Stakeholder views

Minimum rollingstock interface standards

QR - accepts a shift away from QR-prescribed rollingstock interface standards and a separate safety risk assessment, towards one 'interface risk management process', involving an interface risk assessment that culminates in an interface risk management plan (IRMP). In accordance with this revised procedure, QR and an access seeker will jointly undertake the interface risk assessment for the purpose of identifying the hazards and assessing the risks (relating to all safety and rollingstock interfaces) of an operation on QR's infrastructure, and agreeing the controls for those risks. The controls will include rollingstock interface standards, safe working standards and safety standards and any other operational standards. The IRMP will become a schedule to the relevant access agreement.

QR considers the QCA's suggested non-exhaustive list of minimum interface requirements might mislead access seekers as to the types of issues that will need to be addressed during the interface risk management process. The list implies the only 'interface' QR should be concerned with, as railway manager, is the wheel/rail interface.

The wheel/rail interface is only one of the important interfaces that must be controlled to ensure the safety of the rail system. Furthermore, the agreed rollingstock interface standards will address more than the wheel/rail interface. QR considers this is a fundamental misunderstanding on the QCA's part. The QCA appears to have assumed the rollingstock interface standards would only address the wheel/rail interface, and other controls, such as safe-working procedures, would address the other interfaces. As a result, QR considers the QCA has simplified the requirements of interface control, and indeed misinterpreted and over simplified the statements in the Draft National Code of Practice with regard to minimum interface requirements.

The following are examples of areas where the seven parameters listed by the QCA fail to address interfaces adequately:

- the audibility and visibility of rollingstock. This is crucial to ensure the safety of on-track staff and the integrity of interfaces with road vehicles such as at level crossings. It is also an important feature of the safety working system in QR (and most railways). Maximum visibility of rollingstock supports train drivers in the avoidance of collisions during adverse weather conditions and at night;

- structural requirements of rollingstock (including rail tank cars). Rollingstock that is substandard from a structural point of view is inherently dangerous for other operators on the track as it can result in derailment, or the deficient rollingstock coming into contact with another operator's rollingstock on adjacent track; and

- the requirement to carry certain emergency equipment on rollingstock. This is associated with the protection of incident sites such as derailment sites. The carrying of detonators and appropriate flags are important safety critical requirements.

Although the QCA has clearly stated its proposed list is non-exhaustive, QR considers a better approach to describing the types of issues that should be covered by rollingstock interface standards, would be to require the interface risk management process, and the risk assessment process in particular, to consider all risks to QR staff and QR interfaces with the public, or to other operators who are or would potentially be on the QR network.

QR's advice indicates QR would not be adequately addressing its obligations if it did not take this approach. In addition, despite an acknowledgment by the QCA it accepts the rollingstock interface standards will relate to commercial interface risks as well as safety interface risks, QR considers that the QCA has failed to fully reflect this fact in its decision. The standards to be agreed through the interface risk assessment process will have commercial aspects to them and QR considers it would be inappropriate to restrict the scope of the risk assessment to considering base-level safety issues relating only to the wheel/rail interface.

From QR's perspective, it has a legislative imperative to act commercially and, accordingly, is concerned to protect the value of its assets. QR considers this corporate objective legitimately enables it, if necessary and provided the requirement is non-discriminatory, to require operators on its network to have higher safety and engineering standards than those that might be expected by an independent party simply concerned with safety issues. The Independent Pricing and Regulatory Tribunal (IPART) has expressed a similar view to this in relation to the responsibility held by RIC in the NSW forum. This means the agreed rollingstock interface standards may incorporate more than a minimum safety requirement.

ARTC - supports the QCA proposal that minimum interface requirements should be the same as detailed in the draft code of practice on rollingstock issued by the ARA.

ARTC considers the QCA's endeavours to limit the ability of QR to use rollingstock interface standards to hinder third party access still allows QR with more control over the standards and monitoring of compliance than ARTC has or would require. However, it considers QR's and ARTC's approaches are now closer.

FreightCorp - rolling stock standards are needed at a number of levels and it is essential these levels be clearly understood in order to come to a view on responsibilities.

In overview, the aim of these standards is to ensure rolling stock:

(a) operates safely within the constraints of the access provider's infrastructure and systems, and meets the minimum requirements stated on p309 of the Draft Decision.

(b) operates, over and above (a), at a level of safety acceptable to both the access provider and the regulator, by meeting minimum standards for the design, manufacture and use, and maintenance limits, of safety critical items.

Conforming with these standards should be the responsibility of the operator, but however, some of these standards may impact on the interface with the access provider. In those instances, the access provider has a legitimate requirement to ensure such standards are recognised.

FreightCorp is of the view that these standards should follow the National Code of Practice (Code), now in draft form, unless QR can demonstrate to the operator's satisfaction that local conditions demand a higher or otherwise different standard. Further, these standards should form the basis of the safety risk assessment process. The Code has the support of all major operators, access providers and regulators and its adoption will benefit the national growth of the rail industry, plus the rollingstock manufacturing and service supply industry.

Consequently, FreightCorp recommends the QCA mandate the use of the National Code Of Practice as the basis for the conduct of the safety risk assessment between Network Access and the operator.

(c) operates, over and above (a) and (b), at the level of safety and reliability desired by the operator. Such standards are clearly the preserve and responsibility of the operator.

Commensurate with the foregoing, FreightCorp strongly supports the QCA's findings that rollingstock interface standards should not address matters beyond the track wheel interface.

FreightCorp also strongly supports the QCA's findings that the joint safety risk assessment is the best mechanism to address rollingstock interface standards. Further, FreightCorp strongly supports the QCA's finding there is merit in establishing some parameters for negotiations concerning rollingstock interface standards.

FreightCorp notes the QCA's proposal QR be able to vary agreed rolling stock interface standards on safety grounds, subject to consultation with the operator. In the absence of a clear definition of "safety", such an ability to vary rollingstock interface standards may be used to the disadvantage of one rail operator against another. This requires careful consideration, and this may be something that should be considered in a forum chaired by the QCA.

A starting point for consideration of this issue might be an amended formulation that it has been comfortable to use in negotiation of rights of suspension. Safety grounds would be constituted by the rollingstock that has caused or is likely to cause risk to the safety of any person or material risk to property.

FreightCorp recommends Schedule E should contain a level of definition on the same issue, and that definition should form part of the base case.

RTBU - QCA's proposed amendments to QR's drafting would have the effect of watering down all aspects of safety and environment issues to the advantage of third parties and the disadvantage of QR. For example, the QCA's proposal that QR should not have the right to develop standards for rolling stock.

System-wide changes to the rollingstock interface standards

QR - does not accept the QCA's recommendation for the inclusion of the specified principle concerning QR's right to vary agreed rollingstock interface standards.

An obligation to negotiate changes to such system-wide requirements (eg. changes to rollingstock interface standards, safe-working procedures and QR's emergency procedures) with all operators could leave QR in the position of 'being held to ransom' by one operator in order to facilitate a system-wide change. As the network manager, QR considers it needs to have the ability to vary rollingstock interface standards, safe-working procedures and other system-wide requirements in respect to either the infrastructure or processes or procedures related to the management of the infrastructure, notwithstanding that such changes may lead to the need for operators to implement changes to their operations (for instance, rollingstock modifications).

QR proposes the following approach to facilitating a change to system-wide requirements during the course of an access agreement:

- where a change is required to meet a safety requirement QR can require a third party to make the change and both parties will meet their own costs;
- where a change is required to meet a 'material change' (as defined in the access agreement) QR can require the other party to meet QR's costs as well as its own; and
- where a change is required to facilitate a system-wide change (but not to meet a safety requirement or a 'material change'), QR can, after consulting with the third party, require that third party to make the change and the costs will be shared as agreed between the parties, or as determined by an expert if agreement is not reached. In assessing how the costs would be shared, the objective would be that a third party was not at a net financial disadvantage as a result of a change. QR's liability for the third party's costs would decrease to the extent the third party would get some benefit from the change.

QR considers its proposal for sharing the costs of implementing changes to system-wide requirements should provide adequate protection for operators such that QR could not hinder access through this provision.

QCA's analysis

Proposed minimum rollingstock interface standards

QR's submission notes that it accepts a shift away from QR-prescribed rollingstock interface standards and a separate safety risk assessment, towards one 'interface risk management

process', involving an interface risk assessment that culminates in an interface risk management plan (IRMP). The QCA supports such an approach.

The QCA agrees with QR that this approach would entail QR and an access seeker jointly undertaking the interface risk assessment for the purpose of assessing the risks (relating to all safety and rollingstock interfaces) of an operation on QR's infrastructure, and agreeing the controls for those risks. The controls will include rollingstock interface standards, safe working standards and safety standards and any other operational standards. The IRMP will become a schedule to the relevant access agreement.

While the QCA would support an Undertaking that incorporated the IRMP process outlined above, it still has concerns about the scope of the role that QR envisages itself playing in reaching agreement with a third-party operator on the rolling stock interface standards.

Some rolling stock interface standards will relate to the compatibility of the third-party operator's rollingstock with QR's track infrastructure and cover the sorts of issues specified in the QCA's proposed minimum interface requirements. These standards would have to be agreed between Network Access and the third-party operator because of their wheel-rail nature. Other standards will relate to the nature of the third-party operator's rollingstock, such as the interior environment of carriages or the lay-out of the locomotive cabin. These standards are a matter for the third-party operator to develop and ultimately RSAU (not QR) to approve.

QR provides the following examples where it argues the QCA's proposed rollingstock minimum interface requirements inadequately address interface issues: rollingstock audibility and visibility; rollingstock structural requirements; and a requirement to carry emergency equipment on rollingstock. QR argues that the QCA's proposed minimum requirements might mislead access seekers as to the types of issues that will need to be addressed during the interface risk management process.

The QCA emphasises its position in the Draft Decision that these minimum requirements are a non-exhaustive list of factors that must be addressed as part of the interface risk assessment. Ultimately, RSAU will need to satisfy itself that QR and a third-party operator identify all the interface risks (and control measures) of that operator's proposed train services. The proposed informal dispute resolution process involving RSAU (see section 7.5) should also assist QR and third-party operators identify the genuine interface risks as part of the interface risk assessment process. Indeed, QR is the only stakeholder to criticise the proposed minimum interface rollingstock requirements as potentially misleading access seekers as to the types of issues that will need to be addressed during the interface risk management process.

Nevertheless, the QCA is concerned that QR may take a prescriptive approach in identifying the control measures for the risks identified during the interface risk assessment. These control measures are the responsibility of the third-party operator, not the track manager, who would ultimately need the RSAU's approval as to their appropriateness as part of receiving its accreditation.

To illustrate the point, there is not one way in which rollingstock visibility could be appropriately effected. QR has chosen an approach reflected in its internal standard STD0049/TEC and that has been incorporated in its safety management system and approved by RSAU. This does not mean, however, that QR's approach is the only possible way of appropriately effecting rolling stock visibility. A third-party operator could come up with a different means of providing visibility for its rollingstock. The QCA understands that not all QR's trains meet STD0049/TEC (due to 'grandfathering'), however, that does not mean they are unsafe, just that a different standard acceptable to the safety regulator had previously been adopted for its older trains.

Whether the third-party operator's alternative approach was effective would be for the RSAU to decide. If RSAU was not satisfied a rail operator had satisfactorily addressed rollingstock visibility, then accreditation would not be granted. The QCA considers this example provides a practical demonstration of the potential overlap in responsibilities of a track manager and rail safety regulator discussed in section 7.1 of the chapter. There is no room for overlap, the RSAU is the appropriate body.

Finally, QR considers its corporate objective to act commercially enables it, if necessary and provided the requirement is non-discriminatory, to require operators on its network to have higher safety and engineering standards than those that might be expected by an independent party simply concerned with safety issues. The QCA accepts this position in principle, but must ensure that any safety requirements imposed by a network owner should be consistent with competitive neutrality and with the position of the RSAU as safety regulator. QR's current proposals do not take appropriate account of RSCA's attempts to more clearly assign roles and responsibilities of track managers and accreditation authorities and may therefore conflict with the role of the RSAU as safety regulator. Moreover, to the extent that 'grandfathering' arrangements are applying on QR's network with respect to rollingstock interface standards, it would be inappropriate to move away from minimum standards at this time on competitive neutrality grounds.

FreightCorp proposes that the QCA should mandate the National Code of Practice for Rollingstock. The QCA does not have the authority to mandate such a code of practice, rather this would be a decision for the RSAU to make. The RSAU has advised the QCA that it would not be mandating the national codes of practice once they are finalised, however, they would be relevant in its assessment of accreditation applications.[2]

System-wide changes to the rollingstock interface standards

The QCA recognised in the Draft Decision that QR, as network manager, should have certain rights to make changes to its infrastructure and associated rolling stock interface standards.

QR's submission provides a useful breakdown of the grounds for system-wide changes as follows:

- safety;
- 'material changes'; and
- non-safety.

QR goes on to propose how costs should be allocated for each of the above system-wide changes. These are discussed below.

<u>System-wide change of safety grounds</u>

QR proposes that where a change is required to meet a safety requirement QR can require a third party to make the change and both parties will meet their own costs. FreightCorp expressed concerns that in the absence of a clear demonstration of 'safety', QR's right to vary agreed rollingstock standards could be used in a way that disadvantages one rail operator over another.

[2] There are five volumes proposed. Volumes 1, 2 and 3 dealing with general requirements, glossary and operations and safeworking have been finalised. Volume 4, Infrastructure, is in draft form and Volume 5, Rollingstock, is in preliminary draft form. Volume 5 is proposed to replace the existing Railways of Australia (ROA) Manual of Engineering Standards.

The QCA has been advised that QR has an internal safety standards committee composed of representatives from its safety group (chair), technical services group, Network Access and the above-rail groups. No changes to QR's safety standards can be made outside of this group. The QCA sees merit in third-party operators being allowed to form part of this group when system-wide changes to rollingstock interface standards on safety grounds are proposed. Clearly, third-party operators should not form part of the group when QR's internal standards are being discussed.

A third-party operator would also have recourse to the RSAU if it had concerns about changes to a system-wide standard on safety grounds. The RSAU has advised the QCA that it is prepared to extend its informal dispute resolution role with respect to the interface risk assessment – discussed in section 7.4 – to cover system-wide changes to rollingstock interface standards on safety grounds. The QCA considers that the RSAU's involvement would protect QR from a third-party operator attempting to prevent a reasonable system-wide change take place.

Nevertheless, as provided for in the Draft Decision, the QCA considers that the costs of such modifications should be borne in the manner agreed by the parties or, failing agreement, as determined by an expert.

System-wide material change

QR proposes where a change is required to meet a 'material change' (as defined in the access agreement) QR can require the other party to meet QR's costs as well as its own.

The QCA argued in the Draft Decision (section 8.4.16 of Chapter 8) that there should be no assumption of automatic flow-on effects of the cost of material changes, rather the cost effects should be assessed on a case-by case basis. A Schedule E principle was developed along these lines. The QCA has not changed its position on this matter.

System-wide change on non-safety grounds

QR proposes where a change is required to facilitate a system-wide change (but not to meet a safety requirement or a 'material change'), it can, after consulting with the third party, require that third party to make the change and the costs will be shared as agreed between the parties, or as determined by an expert if agreement is not reached. In assessing how the costs would be shared, the objective would be that a third party was not at a net financial disadvantage as a result of a change. QR's liability for the third party's costs would decrease to the extent the third party would get some benefit from the change.

The QCA recognises QR is concerned that a third-party operator could prevent it making a system-wide change that QR considers has net benefits. To address this concern, QR is seeking the right to require such a change but leave the third-party operator no worse off financially.

Nevertheless, the QCA would prefer that such matters are negotiated between QR and the third-party, subject to the third-party operator not unreasonably withholding consent to a non-safety system-wide change.

QCA's position

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

1. **the reference to the development of QR's rollingstock interface standards for the rail infrastructure and the requirement that**

only rollingstock and rollingstock configurations complying with QR's rollingstock interface standards may operate on that infrastructure is removed; and

2. **a schedule to the Undertaking is incorporated that provides the following non-exhaustive list of minimum interface requirements to guide negotiations regarding minimum rollingstock interface standards during the safety risk assessment so that any vehicle a third-party operator proposes to run on QR's network should be able to:**

   - **remain on the track up to the permissible speed limit;**
   - **negotiate the varied track elements and configuration without interference or fouling;**
   - **clear track-side structures and infrastructure;**
   - **activate the signalling system;**
   - **stop from track speed within the required distances;**
   - **retain its loading; and**
   - **comply with environmental requirements; and**

3. **the following Schedule E principle is incorporated:**

   - **"QR may, acting reasonably, vary the agreed rollingstock interface standards at any time on safety grounds, after consultation with the third-party. Otherwise, QR may, acting reasonably, negotiate any other changes with the third-party. Where any changes in the standards necessitate modification of the third-party's rollingstock, the costs of such modifications are to be borne in the manner agreed by the parties or, failing agreement, as determined by an expert."**

7.3 Appropriateness of QR's role in authorising rollingstock

Background

QR's position is that rollingstock and rollingstock configurations that operate on the rail infrastructure must be authorised by QR to ensure they comply with QR's RIS ("Standard 68' – Rollingstock Acceptance, Validation and Registration) QR argues its RIS need to be complied with for an operator to gain and maintain accreditation.

The QCA proposed an alternative authorisation approach involving QR and the third-party operator agreeing on a party competent to provide certification for the operator's rollingstock. Under this approach, QR reserves the right to seek documentation from a third-party operator to confirm the rollingstock/rollingstock configurations for its proposed train services are as agreed by the two parties in the safety risk management plan. The QCA believes this would protect QR's legitimate business interests as any concerns it may have regarding a third-party operators

rollingstock are resolved through its right to agree to the authorisation party, view the operators relevant documentation and negotiate the price of access. A third-party operator's interests are protected, as it would have prime responsibility for authorising its rollingstock, consistent with the current rail safety regulatory environment in Queensland.

Stakeholder views

QR - does not intend to require the party certifying an access seeker's rollingstock and trains to be independent of the access seeker. As a result, QR will not object to a party simply on the grounds that the access seeker employs them.

In relation to who gets to decide whether a party is 'competent' to provide a certificate of compliance, however, QR is concerned the QCA may have overlooked QR's legitimate interests.

The QCA refers to the provisions of the TI Act. QR considers the QCA's comments highlight an area of misunderstanding between QR and the QCA. Firstly, QR considers the QCA has failed to acknowledge that QR, as railway manager, is responsible for ensuring the network is safe and remains safe for the entry of all operators (existing and new), not just the particular operator whose rollingstock and configurations are being authorised. Secondly, QR has other safety obligations, independent of the provisions of the TIA. These obligations arise both at common law (in negligence) and through other legislation, most particularly the provisions of the *Workplace Health and Safety Act 1995* (the WPHSA). The WPHSA places obligations upon QR, both as employer and as an entity in control of a workplace. QR has an obligation to ensure the workplace health and safety of its workers at work and the workplace health and safety of others who may come to be on or at the workplace. Amongst other things, QR must ensure there is appropriate, safe access to and from the workplace for persons other than its own employees, as well as its own employees. These duties are non-delegable.

The TIA contains no provision to relieve QR of its obligations at common law or its statutory obligations under the WPHSA. As a result, even if QR did not have the obligations it considers it does under the TIA, as railway manager, it would still have to meet its obligations at common law and under the WPHSA. QR does not consider RSAU would be able to discharge QR from its obligations in these respects.

For these reasons, QR considers it requires a right to both determine who is competent to provide a certification of rollingstock and configuration compliance, and to be able to verify rollingstock and configurations that have been certified, do in fact comply at the time of access, and on an on-going basis. Without these rights QR does not consider it is able to discharge its responsibilities.

QR accepts the QCA's recommendation it have a right to require an access seeker (or the certifying party) to provide documentation demonstrating the rollingstock and configurations are as agreed in the IRMP. In relation to the QCA's prohibition on QR requiring commissioning tests to be carried out, QR maintains no competent party would certify rollingstock and configurations without carrying out these sorts of tests. In addition, QR does not believe the current drafting of the undertaking provides it with the right to *require* commissioning tests to be undertaken, merely the right to view those tests and reports carried out by the certifier.

FreightCorp - supports strongly the finding of the QCA that certification of a third-party operator's rollingstock should be undertaken by a competent person and further that QR should not have a right to require commissioning testing.

In addition, FreightCorp agrees with the assessment of QT, as described by the QCA, relating to accreditation and the assessment of the QCA to the effect what QR had proposed was unnecessarily intrusive.

QCA's analysis

The key practical differences between the QCA and QR on this matter are that:

- the QCA considers QR and a third party operator should agree upon the party suitable to provide rolling stock certification whereas QR wants the sole right to choose the certification party; and

- QR wants a right to view the tests underpinning the certificates(s) of compliance so that it can satisfy itself as to their appropriateness.

QR's legislative obligations beyond the TIA

QR refers to its obligations at common law and under the *Workplace Health and Safety Act 1995* (the WPHSA) to justify having such a right. QR argues it has an obligation under the WPHSA to ensure the workplace health and safety of its workers at work and of others who may come to be on or at the workplace.

QR argues that the TIA Act contains no provisions to relieve QR of its obligations at common law or its statutory obligations under the WPHSA. However, the QCA does not consider that because QR has a duty of care under the WPHSA, it must personally see that the third-party operator is a competent rail operator. The RSAU has the legislative power to provide accreditation to rail operators it deems, amongst other things, have the competency and capacity to operate rollingstock on the railway safely and have an appropriate safety management system. The QCA considers QR's own accreditation and the accreditation of a third-party operator by RSAU would constitute a reasonable response by QR to its obligations under the WPHSA.

The QCA also considers that the health and safety of workers on a third-party operator's train is primarily the responsibility of the third-party operator.

QR's obligations under the TIA

The QCA considers it is worth reiterating the points raised in the Draft Decision about QR's potentially discriminatory approach to rollingstock authorisation, which also puts QR's comments about its obligations under common law and the WPHSA into context.

QR has developed an internal mandatory standard 'Rollingstock Acceptance, Validation and Registration' (STD/0068/TEC) (known within QR as Standard 68) within its safety management system, effective from 1 March 1999. Standard 68 should be seen as QR, in its role as a rail operator, fulfilling part of RSAU's requirements for granting accreditation.

Nevertheless, Standard 68 is specifically exempted from applying to rollingstock running on QR's network prior to 1 March 1999. In other words, the detailed validation procedures established in Standard 68, which QR in effect is saying it wants to apply to third-party operators, have not been applied to the majority of QR's rollingstock. The QCA is disappointed QR did not identify any justification for this inconsistency in its submission.

The QCA argued in the Draft Decision that, under the current rail safety regulatory environment in Queensland, it is not QR's role to authorise a third-party operator's rollingstock. In particular, QR should not be able to impose its standard on a third-party operator as that party may choose to meet RSAU's requirements in a different way. QR has not raised any arguments in its submission that require the QCA to move from this position.

The QCA proposed in the Draft Decision that QR should have a right to agree upon the certifying party and view the certificate(s) of compliance. Also, QR should not have a right to require commissioning tests be undertaken.

QR argues that the Draft Undertaking does not provide it with a right to require commissioning tests be undertaken, merely the right to view those tests and reports carried out by the certifier. The QCA considers the relevant wording is unclear, however, the key issue is whether QR should have a right to view the commissioning test results and if so, what action it should be able to take as a result.

The QCA is concerned that QR's proposal would effectively give it the right to refuse to authorise a third-party operator's rollingstock if it is not satisfied with the tests and reports. This is unacceptable to the QCA because it is inconsistent with Queensland's safety regulatory framework.

Consequently, the QCA has decided that QR should have a right to view the commissioning test results and reports, however, this should be in the context of RSAU accrediting the third-party operator. The overriding requirement facing a third-party operator is that RSAU is satisfied the operator has had its rollingstock certified by a competent party in accordance with the agreed rollingstock interface standards. As part of this assessment, RSAU would also want to view the relevant certification documentation.

The QCA considers that QR should have a right to provide input to RSAU regarding the authorisation of the third-party operator's rollingstock. For example, any concerns QR might have about certification test results should be brought to RSAU's attention. However, the responsibility for authorising the third-party operator's rollingstock unequivocally clearly rests with RSAU. To prevent QR unduly holding up the authorisation process and imposing unnecessary costs on the third-party operator, the QCA considers that any concerns QR may have about particular rollingstock certification tests should be brought to RSAU's attention within 10 business days of it being provided with the relevant certification documentation. The QCA recognises that its proposed approach to authorisation of a third-party operator's rollingstock entails a potential overlap in the roles of RSAU and QR. The QCA emphasises that QR has been given the benefit of a reasonable doubt about this potential overlap to provide it with reassurance that its legitimate business interests are protected. The QCA does not consider that the potential overlap would impose significant costs on third-party operators, however, this is a matter that will be closely watched over the course of QR's approved Undertaking and will be subject to review in the context of any future undertakings QR provides.

Given the above discussion, the QCA has made a number of changes to its proposed amendment in the Draft Decision to clarify the respective roles of QR and RSAU in the authorisation of a third-party operator's rollingstock. These changes have also been reflected in the relevant Schedule E principles.

QCA's position

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

1. **QR and a third-party operator must agree on a party competent to provide certification for the operator's rollingstock;**

2. **QR has a right to view a certificate(s) of compliance and associated test results from a third-party operator in order to confirm that the rollingstock/rollingstock configurations for its**

proposed train services are as agreed by the two parties in the interface risk management plan;

3. **QR has a right to provide input to RSAU regarding the authorisation of the third-party operator's rollingstock;**

4. **any concerns QR may have about a third-party operator's rollingstock certification tests should be brought to RSAU's attention within 10 business days of it being provided with the relevant certification documentation.**

7.4 Appropriateness of QR's right to suspend the use of a third-party operator's rollingstock

Background

In the Draft Decision, the QCA acknowledged QR's view that it should have the right to suspend a third-party operator's train services and that the exercise of this right would be subject to a reasonableness test. However, the QCA had concerns that QR, as a vertically integrated service provider, may use its suspension power in a way that hinders third-party access.

The QCA's proposed approach provided for QR's response to rollingstock non-compliance to be dependent on whether there are safety implications or not. It suggested the following Schedule E principles to outline a framework covering when QR can suspend rollingstock and constraints on QR exercising this power in an anti-competitive manner:

- "The third-party is responsible for the safe operation of its rolling stock on the nominated network and must ensure that at all times its rollingstock and rollingstock configurations comply with all applicable laws, the rollingstock specification and the rollingstock interface standards specified in the Agreement.

- QR may suspend the operation of rollingstock and trains for demonstrated non-compliance that has safety implications until such non-compliance is rectified. If the source of non-compliance does not have safety implications, the third-party should be required to rectify the non-compliance within a reasonable period of time but not be suspended. If the non-compliance is not rectified within a reasonable period, QR may suspend the operations of the affected rollingstock and trains.

- QR will not exercise its suspension power in relation to a third party's rolling stock and trains in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.

- If the suspension of a third-party operator's rolling stock becomes a source of disputation, in the absence of an alternative dispute resolution process agreed between the parties, the Undertaking's dispute-resolution procedures could be triggered.

- A third-party operator could reserve the right that if its rollingstock is suspended without reasonable justification, then QR would be liable for the loss thereby caused."

Stakeholder views

QR - accepts the QCA recommendation for the insertion of the principle beginning "QR may suspend the operation of rollingstock and trains for demonstrated non-compliance that has safety implications, until such non-compliance is rectified……." subject to an interpretation

of the recommendation that would enable QR to suspend a party's operations immediately for a non-safety related issue if an immediate rectification is reasonable in the circumstances, and is not provided.

QR considers the QCA's proposal for a provision in Schedule E to the effect that QR will not exercise its suspension power in relation to rollingstock and trains in a manner to hinder or prevent access to the declared service contrary to sections 104 and 125 of the QCA Act is unnecessary. Schedule E already provides an obligation upon both parties to comply with all applicable laws, including these provisions of the QCA Act.

Similarly, QR considers it is unnecessary to include a provision in Schedule E stating that if suspension of rollingstock becomes a source of disputation, in the absence of an alternative dispute resolution process agreed between the parties, the Undertaking's dispute resolution procedures will be triggered. Clause 17 in Schedule E already provides for a dispute resolution process in the access agreement, as a result, the suggested recommendation is superfluous.

The QCA has included a recommendation for the incorporation of a principle in Schedule E to the effect that if QR suspends a third party's rollingstock or trains without reasonable justification, QR will be liable for the loss thereby caused. The QCA position appears to be that they anticipate an operator having a contractual right to damages for loss resulting from wrongful suspension in addition to the consequences specified in the agreement for QR's failure to provide the party with their capacity entitlement, or exercise reasonable endeavours to run train services in accordance with the daily train plan. Such a situation would leave QR open to claims from parties on multiple fronts for the same conduct. As a result, QR does not agree with the QCA's recommendation for the inclusion of the specified principle in Schedule E.

FreightCorp - agrees with the assessment of the QCA as to the very serious adverse implications for a rail operator of suspension of its rights of access and use by QR.

In negotiations with QR, FreightCorp continuously expressed concerns about rights of suspension (and termination) that were 'hair-trigger'. The most recent draft of the access agreement provided to FreightCorp continues to contain 'hair-trigger' rights.

Schedule E should state the substance of these, and other rights of suspension and termination, and they should form part of the base case for each access seeker.

A point of clarification arises as to what constitute "safety grounds". As with QR's ability to amend rollingstock interface standards on safety grounds, it is important to understand what is meant by safety. As suggested above, FreightCorp has a view as to a starting point for discussion, indeed something that in negotiation QR seems to have accepted.

Further, a point of clarification arises as to whose view is to be relevant as to whether "safety grounds" exist or not. The test for whether safety grounds exist, to trigger a right of suspension or termination, should be an objective test.

The FreightCorp Mark-up does not allow QR this latitude, providing that the right of suspension arises only when there is a risk to the safety of a person or a material risk to property. The effect of this is no right of suspension arises unless there is such a risk. This places the burden of proof on QR to prove the risk existed, rather than that it was reasonable in having the opinion the risk existed.

FreightCorp strongly supports the QCA's finding rail operators should have a right of action in contract against QR if QR suspends for an anti-competitive purpose. It will be noted the burden of proof rests on QR to demonstrate it did not suspend for any anti-competitive purpose whether principally or ancillary. FreightCorp has taken this stance because it is concerned it will not have information available to it that will allow it to prove that suspension was for an anti-competitive purpose.

The Final Decision should clarify whether each access agreement should impose a contractual obligation on QR not to breach s.104 or s.125 of the QCA Act. The Final Decision should clarify whether "reasonable justification" is a defence to an action for breach of any such contractual provision or a further element to what QR must prove if it suspends a train, ie that suspension was done with reasonable justification and was not intended to frustrate access.

A point of clarification arises in relation to the right of action for frustration of access, and that is whether the right of action would give rise to damages for loss suffered in accordance with common law rules of remoteness of damage. FreightCorp believes breach of the frustration of access provision should give rise to damages on this basis, and accordingly the limitation of liability provisions referred to in Schedule E (see below) and the limitation of liability provisions in the access agreement should not apply on breach. Given the nature of the remedy suggested by the QCA, to allow limitation of liability provisions would negate the benefit of the having the remedy.

Stanwell - the QCA has proposed "A third party operator could reserve the right that, if its rolling stock is suspended without reasonable justification, then QR would be liable for the loss thereby caused". SCL considers this could be amended to read "…for the loss thereby caused, including interest and legal costs". A similar amendment could be made where the Authority reserves a parallel right for third party operators whose staff have been suspended without reasonable justification.

QCA's analysis

FreightCorp has sought clarification as to what constitutes "safety grounds" with respect to QR's right to suspend a third-party operator's rollingstock and also proposes that Schedule E should state the substance of this and other rights of suspension and termination.

While recognising FreightCorp's concerns, given stakeholders' preference for Schedule E to be in the form of high-level principles, the QCA does not intend to amend Schedule E to provide additional detail. This matter should be addressed as part of the development of the standard access agreement. Chapter 8 discusses the role of Schedule E and the development of a standard access agreement in more detail.

FreightCorp also queried whose view would be relevant regarding whether "safety grounds" exist or not to trigger a suspension or termination. It has proposed that the right of suspension should arise only when there is a risk to the safety of a person or a material risk to property. FreightCorp argues this would place the burden of proof on QR to prove the risk existed, rather than that it was reasonable in having the opinion the risk existed.

The QCA agrees with FreightCorp that the identification of the safety risk, its consequence and probability of occurrence are the relevant objective parameters. Consequently, the QCA considers it would be reasonable for the burden of proof to be placed on QR to prove the safety risk existed. This is another matter that will be addressed during the development of the standard access agreement.

The QCA does not agree with QR that the Schedule E principle to the effect that if QR suspends a third-party operator's rollingstock without reasonable justification, QR will liable for the loss thereby caused, leaves QR open to claims on multiple fronts for the same conduct. The QCA understands that in such a situation, the Court would take into account the amount the applicant receives from any successful case in assessing the other cases, so as to prevent the applicant being unjustly enriched. Consequently, a party could not be compensated twice (or more) for the same loss.

FreightCorp also argues that if QR suspends for an anti-competitive purpose, the burden of proof should rest with QR to demonstrate it did not suspend for any anti-competitive purpose whether principally or ancillary. This is on the grounds that FreightCorp would not have information available to it that will allow it to prove that suspension was for an anti-competitive purpose. The QCA considers that FreightCorp has raised a reasonable point.

Essentially, FreightCorp is proposing that if QR were to suspend a third-party operator's rollingstock, the operator would have to establish no grounds for the suspension existed. If the operator was successful at establishing there were no grounds for the suspension, QR would then have to demonstrate that it did not suspend for an anti-competitive purpose.

The QCA considers that QR would be privy to information to support its reasoning as to why it suspended a third-party operator's rollingstock on safety grounds. As a result, it would be in a good position to deal with any allegations made by a third-party operator that QR had suspended its rollingstock for an improper purpose. Consequently, the QCA considers the onus of proof should be reversed as proposed by FreightCorp.

The QCA proposed a Schedule E principle in the Draft Decision such that if suspension of a third-party operator's rollingstock became a source of disputation, in the absence of agreed alternative dispute resolution procedures, the Undertaking's dispute resolution procedures could be triggered. The QCA acknowledges that this principle duplicated Principle 17 Disputes in the QCA's proposed Schedule E. Consequently, it has been deleted from the final version of Schedule E.

QCA's position

The QCA considers it appropriate to amend the Draft Undertaking such that the following Schedule E principles are incorporated :

1. **"The third-party is responsible for the safe operation of its rollingstock on the nominated network and must ensure that at all times its rollingstock and rollingstock configurations comply with all applicable laws, the rollingstock specification and the rollingstock interface standards specified in the Agreement.**

2. **QR may suspend the operation of rollingstock and trains for demonstrated non-compliance that has safety implications until such non-compliance is rectified. If the source of non-compliance does not have safety implications, the third-party should be required to rectify the non-compliance within a reasonable period of time, but not be suspended. If the non-compliance is not rectified within a reasonable period, QR may suspend the operation of the affected rollingstock and trains.**

3. **QR will not exercise its suspension power in relation to a third-party's rollingstock and trains in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.**

4. **A third-party operator could reserve the right that if its rollingstock is suspended without reasonable justification, then QR would be liable for the loss thereby caused."**

7.5 Preparation of joint safety-risk assessment by QR and a third-party operator

Background

The QCA expressed the view in the Draft Decision that the key to determining a balanced set of safety provisions in the Undertaking is the clarification of the allocation of responsibilities between QR, third-party operators and RSAU.

The QCA recommended in the Draft Decision that QR's role in the preparation of a third-party operator's safety risk assessment should not extend beyond the preparation of the joint safety risk assessment. It also suggested that QR and the third-party operator agree any additional training requirements for the third-party operator's staff during the safety risk assessment process. Further, in order to protect access seekers interests, the QCA recommended the Undertaking contain a dispute resolution process for safety-related interface matters and Schedule E principles outline a framework within which QR can exercise its suspension right with respect to third-party operator's staff.

The QCA also proposed that the Undertaking should provide that QR and a third-party operator would agree upon any additional training requirements for the third-party operator's staff during the safety risk assessment process. The QCA considered it reasonable for QR to accept some level of responsibility to assist a third-party operator to meet these requirements. The level of responsibility would be directly related to the nature of QR's requirements.

The QCA proposed the following Schedule E principle regarding QR's right to temporarily suspend the right of a third-party operator's staff to work on the network:

- "QR reserves the right to temporarily suspend the right of the third-party's staff to operate on the nominated network in the event of breach or likely breach of any laws relating to rail safety, QR train control directions, safeworking procedures or safety standards. QR will not exercise this suspension power in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.

- A third-party operator could reserve the right that if its staff are suspended without reasonable justification, then QR would be liable for the loss thereby caused."

Stakeholder views

Interface safety risk assessment

ARTC - the QCA proposal has moved significantly from QR's original position towards a less intrusive outcome.

FreightCorp - it is essential that QR participate in a joint risk assessment in an effective manner that genuinely allows for the third party to demonstrate that its safety case meets the requirements of QR.

For the process to be effective, each of the parties must prepare a submission to the Queensland Transport Rail Safety Accreditation Unit (RSAU) that:

- for QR - demonstrates that the provision of access to the third party operator does not increase the risk of its operation of the railway as the railway manager; and

- for the third party operator - demonstrates that the safety risks of the proposed operation are appropriately considered and addressed.

It is clear that the scope of the third party operator's submission to the RSAU is broader than that of QR's. For this reason, QR's role in the preparation of the joint risk assessment must be

limited (as proposed by the QCA) to participation in the joint safety risk assessment for the area where there is a rail safety interface.

It would not be possible for a third party operator to gain access to the QR network if the safety risk assessment is not carried out in a satisfactory manner. The RSAU would not provide accreditation. QR would breach the Rail Safety Act if it were to allow the third party operator to access the QR network without accreditation.

If, however, QR were to fail to undertake the risk assessment in a satisfactory manner, it would be to the disadvantage of the third party operator. RSAU would not permit the third party operator to gain access to the QR network through an amendment to the accreditation of QR if there is any doubt that the commencement of the new operation would increase the safety risk.

It is therefore a concern that QR has a powerful tool to frustrate access at the most detailed level by failing to engage in the risk assessment process in an effective manner. We point out that this concern is at the conceptual level and that QR has not failed to be willing to participate in such a risk assessment process during our current negotiations 78 . However, FreightCorp believes it appropriate that there be a statement contained within the Undertaking that provided for QR to participate in the risk assessment process in good faith. Such a statement would place no greater obligation on QR than we believe is currently intended, but would provide comfort to operators.

While we note the proposal to provide the RSAU with an advisory role (a proposal that FreightCorp considers likely to be most helpful to all the parties involved) FreightCorp would take additional comfort from a positive statement in the Undertaking that in participating in the risk assessment process QR will make reasonable endeavours to assist the third party operator to fulfil QR's requirements and the RSAU's accreditation requirements to the extent that any matter lies with QR.

Third-party operator's staff – training requirements

QR - has difficulty with the description of training requirements identified during the safety risk assessment as 'additional' to those required by the RSAU to be accredited as an operator. This description is inaccurate as an operator will not be accredited without having an agreement with the railway manager for the safe operation of its rollingstock on that railway manager's infrastructure, and the training requirements will be specified in that agreement between QR, as railway manager and the railway operator. QR requests the QCA clarify its intention in relation to this recommendation.

FreightCorp – supports the QCA's finding if the safety risk assessment process identifies additional training requirements for a rail operator's staff then that training must be undertaken. The FreightCorp Mark-up provides for a cost plus 5% basis for charging for any additional training.

However we would make the comment that it is the role of the safety risk assessment to highlight any risk area that needs to be managed. The provision of training is one control available to assist in the management of the risk. For the area of joint risk, it is appropriate for QR and the third party operator to agree on the appropriate control measures including training. QR should not require the provision of training if:

- the third party operator can demonstrate an equal or superior method of managing the risk; and

- QR does not require training for any other operator in similar circumstances.

It would be our expectation that any occasion where an operator thought that QR was requiring inappropriate training then this could be handled through the dispute resolution mechanism.

Disputes over interface issues

QR - accepts the QCA's recommendation for the inclusion of an additional dispute resolution step in the dispute resolution mechanism already included in the Draft Undertaking, provided that:

- the process does not prevent QR and an access seeker agreeing to an alternative dispute resolution process; and

- the decision provided by the RSAU is non-binding.

QR understands these provisos are also envisaged by the QCA.

FreightCorp - FreightCorp agrees with the assessment of the QCA on this issue. However, it would be preferable to allow for direct reference to the RSAU, rather than requiring reference first to the Chief Executive Officers as proposed by the QCA. While this is a matter of detail, it is FreightCorp's view that the types of matters that will arise would not be those that are amenable to resolution through negotiation so much as being matters of fact on which the RSAU is likely to have a particular view. It would therefore speed resolution if the Undertaking provided for direct reference to the RSAU once a dispute is in existence.

The FreightCorp Mark-up provides for referral of disputes to the RSAU (see Clause 11(c).) and that whilst the RSAU does not as such have the power to give a binding determination, FreightCorp and QR agree they will be bound by its determination.

Queensland Government – The QCA has proposed an expanded role for the Rail Safety Accreditation Unit (RSAU) to resolve safety related interface issues between QR and the third party rail operators by the issue of non-binding rulings. This is likely to impose additional costs on RSAU in terms of the demand on its time and resources. Given the conferral of this new role on the RSAU is for the benefit of the parties to a dispute, the Government believes it is reasonable to expect those parties to pay the RSAU to conduct the mediation process.

Third-party operator's staff – QR's temporary suspension right

QR - our comments in relation to the suspension of a third party's rollingstock and trains apply equally to the Schedule E principles the QCA has recommended in relation to the suspension of a third party's staff.

FreightCorp- in negotiations with QR, FreightCorp has resisted the inclusion of a separate right of QR to suspend FreightCorp's staff as opposed to the suspension of its rollingstock. After negotiation, QR agreed to this.

The Final Decision should state clearly the circumstances in which suspension of third-party operator's staff may occur and that statement should be reflected in Schedule E and, as such, form part of the base case.

It is appropriate for Schedule E to state expressly each access seeker is entitled to the inclusion of a contractual right to proceed against QR if it acts in any way to hinder or to restrict access in the suspension of a third-party operator's staff.

QCA's analysis

Third-party operator's staff – training requirements

In developing its position on additional training requirements agreed during the joint safety risk assessment, the QCA attempted to balance the responsibilities of QR and the RSAU regarding the assessment of third-party operators' staff competencies.

The QCA's reference to 'additional training requirements' addressed the difference between generic and specific skills/knowledge that a third-party operator would require running its train services on QR's network. The context for the reference was that it is not QR's responsibility to check a third-party operator's staff competency levels or qualifications, but rather the RSAU's role. However, local conditions on QR's network could impinge on the ability of a third-party operator's staff to safely undertake their activities. QR identified driver route knowledge as an example. The QCA noted that this would need to be addressed in the joint safety risk assessment and QR, as track manager, should have the responsibility for providing additional training regarding the driver route knowledge.

To address QR's concerns about the reference to additional training requirements, the QCA has re-drafted its position, such that the word 'additional' has been removed and greater specificity regarding the nature of the training requirements inserted. The greater specificity relates to the training requirements being those that, under Australia's co-regulatory rail safety approach, are seen as the responsibility of the track manager.

Disputes over interface issues

The Queensland Government has proposed that the dispute resolution model involving RSAU will impose additional costs on that body in terms of the demand on its time and resources. As a result, RSAU should be entitled to recover its costs associated with it playing this mediation role from the disputing parties. The QCA agrees this is a reasonable position and has reflected this in its proposed amendments.

The QCA notes that the proposed dispute resolution process for safety related interface matters does not prevent the parties to an access agreement negotiating an alternative to arbitration under the QCA Act.

Also with respect to dispute resolution process for safety related interface matters, FreightCorp suggests that it would be preferable to allow for direct reference to the RSAU, rather than requiring reference first to the respective chief executives. RSAU has advised the QCA that it would prefer the initial referral to chief executives to remain to encourage the referral of genuine safety interrelated matters to RSAU. The QCA considers RSAU's point to be reasonable and so has not changed its position in the Draft Decision.

Third-party operator's staff – QR's temporary suspension right

FreightCorp argues it has resisted the inclusion of a separate right of QR to suspend FreightCorp's staff as opposed to the suspension of its rollingstock. QR advised the QCA that FreightCorp and it had agreed that the appropriate wording in their draft access agreement should be 'suspension of the train service' rather than 'suspension of staff'.

The main reason for originally differentiating between suspension of a third party operator's rollingstock and its staff was to deal with situations where QR might not have a particular problem with the state of rollingstock for the proposed train service, but rather with the driver of the locomotive. For example, the driver may have presented in an intoxicated state. In this situation, QR would be prepared to let the train service run provided a different driver was in control of the locomotive.

The QCA considers the use of the term 'suspension of the train service' is more accurate than 'suspension of staff' and consequently has reflected this change in the relevant Schedule E principles.

QCA's position

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

1. **QR's role in the preparation of a third-party operator's safety risk assessments should not extend beyond preparation of the joint safety risk assessment;**

2. **the following dispute resolution process for safety-related interface matters is incorporated :**

- **following receipt of written notice from either party notifying the other party of a safety-related interface matter, the Chief Executive Officers (CEOs) of the two organisations would meet to try and resolve the matter;**

- **if the CEOs could not reach a resolution after 14 days of receipt of the written notice, the matter would be referred to the RSAU to provide non-binding advice to the two parties;**

- **if the RSAU's advice did not facilitate resolution of the dispute, the matter would be referred to the QCA for arbitration under the QCA Act;**

- **allowed RSAU to recover the costs associated with its role in the dispute resolution process;**

3. **QR and a third-party operator would agree any training requirements for the third-party operator's staff during the safety risk assessment process. The training requirements would be restricted to those that are the responsibility of QR, as track manager, to provide under Australia's co-regulatory approach to rail safety.**

4. **the following Schedule E principles are incorporated:**

   - **"QR reserves the right to temporarily suspend the right of the third-party's train service to operate on the nominated network in the event of breach or likely breach of any laws relating to rail safety, QR train control directions, safeworking procedures or safety standards. QR will not exercise this suspension power in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 and s125 of the QCA Act.**

   - **A third-party operator could reserve the right that if its train service is suspended without reasonable justification, then QR would be liable for the loss thereby caused."**

7.6 Appropriateness of QR providing assistance to prospective third-party operators to fulfil the Draft Undertaking's rollingstock and safety requirements

Background

The QCA outlined in the Draft Decision its view that QR's obligations to provide assistance to third-party operators concerning the Draft Undertaking's requirements on rollingstock and safety management could be addressed through providing information in response to access inquiries and during the joint safety risk assessment. In addition, the QCA supported the inclusion of a 'reasonable endeavours' commitment to assist a third-party operator meet any additional training requirements for its staff identified in the interface risk assessment process.

Stakeholder views

QR - will accept an obligation to provide training it requires as a control measure to an identified risk agreed through the interface risk management process, where an operator cannot otherwise reasonably attain that training. In relation to QR recovering its costs of providing such assistance, the QCA has verbally advised that QR should be able to charge a third party for the reasonable costs of providing such assistance.

QR agrees it is in both QR's and an access seeker's interests for a proper exchange of information to occur during the negotiation period to facilitate the interface risk assessment. QR does not object to providing an operator with all relevant information reasonably available to it, and necessary for the operator in question to address a real or potential interface risk. In addition, such an obligation should make it clear QR can only provide information to the level and standard that it has available, and QR may be entitled to recover its costs in providing the information.

FreightCorp - supports the QCA's findings. This support is predicated on the findings of the QCA in relation to other interface issues.

QCA's analysis

Chapter 4 of the Draft Decision discussed the appropriateness and basis of fees for information provision by QR. The QCA argued that QR should be able to reserve itself the right to charge fees to recover the costs of information gathering and dissemination. To ensure consistency with this approach, QR should be able to recover the reasonable costs associated with training requirements identified during the interface risk management process.

To the extent that QR and a third-party operator disagree about the extent of training required to manage a particular safety risk, with its associated cost implications, the QCA would expect the proposed informal dispute resolution process involving the RSAU to be activated.

QR argues that it can only provide information to the level and standard that it has available during the joint safety risk assessment. The QCA recognises this argument as self-evident. Clearly, QR cannot disclose information it does not have. Nevertheless, to provide comfort to QR, the QCA has revised its position such that QR's obligation relates to the provision of information "reasonably available to it".

The QCA has removed the word "additional" from the Draft Decision's proposed amendment that QR commit to a reasonable endeavours commitment to assist a third-party operator meet any additional training requirements identified during the interface risk management process. This is consistent with the discussion in section 7.5.

QCA's position

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

1. **sub-clause 4.7.2 committed QR to provide to a third-party operator, on a timely basis, all information reasonably available to it that is relevant to the interface risk management process during the negotiation period; and**

2. **QR committed to provide a 'reasonable endeavours' commitment to assist a third-party operator meet any training requirements for its staff identified during the interface risk management process, where the operator cannot otherwise reasonably attain that training; and**

3.	**QR was able to recover the reasonable costs associated with such training.**

7.7 Annual audits of third-party operators' compliance with the RIS and safety-management systems

Background

The Draft Undertaking required a third-party operator to have its rail operations audited on an annual basis to demonstrate to QR's reasonable satisfaction that the operator is complying with:

- the RIS; and
- the safety risk management plan.

QR also proposed a 'spot' audit power in relation to these aspects of a third-party operator's operations.

The Draft Decision stated that RSAU has clear legislative responsibility with respect to approving and ensuring compliance with safety management systems both for QR and third-party operators.

Nevertheless, the QCA supported QR reserving the right to suspend a third-party operator's rollingstock or its staff where it believes the safety risk management plan has been breached and safety compromised such that the situation need to be addressed urgently. Given this, the QCA did not support QR having the right to require an annual or 'spot' audit of a third-party operator's safety risk management plan.

The QCA also considered that QR's open-ended audit power of third-party operator's compliance with agreed rollingstock standards should be removed. Rather, QR should be entitled to audit within a framework that requires QR to demonstrate the grounds for an audit.

Stakeholder views

QR - is not sure why the QCA has differentiated between an operator's contractual obligations in respect of rollingstock interface standards, and other elements of the IRMP. An operator will have a contractual obligation to comply with its IRMP. In addition to the rollingstock interface standards, other safety standards will be agreed through the interface risk assessment and incorporated into the IRMP, which will be annexed to the party's access agreement. As the statement of the controls agreed between QR and an operator for the interface risks associated with the operator's train services, the IRMP will include, amongst other things, an audit regime. As a minimum audit requirement, QR anticipates an audit regime will include periodic audits of the operators' compliance with its IRMP.

QR does not want to conduct extensive audits of third parties, but it believes that it needs to be able to conduct audits or require audits to be conducted from time to time in order to assure itself that it is discharging these obligations.

- The TIA clearly recognises safety risks associated with operations will vary (for example, according to different operators with different operations, or on different infrastructure) and as a result, it does not prescribe 'safe' benchmarks or standards for operation. Consequently, the RSAU is not concerned with prescribing actual standards for safe operation upon a railway, but instead, in practice, requires railway operators and railway managers to provide for such standards in their safety management systems. Accordingly, QR considers responsibility for this level of detail in rail safety management is assigned to the respective railway manager and railway operator in each instance. The drafting of the TIA supports QR's view: as a prerequisite to accreditation, an operator

must have an agreement with QR (the applicable railway manager) to operate particular rollingstock on the railway, including appropriate arrangements for the safe operation of rollingstock. As a result, QR considers, as railway manager, it has a critical role in determining applicable interface standards with railway operators seeking to operate on its infrastructure. This role includes responsibility for managing the entire network, including the interfaces between different operators as well as the commercial implications associated with this.

- As a result, QR requires a mechanism to satisfy itself that operators are managing their operations in accordance with the terms of their agreement with QR. The consequence of waiting until something goes wrong exposes QR to significant potential liability. The audit (and suspension rights discussed in part 8 in response to the QCA's re commendation on the issue) are integral to the management of an access agreement as well as managing on-going compliance with applicable rollingstock interface standards, by all operators on QR's network. QR considers that such compliance and enforcement measures are justified on both safety and commercial grounds.

    - The example of wheel flats is demonstrative of this point. Flat wheels damage QR's track, and in turn this damage to the track may potentially damage the rollingstock of other operators. QR considers it has a responsibility to prevent such a situation occurring. In addition, the IRMP will form part of an operator's access agreement with QR. Consequently, a breach of a rollingstock interface standard is not simply a safety issue but also a contractual issue. Clearly, these points have an impact upon QR's interest in ensuring that operators continue to comply with their agreed interface standards. QR's concern relates not only to network safety, but also to the commercial impact upon its track and/or other operators.

QR maintains the following audit requirements in relation to, not just the agreed rollingstock interface standards, but also an operator's IRMP:

- audit obligations and rights will be specified in the IRMP, and in relation to such audits, QR will accept audits that are required by an operator's/third party's safety management system, provided they are conducted by the RSAU or a suitably qualified person reasonably acceptable to both QR and the operator/third party; and

- where QR has reasonable grounds to believe (such as incidents/accidents, observed non-compliance, worsening trends in data from wayside equipment or other evidence reasonably considered by QR) that an operator/third party is not complying with its IRMP, QR may conduct or require the conduct of an audit of the operator's/third party's compliance with the relevant procedures, by a suitably qualified person reasonably acceptable to both QR and the operator/third party.

FreightCorp - supports strongly the QCA's findings in relation to QR's audit rights. Given QR's right of suspension it should not also reserve itself an audit power that appears ill-suited to deal with such situations. Schedule E should be changed to reflect the QCA's detailed findings.

Rail safety accreditation is based upon the applicant having a valid safety management system for its rail operation. The safety management system will include aspects of safety management that interface with the general public and QR as well as aspects that are the organisation's responsibility to its own personnel. An integral part of any safety management system is the auditing procedures that are required to ensure that the system is maintained and complied with by the organisation. This is the case with FreightCorp's safety management system in NSW where external auditors have been engaged to audit the safety management system and identify any areas where there may be a deficiency. The audits begin at the system level and are conducted to ensure that there is implementation and compliance with the system and that the system is achieving the desired result. In this way FreightCorp is able to ensure that it meets all its obligations with respect to its accreditation.

Further, as a significant aspect of FreightCorp's rail safety accreditation, the RSAU will audit FreightCorp's safety management system as part of the yearly accreditation audits required under the Queensland Rail Safety Act. The RSAU will form a view about FreightCorp's compliance with its safety management system and has the power to compel FreightCorp to address any issues found to be unsatisfactory.

QR can be confident that FreightCorp's safety management system is being maintained by the fact the FreightCorp continues to hold its Rail Safety Accreditation. Should QR require further validation of FreightCorp's maintenance of its safety management system, QR may be provided with copies of audit results of areas involving the QR interface. There is therefore no need for QR to introduce a further level of auditing.

FreightCorp agrees that QR should be obliged to provide information that QR is able to gain about the third party operator's train to the third party operator. This should be as part of the normal operating relationship and not part of an audit process. The third party operator should also be obliged to provide QR any information regarding the status of the track including broken rails, track misalignments etc. (This is catered for in the Freight-Mark-Up under Clause 6.2(d).)

The safety management system used by FreightCorp includes the collection and analysis of incident data. The management system will capture the data from a number of sources which includes information from the track owner. There is value in comparing the data with the track owner for the purpose of correlating the data to ensure that the system continues to provide valid results.

The access agreement should reflect the structure of rail safety regulation in Queensland, which requires an operator to be accredited. This accreditation is based on the development of a safety management system, the review and approval of this system, the reporting of incident, the inquiry into accidents and the auditing of the system. This is a thorough and comprehensive approach to rail safety that QR is a party to for its accreditation.

It adds no value to the validity of the process for QR to undertake auditing of rolling stock. It may even detract from the validity of the process by confusing the accountability by involving a party that has no accountability for the outcome.

As above, it is FreightCorp's contention that QR should not audit a third party operator's safety management system. It is the role of the RSAU, as the rail safety regulator, to audit safety management systems. It is also the obligation of the third party operator to audit its safety management system to ensure the continued veracity of the system.

QR should provide the third party operator with the required understanding of the track parameters to permit the third party operator to understand the safety interface. QR must also provide the third party operator with an understanding of the performance of the operator so that actions can be initiated to improve performance.

If it has been established through the incident data of QR, the RSAU or the third party operator that there is unacceptable rail safety performance, the third party operator may be required to audit or investigate the cause of the unacceptable performance. If there are questions about the ability of the third party operator to perform a fair audit of the area of concern, the RSAU has the power to perform some form of review.

QR may also address concerns directly with the RSAU for its attention.

RTBU - the QCA's proposed audit amendments severely limit QR's capability to take prompt steps to prevent unsafe rolling stock from using its network – on the ground that such interventions would be used to impede effective competition. The alternative approach proposed by the QCA is likely to reduce safety regulation to reliance on a process of exchanging paper rather than on-systematic site inspections of rolling stock.

The QCA's obsession with the possibility that QR might use safety controls to impede competition is not supported by any evidence or case studies of past experiences with access regimes. The analysis is simplistic. The outcomes could be dangerous. The QCA's proposal to establish an essentially self-regulatory system for reviewing rolling stock safety should be withdrawn in favour of QR's original proposals.

QCA's analysis

QR argues it is not sure why the QCA has differentiated between an operator's contractual obligations in respect of rollingstock interface standards, and other elements of the interface risk management plan (IRMP).[3]

The QCA has made such a differentiation because if the Undertaking provides QR with a right to audit the safety aspects of the IRMP, it would be inconsistent with Queensland's rail safety regulatory framework. This would be an example of QR, as track manager, proposing to duplicate the role of the RSAU.

QR has proposed that it should be able to audit, or require audits of, the third-party operator's compliance with the IRMP because the operator has a contractual obligation to comply with it once an access agreement is signed. However, it has not proposed a reciprocal right for the third party operator regarding QR's contractual obligation to comply with the IRMP. QR proposes that RSAU could conduct these audits, or a suitably qualified person reasonably acceptable to both QR and the operator/third party.

The IRMP is an important document in the context of the accreditation of both QR and the third party operator. The RSAU would have to be satisfied with the plan, amongst other things, before accrediting the third party operator's safety management system, while QR would have to demonstrate to RSAU how the plan had been reflected in its safety management system. Once the IRMP was approved by RSAU, both QR and the third party operator would be accountable to the RSAU both for their compliance with it and for their respective safety management systems. The RSAU's audits would assess this compliance (see discussion in section 7.1).

Nevertheless, because of the contractual obligations on QR and the third party operator to comply with the IRMP, the QCA considers the Undertaking should commit each party to inform the other party of its compliance with the plan. This would include informing the other party of breaches of the plan and how any breaches would be rectified. The RSAU's audits would be the key source of information for assessing compliance. The QCA notes that while RSAU's audit findings are generally private and confidential, RSAU may share audit results with other railway participants where the findings affect interface operations or inter-operability with others.

It should be noted that QR's suggestion that rather than the RSAU, a suitably qualified person reasonably acceptable to both QR and the third party operator could conduct audits of the IRMP, including its safety elements, would be inconsistent with Queensland's rail safety framework and so should not form part of the Undertaking.

To remove any uncertainty in a contractual sense, the QCA considers the Undertaking should explicitly recognise that RSAU is the body responsible for safety compliance audits under Queensland's rail safety regulatory framework.

The QCA recognises that the IRMP could include commercial, as well as safety matters. To the extent this occurs, it is in the interests of both QR and third-party operators to clearly identify the commercial and safety matters. If QR is unhappy that RSAU has not audited a particular safety aspect of the IRMP, it should request RSAU to do so.

[3] In its submission in response to the Draft Decision, QR refers to an interface risk management plan being developed through the interface risk assessment process. In contrast, the Draft Undertaking referred to the outcome of this process as the safety risk management plan. In practice, the content of the plans should be the same.

RSAU does not have any legislative responsibility to audit the commercial matters in the IRMP. The QCA accepts that QR should be able to audit those commercial matters provided the reasonable grounds for such audits are established in the access agreement. The audit approach the QCA would expect QR to adopt would be along the lines of the example provided by the QCA in the Draft Decision regarding QR's auditing of a third-party operator's compliance with the agreed rollingstock interface standards.

The QCA rejects the RTBU's argument that the proposed audit amendments severely limit QR's capability to take prompt steps to prevent unsafe rolling stock from using its network. The QCA proposed QR should have a right to suspend a third party operator's rollingstock to address such situations. The QCA considered that this would likely be a more effective mechanism to address a situation where safety has been compromised and urgent action is necessary. The RTBU has not explained why QR having a right to require 'spot' audits of third-party operators' activities would be a better mechanism.

The RTBU's criticism that the QCA's proposed approach is likely to reduce safety regulation to a reliance on an exchange of papers rather than on systematic site inspections of rolling stock reflects a general lack of awareness about Queensland's rail safety regulatory framework, including RSAU's extensive audit powers. RTBU also appears to have ignored the QCA's proposal to allow QR a right to conduct rollingstock audits under circumstances specified in access agreements.

QCA's position

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

1. **QR's right to require an annual or 'spot' audit of a third-party operator's interface risk management plan was removed;**

2. **QR and a third-party operator should inform each other of non-compliance with the interface risk management plan, including the nature of the breach and how the breach will be rectified;**

3. **the Rail Safety Accreditation Unit of QT is recognised as the body responsible for safety compliance audits under Queensland's rail safety regulatory framework;**

4. **QR's right to an open-ended audit power concerning a third-party operator's compliance with the agreed rollingstock standards is removed and replaced by an entitlement to audit within the following framework:**

   - **QR must be obliged to provide all relevant information on above-rail rollingstock incidents - eg. incidences of dragging equipment and 'hot box' detection, over-loading and inaccurate train manifests - to a third-party operator concerning its train services;**

   - **it should be specified in the access agreement with a third-party operator what aspects of that operator's compliance with the agreed rollingstock standards QR can audit; and**

- **QR must provide reasonable grounds, as established in the access agreement, for the need for an audit prior to exercising its audit right; and**

- **provided that a third-party operator must pay for audits of its rollingstock required by QR if the reasonable grounds for audit established in the access agreement are satisfied; and**

5. **for commercial matters identified and agreed during the interface risk management process, where QR wants to audit a third-party operator's compliance with its contractual obligations it must provide reasonable grounds, as established in the access agreement, for the need for an audit prior to exercising its audit right. A third-party operator is entitled to a reciprocal audit right along the same lines.**

7.8 Appropriate allocation of QR's and third-party operator's responsibilities under the EPA Act

Background

The Draft Undertaking imposes a number of environmental requirements upon third-party operators, including investigations, risk management plans and audits. The QCA expressed concern that QR's approach could be interpreted as reserving itself a de-facto regulatory role regarding environmental protection, which would effectively impose environmental requirements in addition to those currently imposed under Queensland's environmental regulatory framework.

It is apparent that the general environmental duty that exists under the EPA Act places an emphasis on QR and third-party operators to disclose all relevant environmental information to each other in order for each to conduct an environmental risk assessment and develop an environmental management system. In its Draft Decision, the QCA's position was that both QR and third-party operators can legitimately seek from each other the relevant information to be able to assess environmental risks.

Stakeholder views

QR - accepts it has a right to seek information from an access seeker that will allow it to assess the environmental risks of a proposed operation. However, the purpose of this assessment is primarily to ensure that an appropriate environmental investigation & risk management report (EIRMR) is developed and then to ensure that QR's EMS is consistent with that EIRMR. Additionally, it would not be strictly accurate to describe Schedule I as a list of information that QR will seek from an access seeker, rather it outlines the types of considerations that should be addressed in the EIRMR.

QR accepts the QCA's proposal that an access seeker have a right to seek information from QR which will allow the operator to assess the environmental risks of its proposed operations given the particular features of QR's network, in order to develop an EMS for its Queensland operations. However, as noted previously, it would be more consistent with QR's proposed approach to environmental management for the obligation to refer to a party using the information provided by QR for the purpose of developing an appropriate EIRMR, and then ensuring that its EMS is consistent with that EIRMR.

FreightCorp - agrees with the QCA's assessment of the operation of the EPA Act and QRs responsibilities under the EPA Act and its legitimate business interests.

QCA's analysis

As discussed in the Draft Decision, the EPA Act places an overarching obligation in the form of a general environmental duty on all persons and enterprises conducting activities in Queensland. Consequently, because QR and third-party operators have such a legislative obligation, each has a legitimate business interest to take responsibility for the potential environmental impact of their operations. In addition, consistent with public interest considerations under the QCA Act, access agreements may contain competitively neutral measures designed to promote ecologically sustainable development if there are net public benefits.

The QCA's proposed position that QR and third-party operators should disclose all relevant environmental information to each other in order for each to conduct an environmental risk assessment and develop an environmental management system stemmed from the need for the respective parties to meet their legislative obligations.

In light of this, the QCA does not accept QR's argument it would be more consistent with its proposed approach to environmental management for the obligation to refer to a third-party operator using the information provided by QR for the purpose of developing an appropriate EIRMR. The key point is that the development of an appropriate EIRMR forms part of the respective parties meeting their overriding legislative obligation. In contrast, QR's argument implies the development of an appropriate EIRMR has primacy over the legislative obligation.

QCA's position

The QCA considers is appropriate that:

1. **QR can legitimately seek information of the kind set out in Schedule I of the Draft Undertaking from a third-party operator that will allow QR to assess the impact of that operator's proposed train services and hence any additional environmental risks posed, in order to assess the need to upgrade QR's own environmental management system; and**

2. **a third-party operator can legitimately seek information from QR that will allow that operator to assess the environmental risks of its proposed train services given the particular features of QR's network, in order to develop an environmental management system for its Queensland operations.**

7.9 Reasonableness of QR's environmental requirements

Background

In the Draft Decision, the QCA supported QR's proposal for an environmental investigation and risk management report (EIRMR) provided both QR and the third-party operator provide adequate information to each other and the scope of the investigation and report are appropriately structured to identify the relevant risks and proposed management processes. An independent suitably qualified person would prepare such a report.

The EIRMR process envisaged in the Draft Decision was as follows:

- an independent EIRMR procured by the third party operator;

- QR to provide reasons to the third party operator if it has a problem with the EIRMR;
- the third party operator to have a right of reply to QR's concerns; and
- if the parties cannot agree, the third party operator would have recourse to dispute resolution (effectively a second independent environmental expert would be required to arbitrate).

The QCA stated in the Draft Decision that it could envisage a situation where a third-party operator may already be running train services in Queensland and therefore already have developed an environmental management system for its operations. The QCA considered the Undertaking should provide for such an operator to be able to present a copy of its environmental management system for its Queensland operations to QR to provide a basis for negotiation.

Accreditation of environmental management systems under ISO 14,000

The Draft Undertaking required that a third-party operator's environmental management system be accredited under the ISO 14,000 international standard prior to the operation of its train services. QR's revised environmental requirements proposed consistency with, rather than accreditation under, the ISO 14,000 standard.

The QCA rejected such requirements on a number of grounds. First, the EPA Act does not pose any requirement on how an environmental management system should be accredited under, or be consistent with a particular domestic or international standard. Second, QR provided no evidence to show that accreditation under ISO 14000 was a generally accepted approach to environmental management in the rail industry, or that it was the only feasible method of achieving environmentally sustainable goals. Third, QR's own systems were not compliant with ISO14,000, raising a problem of competitive neutrality if this requirement were imposed on third-party operators.

Third party operator's environmental management system

The Draft Undertaking provides that a third-party operators' environmental management system incorporate all legislative requirements including any requirements in respect of environmental authorities held by QR from time-to-time as appropriate. The QCA proposed a third-party operator should meet "relevant" legislative requirements.

Noise management

QR has obligations under the *Environmental Protection (Noise) Policy Act 1997* (the EPP Noise) that nominates long-term noise 'planning levels' (long-term levels) and establishes the criteria for determining unreasonable noise. In working towards the long-term levels, QR has developed its own Code of Practice for Railway Noise Management which was approved by the Minister for Environment and Heritage and Minister for Natural Resources under s219 of the EPA Act.

In the past, in its role as network manager and as the dominant provider of above-rail services on the network, QR has been able to internalise the handling of noise abatement costs. The QCA recognised that third-party entry on QR's network has the potential to complicate the calculation and assignment of abatement costs.

Nevetheless, given the early stage of development of the above-rail market, and recognising that noise abatement concerns are likely to be principally focussed on the Brisbane metropolitan

system, the QCA did not consider it appropriate to prescribe a methodology for calculating noise abatement costs in the Undertaking.

The QCA argued, in principle, each rail operator should pay for the cost of the incremental units of noise its train services generate, reflected in the cost of noise abatement measures. Under such an approach, a rail operator would pay a proportion of the total incremental cost of noise abatement measures which is related to its contribution to the total units of noise on the corridor.

Environmental audits

As a result of concerns with the Draft Undertaking's proposed annual and 'spot' environmental auditing requirements, the QCA proposed a number of amendments:

- QR's auditing requirements should be linked to the risks posed by a third-party operator's train services and what is established in that operator's environmental management system;

- auditing requirements should be specifically addressed in the EIRMR, if prepared, or during the exchange of information associated with the upgrading of the two parties respective environmental management systems; and

- each party to the access agreement should be required to provide the other party with copies of the relevant parts of its internal audit reports.

Material event of default

QR argued that it needed an environmental material event of default provision in its standard access agreement to protect itself from environmental liability once a third-party operator is running train services on its network.

The QCA considered QR's proposed termination right goes beyond what is necessary for QR to meet its environmental obligations under Queensland's regulatory framework and moreover, goes beyond the EPA's powers to suspend or stop environmentally damaging activities.

The QCA argued that the EPA's enforcement role should be reflected in any process that QR establishes culminating in an environmental termination right. Consequently, the QCA proposed an approach where a third-party operator would be required to comply with its obligations under the EPA Act, including any directions it receives from the EPA. Failure to comply with such an obligation and for that failure to cause or threaten serious environmental harm would establish grounds for a material event of default.

Stakeholder views

Environmental risk investigation and risk management report (EIRMR)

QR - the QCA's proposal for a third party operator to present its environmental management system to QR as a basis for negotiation is a concern. An important benefit of the EIRMR is that a party other than QR assesses the risks of a proposed operation and proposes the appropriate management measures for those risks. This person must be suitably qualified, but they need not necessarily be independent of the operator. The QCA seems to have overlooked this detail in its decision. The QCA's suggestion concerning an existing environmental management system shifts the burden away from the suitably qualified person onto QR. It would effectively mean QR would need to investigate the likely impacts of the altered operations. This would place additional resource constraints upon QR, and put QR in the unacceptable legal position of itself assessing the environmental risks associated with an operator's proposal rather than expressing an opinion on the operator's assessment.

The QCA has mistakenly inferred QR's process requires an "independent" person to prepare the EIRMR. More accurately, QR's process would accommodate a third party utilising the services of their *own* environmental staff in preparing the EIRMR, provided those staff are considered 'suitably qualified'. The QCA has also mistakenly assumed that, if the parties fail to agree on the adequacy of the EIRMR prepared for the proposed operations, only QR may refer the dispute to an independent expert. In reality, QR's proposal requires a suitably qualified person to prepare the EIRMR, and allows either QR or the access seeker to refer a dispute concerning the adequacy of the prepared EIRMR to an independent expert.

Bearing in mind these inconsistencies, QR would ask the QCA reconsider its recommendation on the process by which QR and an access seeker agree on the risks and controls relevant to the environmental interface. In particular, QR considers the QCA's reasons for refusing the reference, by either QR or an access seeker, to an independent expert of any dispute concerning the adequacy of an EIRMR, are addressed in QR's proposed approach and, as such, QR considers the approach it has proposed adequately delivers what the QCA seeks in this recommendation.

FreightCorp - supports the two-option approach.

RTBU - the QCA's stance of relying on access seekers to self-regulate in environmental matters is of concern to RTBU. In framing its proposals – again designed to prevent QR from using environmental controls to impede competition – the QCA seems to have lost sight of the big picture. The Queensland Government and the Queensland community are entitled to be assured that access regimes are in the 'public interest' and will not lead to the introduction of lower environmental standards than previously applied by QR.

Accreditation of environmental management systems under ISO 14,000

QR -much of the QCA's discussion with respect to ISO 14,000 incorrectly assumes QR is seeking that an access seeker achieves accreditation under the ISO standard. This is inaccurate, as QR is seeking no such accreditation. Rather, what QR is seeking to achieve is to derive some comfort from knowing that the EMS is prepared and maintained in accordance with a credible standard.

The QCA acknowledges that: "A requirement for compliance with a particular standard could be justified under the public interest test by reference to generally accepted industry practice or to government policies relating to ecologically sustainable development."

The relevant standards under discussion are AS/NZS 180 14001 – Environmental Management Systems – Specification with guidance for use and AS/NZS 180 14004 – Environmental Management Systems – General Guidelines on principles, systems and techniques. These standards are the only environmental management standards approved by Standards Australia and in the opinion of the head of the technical working group of that organisation, could be regarded as constituting a generally accepted industry practice for environmental management. This is also the firm opinion of Mr. Stuart McFarlane, the Chair of the QCCI's Environment Committee. As a result, QR considers the ISO 14000 standard is commensurate with "generally accepted industry practice".

With respect to this, it is significant that QR is itself developing its EMS in accordance with the ISO 14000 standard. QR considers there is a legitimate business interest in having a uniform approach to environmental management systems for train services running on the same infrastructure. However, bearing in mind QR's belief its current approach accommodates standards, other than ISO 14000 standards, which are consistent with the ISO 14000 approach, QR would be prepared to accept a provision that recognised a third party's EMS should be consistent with the ISO 14001 and 14004 or some other comparable standard.

Third-party operator's environmental management system

QR - accepts the principle of the QCA's recommendation. However, QR considers it is worth noting the effect that recent amendments to section 431 of the *Environmental Protection Act 1994* (EPA) have had.

The holder of an environmental authority must ensure everyone acting under the authority complies with the conditions of the authority, and if another person acting under the authority commits an offence against section 430, the holder also commits an offence.

The holder will have a defence if:

- the holder issued appropriate instructions and used all reasonable precautions to ensure compliance with the conditions; and
- the offence was committed without the holder's knowledge; and
- the holder could not by the exercise of reasonable diligence have stopped the commission of the offence.

As a result of these requirements, QR considers it is reasonable for it to satisfy itself that any operator who might at some stage be acting under an environmental authority held by QR is aware of those conditions and has appropriate regard for compliance with those conditions. Where this is the case QR accepts an obligation to provide details of relevant environmental authorities to an operator during the access negotiation.

In addition, QR's standard access agreement envisages QR providing this information to an operator from time to time during the course of an access agreement, as necessary. An operator's EIRMR will, where relevant, address the requirement for the operator to comply with applicable environmental authorities/licenses.

FreightCorp - supports the QCA's findings.

Noise management

QR - for the purpose of providing further clarification on the issue of noise abatement costs, QR offers the following comments:

- where a new train service will increase the 24 hour average noise level on the relevant infrastructure over the permissible planning levels, the QCA's suggestion that the cost of controls should be funded by all operators, in the proportion of units of noise created, can be applied subject to the new train service meeting at the least the total incremental costs of it entering the system whereby the incremental costs would include the incremental cost of any controls for noise abatement. As a result, in circumstances where the cost of incremental noise control measures is so great that total incremental costs exceed the access charge that would otherwise be levied, the new train service must pay that higher amount as an access charge. This is analogous to the manner in which QR normally assesses incremental capacity cost;
- the above assumes it is possible to put in place controls to reduce noise to allowable levels. Where this is not possible, QR reserves the right to refuse entry onto the nominated infrastructure. Contribution to noise attenuation works in those circumstances would not be an option as nothing could be done to reduce the levels. QR draws an analogy with the approach taken in the Planning & Environment Court to service levels on roads heavily impacted by existing traffic. In circumstances where a proposed new development would increase an existing traffic problem and would detrimentally affect the efficiency of the existing road network, the Planning & Environment Court has been prepared to refuse development applications if nothing could be done to solve the traffic problem that would be created by the additional traffic volumes entering the road network from the proposed development. Unless it can be shown works can be undertaken that would mitigate those unacceptable impacts the application would be refused in those circumstances; and
- the QCA has used the concept of units of noise to apportion the cost of noise controls. This will not always be a simple exercise. For instance, diesel locomotives produce a different frequency spectrum of noise with predominant noise produced higher above the ground (at exhaust level) while electric locomotives and passenger units predominantly produce noise at the traction motor level. As a result, the noise barriers for diesel powered trains need to be higher than those for electric trains, notwithstanding the level of noise output. The barriers may also need to be constructed of different material to be effective in relation to predominantly lower frequency noise.

This example illustrates why it may not be appropriate to apportion cost on the basis of noise times number of trains;

- QR considers that there may be a legitimate argument for services in different markets to contribute to noise controls differently; and

- finally, over time, noise-planning levels may change.

FreightCorp - agrees with the QCA's assessment in relation to constraints on capacity due to noise abatement measures.

Schedule E should state clearly that in relation to noise abatement, each rail operator should pay for the cost of the incremental units of noise its train services generate, reflected in the cost of noise abatement measures. This should form part of the base case of each access seeker. From negotiation with QR, FreightCorp considers it is most unlikely that QR would agree to include provisions that reflect the principles.

FreightCorp has sought the provision of information as an access seeker but has found this difficult to obtain. In some instances this may be because QR has not collected the required data. For example, base line noise data is not available for the majority of the QR network.

Environmental audits

QR - as part of its process of managing the environmental interface with operators, QR proposes the following audit principles:

- an operator's EIRMR will specify the environmental audit requirements for its train services;

- an operator will provide QR with copies of any environmental audits undertaken in respect of its train services;

- except where the environmental audits of the operator's train services are conducted by an independent person, pursuant to its environmental management system, a suitably qualified person, reasonably acceptable to both parties, must conduct environmental audits;

- QR has a right, if it becomes aware of any circumstances associated with the activities of the operator that may give rise to 'environmental harm', or non-compliance by the operator with the EIRMR, to require the operator to undertake a review of the adequacy of the EIRMR and/or the operator's compliance with it. The operator will cause such a review to be carried out and will provide a copy of the review report to QR within a reasonable time.

In relation to the QCA's concern that auditing be linked to the risks posed by an access seeker's operations, QR considers its proposal does in fact relate to perceived environmental harm, as the EIRMR will be prepared specifically for a particular operation. As a result the audit requirements will reflect appropriate controls for the risks posed by that operation.

In addition to the audit requirements specified in the EIRMR, QR proposes a process whereby QR could influence the environmental risk management conduct of an operator during operations if it became obvious that the operator was engaged in regular or systemic conduct which might give rise to a risk of 'environmental harm'. If such conduct were occurring, it would suggest a problem with the risk management proposals in the EIRMR.

It is therefore the adequacy of the initial identification of risks and the development of the response to those risks that needs to be reviewed in circumstances that indicate that risks may not have been properly addressed. As a result, QR maintains the need to retain this right to require an operator to undertake a review of its EIRMR in the stated circumstances.

The QCA states on page 344 of volume 2 of its Draft Decision, that QR's proposed auditing requirements fail to recognise that for each environmentally relevant activity performed by a third party, an EPA environmental authority will be required. QR considers the QCA's objection fails to recognise that in some circumstances the operator may be operating under an environmental authority held by QR in terms of s.431 of the EPA. As a result, whilst there is no specific audit or review power that QR seeks relating to non-compliance by an operator with either a QR environmental authority or an operator's own environmental authority, the comments outlined previously in relation to QR's obligations as the holder of an

environmental authority, are again relevant. As an operator will have an obligation in its EIRMR to comply with applicable authorities and licenses, non-compliance with that obligation may enable QR to require a review of the EIRMR in accordance with dot point 4 above.

In response to the QCA's objection an operator will be conducting audits of its own environmental management system from time to time, QR notes if the environmental management system is generally in accordance with an ISO 14000 based system then that would be correct. However, the audit might simply review the operation of the system without acknowledging the adequacy of the system in terms of the underlying risk it is attempting to address. QR does not seek to audit an operator's environmental management system, it only seeks to have a right to require a review to be undertaken of the adequacy of the initial assessment of risk in the EIRMR, in the circumstances stated above.

QR notes the QCA's concern about the conduct of spot audits of a third party's compliance with its environmental management system. QR does not seek any automatic right to conduct spot audits, but considers the QCA should not prevent QR and access seekers agreeing to such audits in the relevant EIRMR.

QR does not necessarily disagree with the QCA's suggestion it would be reasonable for QR to require an operator to provide QR with copies of the relevant parts of its environmental management system audits. QR's primary interest lies with the operator's EIRMR and, as a result, QR would accept copies of relevant parts of audits undertaken in accordance with an operator's environmental management system, only in so far as those audits were consistent with the requirements of the EIRMR. Importantly, as previously noted, these audits will not address the issue of the adequacy of the initial assessment of risk and proposals for risk management in the EIRMR, in respect of which QR retains the right to require the operator to obtain a review in the circumstances discussed above.

Concerning the right of third parties to access relevant parts of QR's internal environmental audits, QR accepts that in circumstances where its internal audits disclose matters which would be of relevance to the operator's train services, that this is not unreasonable. Similarly, QR does not object to an obligation to advise an operator of any environmental incident of which QR is aware that may be relevant to the operator's train services. However, QR does not consider it is reasonable for it to have an obligation to advise third parties of an environmental incident of non-compliance identified through an internal audit if that non-compliance does not affect the third party's operations in any way. Neither does QR consider it necessary for it to have an obligation to advise a third party of an environmental incident that is not relevant to the operation of that party's train services.

ARTC - while the QCA's proposed approach to environmental issues has some similarities, it is still far more intrusive than our own approach. The balance, whilst it has moved significantly towards the third party operator, would still appear to place unnecessary burden and risks on the third party operator to protect QR's interests.

FreightCorp - supports the QCA's finding that it is reasonable for QR to require the operator to provide copies of relevant parts of internal audits conducted by it to QR, subject always to maintaining legal professional privilege. FreightCorp also supports the provision to it of relevant parts of QR's internal audits.

It would be helpful to receive clarification of the following.

- Is it the intention that a rail operator must notify QR of a breach discovered by the rail operator, irrespective of whether any action is brought or likely to be brought?

- Is it the intention that a rail operator must rectify a breach that has not as such been proved to be a breach by the EPA?

The Final Decision should state that neither party may be required to jeopardise its position in relation to any action by the EPA by virtue of having to make disclosure to the other.

Material event of default

QR - at a principle level, QR does not object to the QCA's suggestion regarding the circumstances that would establish grounds for termination under an operator's access

agreement. However, QR does not consider that these are the *only* circumstances in which it may be appropriate for QR to terminate an access agreement on environmental grounds. In particular, QR maintains a right to terminate in the following circumstances:

- where an operator has failed to comply with its EIRMR, and such default continues for, or the operator has failed to take reasonable action to prevent recurrence of the non-compliance within, 30 days after notice from QR of the non-compliance; and

- where an operator fails to comply with the requirements of a notice given by QR requiring the operator to cease conduct which in the reasonable opinion of QR is causing or contributing to 'environmental harm' or is likely to do so, or is in breach of any law, where that default continues for, or the operator has failed to take reasonable action to prevent recurrence of the default within, 30 days after notice from QR of the default.

The EIRMR details the operator's contractual obligations in relation to environmental management of its operations on QR's network, and it is appropriate that QR be entitled to terminate for its continued breach.

In relation to the QCA's submission that any right to terminate an access agreement on environmental grounds should be linked to the definition of 'serious environmental harm' in the EPA, QR notes the QCA has mistakenly assumed that QR has chosen the broadest definition of environmental harm upon which to base a right to terminate in the standard access agreement. QR's standard access agreement uses the term 'environmental harm' but then defines that to include those things covered by the EPA's definitions of 'serious environmental harm', 'material environmental harm' and 'environmental nuisance'. Whilst QR maintains the environmental harm related to each of these defined terms is appropriate to QR's right to require an operator to review their EIRMR (discussed above), QR accepts that for the purpose of termination, it is unlikely to seek to terminate an agreement for a breach that has or is likely to cause anything less than 'serious environmental harm' as defined in the EPA.

In addition to the right of termination, QR maintains the importance of having a right of suspension against operators in certain circumstances. For instance, where the EPA has been notified about an operator's actions, it may still be necessary for QR to suspend relevant parts of an operator's service for such time as it is necessary to comply with any notice or order issued by the EPA. The right to suspend would operate only in circumstances where it is inappropriate, because of the risks involved, to continue the train services until the offending behaviour is rectified. The current drafting of the standard access agreement provides QR will have a right to suspend an operator's access where that operator:

- has failed to comply with its EIRMR, and QR is of the reasonable opinion that such failure has caused or is likely to cause material disruption to train movements or has caused or is likely to cause risk to the safety of any person or material risk to property; and

- has failed to comply with the requirements of a notice given by QR (within the reasonable time specified in that notice) requiring the operator to cease conduct that in QR's reasonable opinion is causing or contributing to 'environmental harm' or is likely to do so.

FreightCorp - agrees with the QCA's assessment and the finding that as a minimum, any right to terminate an access agreement on environmental grounds should be linked to the definition of serious environmental harm in the EPA Act.

Schedule E should state the circumstances in which an access agreement may be suspended and terminated, and this statement would form the base case for each access seeker.

QCA's analysis

Environmental risk investigation and risk management report (EIRMR)

In terms of meeting its legal obligations under Queensland's environmental regulatory framework, the QCA recognised in the Draft Decision that a third-party operator should conduct

an environmental investigation of the risks of its intended operations and propose control measures for the identified risks.

Nevertheless, the discussion in the Draft Decision assumed the preparation of an EIRMR would be by a suitably qualified independent person, which was contrary to QR's proposed approach of a suitably qualified person who could be internal or independent to the operator.

The QCA recognises QR's proposed approach is potentially a more streamlined, less costly approach for third-party operators employing qualified environmental officers. In practice, it could mean that an independent environmental expert was only required at the end of the process in the event of a dispute, rather than at the beginning - to prepare the initial EIRMR - and again at the end in the event of dispute. On the other hand, a small operator would be unlikely to have such a suitably qualified person internally so it would have to procure an independent report.

Under QR's approach, if QR and a third-party operator could not agree on the adequacy of the EIRMR, either party could refer the matter to an environmental expert for dispute resolution in accordance with sub-clause 4.9.3 of the Draft Undertaking. The QCA notes that the parties must agree upon the expert under sub-clause 4.9.2. Failing such agreement, either party may refer the dispute to the QCA in accordance with sub-clause 4.9.4.

The QCA's proposed change to the preparation of the EIRMR has implications for its proposal that where a third-party operator is already running train services in Queensland it be allowed to present its environmental management system to QR as a basis for negotiation. The key purpose of this proposal was to provide a third party operator with the option of saving time and money through not procuring an independent initial EIRMR. If a third-party operator can prepare an EIRMR using internal suitably qualified personnel, then the QCA's concerns about the costs associated with the requirement for an independent report dissipate.

Consequently, in accepting QR's proposal that a suitably qualified internal person should be able to prepare an EIRMR, the QCA has decided the option of a third-party operator already running train services in Queensland having a right to present its environmental management system as a basis for negotiation should not form part of an approved Undertaking. For such an operator, the QCA envisages that the EIRMR would relate only to its new operations.

As a result of the proposed changes discussed above and incorporating relevant parts of the Draft Decision, an outline of a revised EIRMR process that the QCA considers should be set out in an approved Undertaking is as follows:

- an EIRMR would be prepared for the third-party operator by a suitably qualified person reasonably acceptable to both parties;

- QR should provide in writing to the third-party operator its reasons if it has a problem with the adequacy of the EIRMR within 30 days of receipt, or within a period otherwise agreed between the parties;

- the third party operator would have a written right of reply to QR's concerns;

- if the parties could not agree on the adequacy of the EIRMR, either party would have recourse to dispute resolution under the relevant provisions of the Undertaking (including recourse to an expert or the QCA);

- the third-party operator would be given a reasonable period within which to amend its EIRMR as required by the expert. If the third-party operator failed in this regard, QR would be able to cease negotiations or terminate the access agreement (if signed);

- once finalised, the EIRMR would be incorporated as a schedule to the third-party operator's access agreement.

Accreditation of environmental management systems under ISO 14,000

QR argues much of the QCA's discussion with respect to ISO 14,000 incorrectly assumes QR is seeking that an access seeker achieves accreditation under the ISO standard. The QCA rejects this argument at two levels.

First, the Draft Undertaking imposed such a requirement. Under s136 of the QCA Act, the Authority is required to approve or not approve an undertaking given to it. Consequently, the QCA had a legislative obligation to address the accreditation matter in its Draft and Final Decisions.

Second, the Draft Decision recognised that QR had weakened the requirement to consistency rather than accreditation under the ISO 14,000 standard. Nevertheless, the QCA maintained concerns about such a requirement. Indeed, the majority of the arguments raised by the Authority regarding ISO 14,000 apply equally to a consistency or accreditation requirement.

The EPA Act requires persons and organisation to develop an environmental management system to suit their operations and meet their due diligence obligations. It does not impose any requirement on how an environmental management system is developed or whether the completed system should be accredited under, or be consistent with, a particular domestic or international standard. Any additional requirements imposed by QR as owner of the network must:

- be justified in terms of the public interest, including balancing the promotion of environmentally sustainable development and protecting the integrity of the above-rail market;

- be consistent with competitive neutrality principles;

- not conflict with the basic legislative requirements of third-party operators under the EPA Act; and

- be subject to stakeholder comment to provide input into an assessment of the public interest.

QR argues it seeks to derive some comfort from knowing that a third-party operator's environmental management system is developed and maintained in accordance with a credible standard. However, the QCA considers QR will protect its legitimate business interests through its requirement for the third-party operator to develop an EIRMR and environmental management system that is consistent with the EIRMR. These requirements will form part of the contractual relationship between the parties. QR has not demonstrated that adherence to a standard such as ISO 14,000 is necessary for an environmental management system to be consistent with the EIRMR.

The QCA also notes that consistency of a third-party operator's environmental management system with a credible standard does not guarantee compliance with Queensland's environmental regulatory framework. Compliance with this framework is a fundamental legal obligation, for which both QR and third-party operators are responsible to the EPA.

Finally, although QR has advanced some evidence that ISO 14,000 is regarded by Standards Australia as commensurate with "generally accepted industry practice", further evidence is required to show that accreditation under ISO 14,000 or some similar standard is accepted as a

best practice approach to environmental management in the rail industry, or in Australian industry at large.

In addition, while QR is developing its environmental management system in accordance with the ISO 14,000 standard, it has not yet received accreditation under this standard, raising concerns about competitive neutrality. To illustrate the point by contrast, the QCA has recognised that Australian Standard AS4292 regarding rail safety has been adopted by the rail sector as the standard against which track managers and rail operators must develop their safety management systems to gain accreditation under the rail safety regulatory framework.

In the absence of a clear public benefit from requirements for consistency or accreditation of a third-party operator's environmental management system under the ISO 14,000 standard, the QCA does not intend to amend its position outlined in the Draft Decision. However, it would be open to QR to lodge a draft amending undertaking if circumstances changed in the future.

Third party operator's environmental management system

QR notes recent amendments to section 431 of the *Environmental Protection Act 1994* (the EPA Act) (Chapter 8 General Environmental Offences, Part 2, Division 1 Environmental Authorities). In particular, the holder of an environmental authority must ensure everyone acting under the authority complies with the conditions of the authority, and if another person acting under the authority commits an offence against section 430, the holder also commits an offence.

The QCA understands the amendment is of most relevance for holders of environmental authorities performing environmentally relevant activities (ERAs) as defined in the EPA Act. The only ERAs performed by QR relate to its maintenance and re-fuelling facilities (including workshops). Running train services between origin-to-destination train services is not an ERA and hence does not require a licence.

The QCA understands the main aim of the amendment is to clarify situations where a third party is performing the environmentally relevant activity on behalf of the holder of the environmental authority within the holder's facility that is the subject of the licence. Hence, in QR's case, an example would be where QR appoints a third party to use or operate one of its maintenance facilities for which QR holds the environmental authority. In contrast, a third-party operator using one of these facilities on a standard commercial basis (for example, paying QR to service its rollingstock in QR's maintenance facilities) would not be covered by the legislative amendment because the third-party operator was not acting under QR's authority for those facilities.

It is apparent from the above discussion that the circumstances when a third-party operator would be acting under one of QR's environmental authorities would be quite rare and so has minimal relevance for third party access to QR's network. Consequently, the QCA does not consider it needs to amend its position outlined in the Draft Decision.

Noise management

The QCA noted in the Draft Decision that it did not consider it appropriate to prescribe a methodology for calculating noise abatement costs in the Undertaking. This would be a matter to be addressed in future reviews of QR's Undertaking.

Nevertheless, the QCA is disappointed with QR's comments in its submission that it reserves the right to refuse entry onto the nominated infrastructure where it is not possible to reduce noise to allowable levels. This is of particular concern because of QR's apparent unwillingness to provide full disclosure of relevant noise information to third-party operators (see section 7.10

below). The lack of a transparent approach regarding QR's noise management policy, as discussed in the Draft Decision, raises competitive neutrality concerns regarding the application of that policy for third-party operators vis-a -vis QR's above-rail groups.

The QCA considers that at this stage, noise management will need to be addressed by QR and third-party operators on a case-by-case basis. However, QR should aim for greater transparency in its noise management policy. This should reduce the likelihood of access disputes arising because of noise-related matters.

Environmental audits

QR proposes the following environmental audit principles:

- an operator's EIRMR will specify the environmental audit requirements for its train services;

- an operator will provide QR with copies of any environmental audits undertaken in respect of its train services;

- except where the environmental audits of the operator's train services are conducted by an independent person, pursuant to its environmental management system, a suitably qualified person, reasonably acceptable to both parties, must conduct environmental audits; and

- QR has a right, if it becomes aware of any circumstances associated with the activities of the operator that may give rise to 'environmental harm', or non-compliance by the operator with the EIRMR, to require the operator to undertake a review of the adequacy of the EIRMR and/or the operator's compliance with it. The operator will cause such a review to be carried out and will provide a copy of the review report to QR within a reasonable time.

The QCA accepts the first three principles above as being consistent with the proposed environmental audit amendments in the Draft Decision, except that a third party operator should have a right to be provided a copy of the relevant parts of QR's internal audit reports. QR accepts this latter obligation elsewhere in its submission. The QCA accepts that it is not reasonable for QR to have an obligation to advise a third-party operator of environmental incidents of non-compliance identified through an internal audit if that non-compliance does not affect the third party operator's operations in any way.

The QCA is in broad agreement with the fourth principle above, but has some concerns. The QCA accepts that QR should have a right to seek confirmation from a third-party operator regarding the adequacy of the EIRMR and/or its compliance with the EIRMR. The QCA does not accept, however, QR seeking confirmation of such matters if it becomes aware of any circumstances associated with the activities of the operator that may give rise to 'environmental harm', the latter term as currently defined by QR in its standard access agreement. QR's definition of 'environmental harm' incorporates the definitions of environmental nuisance, material environmental harm and serious environmental harm in the EPA Act.

The QCA notes that the duty to notify environmental harm under the EPA Act (s320) "applies to a person who, while carrying out an activity (the "primary activity"), becomes aware that serious or material environmental harm is caused or threatened by the person's or someone else's act or omission in carrying out the primary activity or another activity being carried out in association with the primary activity". This duty to notify applies to both QR and third-party operators.

The QCA considers that QR's right to require confirmation of the adequacy of the third-party operator's EIRMR and/or its compliance with the EIRMR should be linked to QR's duty to notify environmental harm under the EPA Act. In other words, if QR becomes aware of any circumstances associated with the activities of the operator that cause or threaten serious or material environmental harm, then it can require the operator to undertake a review of the adequacy of the EIRMR and/or the operator's compliance with it. At the same time, to meet its obligations under the EPA Act, QR would have a duty to notify the EPA about the circumstances involving the third-party operator that so concerns it.

The QCA also considers that it would be reasonable for QR to require a review of the adequacy of the third-party operator's EIRMR if there was a change in environmental law of relevance to the performance of train operations. A relevant change in environmental law would clearly have consequences for both parties.

Consequently, a breach of the EIRMR that causes material or serious environmental harm or a relevant change in environmental law should be the only triggers for QR to exercise its proposed review right. The QCA considers that providing a link between the contractual relationship between QR and a third-party operator and each party's obligations under the EPA Act provides a reasonable balance between QR's legitimate business interests and the interests of third-party operators with respect to QR's proposed review right.

FreightCorp seeks clarification whether it is the intention that a rail operator must notify QR of a breach discovered by the rail operator, irrespective of whether any action is brought or likely to be brought. The QCA considers that a third-party operator would have a contractual obligation to inform QR of a breach of the EIRMR. FreightCorp also seeks clarification whether it is the intention that a rail operator must rectify a breach that has not as such been proved to be a breach by the EPA. The QCA considers that a rail operator should rectify a material breach, regardless of whether or not it is a breach of the EPA Act, because of its contractual implications.[4]

The QCA notes that the EIRMR forms part of the access agreement between QR and the third-party operator and so can be enforced contractually, however, it has no legislative status. While the existence and adequacy of the EIRMR would be relevant in terms of both parties meeting their environmental obligations under the EPA Act, compliance with the EIRMR in a contractual sense should be seen as a separate matter to both parties compliance with their obligations under the EPA Act.

The QCA agrees with FreightCorp that neither QR nor a third-party operator party should be required to jeopardise its position in relation to any action by the EPA by virtue of having to make disclosure to the other.

Environmental termination right

QR notes the QCA, in proposing a process for an environmental termination right, has mistakenly assumed that QR has chosen the broadest definition of environmental harm upon which to base a right to terminate in the standard access agreement. In response, the QCA notes that the version of QR's standard access agreement in its possession at the time of the release of the Draft Decision incorporated such a definition of environmental harm and that the Authority had previously expressed its concerns to QR regarding such a definition.

[4] Similarly, QR would be obliged to inform a third-party operator if it breached any of its obligations under the EIRMR.

The QCA extensively discussed QR's proposed environmental termination right in the Draft Decision. The QCA notes that QR has re-drafted the right such that termination could be effected in the following circumstances:

- where an operator has failed to comply with its EIRMR, and such default continues for, or the operator has failed to take reasonable action to prevent recurrence of the non-compliance within 30 days after notice from QR of the non-compliance; and

- where an operator fails to comply with the requirements of a notice given by QR requiring the operator to cease conduct which in the reasonable opinion of QR is causing or contributing to 'environmental harm'[5] or is likely to do so, or is in breach of any law, where that default continues for, or the operator has failed to take reasonable action to prevent recurrence of the default within, 30 days after notice from QR of the default.

The QCA considers that the above grounds of termination are too broad. They cover a range of scenarios, including those where termination would be too drastic a consequence for the breach involved, and the grounds provide no link to the severity of the breach. There also remains a lack of clarity in QR's definition of environmental harm (see discussion in previous section), such that QR acknowledges it would only be likely to seek termination in the event of serious environmental harm, however, it could terminate for far less than this. In addition, the triggers for a right to terminate are in no way linked to the impact on QR in terms of liability arising from an environmental breach by the third-party operator.

In light of the above arguments, the proposed termination right still goes considerably beyond what is necessary for QR to meet its environmental obligations under Queensland's environmental regulatory framework. Moreover, it goes beyond the EPA's powers to suspend or stop environmentally damaging activities.

It is useful to assess QR's own environmental performance in the context of the EPA's administration of the EPA Act. There have been a number of incidents posing serious environmental risks involving QR train services on QR's network over recent years. For example, a 120,000-litre diesel spill due to a derailment at Richmond (east of Mt Isa) and a chemical spill from a leaking rail car at Bundaberg both in February 2000. QR's 1999-2000 Annual Report refers to diesel fuel spills at Barabon and Roma Street, Brisbane.

The QCA does not raise these examples to imply QR has a poor environmental record - the QCA does not have a view on this matter. The key points the QCA wants to make about these incidents are:

- notwithstanding QR's argument that its termination right allows it to take a pro-active approach to environmental matters involving third-party operators, environmental incidents of varying degrees of seriousness involving QR's trains are occurring on its network every year. However, QR continues to run train services on the affected parts of its network. The QCA is not aware of train services having been terminated due to such incidents occurring, although changes to environmental risk management may have occurred;

  - in contrast, QR proposes a right sufficiently broad to terminate an operator's access agreement because of a non-trivial breach of its EIRMR;

[5] Defined to include those things covered by the EPA Act's definitions of 'serious environmental harm', 'material environmental harm' and 'environmental nuisance'.

- QR was accountable for these incidents to the EPA, which was closely involved in assessing the seriousness of the incidents and what should be the appropriate response to them;

  – if a third-party operator's train was involved in an incident such as Richmond, the QCA considers the operator, not QR, would be primarily accountable to the EPA. QR's only involvement would be if it had failed to maintain its infrastructure or safeworking systems in an appropriate state and as a result was a link in the chain resulting in the environmental incident.

The QCA outlined a hypothetical situation in the Draft Decision about how the EPA would deal with a situation where an organisation is performing an activity that was causing serious environmental harm and how the EPA would respond to the situation. The example is worth repeating because it highlights the QCA's concerns with QR's redrafted termination right.

The QCA noted that the EPA has a number of enforcement measures at its disposal to respond to a situation where an organisation is performing an activity that was causing serious environmental harm. For example, the EPA could seek an injunction to stop the particular activity causing the harm. This would not mean, however, that the organisation would have to stop any other activities it was performing which had no relation to the activity causing the harm. The injunction would only apply to the relevant activity. Similarly, the EPA could issue an environmental protection order requiring the offending organisation to cease an action or to undertake an action in relation to the activity causing the harm. The thrust of any EPA action would be to stop the activity causing the environmental harm until a means could be found, if any, for it to recommence without causing that harm. This is clearly a more narrowly focussed approach than closing down the whole of the affected organisation's operations in Queensland, which could be the practical effect of QR's proposed redrafted material environmental default right.

Under QR's proposal, the QCA can envisage a possible scenario where a third-party operator is forced off QR's tracks and its access agreement terminated without a breach of environmental legislation actually having occurred. While a third-party operator could subsequently be able to claim damages against QR under such a scenario, this may be little consolation if its business reputation has been ruined in the Queensland market for the long-term.

The QCA recognises that the environmental termination right issue will need to be resolved as part of the development of the standard access agreement. Nevertheless, to provide some guidance to that process, the following Schedule E principle reflecting the above discussion has been drafted:

- "A third-party operator should comply with its obligations under the EPA Act, including any notices or directions it received from the EPA. Failure to comply with such an obligation and for that failure to cause or threaten serious environmental harm establishes grounds for a material event of default."

Environmental suspension right

In addition to the environmental termination right, QR's submission proposes the following environmental grounds on which it would suspend a third-party operator's train services:

- it has failed to comply with its EIRMR, and QR is of the reasonable opinion that such failure has caused or is likely to cause material disruption to train movements or has caused or is likely to cause risk to the safety of any person or material risk to property; and

- it has failed to comply with the requirements of a notice given by QR (within the reasonable time specified in that notice) requiring the operator to cease conduct that in QR's reasonable opinion is causing or contributing to 'environmental harm' or is likely to do so.

The QCA considers that, in principle, an environmental suspension right is a far better, more flexible, means of QR managing its potential environmental liability as a result of the activities of a third-party operator than a termination right. However, the QCA does not support QR's proposed suspension right. As discussed above, the QCA considers QR's definition of 'environmental harm' is too broad.

As with the termination right, an environmental suspension right will need to be resolved as part of the development of the standard access agreement. Nevertheless, to provide some guidance to that process, the following Schedule E principle, reflecting the above discussion, has been drafted:

- "QR reserves the right to temporarily suspend the right of a third-party operator to operate on the relevant network section in the event that, in QR's reasonable opinion, the operator's train services cause or threaten material or serious environmental harm. QR will not exercise this suspension power in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 or s125 of the QCA Act.

- A third-party operator could reserve the right that if its train services are suspended on environmental grounds without reasonable justification, then QR would be liable for the loss thereby caused."

This principle is consistent with the one regarding QR's suspension of a third-party operator's rollingstock on safety grounds.

QCA's position

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

1. **an environmental investigation and risk management report (EIRMR) should be prepared for the third-party operator by a suitably qualified person reasonably acceptable to both parties;**

2. **an EIRMR would be prepared for the third-party operator by a suitably qualified person reasonably acceptable to both parties;**

3. **QR should provide in writing to the third-party operator its reasons if it has a problem with the adequacy of the EIRMR within 30 days of receipt, or within a period otherwise agreed between the parties;**

4. **the third party operator would have a written right of reply to QR's concerns;**

5. **if the parties could not agree on the adequacy of the EIRMR, either party would have recourse to dispute resolution under the relevant provisions of the Undertaking (including recourse to an expert or the QCA);**

6. **the third-party operator would be given a reasonable period**

within which to amend its EIRMR as required by the expert. If the third-party operator failed in this regard, QR would be able to cease negotiations or terminate the access agreement (if signed);

7. **once finalised, the EIRMR would be incorporated as a schedule to the third-party operator's access agreement.**

8. **a third-party operator's environmental management system does not need to be accredited under, or be consistent with, the ISO 14,000 environmental standard;**

9. **the imposition of requirements in respect of QR's environmental authorities/licences on third-party operators were only to the extent that these licence requirements are relevant to the third-party operator's train services;**

10. **linked QR's auditing requirement to the risks posed by a third-party operator's train services and what is established in the operator's environmental management system. Auditing requirements should be specifically addressed in the EIRMR. Each party should be required to provide the other with copies of the relevant parts of its internal audit reports;**

11. **provided QR a right to seek confirmation from a third-party operator regarding the adequacy of the EIRMR and/or its compliance with the EIRMR. If QR becomes aware of any circumstances associated with the activities of the operator that cause or threaten serious or material environmental harm, then it can require the operator to undertake a review of the adequacy of the EIRMR and/or the operator's compliance with it.**

12. **the following Schedule E principles were incorporated:**

    - **"Environmental management must be approached on a risk identification and risk management basis with respect to operations on the nominated network and auditing requirements should be linked to the environmental risks posed by a third-party's train services and be established in that third-party's environmental management system.**

    - **The third-party is required to inform QR of non-compliance with its environmental management system and provide details of how it intends to address the non-compliance. The third-party is required to rectify the breach as soon as practicable having regard to the nature of the breach and any action required by the EPA.**

    - **A third-party operator should comply with its obligations under the EPA Act, including any notices or directions it received from the EPA. Failure to comply with such an obligation and for that failure to cause or threaten serious environmental harm establishes grounds for a material**

event of default.

- **QR reserves the right to temporarily suspend the right of a third-party operator to operate on the relevant network section in the event that, in QR's reasonable opinion, the operator's train services cause or threaten material or serious environmental harm. QR will not exercise this suspension power in such a manner as to hinder or restrict access to the declared service in any way contrary to s104 or s125 of the QCA Act.**

- **A third-party operator could reserve the right that if its train services are suspended on environmental grounds without reasonable justification, then QR would be liable for the loss thereby caused."**

7.10 QR's assistance to prospective third-party operators concerning the Draft Undertaking's environmental requirements

Background

The QCA considers there needs to be full disclosure by QR of all relevant environmental information that will have an impact on a third-party operator's proposed or actual train services. Some of this information, such as noise planning levels, including 'interim' planning levels, and the extent to which such levels are binding, should be provided as part of QR's proposed Information Packs (Schedule D). More detailed information should be provided during the negotiation period.

Stakeholder views

QR - does not object to providing an operator with all relevant information reasonably available to it, and necessary for the operator in question to address a real or potential environmental risk. In addition, such an obligation should make it clear QR can only provide information to the level and standard that it has available, and QR may be entitled to recover its costs in providing the information. QR also queries what is meant by the reference to 'environmental reports'.

A requirement for QR to provide '*an indication as to whether the planning levels are binding*' or not, essentially calls for legal advice that QR should not be expected to provide. Both the Environmental Protection Policy (Noise) and QR's Code of Practice for Railway Noise Management commit QR to working towards achievement of planning levels. QR accepts that it cannot require a third party operator to meet planning levels over and above those QR operators are currently meeting because of the Code of Practice. However, it would not be appropriate to require it to provide advice as to the legal status of planning levels.

FreightCorp - supports strongly the QCA's finding.

QCA's analysis

As discussed in section 7.8, the general environmental duty emphasises the importance of mutual disclosure of relevant environmental information available to QR and third-party operators. QR argues that it can only provide information to the level and standard that it has available. The QCA recognises this argument as self-evident. Clearly, QR cannot disclose information it does not have and nor can a third-party operator. Nevertheless, to provide comfort to QR, the QCA has revised its position such that QR's obligation relates to the provision of environmental information "reasonably available to it".

QR argues that it may be entitled to recover its costs in providing the relevant environmental information. Chapter 4 of the Draft Decision discussed the appropriateness and basis of fees for information provision by QR. The QCA argued that QR should be able to reserve itself the right to charge fees to recover the costs of information gathering and dissemination. Such fees should reflect the costs of provision and guiding principles regarding the setting of fees should be established in the Undertaking. This approach would cover environmental information requested by a third party operator. In practice, given the nature of QR's obligation to provide relevant information reasonably available to it, the QCA would envisage fees applying only rarely.

QR considers it would not be appropriate to require it to provide advice as to the legal status of noise planning levels in the Information Packs. In preparing the Draft Decision, the QCA was concerned the planning levels could be misleading if there is a lower actual noise level being enforced.

QR notes in its submission that it cannot require a third-party operator to meet planning levels over and above those QR operators are currently meeting because of the code of practice. Consequently, the QCA considers it appropriate to require QR to disclose those noise levels that it is currently meeting because of its code of practice during the negotiation period, but not in the Information Packs.

To the extent binding noise limits have been imposed, these should also be disclosed in the other information that needs to be made available to third-party operators during the negotiation period, such as licence considerations and details of any enforcement actions. To the extent the EPA has acted on QR not meeting any limits, this would be disclosed in details of any enforcement action.

QR queries the QCA's reference to 'environmental reports'. The QCA intended that this term refer to any written environmental reports/assessments generated internally or prepared by an external party for QR on issues which will need to be dealt with by a third-party operator in addressing a real or potential environmental risk.

QCA's position

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

1. **QR committed to provide to a third-party operator on a timely basis during the negotiation period, all relevant information reasonably available to it, and necessary for the operator in question to address a real or potential environmental risk. The relevant information could include environmental reports, relevant licence conditions, currently applicable noise levels or binding noise limits, particulars of noise complaints, any enforcement actions and a copy of the QR Code of Practice for Railway Noise Management.**

7.11 Treatment of issues relating to adjoining infrastructure

Background

The QCA considered that the Draft Undertaking lacks clarity with respect to QR's intentions regarding the design and construction of adjoining infrastructure essential to the interface with its network.

As a result, the QCA formulated the principle in the Draft Decision that QR's involvement in the development of any adjoining infrastructure should be limited to the interface with the existing network. This would cover three elements:

- the connection point or turnout;
- the safeworking system, including signalling; and
- the electrical overhead system, where relevant.

The QCA proposed that QR be reserved the right to approve the design of adjoining infrastructure and check its construction (after completion) against the design for the above interface elements and recover its reasonable costs thereof.

Stakeholder views

QR - generally agrees with the approach that the QCA has recommended in relation to dealing with adjoining infrastructure. However, QR considers that the following general comments regarding the QCA recommendations add clarity to Draft Decision recommendations.

QR considers using and defining the following terms will add simplicity to the adjoining infrastructure discussion:

- QR Network;
- Connecting Infrastructure; and
- Private Infrastructure.

The Connecting Infrastructure is a subset of the QR Network and QR, therefore, is also the 'accredited railway manager' for the Connecting Infrastructure. The owner of the Private Infrastructure may be either an accredited or non-accredited railway manager, the choice of which will impact QR's involvement in relation to this infrastructure.

In the first instance, it is important to understand how the transition relates to the three infrastructure areas (i.e. Connecting Infrastructure to other QR Network and Connecting Infrastructure to Private Infrastructure). The transition from Connecting Infrastructure to other QR infrastructure occurs at the point where an element of infrastructure exists which would not exist if it were not for the private siding, while the transition from Connecting Infrastructure to Private Infrastructure is such that the Connecting Infrastructure includes all elements which can impact on the QR Network.

For the QR Infrastructure, including the Connecting Infrastructure, QR is the accredited railway manager and, therefore, is responsible for managing all issues relating to the standard of the infrastructure and its operational systems (including access arrangements with operators). To this end, QR reserves the right to design, project manage, construct, commission, maintain, upgrade and in any other way manage this infrastructure in a manner that QR, as the accredited railway manager, considers reasonably appropriate. QR considers these principles to be broadly consistent with the Draft Decision.

With respect to Private Infrastructure, QR's role would depend upon whether the owner chooses to become an accredited railway manager or not. If the choice is to be an accredited

railway manager, then most of the responsibility for this infrastructure would lie with the owner. QR's interest as the adjoining railway manager would be restricted to:

- the control of train movements across the junction (between the Connecting Infrastructure and Private Infrastructure). This junction will operationally be defined as one particular point (most likely linked to the signalling transition point); and

- the issue of risk assessment and indemnity. The risk assessment would be restricted to issues where the Private Infrastructure will have a potential impact on QR's infrastructure. Matters likely to be identified include issues such as ensuring adequate train speed can be maintained to clear the QR infrastructure in a reasonable time frame when entering or exiting the QR Network so as not to block other traffic on that network, the appropriate use of catch points or similar to protect the QR infrastructure from runaway trains and so on.

Under s 81(3)(b) & (c) of the TIA a non-accredited railway manager would be required to enter into an agreement with QR for the connection of the Private Infrastructure via the Connecting Infrastructure to the QR Network. In such a case, the non-accredited railway manager would be required to maintain the railway (or arrange for it to be maintained) in a manner acceptable to QR.

In the event QR chooses not to accept the maintenance regime, QR does not believe that this decision should be subject to a dispute resolution process. The reasoning for this is if an expert were to adjudicate, then this would effectively result in the expert accepting the maintenance regime rather than QR. The Act clearly requires QR, as the accredited railway manager of the QR infrastructure, to accept the maintenance regime. In any event, if the owner disagrees, the option of becoming accredited and having the regulator review the arrangements is available and so access would not be hindered.

ARTC - supports the QCA proposal.

FreightCorp - agrees with the QCA's assessment QR's involvement in the development of any adjoining infrastructure should be limited to the interface with the existing network.

FreightCorp notes the second element of the interface is identified on a non-exhaustive basis; "the safeworking system, including signalling". Whilst FreightCorp notes and agrees with the QCA's assessment that it is not possible to specify in detail the safeworking standards that are appropriate for adjoining infrastructure it may be helpful if the Final Decision required QR to define "safeworking system" along the lines of the generic definition suggested by the QCA:

'A safeworking system meaning a system that addresses risks to people and property that arise as a result of the physical characteristics of the adjoining infrastructure and the mainline, and train services using that infrastructure and mainline.'

FreightCorp strongly supports the QCA's finding QR should not have a right of approval of design or construction other than to the extent the design or construction relates to the interface.

The Final Decision should define clearly what the nature and extent of approval required from QR is for the purposes of approving adjoining infrastructure.

QCA's analysis

QR argues that using and defining the following terms will add simplicity to the adjoining infrastructure discussion:

- QR network;

- connecting infrastructure; and

- private infrastructure.

QR has advised the QCA that its term 'connecting infrastructure' covers the interface elements specified by the QCA in the Draft Decision ie. the connection point or turnout; the safeworking system, including signalling; and the electrical overhead system, where relevant. QR agrees with the QCA that the respective interfaces extend to varying lengths from the actual point of connection with QR's network. Hence, the turnout might be 100m of track adjoining the private infrastructure, but the signalling system extends 300m up the private infrastructure from the connection point.

QR argues that for the QR network and connecting infrastructure, it is the accredited railway manager and, therefore, it is responsible for managing all issues relating to the standard of the infrastructure and its operational systems (including access arrangements). To this end, QR reserves the right to design, project manage, construct, commission, maintain, upgrade and in any other way manage this infrastructure in a manner that QR, as the accredited railway manager, considers reasonably appropriate.

QR's position essentially reverses the QCA's position in the Draft Decision, which envisaged the third-party operator being the primary manager of the development of connecting infrastructure, with QR having a right to approve the design and check its construction (after completion) against the design for each of its interface elements. Nevertheless, the practical outcome of the two approaches need not be materially different.

Given QR's role as the accredited railway manager for the QR network and the connecting infrastructure, the QCA accepts QR reserving itself the right to design, or approve the design of, and supervise the construction of, any connecting infrastructure, within the following framework:

- if QR exercises its right to design and construct the connecting infrastructure, the third-party operator must be given a reasonable period within which to provide comments to QR on any design or construction matters;

- if QR exercises its right to design and construct the connecting infrastructure, the third-party operator would be required to demonstrate the reasonableness of the costs associated with QR performing those design and construction (and any associated) tasks, including providing the third-party operator with a fixed quote for the design and construction work prior to its commencement;

- QR should be required to pay the reasonable costs incurred by third parties as a result of unreasonable delays in any phase in the development of the connecting infrastructure;

- the Draft Decision's clarification of design standards associated with the connection point and electrical power system and the risk-based nature of safeworking standards should be maintained. In addition, QR could be required to demonstrate that the design and construction of the connecting infrastructure is not in excess of that required to retain the functionality of QR's existing infrastructure.

QCA's position

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

1. **QR's interest in the development of any adjoining infrastructure is limited to the connecting infrastructure, which is defined as follows:**

- **the connection point or turn-out;**
- **the safeworking system, including signalling; and**
- **the electrical overhead system, where relevant.**

2. **QR has a right to design, or approve the design of, and supervise the construction of, any connecting infrastructure. If QR exercises its right to design and construct the connecting infrastructure, it should be within the following framework**

   - **the third-party operator must be given a reasonable period within which to provide comments to QR on any design or construction matters.**
   - **QR is required to demonstrate the reasonableness of the costs associated with it performing those design and construction (and any associated) tasks;**
   - **QR is required to pay the reasonable costs incurred by third parties as a result of unreasonable delays in any phase in the development of the connecting infrastructure; and**
   - **the Draft Decision's clarification of design standards associated with the connection point and electrical power system and the risk-based nature of safeworking standards is maintained. In addition, QR could be required to demonstrate that the design and construction of the connecting infrastructure is not in excess of that required to retain the functionality of QR's existing infrastructure.**