



Request for Comments

Queensland Rail Draft Undertaking

April 1999

SUBMISSIONS

The Queensland Competition Authority (the Authority) considers public involvement to be an important element of its decision making processes. It therefore invites submissions from interested parties concerning its assessment of the draft undertaking submitted by Queensland Rail.

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

Euan Morton
Director
Queensland Competition Authority
GPO Box 2257
Brisbane QLD 4001

Telephone: (07) 3222 0506
Fax: (07) 3222 0599
Email: rail.submissions@qca.org.au

The **closing date** for submissions is 14 May, 1999.

Confidentiality

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

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

Public access to submissions

Subject to the above, submissions will normally be made available for public inspection at the Brisbane office of the Authority (see below), or on its website at www.qca.org.au.

Information about the role and current activities of the Authority, including copies of reports, papers and submissions can also be found on the Authority’s website.

Queensland Competition Authority
Level 19, 12 Creek Street
GPO Box 2257
Brisbane QLD 4001

Tel: (07) 3222 0555
Fax: (07) 3222 0599
Internet: www.qca.org.au

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ATTACHMENTS

- 1. A copy of QR's Draft Access Undertaking incorporating both QR's Explanatory Guide and the relevant sections of the QCA's Request for Comments Paper*
- 2. A copy of the Regulation Based Declaration of QR's Rail Transport Infrastructure under the QCA Act*
- 3. An excerpt from the Transport Infrastructure Act 1994 containing the definition of Rail Transport Infrastructure referred to in the Regulation Based Declaration*

1. INTRODUCTION

1.1 Background

The Queensland Competition Authority (the QCA) is a statutory body established under the *Queensland Competition Authority Act 1997* (the Act). Its aim is to perform specified services associated with national competition policy in Queensland. Broadly, the QCA is responsible for:

- subject to reference or declaration by the Ministers (the Premier and the Treasurer), undertaking prices oversight of monopoly or near monopoly Government business activities;
- receiving and investigating competitive neutrality complaints against significant government and local government business activities;
- accrediting significant Government and local government business activities as complying with the principle of competitive neutrality;
- overseeing and arbitrating third party access infrastructure; and
- undertaking such other activities relating to national competition policy as the Ministers may direct.

Under the *Queensland Competition Authority Regulation 1997*, the Queensland Government declared the services provided by Queensland Rail's (QR's) rail transport infrastructure for the purpose of providing intrastate transportation by rail under Part 5 of the Act.

The QCA recently received from QR a draft access undertaking covering certain services relating to the use of rail transportation infrastructure it owns. QR has prepared an Explanatory Guide to clarify the intent of selected provisions of the draft undertaking.

Over the coming months, the QCA will consider whether to approve, or refuse to approve, the draft undertaking. In order to facilitate this process, the Authority invites written submissions to assist in the consideration of the draft undertaking. To assist interested parties prepare submissions, the Authority has prepared this Request for Comments Paper, which is in two sections. The first section:

- provides a brief description of the third party access regime established under the QCA Act;
- outlines the nature of QR's network, corporate structure and traffic task; and
- outlines the process by which the Authority will assess the draft undertaking.

The second section raises issues for comment through a discussion of the draft undertaking.

Accompanying this Request for Comments Paper is:

- a copy of QR's draft access undertaking incorporating both QR's Explanatory Guide and the relevant sections of this Request for Comments Paper (Attachment 1);
- a copy of the regulation based declaration of QR's rail transport infrastructure under the QCA Act (Attachment 2); and

- an excerpt from the Transport Infrastructure Act 1994 containing the definition of rail transport infrastructure referred to in the regulation based declaration (Attachment 3).

These documents may be obtained from the Authority and are also available from its website at www.qca.org.au

The Authority has produced this paper in an effort to assist interested parties comment on QR's draft undertaking. However, in so doing, the Authority is concerned not to inhibit comment. To this end, the Authority is keen to receive submissions that raise issues other than those outlined in this paper. To facilitate feedback, this paper summarises aspects of the draft undertaking as the Authority has interpreted it. However, this summary is intended only as a guide and should not be regarded as a substitute for stakeholders reading the draft undertaking and associated documentation.

For ease of reference, this Request for Comments Paper follows QR's draft undertaking structure and picks up the defined terms from the undertaking.

1.2 Queensland Competition Authority Act

Part 5 of the QCA Act establishes a third party access regime. Broadly, the process of seeking third party access to services covered under the Act involves two steps.

The first stage is the *declaration process*, which assesses whether the identified services satisfy a threshold test. In the case of the services that are the subject of QR's draft undertaking, declaration has already been effected under the Act.¹

The second stage is *compulsory dispute resolution*, where the QCA assumes the role of an independent arbitrator when parties cannot agree on the terms under which access to the declared services is to be provided.

In an effort to minimise the need to resort to arbitration and to provide a basis for meaningful, informed negotiations between access seekers and providers, the Act provides for the owner of a declared service to submit a draft undertaking to the QCA for its approval (as QR has recently done). An undertaking for a service sets out details of the terms on which an owner undertakes to provide access to the service, outlines other information about the provision of access to the service and describes the process by which an Access Agreement will be negotiated.

The contents and degree of specification of undertakings will vary from service to service. The Act indicates that the type of matters to be included in an undertaking *may* include:

- how charges for access to the service are to be calculated;
- information to be given to access seekers;
- information to be given to the Authority;
- time frames for giving information in the conduct of negotiations about access to the service;
- how the spare capacity of the service is to be worked out;
- the regulation of secondary markets;

¹ Queensland Competition Authority Regulation 1997, section 4.

- accounting requirements to be satisfied by the owner and a user in relation to the service or separate parts of the service;
- ringfencing arrangements;
- terms relating to capital contributions and extensions to a facility;
- requirements for the safe operation of the facility;
- how contributions by users to the cost of establishing or maintaining the facility will be taken into account in calculating charges for access to the service;
- provisions to be included in access agreements in relation to the service; and
- the review of the undertaking.

Before approving a draft undertaking, the Authority is required to publish and consider submissions on it. Matters the Authority must consider in deciding whether to accept a draft undertaking include the legitimate business interests of the owner, the interests of persons who may seek access and the public interest (including the public interest in having competition in markets (whether or not in Australia)). The Competition Principles Agreement indicates that matters that should be taken into account when considering the public interest include ecologically sustainable development, social welfare and equity considerations, occupational health and safety, economic and regional development, the interests of consumers and the competitiveness of Australian business. The Authority may also take account of any other matter it thinks fit.

The Authority seeks comments on:

- **what issues it should consider in the public interest for the purpose of assessing QR's draft undertaking**

1.3 QR's Network

Queensland Rail (QR) is an integrated rail service provider, owning and managing almost all Queensland's rail infrastructure and delivering almost all passenger and freight services utilising that infrastructure.² In addition, QR owns the 98km standard gauge interstate rail link from the NSW border to the intermodal freight terminal at Acacia Ridge in South Brisbane. From Acacia Ridge, a standard gauge link is provided to the Brisbane metropolitan rail terminal at Roma Street and the Port of Brisbane. Sections of this track are dual gauge. However, QR does not operate interstate services on the standard gauge line.

QR's network consists of around 10,000 route km of narrow gauge track and associated works built for the railway, such as cuttings and track support earthworks (see figure 1). The track infrastructure is supplemented by related infrastructure necessary for a railway's operation, such as signalling facilities and equipment, train operation control facilities, a communications system and overhead electrical supply system. These facilities fall within the definition of rail transport infrastructure under the *Transport Infrastructure Act 1994*, (see attachment 3 for the relevant excerpt of that Act).

² Comalco Minerals & Alumina is a private rail owner/operator on the Weipa to Andoom line in North Queensland. In addition, QR manages several sidings owned by private companies. Also, there are a number of privately operated heritage train services in the State.

1.3.1 QR's Corporate Structure and Ownership

QR became a corporatised entity under the *Government Owned Corporations Act 1993* on 1 July 1995. As a result of the corporatisation process, QR is required to pursue an unambiguous commercial charter, subject to complying with Government directions.

Whilst the Rail Access Corporation (RAC) and Australian Rail Track Corporation (ARTC) have been created as exclusively below rail service providers, the Queensland Government last year decided that QR would remain an integrated rail service provider.³ QR is structured into six business groups and two corporate support groups. The business groups are:

- Network Access - manages provision of below rail services, including third party access, infrastructure investment planning, train control specification and network capacity management;
- Coal and Mainline Freight - major customers are the mining industry, minerals processors, electricity generators, and freight forwarders;
- Metropolitan and Regional Services - major customers are metropolitan, long distance and tourist passengers, and the grain, livestock and small/express freight sectors.
- Infrastructure Services - supplies track maintenance and construction services to QR's above rail groups and Network Access;
- Workshops - undertakes maintenance, modifications, major overhaul, component exchange and manufacturing support for the rolling stock requirements of QR's above rail service groups; and
- Technical Services - supplies engineering, project management and supply services to QR's above rail service and corporate groups.

Under the new corporate structure, the Coal and Mainline Freight and Metropolitan and Regional Services business groups are principally above rail operators which will be in direct competition with third party operators. QR's draft undertaking proposes that these business groups will also be responsible for the provision of certain below rail services on behalf of Network Access, including train scheduling, train control and associated incident management services, and the management of stations, platforms and selected marshalling yards. This raises important ring fencing issues which are discussed in detail in Section 2 of the Request for Comments Paper (refer Ringfencing Guidelines).

Two corporate support groups provide services to both QR's above rail operators and Network Access:

- Strategy and planning - major responsibilities include corporate strategic planning, new venture development, process improvement and consulting services; and
- Deputy Chief Executive - major responsibilities include finance, employee relations, information systems and telecommunications, legal and property issues.

³ The NSW Government created the RAC in July 1996 as part of the establishment of the NSW Rail Access Regime under the *Transport Administration Amendment (Rail Corporatisation and Restructuring) Act 1996*. ARTC is a Commonwealth Government Business Enterprise incorporated in February 1998 which commenced operations on 1 July of that year. The ARTC inherited the functions of the former Australian National Track Access unit.

1.3.2 QR's Traffic Task

During 1997-98, QR's network carried over 110 million tonnes (Mt) of freight and catered for in excess of 42 million passenger journeys (see Table 1).

Table 1: QR's traffic task in 1997-98

	Volume (tonnes) (m)	Output (net tonne kms) (bn)	Sales revenue (\$m) (1)	Government subsidies (2) (\$m)	Average haul length
Coal and minerals					
Export Coal	86.1	21.4			248
Domestic Coal	9.9	2.5			253
Total Coal	96.0	23.9			
Major Minerals	5.6	1.3			237
Total Coal and Minerals	101.6	25.2	866.7	0	
Freight	8.8	4.9	217.0	158.8	560
Total Freight	110.4	30.1	1083.7	158.8	
Passenger	Trips (M)	Passenger Kms (M)			
Total Citytrain	41.5	801.4	68.4	319.7	19
Total Traveltrain⁴	0.8	312.6	45.2	59.8	343
Total passengers	42.3	1114.0	113.6	379.5	
Total sales			1197.3	538.3	

Source: Queensland Rail Annual Report 1997-98

- (1) Coal royalties (\$50.2M) remitted to Queensland Treasury have been netted out of the coal and minerals sales revenue. Total sales revenue include a non-government capital contribution of \$16.5m.
- (2) Government payments to QR for the delivery of certain loss making services are referred to as 'government community services' in QR's annual accounts. However, there are no formal agreements between the Government and QR concerning the objectives and conditions of these payments. QR allocates these payments to its Freight, Citytrain and Traveltrain services. \$3.3m is not allocated to any of QR's business groups.

Table 1 indicates that around 87 per cent of the freight carried was coal and around 98 per cent of the passenger journeys were in Brisbane's metropolitan rail sub-network. QR's metropolitan passenger (Citytrain) and general freight operations receive significant levels of government funding for the delivery of "community services". The different types of QR's rail traffic impacts on the average haul length of train trips.

The nature of QR's total traffic task and the significantly different market conditions within which its above rail services are being delivered have important implications for usage of the network and the development of third party access arrangements.

It is possible to identify three dense sub-networks and a number of thinner sub-networks within QR's network. Of the dense sub-networks:

- the Brisbane metropolitan system has a heavy concentration of urban passenger and a reasonably significant volume of general freight traffic;
- the Goonyella and Blackwater corridors handle almost all of Queensland's export coal (and around half of the State's domestic coal), and a reasonably significant volume of general freight traffic; and

⁴ Traveltrain provides long distance and tourist passenger services.

- the North Coast line from Brisbane to Cairns is important for the carriage of general freight between Brisbane and central and north Queensland. A reasonably significant volume of long distance passenger trips are also completed on this sub-network.

Of the thinner sub-networks, the largest by traffic volume is the Mount Isa line, which carries almost all minerals traffic in the State and some general freight traffic.

Of QR's above rail services, the freighting of bulk commodities over long distances, such as coal and minerals, is subject to little competition from other transport modes. On the other hand, QR's passenger services and small/express freight services face significant competition from other services, particularly road transport. Private operators in the freight forwarding sector in Queensland currently utilise QR's rail services in the containerised and general freight market for hauls in excess of 500km (predominantly freight moving up the Brisbane-Cairns corridor) with QR providing and operating dedicated freight trains under contract.

As one of the largest railway manager/operators in Australia, measured in terms of rail infrastructure under management, traffic task and revenues, the development of third party access arrangements for QR's rail infrastructure is an important milestone in the on-going national rail reform process. The performance and growth of the rail sector vis-a-vis other transport modes is likely to be significantly affected by the final shape of QR's access undertaking.

1.4 The Assessment Process

The publication of this Request for Comments Paper marks the commencement of the formal consultation process associated with the QCA's assessment of QR's undertaking. This is a significant process for the Authority, entailing the following steps:

- further consultation on significant issues arising from this paper;
- public hearings being held as necessary in May or June, as well as possibly after a Draft Determination has been issued;
- the publication of a Draft Determination (planned towards the end of September, although timing will depend upon a number of matters, including the Authority's analysis of the issues and whether QR submits amendments to its draft undertaking);
- the publication of a Final Determination by the end of 1999.

This timing assumes that reference tariffs for access charges in respect of the coal network will form part of the Draft Determination. The Authority's assessment of the draft undertaking will require it to consider a range of issues relating to the quantification of below rail charges, including:

- services definition for reference tariffs and other below rail services;
- asset valuation methodologies;
- the treatment of contributed assets;
- the appropriate rate of return on QR's assets;
- the efficiency of QR's operations;
- cost allocation between above and below rail services;

- information provision to users and to the QCA;
- pricing structures and incentive regulation;
- service quality, including queuing and priority issues;
- ring fencing arrangements; and
- interface issues.

In addition, if during the course of the Authority's assessment QR submits further details on issues such as its scheduling and train control protocols, consultation will be undertaken with stakeholders.

2. DISCUSSION OF QR'S DRAFT UNDERTAKING

PART 1. PREAMBLE

This part of the draft undertaking outlines QR's objectives and makes reference to the Explanatory Guide which should be referred to where the intent of a relevant provision of the undertaking is not clear.

PART 2. SCOPE AND ADMINISTRATION OF UNDERTAKING

Clause 2.1

QR proposes that the services of its track, and associated Rail Infrastructure essential to the use of the track, will be subject to the undertaking. The associated Rail Infrastructure includes signalling, train control and associated communications and, if necessary, electric energy for traction.⁵ As noted in Section 1.3, it is generally accepted that it would not be economically feasible to duplicate this infrastructure given the current level of demand for these below rail services.

Nevertheless, as a result of QR's proposed exclusion of stations, platforms and selected marshalling yards from the undertaking under certain circumstances, the scope of the undertaking is narrower than that covered by the regulation based declaration of QR's rail transport infrastructure services (see Attachment 2), which in turn is based on the definition of rail transport infrastructure in the *Transport Infrastructure Act 1994* (see Attachment 3). The uncertainty as to how third party access will operate for stations, platforms and marshalling yards is a significant issue and is discussed in more detail in the discussion of Part 4 of the draft undertaking.

The undertaking does not cover the provision of:

- above rail services; and
- below rail services provided by track which forms part of the national standard gauge network for the purposes of interstate traffic.

Without providing an indication of the size of the potential difficulty, QR indicates that there is land upon which it has Rail Infrastructure for which it does not have the authority to authorise access by Third Party Operators. QR proposes that it is the responsibility of Third Party Operators to obtain the necessary approvals from the landowner upon which the affected infrastructure is situated. QR indicates that it will provide reasonable assistance in identifying the relevant landowners.

The Authority seeks comments on whether:

- **the undertaking should cover all of the services declared under the QCA Act (clause 2.1(a))**
- **QR should identify the extent of lines affected by the need for Third Party Operators to obtain landholder consent and provide details of contact names etc. for bona fide access seekers (clause 2.1(d))**

⁵ The undertaking recognises that a Third Party Operator may choose to operate diesel locomotives instead of electrically powered locomotives.

Clause 2.2 Duration of Undertaking

QR proposes that the undertaking will apply for a period of three years. This is consistent with QR's proposal to limit the term of Reference Tariffs to three years.

The Authority seeks comments on whether:

- **the proposed three year term of the undertaking is appropriate**

Clause 2.3 Review of Undertaking

A review of the operation of the undertaking by QR and the QCA is proposed twelve months after its commencement. If the review identifies provisions of the undertaking requiring amendment, QR will submit a draft amending undertaking for the QCA's approval.

The draft undertaking does not provide any guidance as to the process for resolving disputes between QR and the QCA. In addition, the draft undertaking does not provide for QR to publicly disclose its performance in relation to matters it undertakes to fulfil in the undertaking. Examples of such performance include:

- timely acknowledgment of access applications;
- periods taken to provide indicative access proposals; and
- number of substantial complaints regarding breaches of ringfencing guidelines.

The draft undertaking makes no provision for the QCA to request an amending undertaking from QR if the QCA believes, for example, that an amendment is necessary because the approved undertaking may not adequately recognise the interests of persons who may seek access to the service.

The Authority seeks comments on:

- **how disputes between QR and the QCA ought to be resolved**
- **whether QR should undertake to publicly report on its compliance with the undertaking, and if so, the key parameters for that reporting**
- **whether the undertaking should set out the process by which the QCA requests amendments to QR's undertaking, and if so, in what circumstances is such action likely to be appropriate**

Clause 2.4 Contractual Arrangements

The undertaking will only apply to the negotiation of new Access Agreements or the negotiation of Access Rights additional to those subject to an existing Access Agreement. Existing rail haulage agreements will be unaffected by third party access.

The Authority seeks comments on whether:

- **the undertaking should include any transitional arrangements, and if so, what transitional arrangements may be appropriate**

PART 3. RINGFENCING GUIDELINES

3.1 INTRODUCTION

As noted in Section 1.3, QR is a vertically integrated provider of rail services operating in both a monopoly market (for below rail services) and a potentially contestable market (for above rail services).

QR's vertical integration can potentially enable it to use its monopoly power in the below rail market to gain an unfair competitive advantage in the above rail market. For example, by shifting costs from its above rail operations to its below rail operations, QR could inappropriately increase its profit (or compete unfairly with other Third Party Operators). Similarly, QR's below rail operations could pass confidential information about third party operators to QR's above rail business groups. These practices would provide QR with an unfair competitive advantage in the above rail market, distorting the evolution of competition in that market.

One mechanism to minimise this potential problem is the development of ring fencing arrangements by the vertically integrated enterprise. Ring fencing is the internal separation of business functions within an enterprise for organisational and accounting purposes. It is based on the premise that the operation and management of the monopoly assets are placed on a stand-alone basis to be managed independently of any other business arms of the enterprise. This is intended to eliminate or substantially reduce the likelihood of anti-competitive conduct.

The Authority seeks comments on:

- **what alternatives should be explored to address the competition issues emerging from QR's vertical integration**

3.2 ORGANISATIONAL STRUCTURE

QR's proposed allocation of responsibilities amongst its business groups aims to ring fence the monopoly and contestable parts of the organisation. However, the proposal does not provide for a clean separation of the respective functions within the organisation. For example, QR's above rail business groups are to:

- perform train control and train scheduling functions (on a sub-contract basis on behalf of Network Access); and
- manage stations, platforms and certain (unspecified) marshalling yards.

There is a conflict of interest for QR's above rail groups in performing train control and scheduling functions, as they will be simultaneously controlling their own and competing third party traffic. This places QR's above rail groups in a position to advantage their own traffic over third party operators. For example, by giving QR trains priority over those of its competitors, QR would confer upon itself a significant competitive advantage.

In order to address this conflict of interest, QR is proposing to develop Scheduling and Train Control Protocols which will specify:

- the practice for determining train priority;
- the practice for management of out-of-course running;
- incident management practices;

- train operation information and communication practices; and
- the practice of train scheduling.

Whilst the draft undertaking provides that QR will make available its Scheduling and Train Control Protocols to the QCA for review, it does not provide any guidance as to what should occur if the QCA has reservations about the content of these protocols. Moreover, QR is yet to submit these protocols to the QCA. In this regard, the QCA is mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

QR proposes that above rail business groups will be responsible for the management of stations and selected marshalling yards (on the grounds that these facilities will be providing above rail services). This means that above rail business groups will be responsible for services that have been declared under the regulation based declaration under the QCA Act for the purpose of providing transportation by rail.⁶

QR proposes to submit a Draft Amending Undertaking in the event that it varies its organisational structure, but the draft undertaking is silent on the issue of the consequences of the QCA failing to approve such a Draft Amending Undertaking.

The Authority seeks comments on whether:

- **the ringfencing arrangements proposed adequately address the problems inherent in a vertically integrated structure**
- **the undertaking should address the consequences of the Authority not approving a Draft Amending Undertaking that has been prompted by an organisational restructure**
- **there are alternative arrangements to address this issue**
- **the undertaking should specify exactly which marshalling yards are intended to be managed by Network Access as opposed to QR's above rail business groups (clause 3.2(c))**
- **responsibility for the train control function has been appropriately assigned within QR (clause 3.2(c) and (d))**
- **the proposal to develop Scheduling and Train Control Protocols is an adequate means of addressing the conflict of interest inherent in QR's above rail groups performing the train control function. If not, what alternative measures could be adopted? (clause 3.2(c) and (d))**
- **the assignment of responsibility for stations, platforms and marshalling yards to above rail business groups is appropriate (clause 3.2(d))**
- **there should be a distinction between operational management and control over access to stations, platforms and marshalling yards (eg should business groups be granted non-exclusive licences to manage these facilities rather than control them outright) (clause 3.2(d))**

⁶ QR's proposed approach to the negotiation of access to the services provided by these facilities is discussed in section 4.1 below.

- **QR's proposed Scheduling and Train Control Protocols should be incorporated in the undertaking. If so, what operational matters should the protocols address? (Clause 3.2(e))**
- **the undertaking should address the consequences of the Authority not accepting QR's proposed Scheduling and Train Control Protocols**

3.3 ACCOUNTING ARRANGEMENTS

Another key objective of ring fencing arrangements is to permit easier and more effective scrutiny of QR's accounting framework to provide transparency in its allocation of costs and assets between above and below rail (ie contestable and monopoly) operations.

Public disclosure of separate financial accounts provides information to dispute resolution bodies and also allows potential third party operators to observe the allocation of assets (current and non-current) and costs between the monopoly and contestable activities, which can be compared to the sources of revenue of the respective activities. This in turn facilitates transparency and accountability in the formulation of access prices. A key task therefore is to precisely define the boundaries of the monopoly and contestable activities so that assets and costs can be allocated accordingly.

The degree of disaggregation of the separated financial information is also an important issue. For example, a highly aggregated summary of costs and revenues for monopoly and contestable services may not contribute significantly to price and cost transparency.

QR is proposing to establish and maintain a profit and loss statement and balance sheet in respect of the below rail services provided by Network Access. QR indicates that the separate financial accounts will be based on cost, revenues and assets uniquely associated with the below rail services. This is the only financial information QR proposes to publicly disclose. The methodology for allocating costs associated with the provision of both above and below rail services (ie joint costs) will be set out in a proposed Cost Allocation Manual. (The development of this manual is discussed in more detail in the discussion of Part 5 of the draft undertaking.)

The Authority seeks comments on whether:

- **the financial statements should be prepared in accordance with any accounting standards, and if so, what standards**
- **the extent of financial disclosure implied by QR's proposed accounting separation framework is sufficient**
- **a cash flow statement for below rail services should be prepared and publicly released by QR (clause 3.3(a))**
- **the detail of the accounting separation arrangements should be included in the undertaking (clause 3.3(a))**
- **any part of QR's below rail operations should be separately reported on (clause 3.3(c))**

3.4 INTERNAL ACCESS AGREEMENTS

3.4.1 Internal Access Agreements For Existing QR Train Services

As QR is vertically integrated, the nature of the terms and conditions on which its below rail services are sold to its above rail business activities is a significant issue. There is arguably considerable scope for QR to favour its own operation at the expense of third party operators in the contestable market. This has the potential to distort the development of the above rail market, including raising barriers to entry for new operators, with associated implications for price levels and the quality of services provided to end users. Consequently, equivalence of the terms and conditions of internal and external access agreements is a key objective of the process.⁷

QR is proposing to develop internal Access Agreements between Network Access and the respective above rail business groups for all its existing above rail services. The internal Access Agreements will be made available to the QCA for review if the QCA requires (although the undertaking is silent on the consequences of the QCA not accepting internal Access Agreements). QR includes a proposed timetable for the development of the internal Access Agreements (Schedule A of the draft undertaking). However, QR does not intend to observe the terms of the undertaking in developing these Access Agreements.⁸

The Authority seeks comments on whether:

- **the proposed framework for establishing internal Access Agreements is sound**
- **the timetable set out in Schedule A is appropriate**
- **for seasonal traffics, end customers should have the option of unbundling to gain separate above and below rail contracts**
- **the life span of access contracts for existing services should be strictly limited to the duration of the end customer's haulage agreement with QR**
- **QR's proposal to allow the QCA to review QR's internal Access Agreements is sufficient to protect the legitimate business interests of those seeking access to QR's network given that section 104 of the QCA Act provides that an act done in accordance with an approved undertaking will not breach the hindering access provisions of the QCA Act**

3.4.2 Internal Access Agreements for New or Renewed QR Train Services

QR proposes that new or renewed Access Agreements be developed on a basis consistent with the principles outlined in QR's standard Access Agreement (Schedule E of the draft undertaking), as well as with respect to Part 5 (pricing principles), Part 6 (Capacity Entitlements) and Part 7 (interface standards) of the draft undertaking. Again, QR proposes to make such contracts available for review if the QCA requires. However, the undertaking is silent on the consequences of the QCA not accepting internal Access Agreements.

⁷ Sections 104 and 125 of the QCA Act prohibit an access provider (ie QR) providing access to itself on more favourable terms than to a competitor (such conduct being deemed under these provisions to hinder access). However, these sections provide that an act done in accordance with an approved undertaking will not contravene these provisions.

⁸ Refer to clause 4.1.2 for a discussion of the implications of these internal arrangements.

The Explanatory Guide proposes that QR is entitled to take advantage of the benefits of synergies from its vertically integrated structure. Nevertheless, an issue arises as to whether end customers should also enjoy a share of any benefits of QR's structure, and if so, how and in what circumstances. The potential appears to exist for QR's above rail groups to be provided with a competitive advantage relative to third party operators due to QR's integrated structure.

The Authority seeks comments on:

- **whether the proposed framework for establishing internal Access Agreements is sound**
- **whether it is appropriate that QR retains the benefits of synergies from vertical integration (Explanatory Guide)**
- **whether the principles of cost allocation are sufficiently clear to distinguish between Cross-Subsidies and genuine synergies from vertical integration**
- **how the benefits of vertical integration can be best passed on to end customers**
- **whether QR's proposal to allow the QCA to review QR's internal Access Agreements is sufficient to protect the legitimate business interests of those seeking access to QR's network, having regard to the fact that conduct in accordance with an undertaking will not be subject to section 104 of the QCA Act**

3.5 RINGFENCING GUIDELINES

A major issue that has emerged in other jurisdictions concerns the propensity for the monopoly arm of the vertically integrated enterprise to share with its contestable arm sensitive information that might emerge in the context of access negotiations with access seekers or over the course of an access agreement. This information could provide the above rail business with a considerable commercial advantage in its market.

In this context it is important to remember that potential above rail competitors will only commit to the investment necessary to enter the market if they perceive profitable entry is feasible. Accordingly, providing a credible and effective means of preventing the inappropriate transmission of information becomes critical. Therefore, measures to restrict the flow of access related information between the contestable and monopoly activities of the vertically integrated enterprise are likely to form an important part of the undertaking.

One option is to establish 'Chinese walls' within QR's operations such that it employs different personnel across below rail (monopoly) and above rail (contestable) activities and establishes internal mechanisms to prevent the sharing of sensitive commercial and customer information between its activities. Further measures include establishing credible audit processes to review the effectiveness of these arrangements and procedures for dealing with breaches of the confidentiality mechanisms.

QR is proposing to develop Ringfencing Guidelines concerning, amongst other things, the handling of Confidential Information provided to QR's Network Access by Third Party Operators within three months of the commencement of the undertaking. In this regard, the undertaking is silent on what would happen if QR and the QCA disagree on the terms of the Ringfencing Guidelines. The Authority is mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

QR also proposes to allow the QCA to require an annual audit be undertaken. The undertaking is silent on what would happen if QR and the QCA disagree on the identity of the person who is

to conduct the annual audit. QR has indicated to the QCA that the Ringfencing Guidelines will address this issue.

The Authority seeks comment on whether:

- **the detail of QR's proposed Ringfencing Guidelines should be included in the undertaking (clause 3.5 & Schedule B)**
- **the parameters of the Ringfencing Guidelines proposed by QR are satisfactory (clause 3.5(b) & Schedule B)**
- **the undertaking should address the consequences of the Authority not accepting the Ringfencing Guidelines**
- **provision should be made for external review of alleged breaches of the Ringfencing Guidelines (clause 3.5(b) & Schedule B)**
- **auditing of QR's compliance with its ringfencing arrangements should be limited to an annual event as QR proposes (clause 3.5(b) & Schedule B)**
- **the undertaking should address the consequences of the Authority not accepting the identity of the person who is to conduct the audit**
- **the undertaking should address the implications of a finding of a breach of the Ringfencing Guidelines by QR**

PART 4. NEGOTIATION FRAMEWORK

The QCA Act makes it clear that commercial negotiation is to play a central role in the securing of third party access by an access seeker.⁹ This requires that an effective negotiation framework be established. Such a framework is likely to have a number of key features including:

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

A negotiation framework which omits or insufficiently develops any of the above features may become a barrier to entry to third party operators. This is a concern because QR potentially has an incentive to inhibit entry to the contestable market to protect the revenues of its competitive arm. Therefore, one of the key goals of the negotiation framework must be to strike a balance between the legitimate business interests of QR and access seekers.

⁹ Commercial negotiation is particularly important in the context of access to rail infrastructure due to the varying nature of the service required by a user including frequency, timeliness etc.

4.1 FRAMEWORK

QR's undertaking proposes the establishment of a negotiation framework which incorporates:

- preliminary meetings and an initial exchange of information;
- an initial Access Application by the interested Third Party Operator;
- an Indicative Access Proposal by QR; and
- parameters within which negotiations to develop an Access Agreement are conducted.

4.1.1 Parties to negotiation

QR proposes that stations, platforms and certain marshalling yards will be managed by its above rail business groups, on the grounds that these facilities are predominantly providing above rail services. Nevertheless, the services provided by stations, platforms and marshalling yards have been declared under the QCA Act for the purpose of providing transportation by rail.

QR proposes that Network Access will negotiate access to the below rail services of these facilities as an agent for the QR above rail business group that manages the facility, unless the Third Party Operator's sole purpose of gaining access to the station, platform or marshalling yard is to utilise another above rail facility managed by the same QR business group, such as a workshop or terminal.

The Explanatory Guide seeks to clarify this clause of the undertaking.¹⁰ It states that a Third Party Operator is unlikely to seek access to stations and platforms for the sole purpose of gaining access to another facility of the relevant business group (but does not provide examples). However, the Explanatory Guide provides a number of practical examples to explain how the threshold test would be applied for marshalling yards. A Third Party Operator seeking access to a marshalling yard area used for queuing trains for unloading at a port would negotiate access with Network Access. On the other hand, a Third Party Operator seeking access to a marshalling yard in order to unload and store freight in an adjoining terminal operated by a QR above rail group would negotiate access to that yard with that group, not Network Access.

Neither the Explanatory Guide nor the draft undertaking addresses how disagreements with Third Party Operators over which QR business group should be negotiating access to the services of these facilities will be resolved. Another uncertainty is that the draft undertaking does not establish how access to the below rail services of the facilities managed by QR's above rail groups will be priced for internal or external purposes. In addition, the draft undertaking and Explanatory Guide do not make clear what level of control Network Access will be able to exert over the access negotiation process in its role as an agent for the above rail groups.

The Authority seeks comments on whether:

- **the nature of the proposed arrangement whereby Network Access will negotiate access to the below rail services of stations, platforms and marshalling yards as an agent for QR's above rail business groups is sufficiently clear in terms of the control Network Access will have over this process ie whether QR's above rail business groups should have any input into the negotiation of access to stations, platforms and marshalling yards (clause 4.1.1(a))**

¹⁰ Pages 4 - 5

- **the assignment of responsibility for the negotiation of stations, platforms and marshalling yards to QR's above rail business groups in the circumstances defined by QR is appropriate or whether control over these declared services should be assigned to Network Access (clause 4.1.1(b))**
- **the threshold test for determining which QR business group is responsible for negotiating access to these below rail services has sufficient clarity to remove the potential for disagreements with Third Party Operators. (The Explanatory Guide)**
- **the use of stations, platforms and marshalling yards by QR's above rail business groups should be priced, and if so, how**

4.1.2 Conditions to Negotiation

QR has a legitimate business interest in retaining a capacity to refuse to negotiate with parties who represent a poor commercial risk. In the context of the draft undertaking, there is a need to balance QR's legitimate business interests with the potential anti-competitive effect of imposing unnecessarily onerous conditions on access seekers.

QR reserves the right to refuse to negotiate with Third Party Operators who are not Solvent or where QR considers there is material non-compliance with the relevant obligations and applicable processes set out in the draft undertaking (clause 4.1.2(a)). The Explanatory Guide provides a discussion of instances of non-compliance which QR is likely to consider material.¹¹

QR also reserves the right to refuse to negotiate with any Third Party Operator where it, or a related party, is currently or has been over the last two years, in material default of any agreement with QR (ie above rail, below rail or integrated service) or any agreement relating to the provision of access to rail with any railway anywhere (clauses 4.1.2(b) and (c)).

The draft undertaking provides recourse for a Third Party Operator to take a refusal by QR to negotiate to the QCA if the Third Party Operator considers that QR has unreasonably refused to commence or subsequently unreasonably ceased negotiations. QR undertakes to immediately recommence negotiations if the QCA finds it has unreasonably refused to negotiate (although the circumstances in which QR could be "required" to negotiate would be limited to where it is obliged to do so under the undertaking (clause 4.1.2(f)).

QR proposes to provide written reasons to the Third Party Operator if it refuses to negotiate access on the grounds of its prudential requirements or Committed Capacity, but does not state a timeframe within which this information will be provided (clause 4.1.2(e)).

The Authority seeks comments on whether:

- **QR reserves to itself too much discretion to refuse to negotiate**
- **the prudential requirements are overly strict (clause 4.1.2(b))**
- **the term "material default" is sufficiently clear (clause 4.1.2(c))**
- **a timeframe within which QR provides written reasons for a refusal to negotiate should be given (eg. seven days) (clause 4.1.2(e))**
- **there should be barriers to instigating dispute resolution processes (for either party) at any time (clause 4.2.1 (f))**

¹¹ Page 5

- **a party should be restricted from seeking orders other than a requirement that QR recommence negotiations (clause 4.2.1(f))**

QR proposes that it will not be obligated to enter further negotiations beyond an Indicative Access Proposal where a Third Party Operator seeks access to Capacity already committed to another Railway Operator, and/or Capacity that QR reasonably believes is required for carrying a bulk commodity traffic already carried by another Railway Operator under an existing Access Agreement. Further negotiations would not occur until there is a process for releasing Capacity committed to the existing operator (clause 4.1.2(d)).

A potential practical effect of these provisions is that QR operated trains could entrench their priority on the network and block new entrants into the above rail market. QR argues in its Explanatory Guide that it does not intend to stifle above rail competition. Rather, as Railway Manager, it is required to dedicate significant amounts of capacity for the freighting of bulk commodities for each end user. Once an end user has entered into a (typically) medium to long term agreement with an operator and QR has made a commitment for sufficient capacity to be provided, it is not in QR's business interest to negotiate with another operator seeking to freight the commodity in question.

One option to deal with this concern might be to provide customers of bulk commodities with access rights that they can manage with any above rail operator they desire. The price in any such contract would be dependent upon the precise characteristics of the rolling stock configuration that the railway operator ultimately chooses (eg to take account of wear and tear of particular configurations). This may provide a more competitively neutral transitional arrangement for QR's existing traffics that are not the subject of long term contracts.

The Authority seeks comment on whether:

- **it is necessary for QR to limit negotiation for access where there is an existing traffic in the manner proposed (clause 4.1.2(d))**
- **the current wording of clause 4.1.2(d) could unfairly enable QR to block entrants into the market**
- **customers should be able to exercise a greater degree of control over third party access for the transportation of their commodities than is provided in the undertaking and if so, whether there is a better mechanism for addressing the issue of contestability for existing traffics than that proposed by QR**

4.2 CONFIDENTIALITY ARRANGEMENTS

The draft undertaking proposes that QR and a Third Party Operator will, at all times, protect confidential information exchanged as part of Access negotiations, and not disclose that information without the other party's approval. In addition, both parties will ensure that all confidential information is used only for the purposes for which it was provided. It appears that QR's own confidentiality arrangements require the completion of its Ringfencing Guidelines (which do not currently form part of the undertaking) to be effective.

QR makes an exception to the confidential information disclosure provisions in specific certain circumstances, including where disclosure is to a range of advisers, including the recipient's lawyers, financial institutions, consultants.

QR reserves its right to cease negotiations with access seekers who do not observe this provision. However, the draft undertaking is silent on what happens if QR breaches this provision.

The Authority seeks comments on whether:

- **the Ringfencing Guidelines should form part of the undertaking, and if so, what form should they take in order to protect confidential information**
- **a Third Party Operator should be informed of any of its confidential information that is disclosed to persons not involved in the actual negotiations**
- **the confidentiality provisions are reasonable given that QR's solicitors and advisers may be acting on behalf of QR's above and below rail operations**
- **there should be a symmetry between the consequences if QR and a Third Party Operator breach the confidentiality provisions of the undertaking, and if so, what form this should take**

4.3 ACCESS APPLICATION

In order to assess an Access Application, QR proposes that it will require the Third Party Operator to provide detailed information concerning its planned operations (refer Schedule C of the draft undertaking).

QR will provide to a Third Party Operator, on request, Preliminary Information with respect to the corridor of interest (refer Schedule D of the draft undertaking). QR will use reasonable efforts to make the information available to the Third Party Operator within 14 days of receiving the request if the information has previously been compiled, or within 30 days otherwise. QR will make reasonable efforts to ensure that the information is the most current available. QR proposes to levy a charge for providing the Preliminary Information based on the cost of its preparation and supply. In contrast to the arrangements in NSW, QR proposes that no financial information be provided to access seekers.

An important part of the negotiation process for a prospective third party operator is likely to be the interaction between its above rail operations and below rail costs (ie access charges) which may only emerge through negotiation. As a consequence, there may be merit in an interactive preliminary process prior to lodgement of an access application which provides an access seeker with the opportunity to get feedback on the likely costs of alternative arrangements.

The Authority seeks comments on whether:

- **the information set out in Schedule C is more extensive than is likely to be necessary for QR to prepare an Indicative Access Proposal**
- **the information that QR proposes to provide to access seekers is sufficient (Schedule D)**
- **QR should be under an obligation to provide any other operational information a prospective Third Party Operator reasonably requires if the Third Party Operator pays QR's reasonable costs in providing the information (clause 4.3(c))**
- **a "reasonable efforts" obligation to ensure that the information QR provides Third Party Operators is up-to-date and accurate is appropriate (ie what responsibility should QR take for the accuracy of information it provides to access seekers) (clause 4.3(e))**
- **it is reasonable for QR to charge fees for information it provides, and if so, should the basis for the charge be established as part of the undertaking (clause 4.3(f))**

- **a preliminary access process prior to the lodgement of an Access Application has merit**

4.4 ACKNOWLEDGEMENT

QR proposes to provide a number of commitments upon receiving an Access Application including:

- providing a written acknowledgment within seven days of receipt; or
- seeking additional information or clarifying existing information within seven days of receipt and acknowledging receipt of such information within a further seven days.

QR undertakes to provide an Indicative Access Proposal within 30 days of acknowledgment of an Access Application, unless extenuating circumstances exist. In these cases QR undertakes to notify the applicant of the expected delivery of the Indicative Access Proposal within 7 days of acknowledgment and use reasonable efforts to meet this timeframe.

The Authority seeks comments on whether:

- **the timeframes outlined in these clauses are reasonable**

4.5 INDICATIVE ACCESS PROPOSAL

QR proposes to develop Indicative Access Proposals which will set out non-binding indicative arrangements in relation to:

- the relevant Rolling Stock and Rolling Stock Configurations;
- a summary of applicable operating characteristics;
- Available Capacity;
- advice as to other Railway Operators seeking Capacity;
- a standard Access Agreement;
- an initial estimate of the Access Charge for the requested Access Rights; and
- details of additional information required for QR to develop the terms and conditions of Access and the Access Charge.

If a Third Party Operator considers that QR is not making reasonable progress in preparing an Indicative Access Proposal, it may refer the matter to the QCA for a determination. However, it may only instigate this process after the time QR allows itself to provide the Indicative Access Proposal has expired.

The Authority seeks comments on whether:

- **QR should provide information on how the need for additional capacity has been determined and detailed costing estimates for the works (clause 4.5(a))**
- **A Third Party Operator should have its right to instigate dispute resolution processes limited as QR proposes (clause 4.5(c))**

4.6 NOTIFICATION OF INTENT

The draft undertaking proposes that a Third Party Operator wishing to proceed to the access negotiation phase must notify QR of its intention in writing within 90 days of receiving an Indicative Access Proposal (unless otherwise agreed). If QR receives a notification of intent after this limit, it reserves the right to revise the Indicative Access Proposal. However, QR does not propose to provide the access seeker with written advice outlining the reasons for any revisions.

A prospective Third Party Operator concerned that an Indicative Access Proposal has not been prepared in accordance with the undertaking will need to notify QR within 30 days of its receipt. QR proposes to impose a further limitation of 30 days for a prospective Third Party Operator to trigger the dispute resolution process after receipt of a response from QR (whether that response takes the form of a revised Indicative Access Proposal or, if QR considers appropriate, a refusal to provide such a Proposal). In addition, the prospective operator must also notify QR in writing within 14 days of dispute resolution if it wishes to proceed with an Access Application.

The Authority seeks comment on whether:

- **the time limits imposed upon Third Party Operators are reasonable**
- **Third Party Operators should be restricted by the undertaking in relation to the triggering of dispute resolution or the issues to be resolved in the dispute resolution process**

4.7 NEGOTIATION PROCESS

4.7.1 Negotiation Period

The draft undertaking establishes a number of grounds for terminating a Negotiation Period including:

- a reduction in Available Capacity resulting from another Railway Operator finalising an Access Agreement with QR such that QR cannot offer access to the Third Party Operator under the terms of the Indicative Access Proposal; and
- the expiration of nine months (or an agreed extended period) from the commencement of the Negotiation Period provided agreement is not unreasonably withheld.

Cutting off negotiations with the access seeker where, for example, QR's reduction in available capacity is in respect of a QR above rail group whose contract was expedited to take up the available capacity, would raise significant sensitivities from a competition perspective (refer to discussion of clause 6.3.2). An auction process may provide a more efficient means of achieving the objective of allocating traffic to its highest value use or alternatively, where there is a reduction in available capacity, QR could perhaps continue to negotiate on revised terms (bearing in mind the propensity for queuing protocols to deal with this issue).

The Authority seeks comments on whether:

- **it is appropriate that any reduction in Available Capacity should allow QR to end negotiations completely (clause 4.7.1)**
- **an auction process would provide a better means of protecting QR's and access seeker's legitimate business interests whilst efficiently rationing scarce capacity**

- **capacity information should be publicly available, and if so, what aspects**

4.7.2 Issues to be Addressed During Negotiation

This clause outlines the matters the parties are to address during the negotiation phase. QR reserves the right to charge for the information it provides. QR undertakes to use reasonable efforts to provide the most current information available to QR.

Clause 4.7.2(f) provides that where another Third Party Operator seeks Capacity via submission of an Access Application and this usage affects the Access Rights being negotiated, the first Third Party Operator will be informed of the Access Application before provision of an Indicative Access Proposal to the other Railway Operator.

The draft undertaking proposes that QR will be responsible for the investigation and design of any necessary enhancements for the Rail Infrastructure. The practical implication of this proposal is that QR will be the sole arbiter of the capacity of its network and how it may be increased. An issue arises as to the merits of a greater involvement for access seekers in capacity enhancements. It is likely that the more information that is publicly available on QR's capacity, the less potential there will be for disputes to arise in relation to it.

The Authority seeks comments on whether:

- **a “reasonable efforts” obligation to ensure that the information QR provides Third Party Operators is up-to-date and accurate is appropriate (clause 4.7.2(b))**
- **it is reasonable that QR charges fees for information it provides, and if so, should the basis for the charge be established as part of the undertaking (clause 4.7.2(c))**
- **QR should set specifications for its network rather than design interconnecting works to enable a Third Party Operator to design its own enhancements for approval by QR according to previously advised specifications (clause 4.7.2(e))**

4.8 ACCESS AGREEMENT

Unless otherwise agreed, the Access Agreement must be consistent with the principles outlined in the standard Access Agreement (Schedule E – discussed below), although QR allows itself flexibility to add further conditions. The undertaking also provides scope for other agreed conditions to be included in an Access Agreement. Other Australian rail access providers, such as the Rail Access Corporation (NSW) and Australian Rail Track Corporation (national), produce standard form access agreements.

The parties to an Access Agreement will be QR and the Third Party Operator (not the end customer). There is an issue as to whether the undertaking should also deal with customers seeking to organise access rights which they can then arrange for a third party operator to deliver on their behalf. This “unbundling” would provide customers who want additional control over their rail freight to gain it through the direct negotiation of access rights (refer to discussion at clause 4.1.2(d)).

Schedule E provides for the following:

- Access Charges, including the payment of a security deposit and resolution of disputed amounts owing;
- Train Service entitlements, including the possible reduction of Access Rights;

- day-to-day train movements, including conferring upon QR exclusive responsibility for train control;
- train operations, including QR reserving the right to vary Safeworking Procedures at any time and neither party being liable for delays not caused by wilful default. QR also reserves the right to change a Third Party Operator's performance levels if it consistently fails to meet those levels. QR may also prevent operation of a service where it has a reasonable belief that rolling stock is loaded in excess of allowed limits or in an unsafe or insecure manner (although QR is under no liability should its belief be wrong);
- infrastructure management;
- incident management, under which QR reserves the right to coordinate and manage all incident responses;
- environmental protection, under which QR can terminate an Agreement (following an environmental investigation, environmental risk management plan, or any independent audit) if it is reasonably satisfied that it will face an unacceptable risk of liability. Before terminating an Agreement, an independent expert review is required of the material upon which QR based its decision. However, QR is not bound by the findings of the expert report nor does the Third Party Operator have a right to see the report.
- each party to warrant it is accredited prior to the commencement of Train Services;
- Third Party Operator's staff – where QR requires the Third Party Operator to demonstrate the competence of its staff (including holding all necessary qualifications). QR reserves the right to temporarily suspend Third Party Operator's staff if they breach any law, a QR train control direction, or QR Safeworking Procedures and Safety Standards;
- risk management;
- the Third Party Operator must effect all insurances required by QR, with QR to approve the terms and conditions of insurance policies;
- indemnities and liabilities;
- limitation of liability, which provides that neither party will be liable for any consequential loss or damage or loss of profits and imposes a requirement that claims by either party be lodged within six months of the event;
- material change, where QR and a Third Party Operator will enter into good faith negotiations to determine if amendments to an Access Agreement are necessary as a result of changes which may give rise to an additional cost or variation to QR's performance of its contractual obligations. However, Access Charges are to be adjusted to reflect the impact of any material change including, but not limited to, changes in taxes, laws and government funding;
- dispute resolution;
- events of default (no details provided in the draft undertaking);
- the circumstances in which QR may suspend a Third Party Operator;
- force majeure events which are undefined but nevertheless require a Third Party Operator to continue to pay money to QR even though its rights to operate are suspended;

- termination events (again undefined);

The Authority seeks comments on whether:

- **Schedule E should incorporate a standard form Access Agreement**
- **the following principles are appropriate to underpin the formation of access agreements:**
 - **an efficient allocation of risk (which requires that any particular risk be assigned to the party who can most cost effectively minimise the contingency);**
 - **be even handed;**
 - **allow commercial negotiation; and**
 - **subject to the above, be consistent with rail contracts in other jurisdictions**
- **the payment terms and conditions are reasonable and even handed ie is the lodgement of an irrevocable bank guarantee necessary to protect QR's legitimate business interests? (Access Charges)**
- **Access Agreements should be designed so as to incorporate an incentive framework to improve performance and to compensate for bad performance (eg to avoid persistent failure by either party in meeting service standards and requirements) (Train Operations)**
- **QR should be able to amend Rolling Stock Interface Standards (Train Operations)**
- **an operator's obligations to QR should be subject to the overriding requirement that the operator and QR comply with the *Transport Infrastructure Act 1994* (Incident Management)**
- **it is appropriate that QR be capable of terminating Access Agreements on environmental grounds even though there may have been no breach of environmental legislation (Environmental Protection and Other Issues)**
- **QR's requirements in relation to Third Party Operator's staff are excessive (Third Party Operators Staff)**
- **insurances should be specified in the Access Agreement rather than be left to QR's discretion (Insurance by Operator)**
- **indemnities should be reciprocal (Indemnities and Liabilities)**
- **QR should be liable for recently foreseeable consequential losses in facts or omissions (Limitation of Liability)**
- **events of default should be defined in the undertaking (Events of Default)**
- **the circumstances of suspension are reasonable (Suspension)**
- **the meaning of "force majeure" should be set out in the undertaking (Force Majeure)**
- **a party's access charges should continue to apply even though its services are suspended through force majeure (Force Majeure)**

- **should QR compensate affected Third Party Operators for any of the following circumstances:**
 - **reassignment of Access Rights**
 - **adverse change in Safeworking Procedures**
 - **poor train operations and performance**
 - **frivolous investigations (including the cost of the audit)**
 - **QR taking possession of track**
 - **changes in a Third Party Operator's rights which adversely affect its operations**
 - **consequential losses arising from QR's conduct**
 - **changes in QR's operational practices which adversely affect a Third Party Operator's rights**

4.9 DISPUTE RESOLUTION

QR proposes to establish a three tiered approach to disputes arising under the undertaking. Initially disputes are to be referred to the chief executive of the respective parties or their nominees.

Failing resolution of the dispute by the chief executives, the dispute may be referred to either an expert or to the QCA. QR proposes that in the absence of manifest error, the decision of the expert shall be final and binding upon the parties.

If a party believes there has been a manifest error, it may refer the matter to the QCA for a determination. If the QCA finds that a manifest error has occurred, the parties may agree to refer the dispute to another expert or, failing agreement, either party may refer the dispute to the QCA. QR proposes that if a Third Party Operator does not comply with a decision of the expert, it will not be entitled to refer the dispute to the QCA and QR will no longer be obligated to continue access negotiations with the operator.

The Authority seeks comments on whether:

- **chief executive resolution is appropriate for QR given its vertically integrated status (clause 4.9.2)**
- **QR should be exposed to penalties if it does not comply with an expert's decision (clause 4.9.3)**

PART 5. PRICING PRINCIPLES

The pricing principles that are adopted in the undertaking will be critical to protecting the legitimate business interests of both QR and potential third party operators. For example, if QR is prevented from generating sufficient revenue, it will have no incentive to undertake investment in, and maintenance of, its infrastructure, which clearly is not in the long term interests of users. On the other hand, QR's access prices should not be set at such a level that the entry of third party operators into the above rail market is precluded. In addition, access prices which discriminate between QR's above rail groups and third party operators, or between different third party operators, on other than cost grounds are likely to hinder the development of competition in the above rail market.

Rail infrastructure (and its associated below rail services) exhibits economies of scale arising from the large fixed (and sunk) costs associated with investment in the rail infrastructure and associated facilities (eg signalling). Leaving aside congestion costs (which are discussed below), additional users impose few additional costs on the network. As traffic increases in a rail

corridor, costs remain essentially unchanged and can be spread over the greater volume of traffic, thus reducing unit costs. Consequently, setting prices on the basis of recovering the cost of production of an additional unit would not allow QR to break even.

This position is further complicated by the fact that different traffics have differing capacities to pay. In order to address this problem, QR is proposing to adopt what is known as a constrained market pricing or a ‘floor/ceiling’ approach to the setting of access prices. Access prices are negotiated within the band set by the price floor and price ceiling. The floor/ceiling approach to pricing has been adopted by the NSW Rail Access Corporation as part of the NSW Rail Access Regime and is common in the United States.

5.1 PRICING OBJECTIVES

QR proposes that its overriding objective, over time, is to achieve revenue adequacy. It proposes to pursue this objective by maximising the commercially viable utilisation of the Rail Infrastructure. QR also proposes to observe a constraint on price differentiation.

A particularly sensitive issue is that the constrained market pricing approach provides QR with the discretion to charge third party operators different prices for similar services depending on QR’s assessment of their ability to pay. In practice, QR could potentially engage in price differentiation to entrench its own traffics at the expense of third party operators.

The Authority seeks comments on:

- **the appropriateness of QR’s proposed pricing objectives (clause 5.1)**
- **how conflicts between the pricing objectives (eg between revenue adequacy and ensuring that Railway Operators are treated on an equal basis) should be resolved**

5.1.1 Revenue Adequacy

The draft undertaking defines revenue adequacy as revenue that is sufficient to achieve full cost recovery of ‘reasonable costs’ (which is defined to include all costs, provided that such costs reflect ‘reasonably expected improvements in efficiency that QR should achieve’), including a risk-adjusted commercial rate of return on the value of assets ‘reasonably required’ for the long term sustainable provision of Rail Infrastructure.

The Authority seeks comments on whether:

- **it is reasonable that QR recovers costs which reflect the “reasonably expected improvements in efficiency that QR should achieve”, and if so how might such costs be determined (clause 5.1.1(b)(i))**
- **users should pay for Government directions to QR (eg relating to there being no forced relocations or redundancies of QR staff)**
- **the appropriate test should be what is “reasonably required” or what is “efficiently required” in the context of the provision of Rail Infrastructure**

5.1.2 Limits on Price Differentiation

QR’s proposed constraint on its exercise of discriminatory access pricing is that where access negotiations occur at a similar time (clause 5.1.2(c)):

- Railway Operators *directly competing* to provide a specified commodity between a specified origin and destination will be offered Access Charges that differ only as a result of differences in costs (including risks) faced by QR, for example, as a result of the type of Rolling Stock used (clause 5.1.2(a)). QR explains its intent in relation to clause 5.1.2(a) in its Explanatory Guide. Essentially, QR will assess consistency in Access Charges only with respect to the costs (including risks) to QR of providing Access according to QR's commercial judgement. In practice, this may allow QR to charge Third Party Operators significantly more than it charges itself for identical services negotiated at different times.
- where Railway Operators are not competing directly with each other but providing Train Services for a specified commodity within the same Geographic System, QR proposes to take a consistent approach to the determination of Access Charges for such services. (clause 5.1.2(b)).

Clause 5.1.2(a) refers to a 'consistent Access Charge', whilst clause 5.1.2(b) refers to a 'consistent approach'. This means that very different rules may apply in practice. For example, paragraph (b) could allow QR to set a higher Access Charge to a Third Party Operator than applied to its own operations simply because of the former's more efficient operations. Moreover, QR effectively reserves the right to charge substantially different Access Charges in relation to directly competing services when Access is negotiated at different times. QR has included a provision to allow Third Party Operators a right to incorporate rate review provisions in Access Agreements. However, the undertaking does not specify how the provision would apply in practice.

The Authority seeks comments on whether:

- **the draft undertaking provides QR with excessive pricing latitude**
- **the draft undertaking should define a more prescriptive methodology that QR would apply for the calculation of Access Charges, provided that it does not compromise its legitimate business interests**
- **it is appropriate that QR charge two different prices for similar services at two different points in time, even though the services may be competing "head to head" during the respective terms of the contracts**
- **QR's proposal to limit the making of 'consistent access charges' to a 'similar time' is sufficiently clear (clauses 5.1.2(a) & (c))**
- **the undertaking should define the circumstances in which rate review provisions will apply and how they will operate (clause 5.1.2(c))**

5.1.3 Rail Infrastructure Utilisation

The draft undertaking reserves QR's right to establish Access Charges with different levels of contribution to the Common Costs for Railway Operators serving different markets (reflecting QR's perception of respective operators' ability to pay), in order to maximise use of its Available Capacity (clause 5.1.3(a)). Where there is limited capacity, the pricing principles allow QR to direct that capacity towards its highest value use (ie establish an Access Charge which incorporates the highest contribution to the Common Costs of providing the Rail Infrastructure) (clause 5.1.3(c)).

An alternative to this 'auctioning' of available capacity would be to ensure that any person prepared to make a greater contribution to common costs of providing rail infrastructure be

given priority relative to a current user who is not prepared to make that similar contribution. However, the draft undertaking does not currently make provision for priority or queuing arrangements for access seekers.

Infrastructure Payments (ie CSO payments from Government) that are only available for Train Services serving a specified market will be attributed to the Access Charges for the relevant services.

The Authority seeks comments on whether:

- **priority and queuing arrangements should be established for the purpose of rationing capacity**
- **congestion and opportunity costs should be incorporated into Access Charges, and if so, what role should priority arrangements play in the process**
- **a newcomer, who is prepared to make a greater contribution to Common Costs, should gain priority over a current user who is given the opportunity to match the newcomer's contribution but declines to do so**
- **QR should undertake to comply with the principle of competitive neutrality in attributing Infrastructure Payments to Train Services**

5.2 PRICING LIMITS

As noted above, QR is proposing to adopt a constrained market pricing approach as the basis upon which its access prices will be set.

5.2.1 Definition of Pricing Limits

QR proposes to develop upper and lower limits for Access Charges to ensure that there is no Cross Subsidy between:

- individual Train Services; and
- combinations of Train Services.

A 'Cross Subsidy' is defined to occur where any Train Service or combination of Train Services pays Access Charges which are insufficient to meet:

- the Incremental Cost imposed on the Rail Infrastructure by that Train Service or combination of Train Services; and
- the Common Costs related specifically to sections of Rail Infrastructure that are used solely for the purpose of Train Services within that combination of Train Services; and

the shortfall is contributed to by another Train Service or combination of Train Services.

The proposed definition of Cross Subsidy attempts to limit Common Costs to those specifically related to Rail Infrastructure. However, many of QR's costs are unlikely to specifically relate to Rail Infrastructure (eg many overheads).

The Authority seeks comments on whether:

- **it is necessary for a shortfall to be contributed by another Train Service for there to be a Cross Subsidy**
- **it is necessary for Common Costs to be related specifically to sections of Rail Infrastructure for the purposes of defining a Cross Subsidy**

5.2.2 Price Limits for Individual Train Services

QR proposes to limit its pricing so that every service covers its Incremental Cost (the costs that would be avoided if the Access was not provided) to ensure that prices are not set so low that some Third Party Operators do not pay for the services they use. However, QR's proposed definition of Incremental Cost makes no allowance for either congestion costs or the opportunity costs of foregone traffic (refer 5.1.3 above).

The clause also limits the maximum Access Charge to the Stand Alone Cost of providing access for the Train Service (the costs QR would incur if the Train Service were the only Train Service provided access). This aims to prevent QR receiving excessive returns.

5.2.3 Price Limits on Train Service Combinations

In addition to the constraint imposed in clause 5.2.2, QR proposes to limit the expected revenue it will earn from any combination of Train Services to the Stand Alone Cost of providing Access for that combination of Train Services. QR further proposes a revenue limit for the Train Service Groups identified in Schedule F of the undertaking (which relate to the Goonyella, Moura, Blackwater, Newlands and Mt Isa train systems, as well as the Central Queensland coal systems together as a group). Expected revenue will be based on current applicable Access Charges unless Reference Tariffs are in place, in which case expected revenues will be based upon Reference Tariffs.

In the case of a group of operators, the stand alone test should apply such that revenue from any group of operators cannot exceed the economic cost of the services provided to them if they were provided on a stand alone basis. In order to meet this 'combinatorial' test for multiple users of a line section, or group of line sections, it would not be possible for QR to charge *all* operators the Stand Alone Costs of their individual operations.

However, it appears that QR's proposed use of Stand Alone Cost in the context of an Individual Train Service could recover very high amounts in Access Charges from Third Party Operators whilst (perhaps) charging itself relatively modest sums in comparison for similar services negotiated at different times (refer to the discussion of clause 5.1).

Given the multi-line section nature of the track and multi-user pattern of demand for below rail services, calculating all potential cost combinations could become a very complicated task. QR is proposing to deal with this complexity by applying the price ceiling to certain geographical areas dominated by coal and mineral carrying services. Schedule F of the draft undertaking (referred to in the definition of Train Service Group) specifies six Train Service Groups for the purposes of the combinatorial test. QR's rationale is that these sub-networks are the only areas in which QR has the potential to charge access prices close to the ceiling.

The Authority seeks comments on whether:

- **revenue limits should be limited to those Train Service Groups specified in Schedule F**

5.2.4 Definition of Revenue Limit

QR proposes that it will establish Revenue Limits for Individual and/or group Train Services which reflect the Stand Alone Cost of providing Access for the respective services over the course of an Evaluation Period. The Evaluation Period can be no longer than 10 years (except in the case of an Individual Train Service in which case the Evaluation Period is the life of the proposed Access Agreement).

Basically, the Revenue Limit seeks to ensure that the Access Charges over the Evaluation Period cover all operational and maintenance costs and capital related costs (including return on assets and depreciation).

The formula proposes that:

- the return on assets will be determined in nominal pre-tax terms;
- depreciated replacement cost will be the asset valuation methodology; and
- there will be no explicit incentive regulation arrangements applied (for efficiency and growth).

The Authority will be releasing background papers on each of these issues.

The concepts expressed in the formula refer to “reasonably expected” rather than “efficient” costs for both capital expenditure and operating and maintenance costs. The potential problem with such a definition has already been discussed (refer to discussion of clause 5.1).

QR proposes that the costing of capital expenditure and operating and maintenance costs will be on the basis of stand-alone provision. This has the potential to allow ‘double dipping’ because the Stand Alone Cost needs to also be considered in the context of all of the traffic for the network as a whole rather than just individual Train Service Groups. For example, it will enable recovery of one set of system wide overhead costs for each Train Service Group.

For the purposes of calculating Revenue Limits, QR proposes to exempt all impacts, including expenditure and revenue, from traffics for new projects that are not committed at the time of calculation. A concern is that QR could benefit from a mine commencing during the life of a Reference Tariff (which is based upon the revenue cap), because the traffic was not included in the modelling.

The Explanatory Guide refers to the cost of self-insurance as a cost to be recovered.¹² This could potentially lead to ‘double dipping’ in cost recovery (via increased maintenance costs in addition to insurance costs).

The Authority seeks comments on whether:

- **any provision should be made for incentive regulation of QR’s revenues (eg. cpi-x mechanisms), including what arrangements should be introduced in case QR exceeds its cap in any period**
- **the undertaking potentially allows “double dipping”**
- **the cost of self-insurance should be recovered, and if so, how double dipping could be prevented**

¹² Page 15

- **it is appropriate for QR to exempt revenue from traffics for new projects in its calculation of Revenue Limits (clause 5.2.4 (c))**

5.3 REFERENCE TARIFFS

5.3.1 Establishment of Reference Tariffs

In recognition of the potential for a wide band to emerge between the price floor and price ceiling under the constrained market pricing approach, QR proposes to develop, and have approved by the QCA, Reference Tariffs for certain types of Train Service. Reference Tariffs are aimed at promoting access price transparency and, as a result of the regulatory approval process, giving Railway Operators confidence that access prices have been set at a reasonable level. In this way, Reference Tariffs can potentially save the time (and costs) of the access provider and access seekers by reducing the duration of access negotiations.

In the first instance, the draft undertaking proposes that Reference Tariffs for the coal carrying services will be developed (refer Schedule G). QR proposes to submit to the QCA Reference Tariffs for the services mentioned in Schedule G within 3 months of the QCA's approval of the undertaking. In this regard, the QCA is mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

Each Reference Train Service will have technical (eg axle load/configuration, train length, gross tonnage) and operational (eg compliance with nominated sectional running times, availability for operation, loading/unloading time on network) train characteristics so that actual Access Charges for a particular Train Service will vary depending on how the characteristics of that Train Service compares to the Reference Train Service characteristics.

Reference Tariffs will be structured along the lines of: a \$/000 gross tonne kilometres (gtk) charge, with fixed and escalation components. The validity of the Reference Tariff will be conditional on a nominated annual traffic volume range (measured as gtk resulting from Train Services operating on the track between all loading and unloading points within the relevant Geographical Area). Actual traffic volumes falling outside the nominated range for a particular Reference Tariff are grounds for its review.

The draft undertaking proposes that Reference Tariffs will not be required to be consistent with the actual Access Charges for the relevant Train Services under existing Access Agreements. However, QR will allow Railway Operators to incorporate rate review provisions in new Access Agreements to reflect changes in Reference Tariffs.

QR proposes that Reference Tariffs will be submitted to the QCA for endorsement within three months of the QCA's approval of the undertaking. Given the potential interest of Third Party Operators in QR's coal carrying services, an issue arises as to whether this time frame is appropriate.

It is proposed that Reference Tariffs for other types of Train Services will be developed by agreement between QR and the QCA, and will depend on the level of demand for access to those Train Services. The undertaking is silent on the issue of a disagreement between the QCA and QR concerning the need for a Reference Tariff for a particular Train Service (ie where the QCA considers that a Reference Tariff should be developed but QR declines to do so).

The Authority seeks comments on whether:

- **the undertaking should set out a process to be followed in the event that the QCA does not endorse Reference Tariffs submitted by QR**

- **the undertaking should establish a process if QR and the QCA disagree on the need for Reference Tariffs**
- **there are services beyond those mentioned in Schedule G which justify Reference Tariffs being developed**
- **there are Reference Tariffs which should be settled before an undertaking is accepted**

5.3.2 Review of Reference Tariffs

The undertaking provides for Reference Tariffs to be effective for a maximum period of three years after approval by the QCA. Three months prior to the expiry of a Reference Tariff, QR proposes that it will submit a revised Reference Tariff to the QCA for its consideration and approval.

QR proposes that a Reference Tariff may be reviewed at any time within its life upon the occurrence of a Material Change Event, the definition of which is extremely wide and includes:

- any changes to QR's regulatory environment including any changes to any law or the interpretation of any law; and
- a change in the Commonwealth Government 10 year bond rate of more than 100 basis points.

The key issue concerning QR's definition of Material Change Event is whether it protects QR's legitimate business interests or goes beyond what is necessary to meet that objective and rather attempts to push QR's commercial risks onto Third Party Operators. Moreover, it is unclear whether the terms of the draft undertaking clearly provide for the QCA to instigate a review of Reference Tariffs upon the occurrence of a Material Change Event (ie where a Material Change Event is to QR's benefit). QR proposes that the QCA should assess whether the changes to the Reference Tariff adequately preserve the financial position of QR compared to the position it would have been in if the Material Change Event had not occurred.

The Authority seeks comments on whether:

- **the definition of Material Change Event sets out appropriate triggers for a review of Reference Tariffs (Part 8 – Definitions and Interpretations)**
- **the QCA should be able to instigate a review of Reference Tariffs on the occurrence of a Material Change Event**
- **how revenue fluctuations from price or tonnage effects should be incorporated into Reference Tariffs (refer clause 5.2.4 (c))**

5.4 STRUCTURE OF ACCESS PRICES

QR proposes that there be no limitation on the structure of Access Charges except that it reserves the right to impose an Access Charge structure on a Third Party Operator which differs from other Railway Operators (including QR above rail groups) to take account of the costs and risks QR perceives is associated with providing access.

5.5 COST ALLOCATION

QR proposes to develop and submit for the QCA's approval a Cost Allocation Manual three months after the commencement of the undertaking.

The manual will set out the methodology for identifying the cost base for Below Rail Services attributable to: specified line sections; specific geographic regions; and costs not attributable to either. The process for identifying the upper and lower pricing limits will also be set out.

QR has indicated that the Cost Allocation Manual will explain the process by which it identifies and, where appropriate, allocates costs rather than including information on actual costs (disclosure of which will be limited to a profit and loss statement and balance sheet for the whole of the below rail business). QR considers that the development of Reference Tariffs better addresses the information asymmetry problem facing third party operators than would detailed cost disclosure.

The QCA, in approving Reference Tariffs, will need to make a number of decisions concerning cost allocation between the various services QR provides. Accordingly, as part of the development of these tariffs, a basis of cost allocation will need to be developed and the QCA's decisions regarding these cost allocations would be published in conjunction with the Reference Tariffs themselves. Accordingly, the timing of the development of Reference Tariffs could have implications for the timing of the development of a Cost Allocation Manual. The QCA is also mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

The Authority seeks comments on whether:

- **it is necessary for a Cost Allocation Manual to be finalised before the undertaking is accepted (depending upon the approach that is taken to Reference Tariffs)**

PART 6. CAPACITY MANAGEMENT

The draft undertaking defines Capacity as the capability of a specified section of Rail Infrastructure to accommodate Train Services within a specified time period, after providing for QR's reasonable requirements concerning exclusive use of that infrastructure for repair or enhancement purposes.¹³

The allocation of a rail network's capacity is achieved through the development of train schedules/timetables. A train schedule for a particular section of the rail network can be considered as a series of train paths (or slots) with a time and distance dimension. Each train path has a departure, transit and arrival time between origin and destination points. The train paths reflect the priorities established in the schedule for different types of traffic (eg. passenger trains generally receive priority over coal and general freight trains when each seeks to move over a particular section of QR's network at the same time). In theory, such a decision should reflect an estimation and comparison of the flow-on effects on the train timetable of delaying each train, and the respective costs incurred as a result of the delay. In practice, the efficient allocation of capacity also requires account be taken of the railway operator's willingness to pay for priority.

The constraints on the capacity (and hence available train paths) of a rail network reflect a range of factors including:

¹³ The draft undertaking defines Train Services as the operation of a train between a specified origin and destination on the rail infrastructure.

- the condition of the track and associated infrastructure (eg. the size and spacing of sleepers and depth of ballast under the track affect axle loads and train speeds, the length of passing loops affects train length);
- the type of train services operating on the network (eg. passenger trains generally travel faster than freight trains); and
- the need to observe safeworking procedures on and around the track (eg. trains must travel at safe distances from each other).

Available capacity could be expected to vary quite significantly across different parts of QR's network. Demand for train paths on certain parts of QR's network may be relatively uniform throughout each day (eg the Goonyella and Blackwater coal sub-systems), while other parts of the network are characterised by significant variations in train path demand depending on the time of day (eg the peak and off-peak demands on the Brisbane metropolitan sub-system). During peak times, the existing capacity of a particular sub-system may be fully utilised.

To increase capacity, the range of investment options includes:

- investment in new infrastructure (eg longer passing loops, track duplication, signalling);
- investment in improved train scheduling techniques; and
- investment in improved track maintenance scheduling techniques.

6.1 SERVICE SPECIFICATION AND TRAIN SCHEDULING

QR proposes that the Capacity Entitlement of a Third Party Operator will be defined in terms of the number of Train Services that can be operated in a given time period, subject to constraints agreed with the operator. The constraints may include:

- specified origin/destination times with allowable variations around these times;
- maximum/minimum periods between Train Services;
- average travel time including acceptable variations;
- the applicable process for timetable reviews and their regularity; and
- allowable modifications of the timetable.

The draft undertaking provides that a Third Party Operator's Capacity Entitlement will be used to develop an initial timetable, which QR and the operator will be required to adhere to. QR reserves the right to manage the development of timetables to optimise the use of rail infrastructure as circumstances change from time to time, subject to Third Party Operators' Capacity Entitlements and QR's proposed Scheduling and Train Control Protocols.

The QCA understands that QR's train scheduling process has broadly three phases:

- a master timetable for the whole network is prepared six to nine months in advance by a set of planning officers in its respective above rail groups;
- the preparation of 24/48 hour 'in advance' schedules is undertaken by different planning officers in the respective above rail groups; and

- QR's train control centres manage traffic movements in real time utilising the 24/48 hour plans, but train controllers can use their discretion to change these plans in response to unforeseen events eg unloading delays at a port, loading delays at a mine, and a level crossing accident.¹⁴

As manager of the network, QR has a legitimate interest in making changes to timetables/schedules in response to unforeseen events such as accidents and flooding. On the other hand, the possibility of arbitrary changes in agreed train timetable/schedules is likely to be a very sensitive issue for potential third party operators given that such changes impact directly on the quality of service they can offer their customers. The more time sensitive the freight or passenger traffic carried, the greater the risks faced by a third party operator potentially subject to such timetable/scheduling changes.

Recognising the potential conflicts that can arise, an important issue will be the amount and nature of information QR is prepared to release to third party operators concerning train schedules and scheduling changes.¹⁵ The development of Scheduling and Train Control Protocols by QR are important in this regard (refer to the discussion of Part 3 of QR's undertaking).

Third party operators' confidence in QR's scheduling and train control arrangements are likely to be enhanced if they are able to monitor (in real time) the movement of their trains through QR's network. The QCA understands that QR has a mainframe based operational information system (the freight management system (FMS)) which its train control centres continually update with data concerning all train movements on the network. The FMS can be accessed by all QR business groups and selected customers.

The draft undertaking provides that a Third Party Operator affected by QR's train scheduling changes will be entitled to use the dispute resolution provisions of its Access Agreement if it believes QR's decision was inconsistent with the operator's Capacity Entitlement and/or Scheduling and Train Control Protocols.

The Authority seeks comments on whether:

- **compensation (if any) should be paid in the event of a re-assignment of train scheduling**
- **queuing and priority arrangements should be established as part of the undertaking**
- **information about train movements, such as master timetables, '24/48' hour plans and train control diagrams should be publicly available**

6.2 CAPACITY ANALYSIS

QR proposes that it will undertake an Initial Capacity Assessment as part of the preparation of a potential Third Party Operator's Indicative Access Proposal. The Initial Capacity Assessment will identify whether there is sufficient Capacity to meet the Third Party Operator's requirements while preserving existing Capacity Entitlements, and if not, the extent to which additional Capacity is required. If additional Capacity is required which would have a

¹⁴ The QCA understands that the 24/48 hour train schedules are more subject to change by the train controllers on the coal and minerals sub-systems than on the metropolitan sub-system, reflecting the different nature of freight services compared to passenger services.

¹⁵ In NSW, the Rail Access Corporation makes its master timetable publicly available and is developing a timetable protocol. QR's draft undertaking is silent on the issue of a public release of its master timetable/schedule.

significant bearing on the Third Party Operator's proposed operation, QR proposes to conduct a more detailed Indicative Capacity Assessment.

The draft undertaking indicates that a more comprehensive Capacity Analysis will be undertaken as part of the negotiation process between QR and the potential Third Party Operator, including using information from the latter's Operating Plan. The Capacity Analysis will enable finalisation of: the Third Party Operator's Capacity Entitlement; an initial timetable; applicable Access Charges; and funding arrangements. However, the draft undertaking makes no reference to the interaction of the Capacity assessment and queuing protocols.

There is a significant information asymmetry between QR and third party operators concerning available capacity on the network. An issue arises as to how the capacity analysis process could be made more transparent given QR's commercial incentive as a vertically integrated rail service provider to protect the revenues of its above rail operations. This is a critical issue for time sensitive freight services.

The Authority seeks comments on whether:

- **QR should make sufficient information available for access seekers to conduct their own Capacity analysis**
- **explicit recognition should be given to queuing protocols in the context of Capacity assessments**

6.3 CAPACITY ALLOCATION

6.3.1 Register of Interested Parties

QR proposes to maintain a register of parties who have an interest in existing Access Rights. Railway Operators with Access Agreements will be automatically placed on the register. Other parties who consider that they have an interest in existing Access Rights and wish to be included on the register must notify QR in writing. Where an Access Application will utilise Capacity only becoming available following the expiration of an existing Access Agreement, QR will use reasonable endeavours to notify any parties on the register with an interest in those Access Rights of the Access Application. While the undertaking is silent on the issue, QR has indicated to the QCA that it does not intend that the register will be a public document.

The Authority seeks comments on whether:

- **the register of interested parties should be a public document (clause 6.3.1(b))**
- **a person who considers its request to be included on the register of interested parties has been unjustifiably refused should have some right of recourse**
- **the undertaking should articulate the rights (if any) that are conferred upon a prospective Third Party Operator by the entry of its name on the register**

6.3.2 Allocation of Capacity

The draft undertaking notes that Access Rights will be allocated to the first Railway Operator with whom QR can negotiate and execute an "acceptable" Access Agreement. If two or more Railway Operators are seeking access with respect to mutually exclusive Access Rights, QR will finalise an agreement with the operator which QR considers is most favourable to the commercial performance of its Below Rail Services.

The Explanatory Guide provides an indication of the factors QR will take into account in making such as assessment including: the length of the Access Agreement; the Access Charge and resultant contribution to Common Costs having regard to the Incremental Costs of the particular Train Service; terms and conditions relating to interface issues; and an approach to Capacity Entitlement definition that is conducive to the optimisation of the utilisation of the Rail Infrastructure.¹⁶

Whilst the Authority recognises the need for a clause which reserves QR's right to execute access agreements which are most favourable in terms of the commercial performance of its below rail services, an issue arises as to how QR intends to ensure that competitive neutrality is observed between third party operators and its own above rail groups. The development of an objective, transparent decision making procedure for the allocation of train paths in the undertaking may assist in this regard. Such a procedure is likely to be particularly important where competition for a train path is between a QR above rail group and a third party operator.

The Authority seeks comments on whether:

- **QR should establish protocols to ensure competitive neutrality is observed between the third party operators and its own traffic concerning the allocation of train paths**
- **public reporting is an appropriate vehicle to facilitate transparency of capacity allocation and if so, what reporting arrangements could be established to achieve this**
- **capacity auctions should be undertaken for the allocation of mutually exclusive capacity demands (eg as part of queuing and priority protocols)**

6.4 CAPACITY TRANSFER

QR reserves the right to reduce a Third Party Operator's Access Rights where the operator has consistently under-utilised its rights under its Access Agreement for a six month period and cannot reasonably demonstrate to QR a future requirement for those Access Rights (clause 6.4(a)). QR proposes that it would not adjust the operator's Access Rights below its maximum usage over the six month period. Access charges would be varied in accordance with the terms of the Access Agreement.

The Explanatory Guide notes that a Third Party Operator could meet the 'reasonably demonstrate' test if it provides evidence of a contract it has with another party which will require it to utilise the relevant Access Rights, or evidence of short term extenuating circumstances affecting demand for its Train Services. Nevertheless, if the operator does not demonstrate that it will increase the use of its Access Rights to their full extent, QR may reduce those rights to a level that QR considers will meet the operator's anticipated level of demand.

The draft undertaking provides for QR to approach a Third Party Operator to seek to negotiate an amendment to its Access Agreement in order to facilitate access by another operator. The Explanatory Guide indicates that if QR was satisfied that an operator's Access Rights had been under-utilised (in line with clause 6.4(a)), QR may reduce those rights without the agreement of the operator concerned. On the other hand, if the circumstances of clause 6.4(a) did not exist, the Railway Operator's Access Rights would only be reduced with its agreement.

QR proposes that if an end user wants to secure the services of a different Railway Operator, it may request QR to negotiate with the incumbent operator to attempt to re-allocate that capacity

¹⁶ Pages 18-19

to the new Railway Operator. Such a re-allocation of Access Rights would be conditional on the agreement of the incumbent operator, unless the circumstances of clause 6.4(a) applied.

The draft undertaking proposes to prevent a Third Party Operator from on-selling its Access Rights to another party, with QR reserving this brokerage function to itself, including for traffics within the same market. Moreover, QR would appear unlikely to assign a Third Party Operator's rights where it can benefit from negotiating a fresh agreement with a new Third Party Operator. As a consequence, the development of a secondary market in rail access rights may be constrained.

Secondary markets potentially introduce competition into the re-sale market for access rights and promote the transfer of those rights to parties who can make best use of them. Section 106 of the QCA Act seeks to facilitate the ability of users to transfer all or part of their access rights (for declared services) without requiring the infrastructure owner's or the QCA's approval.¹⁷ However, allowing the transfer of a user's interests in an access agreement will not be appropriate in all circumstances, such as where it would present arbitrage possibilities which undermine the efficient utilisation of the infrastructure. Arbitrage may not be a concern where a potential transferor and transferee each operate in the same market.

The Authority seeks comments on whether:

- **the capacity reassignment procedure could become a barrier to entry for newcomers by preventing them building up their business over time**
- **Third Party Operators should be able to reassign their Access Rights to another accredited rail operator, and if so, whether arrangements should be made to protect QR's legitimate business interests in such a situation (eg. to prevent arbitrage)**

PART 7. INTERFACE CONSIDERATIONS

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 owner/manager and third party operators.¹⁸ Key interface issues include the establishment of safety, technical and operational standards. It is important that the introduction of competition on QR's network does not compromise safety 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. QR argues that in order to retain the integrity of the rail infrastructure, it has an interest in ensuring that the interface is closely managed on a consistent basis. On the other hand, as a vertically integrated rail provider, QR could potentially use interface standards to hinder access to its below rail services, thereby protecting the revenues of its above rail operations. This could be achieved by imposing unnecessarily restrictive interface conditions on potential third party operators and/or by QR taking on technical regulatory functions instead of them being performed by regulatory bodies that are independent of the commercial operator¹⁹.

¹⁷ However, section 106 may be overridden by an access code, undertaking or an access agreement (if approved by the QCA).

¹⁸ Interdependencies include how:

- the design of a track impacts on train speed limits;
- track condition affects rolling stock performance and vice versa;
- length of passing loops affects maximum train lengths; and
- derailments may cause damage to both rail infrastructure and rolling stock.

¹⁹ Clause 4(2) of the Competition Principles Agreement states that "before a party introduces competition to a sector traditionally supplied by a public monopoly, it will remove from the public monopoly any responsibilities

7.1 ROLLING STOCK INTERFACE STANDARDS

7.1.1 Development of Rolling Stock Interface Standards

Rolling stock standards are an important component of the Safety Management System for a railway operator. The rail safety accreditation process in Queensland, including Safety Management Systems, is discussed under clause 7.2 below. As an accredited railway operator, QR must provide evidence to the Rail Safety Accreditation Unit (RSAU) of Queensland Transport that suitable rolling stock standards for the network are in place.

Under the *Transport Infrastructure Act 1994* (the TI Act), the RSAU must be satisfied that a third party operator's management process for the rolling stock is appropriate for its proposed rail operations. QR goes through a similar process for its own rolling stock. The RSAU has indicated to the QCA that it would accept rolling stock interface validation undertaken by qualified engineers.

In addition to the above process, QR is proposing to develop Rolling Stock Interface Standards concerning Rolling Stock design and performance and the configuration of Rolling Stock to form a train as part of the undertaking.

QR indicates that during the negotiation process it may consider variations to the Rolling Stock Interface Standards in response to particular requirements of the Third Party Operator with respect to either its proposed Rolling Stock requirements or Operating Plan. The draft undertaking recognises that a particular Rolling Stock Configuration chosen by a Third Party Operator may impose additional costs on QR, such as greater wear and tear on the track. QR reserves the right to recover such additional costs from the operator.

On the other hand, where a Third Party Operator exclusively funds the additional costs of an agreed variation in Rolling Stock Interface Standards, QR reserves the right to restrict the benefits of the variation flowing to other rail operators until they make an appropriate contribution to the costs thereof.

In considering the development of rolling stock standards, an issue arises as to what extent the onus should be placed on third party operators to ensure rolling stock standards are maintained to a sufficiently high standard.

The Authority seeks comments on whether:

- **QR's proposed Rolling Stock Interface Standards should be a part of the undertaking**
- **Railway Operators who contribute to upgrades etc should be compensated where other Third Party Operators (including QR's above rail groups) seek to benefit (clause 7.1.1(h))**

7.1.2 Compliance with Rolling Stock Interface Standards

The draft undertaking provides that only Rolling Stock and Rolling Stock Configurations authorised by QR may operate on the Rail Infrastructure. This requires a certificate of compliance must be prepared by someone QR accepts as being competent to give certification (which may require commissioning tests to be undertaken).

for industry regulation. The Party will re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its (existing and potential) rivals”.

The Authority seeks comments on whether:

- **the undertaking effects a desirable arrangement in terms of how QR, Third Party Operators and RSAU will interact in order to ensure safety is not compromised, QR's legitimate business interests are protected and unnecessary barriers to entry are not created**
- **the undertaking reflects an appropriate role for QR in authorising Rolling Stock and Rolling Stock Configurations (clause 7.1.2(b) & (c))**
- **QR should be able to refuse an accredited Third Party Operator from gaining access to its track**

7.2 OPERATING PLAN

This clause requires a Third Party Operator to develop an Operating Plan to QR's reasonable satisfaction. An Operating Plan will be relevant to several aspects of the parties' relationship such as Capacity Entitlements and interface issues.

7.3 SAFETY MANAGEMENT

In order to manage a rail network and/or operate train services in Australia, it is necessary to hold safety accreditation. Safety accreditation is granted by the respective State and Territory Transport Departments. Under the provisions of an intergovernmental agreement between the Commonwealth, States and Territories, processes have been established to mutually recognise accreditations granted in another jurisdiction, subject to any specific local requirements and the rail owner/operator carrying out similar operations.

The Queensland rail safety framework is established in 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 of the Act. Rail safety policy, accreditation and performance monitoring functions have been delegated to the Rail Safety Accreditation Unit (RSAU) within the Land Transport and Safety Division of QT.

Legislative Provisions

Under the provisions of Part 4 of the TI Act, QT is required to accredit an applicant as a 'railway operator' to operate rolling stock on a railway if satisfied of the following criteria:

- the applicant is accredited in another State to operate rolling stock on a railway for a similar type of service or has the competency and capacity to operate rolling stock on the railway safely;
- the applicant has an agreement with the railway's manager to operate particular rolling stock on the railway, and the agreement includes appropriate arrangements for the safe operation of the rolling stock, unless the applicant is applying for accreditation as a railway manager and operator;
- 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.

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, QT may consider any matter it considers appropriate but is required to consider:

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

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.

QT'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.²⁰

The underlying safety management principles on which the railway safety requirements of AS 4292 are based are:

- identification and management of risk;
- ensuring that emergencies and incidents can be properly managed;
- ensuring that interfaces between different organisations and organisational elements are properly defined and managed;
- protection of passenger, worker and public health and safety; and
- protection of property from damage.

Implementation of the safety management principles requires compliance with a range of operational, infrastructure and rolling stock 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).

Auditing of safety management systems is undertaken by the RSAU at its discretion, which typically means within the first six months of commencement of an accreditation, and subsequently on an annual basis. However, audits may be undertaken at any time, including where RSAU has reason to believe compliance concerns warrant such action. This is

²⁰ AS 4292 is the benchmark standard used by all Australian rail safety regulators.

supplemented by on-going monitoring (for example, every month the RSAU prepares a summary of rail incidents).

7.3.1 Safety Risk Assessment

Against the background of the above rail safety framework, QR's draft access undertaking is proposing that a Third Party Operator will, jointly with QR, conduct a Safety Risk Assessment of its operations insofar as they interface with the Rail Infrastructure. The Safety Risk Assessment must be conducted by a suitably qualified person who is reasonably acceptable to both parties.

The Authority seeks comment on whether:

- **QR's legitimate business interests would be protected and rail safety not jeopardised if its participation in Safety Risk Assessments and in the development of risk management strategies were constrained to the interface issues agreed with a Third Party Operator in the relevant Interface Co-ordination Plan. (Clauses 7.3.1 and 7.6)**

7.3.2 Safety Risk Management Plan

The draft undertaking states that a Third Party Operator will need to implement a Safety Risk Management Plan agreed upon by QR prior to the commencement of operation of its Train Services on the Rail Infrastructure. Each party must incorporate this plan into their respective Safety Management Systems before commencement of Train Services.

The Authority seeks comment on whether:

- **the undertaking provides for an appropriate relationship between the Rail Safety Accreditation Unit of Queensland Transport, QR and Third Party Operators concerning the development and enforcement of rail safety standards**
- **QR should provide assistance to Third Party Operators in fulfilling the requirements of the undertaking with respect to rolling stock, safety management and interface standards (clauses 7.1 and 7.2)**

7.4 ENVIRONMENTAL MANAGEMENT PLANS

7.4.1 Environmental Investigation

The draft undertaking requires a Third Party Operator to conduct jointly with QR an Environmental Investigation (which QR may require be in the form of an Impact Assessment Study). The study is to be undertaken by a person suitable to QR and the Third Party Operator.

The Authority seeks comments on:

- **what requirements QR should adopt to ensure that any restrictions on access to its network on environmental grounds are consistent with the public interest, having regard to the public interest in competition and environmental protection**

7.4.2 Environmental Management System

QR's draft access undertaking requires the Third Party Operator to develop an Environmental Risk Management Plan to QR's satisfaction and gain accreditation under ISO 14,000 before operating Train Services. The Environmental Risk Management Plan is to be based on the Environmental Investigation. The Third Party Operator and QR are then responsible for

implementing the Environmental Risk Management Plan and incorporating its requirements into their respective Environmental Risk Management Systems.

In addition to the proposed requirements of the draft undertaking, the operations of Third Party Operators would need to comply with the relevant provisions of the *Environmental Protection Act 1994*, administered by the Environmental Protection Agency.²¹ Schedule I of the draft undertaking lists the minimum requirements to be addressed in Environmental Investigations and Environmental Management Systems.

Schedule E (Environmental Protection and Other Issues) indicates that Access Agreements may contain a provision that allows QR to terminate an Access Agreement if it considers (to its reasonable satisfaction) that it will be placed at an unacceptable risk of liability from possible environmental harm or of breaching environmental laws. Accordingly, this would appear to result in QR reserving the right to terminate an Access Agreement even though there may not have been a breach of environmental requirements.

The Authority seeks comments on whether:

- **QR's environmental requirements are excessive having regard to the public interest and the need for QR to protect its legitimate business interests (clauses 7.4.1 & 7.4.2)**
- **the undertaking reflects an appropriate allocation of responsibility between the Environmental Protection Agency, QR and Third Party Operators (clause 7.4)**
- **it is necessary for every Third Party Operator to gain accreditation under ISO 14,000 in order to operate Train Services**
- **QR should provide assistance to prospective Third Party Operators to fulfil the requirements of the undertaking**
- **QR should be entitled to terminate an Access Agreement if it believes (to its reasonable satisfaction) that it would be placed at an unacceptable risk of environmental liability (Schedule E)**

7.5 AUDITS

QR proposes that a Third Party Operator will be required to have its rail operations audited on an annual basis in order to demonstrate to QR's reasonable satisfaction that the operator is complying with:

- the Rolling Stock Interface Standards;
- the Safety Management System; and
- the Environmental Management System.

In addition, QR reserves the right, at any time, to require a Third Party Operator to have specific elements of its operations audited where QR has reasonable grounds for believing that these interface requirements have not been complied with and appropriate measures to rectify such non-compliance have not been undertaken.

²¹ Formerly known as the Department of Environment and Heritage

QR proposes that subject to its reasonable satisfaction, audits concerning Rolling Stock Interface Standards and Safety Management Systems may be undertaken in conjunction with an audit required by the Safety Regulator.

The Authority seeks comments on whether:

- **it is necessary for QR to undertake audits, or to arrange for the preparation of audits, of a Third Party Operator's Safety Management System and compliance with Rolling Stock Standards given the Rail Safety Accreditation Unit's responsibilities in this area (Clause 7.5(c))**
- **it is necessary for QR to undertake audits of Third Party Operator's environmental performance, given the Environmental Protection Agency's role**
- **QR should pay for the cost of an audit it requires if it finds no deficiencies (Clause 7.5(a) & (b))**

7.6 INTERFACE COORDINATION PLAN

QR proposes that prior to the commencement of the Third Party Operator's Train Services, both parties will collaborate in the development of an Interface Co-ordination Plan to supplement the provisions of the Access Agreement. The plan will address issues such as operational procedures, emergency procedures and incident management, track possession procedures, train control contacts, train schedule variation procedures and service recovery procedures.

The development of an Interface Co-ordination Plan is a requirement of the rail safety accreditation process. The agreed responsibilities of QR and a Third Party Operator at the interface should be addressed in their respective Safety Management Systems for the RSAU's consideration and approval.

7.7 ADJOINING INFRASTRUCTURE

QR proposes that where a Third Party Operator proposes to construct adjoining infrastructure for which QR will not be Railway Manager, QR will design and supervise the construction of the connection and other elements of the adjoining infrastructure essential to the operation of safeworking systems on the Rail Infrastructure. QR proposes that the Third Party Operator will reimburse QR's design and supervision costs and fund all construction costs associated with the adjoining infrastructure and connection.

The Authority seeks comments on:

- **what does the protection of QR's legitimate business interests require in relation to connecting infrastructure**
- **whether QR's proposal potentially enables it to require that adjoining infrastructure be constructed to a higher standard than QR's current infrastructure**

Queensland Rail Undertaking

The purpose of this Attachment is to present to interested parties a consolidation of:

- QR's Draft Undertaking;
- QR's Explanatory Guide; and
- the QCA's Request for Comments Paper

The consolidation has been prepared with the text of QR's Draft Undertaking, followed by the text of QR's Explanatory Guide (noting that the Explanatory Guide does not cover all aspects of QR's Draft Undertaking). This text is then followed by the relevant section of the QCA's Request for Comments Paper. The following fonts differentiate the three documents:

- text in this font is from QR's Draft Undertaking

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| <ul style="list-style-type: none">• text in this font is from the QCA's Request for Comments |
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PART 1. PREAMBLE

- (a) Queensland Rail ("QR") has developed this Undertaking to provide a framework to manage negotiations with Third Party Operators for Access to Rail Infrastructure for the purpose of operating Train Services.
- (b) This Undertaking is a voluntary Undertaking as provided for in Section 136 of the *Queensland Competition Authority Act 1997*. The intent of the Undertaking is to:
 - (i) ensure that Access negotiations are conducted expeditiously on a commercial basis between QR and Third Party Operators;
 - (ii) provide a mechanism for the exchange of information between QR and Third Party Operators necessary to facilitate the negotiation process;
 - (iii) establish pricing principles to be employed by QR in negotiating Access and which provide guidance in the resolution of a pricing dispute;
 - (iv) ensure that Access is negotiated in a competitively neutral environment;
 - (v) outline the interface considerations to be addressed for Third Party Operators to obtain and maintain Access;
 - (vi) outline the principles to be incorporated in an Access Agreement; and
 - (vii) provide for a binding dispute resolution process to apply during negotiations for Access.
- (c) This Undertaking will be consistently applied to Access Applications where those applications are within the scope of this Undertaking as set out in Part 2.

- (d) For the purpose of assisting in the interpretation of this Undertaking, an Explanatory Guide is provided. The Explanatory Guide should not be relied upon as a complete and legally binding summary of the provisions of the Undertaking but should be referred to where the intent of a relevant provision of the Undertaking is not clear on its face. To the extent that there is any inconsistency between the Undertaking and the Explanatory Guide, the provisions of the Undertaking will prevail.
- (e) For further information on the negotiation of Access in accordance with the provisions of this Undertaking, contact:

Manager Business Development
Network Access
Queensland Rail
21st Floor, 127 Creek Street
Brisbane Qld 4000

Phone: (07) 3235 3144

Fax: (07) 3235 3930

OCA Request for Comments

This part of the draft undertaking outlines QR's objectives and makes reference to the Explanatory Guide which should be referred to where the intent of a relevant provision of the undertaking is not clear.

PART 2. SCOPE AND ADMINISTRATION OF UNDERTAKING

2.1 SCOPE

- (a) This Undertaking provides for the negotiation of Access required for the operation of Train Services by Third Party Operators over the Track, with details of the specified Train Services and the sections of Track defined during the Access negotiations. Access will include, in addition to access to the Track, the benefit of other Rail Infrastructure services essential to the use of the Track such as signalling, train control and associated communications and, if the Train Services require electric energy for traction, the provision of such electric energy. Paragraph 4.1.1(b) sets out the exception to this and identifies when negotiations for access to certain Rail Infrastructure is not subject to this Undertaking.
- (b) This Undertaking does not cover the provision of Above Rail Services. Third Party Operators shall be responsible for the provision of any such Above Rail Services required for the operation of their Train Services.
- (c) This Undertaking is not applicable to the negotiation of Access to Rail Infrastructure for the purpose of operating Train Services that are used for transportation between Queensland and another state and that utilise Standard Gauge Track and Standard Gauge Rollingstock ("Interstate Train Services"). Third Party Operators may negotiate Access for the operation of Interstate Train Services in accordance with the relevant access regime.
- (d) Where the land upon which the Rail Infrastructure is situated is not owned by QR or subleased by QR from Queensland Transport and QR does not, through its arrangements with the owners of the land or pursuant to the *Transport Infrastructure Act 1994*, have the authority to authorise Third Party Operators to access that land, it is the responsibility of the Third Party Operator to obtain the necessary approvals from the owners of the land upon which the Rail Infrastructure is situated. QR will provide reasonable assistance in identifying the relevant land owners.

QR's Explanatory Guide

There may be occasions where a Third Party Operator seeks Access to certain Rail Infrastructure that, although owned by QR, is situated on land to which QR is not legally entitled to authorise access by third parties. For example, some of QR's Rail Infrastructure may run over land subject to crown mining leases, or land owned by a port authority. Whilst QR may be licensed (or otherwise permitted) to operate on Rail Infrastructure situated on such land, it may not be entitled to allow Third Party Operators to enter the land (as would occur if they operated on the Rail Infrastructure) under the terms of the relevant licence or agreement. In such cases, paragraph 2.1(d) places the obligation for obtaining any necessary approvals from the land owner on the Third Party Operator. It should also be noted that where QR is authorised to allow Third Party Operators to enter land that is not owned or subleased (from Queensland Transport) by QR, any agreement for Access by Third Party Operators will be subject to the inclusion of conditions that mirror the conditions under which QR is permitted to allow Third Party Operators to enter the land.

QCA Request for Comments

QR proposes that the services of its track, and associated Rail Infrastructure essential to the use of the track, will be subject to the undertaking. The associated Rail Infrastructure includes signalling, train control and associated communications and, if necessary, electric energy for traction.²² As noted in Section 1.3, it is generally accepted that it would not be economically feasible to duplicate this infrastructure given the current level of demand for these below rail services.

Nevertheless, as a result of QR's proposed exclusion of stations, platforms and selected marshalling yards from the undertaking under certain circumstances, the scope of the undertaking is narrower than that covered by the regulation based declaration of QR's rail transport infrastructure services (see Attachment 2), which in turn is based on the definition of rail transport infrastructure in the *Transport Infrastructure Act 1994* (see Attachment 3). The uncertainty as to how third party access will operate for stations, platforms and marshalling yards is a significant issue and is discussed in more detail in the discussion of Part 4 of the draft undertaking.

The undertaking does not cover the provision of:

- above rail services; and
- below rail services provided by track which forms part of the national standard gauge network for the purposes of interstate traffic.

Without providing an indication of the size of the potential difficulty, QR indicates that there is land upon which it has Rail Infrastructure for which it does not have the authority to authorise access by Third Party Operators. QR proposes that it is the responsibility of Third Party Operators to obtain the necessary approvals from the landowner upon which the affected infrastructure is situated. QR indicates that it will provide reasonable assistance in identifying the relevant landowners.

The Authority seeks comments on whether:

- **the undertaking should cover all of the services declared under the QCA Act (clause 2.1(a))**
- **QR should identify the extent of lines affected by the need for Third Party Operators to obtain landholder consent and provide details of contact names etc. for bona fide access seekers (clause 2.1(d))**

²² The undertaking recognises that a Third Party Operator may choose to operate diesel locomotives instead of electrically powered locomotives.

2.2 DURATION OF UNDERTAKING

This Undertaking will take effect on the date that it is approved by the QCA in accordance with Section 149 of the Act (herein referred to as the “Commencing Date”).

This Undertaking will apply for a period of three (3) years from the Commencing Date unless withdrawn as provided for in the Act.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes that the undertaking will apply for a period of three years. This is consistent with QR's proposal to limit the term of Reference Tariffs to three years.

The Authority seeks comments on whether:

- **the proposed three year term of the undertaking is appropriate**

2.3 REVIEW OF UNDERTAKING

QR and the QCA will meet approximately twelve (12) months after the Commencing Date to review the operation of the Undertaking. This review will identify those provisions (if any) of the Undertaking that are not operating to the satisfaction of either QR or the QCA. If this review identifies that amendments are required to the Undertaking, QR will submit a Draft Amending Undertaking following this process.

QR's Explanatory Guide

Clause 2.3 provides for a review of the Undertaking to occur approximately twelve months after the Commencing Date. This does not preclude QR from submitting a Draft Amending Undertaking (as provided in the QCA Act) within the twelve month period from the Commencing Date, nor at any other time within the life of the Undertaking if QR considers that it is necessary to address provisions of the Undertaking that are not operating satisfactorily. Similarly, this does not preclude the QCA from requiring QR to lodge a Draft Amending Undertaking in the circumstances provided in the QCA Act.

QCA Request for Comments

A review of the operation of the undertaking by QR and the QCA is proposed twelve months after its commencement. If the review identifies provisions of the undertaking requiring amendment, QR will submit a draft amending undertaking for the QCA's approval.

The draft undertaking does not provide any guidance as to the process for resolving disputes between QR and the QCA. In addition, the draft undertaking does not provide for QR to publicly disclose its performance in relation to matters it undertakes to fulfil in the undertaking. Examples of such performance includes:

- timely acknowledgment of access applications;
- periods taken to provide indicative access proposals; and
- number of substantial complaints regarding breaches of ringfencing guidelines.

The draft undertaking makes no provision for the QCA to request an amending undertaking from QR if the QCA believes, for example, that an amendment is necessary because the approved undertaking may not adequately recognise the interests of persons who may seek access to the service.

The Authority seeks comments on:

- **how disputes between QR and the QCA ought to be resolved**
- **whether QR should undertake to publicly report on its compliance with the undertaking, and if so, the key parameters for that reporting**
- **whether the undertaking should set out the process by which the QCA requests amendments to QR's undertaking, and if so, in what circumstances is such action likely to be appropriate**

2.4 CONTRACTUAL ARRANGEMENTS

This Undertaking applies only to the negotiation of new Access Agreements or the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Nothing in this Undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement. In addition, nothing in this Undertaking can require a party to an existing rail haulage agreement to vary a term or provision of that agreement.

The Explanatory Guide did not address this clause.

QCA Request for Comments

The undertaking will only apply to the negotiation of new Access Agreements or the negotiation of Access Rights additional to those subject to an existing Access Agreement. Existing rail haulage agreements will be unaffected by third party access.

The Authority seeks comments on whether:

- **the undertaking should include any transitional arrangements, and if so, what transitional arrangements may be appropriate**

PART 3. RINGFENCING ARRANGEMENTS

3.1 INTRODUCTION

QR is an integrated provider of rail services and as such manages the Rail Infrastructure as a Railway Manager as well as operating Train Services as a Railway Operator. This Part outlines the processes and policies that ensure that Access can be negotiated in a competitively neutral environment. These processes and policies are intended to assist QR in meeting its obligations under section 104 of the Act.

The Explanatory Guide did not address this clause.

QCA Request for Comments

As noted in Section 1.3, QR is a vertically integrated provider of rail services operating in both a monopoly market (for below rail services) and a potentially contestable market (for above rail services).

QR's vertical integration can potentially enable it to use its monopoly power in the below rail market to gain an unfair competitive advantage in the above rail market. For example, by shifting costs from its above rail operations to its below rail operations, QR could inappropriately increase its profit (or compete unfairly with other Third Party Operators). Similarly, QR's below rail operations could pass confidential information about third party operators to QR's above rail business groups. These practices would provide QR with an unfair competitive advantage in the above rail market, distorting the evolution of competition in that market.

One mechanism to minimise this potential problem is the development of ringfencing arrangements by the vertically integrated enterprise. Ringfencing is the internal separation of business functions within an enterprise for organisational and accounting purposes. It is based on the premise that the operation and management of the monopoly assets are placed on a stand-alone basis to be managed independently of any other business arms of the enterprise. This is intended to eliminate or substantially reduce the likelihood of anti-competitive conduct.

The Authority seeks comments on:

- **what alternatives should be explored to address the competition issues emerging from QR's vertical integration**

3.2 ORGANISATIONAL STRUCTURE

- (a) QR has established its organisational structure to facilitate the separation of the management of Rail Infrastructure from the operation of Train Services. Paragraphs (b) to (d) of this Clause set out the organisational structure of QR at the Commencing Date which was developed in accordance with this objective. In the event that QR varies its organisational structure during the term of the Undertaking and such variation impacts upon the contents of this Clause 3.2, this Clause will be varied to reflect the implications of the restructure having regard to the objectives of this Part 3, through the submission to the QCA of a Draft Amending Undertaking prior to the restructure being implemented.
- (b) Network Access has been established as a business group of QR, separate from those business groups within QR that operate Train Services. In addition, there are service groups whose purpose is to provide support activities for both Network Access and the business groups operating Train Services.
- (c) The Group General Manager of Network Access reports directly to the Chief Executive. The function of Network Access is to manage the provision of Below Rail Services, with the exception of services associated with stations, platforms and selected marshalling yards. In performing this function, the responsibilities of Network Access will include:
- (i) negotiation and management of Access Agreements with Railway Operators;
 - (ii) development and management of agreements with Queensland Transport regarding the provision of Rail Infrastructure that is supported by Infrastructure Payments;
 - (iii) provision and/or procurement of appropriate levels of maintenance and investment for the Rail Infrastructure to ensure that the Rail Infrastructure is provided at the standard required to meet QR's obligations to Railway Operators;
 - (iv) assessment and management of Capacity and Available Capacity;
 - (v) procurement of appropriate train control, including specifying Scheduling and Train Control Protocols, and monitoring the provision of train scheduling and control to ensure that it is provided in accordance with the Scheduling and Train Control Protocols; and

- (vi) procurement of traction power on electrified sections of the Track, including the management of power supply from other parties.
- (d) Operation of Train Services is undertaken by business groups within QR that are separate from Network Access. The managers of these operational business groups report directly to the Chief Executive. The responsibilities of these operational business groups include:
 - (i) operation of Train Services and other Above Rail Services;
 - (ii) provision and/or procurement of appropriate levels of maintenance of and investment for Above Rail Services;
 - (iii) the management of stations, platforms and selected marshalling yards;
 - (iv) provision or procurement of appropriate levels of maintenance and investment for stations, platforms and selected marshalling yards; and
 - (v) provision of train scheduling, train control and associated incident management services on behalf of Network Access and in accordance with the Scheduling and Train Control Protocols specified by Network Access.
- (e) Within three (3) months of the Commencing Date, QR will develop Scheduling and Train Control Protocols which will specify:
 - (i) the practice for determining train priority;
 - (ii) the practice for management of out-of-course running;
 - (iii) incident management practices;
 - (iv) Train operation information and communications practices; and
 - (v) the practice for train scheduling.

These Scheduling and Train Control Protocols, once developed, will be made available to the QCA for review if the QCA so requires.

QR's Explanatory Guide

Network Access is responsible for managing the provision of QR's Below Rail Services, with the exception of those services associated with platforms, stations and selected marshalling yards. The term marshalling yard (which is used in legislation such as the Transport Infrastructure Act 1994) has tended to have a broad application in its interpretation and has been applied to areas of Track used for queuing, shunting, provisioning, marshalling and storage. Network Access will be responsible for managing those areas of Track within marshalling yards that are required for the through operation of Trains (including Track used for queuing for entry to ports). This extends to all Track on existing rail corridor land or new rail corridor land (as defined under the Transport Infrastructure Act 1994) with the exception of any of those Track that is not necessary for through traffic and that is specifically nominated by QR as "operator specific rail infrastructure". Operator specific rail infrastructure includes areas within marshalling yards, used for provisioning and storage, that is in operator specific use. Interested parties will be advised which infrastructure is defined as "operator specific rail infrastructure".

QCA Request for Comments

QR's proposed allocation of responsibilities amongst its business groups aims to ring fence the monopoly and contestable parts of the organisation. However, the proposal does not provide for a clean separation of the respective functions within the organisation. For example, QR's above rail business groups are to:

- perform train control and train scheduling functions (on a sub-contract basis on behalf of Network Access); and
- manage stations, platforms and certain (unspecified) marshalling yards.

There is a conflict of interest for QR's above rail groups in performing train control and scheduling functions, as they will be simultaneously controlling their own and competing third party traffic. This places QR's above rail groups in a position to advantage their own traffic over third party operators. For example, by giving QR trains priority over those of its competitors, QR would confer upon itself a significant competitive advantage.

In order to address this conflict of interest, QR is proposing to develop Scheduling and Train Control Protocols which will specify:

- the practice for determining train priority;
- the practice for management of out-of-course running;
- incident management practices;
- train operation information and communication practices; and
- the practice of train scheduling.

Whilst the draft undertaking provides that QR will make available its Scheduling and Train Control Protocols to the QCA for review, it does not provide any guidance as to what should occur if the QCA has reservations about the content of these protocols. Moreover, QR is yet to submit these protocols to the QCA. In this regard, the QCA is mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

QR proposes that above rail business groups will be responsible for the management of stations and selected marshalling yards (on the grounds that these facilities will be providing above rail services). This means that above rail business groups will be responsible for services that have been declared under the regulation based declaration under the QCA Act for the purpose of providing transportation by rail.²³

QR proposes to submit a Draft Amending Undertaking in the event that it varies its organisational structure, but the draft undertaking is silent on the issue of the consequences of the QCA failing to approve such a Draft Amending Undertaking.

The Authority seeks comments on whether:

- **the ringfencing arrangements proposed adequately address the problems inherent in a vertically integrated structure**

²³ QR's proposed approach to the negotiation of access to the services provided by these facilities is discussed in section 4.1 below.

- the undertaking should address the consequences of the Authority not approving a Draft Amending Undertaking that has been prompted by an organisational restructure
- there are alternative arrangements to address this issue
- the undertaking should specify exactly which marshalling yards are intended to be managed by Network Access as opposed to QR's above rail business groups (clause 3.2(c))
- responsibility for the train control function has been appropriately assigned within QR (clause 3.2(c) and (d))
- the proposal to develop Scheduling and Train Control Protocols is an adequate means of addressing the conflict of interest inherent in QR's above rail groups performing the train control function. If not, what alternative measures could be adopted? (clause 3.2(c) and (d))
- the assignment of responsibility for stations, platforms and marshalling yards to above rail business groups is appropriate (clause 3.2(d))
- there should be a distinction between operational management and control over access to stations, platforms and marshalling yards (eg should business groups be granted non-exclusive licences to manage these facilities rather than control them outright) (clause 3.2(d))
- QR's proposed Scheduling and Train Control Protocols should be incorporated in the undertaking. If so, what operational matters should the protocols address? (Clause 3.2(e))
- the undertaking should address the consequences of the Authority not accepting QR's proposed Scheduling and Train Control Protocols

3.3 ACCOUNTING ARRANGEMENTS

- (a) QR will establish and maintain a separate set of financial accounts in respect of those Below Rail Services provided by Network Access, as identified in Paragraph 3.2(c), separately identifying in respect of those services a profit and loss statement and a balance sheet. Where possible, these financial accounts will be based on costs, revenues and assets uniquely associated with Below Rail Services provided by Network Access. Otherwise, these financial accounts will be based on an allocation of costs associated with staff and assets which provide functions jointly for Below Rail Services provided by Network Access and for any other services.
- (b) QR will allocate any costs associated with staff or assets that provide functions jointly for both Below Rail Services provided by Network Access and for any other services in accordance with the methodology set out in the Cost Allocation Manual referred to in Clause 5.5.
- (c) QR will publish, in its annual report, the profit and loss statement and balance sheet for Below Rail Services provided by Network Access developed in accordance with Paragraph (a) of this Clause.

QR's Explanatory Guide

The Undertaking provides that separate financial accounts (profit and loss statement and balance sheet) will be maintained for those Below Rail Services provided by Network Access. Given that Network Access does not provide services in relation to platforms, stations and certain marshalling yards (as identified above), the financial accounts kept in accordance with the Undertaking will not include financial details relating to these facilities.

The publication, in QR's annual report, of the profit and loss statement and balance sheet for Below Rail Services provided by Network Access will be the only cost information (in respect of Below Rail Services) that QR will publish.

QCA Request for Comments

Another key objective of ringfencing arrangements is to permit easier and more effective scrutiny of QR's accounting framework to provide transparency in its allocation of costs and assets between above and below rail (ie contestable and monopoly) operations.

Public disclosure of separate financial accounts provides information to dispute resolution bodies and also allows potential third party operators to observe the allocation of assets (current and non-current) and costs between the monopoly and contestable activities, which can be compared to the sources of revenue of the respective activities. This in turn facilitates transparency and accountability in the formulation of access prices. A key task therefore is to precisely define the boundaries of the monopoly and contestable activities so that assets and costs can be allocated accordingly.

The degree of disaggregation of the separated financial information is also an important issue. For example, a highly aggregated summary of costs and revenues for monopoly and contestable services may not contribute significantly to price and cost transparency.

QR is proposing to establish and maintain a profit and loss statement and balance sheet in respect of the below rail services provided by Network Access. QR indicates that the separate financial accounts will be based on cost, revenues and assets uniquely associated with the below rail services. This is the only financial information QR proposes to publicly disclose. The methodology for allocating costs associated with the provision of both above and below rail services (ie joint costs) will be set out in a proposed Cost Allocation Manual. (The development of this manual is discussed in more detail in the discussion of Part 5 of the draft undertaking.)

The Authority seeks comments on whether:

- **the financial statements should be prepared in accordance with any accounting standards, and if so, what standards**
- **the extent of financial disclosure implied by QR's proposed accounting separation framework is sufficient**
- **a cash flow statement for below rail services should be prepared and publicly released by QR (clause 3.3(a))**
- **the detail of the accounting separation arrangements should be included in the undertaking (clause 3.3(a))**
- **any part of QR's below rail operations should be separately reported on (clause 3.3(c))**

3.4 INTERNAL ACCESS ARRANGEMENTS

3.4.1 Internal Access Agreements for Existing QR Train Services

- (a) QR will develop internal Access Agreements in respect of all existing QR Train Services. These Access Agreements will be between Network Access and the business group that is operating the relevant Train Services.
- (b) These internal Access Agreements will be developed according to the timetable set out in Schedule A.
- (c) These internal Access Agreements, once developed, will be made available to the QCA for review if the QCA so requires.

QR's Explanatory Guide

For QR Train Services existing at the commencement of the Undertaking, Network Access will formalise the arrangements currently in place through internal Access Agreements. QR is not required to undertake all of the processes provided in the Undertaking in the development of the related internal Access Agreements. Many of the processes in the Undertaking do not have any meaningful application to Train Services that have been operating on the QR network for some time. For example, all existing QR Train Services are already covered by QR's Safety Management System and as a result, the Safety Risk Assessment provided in part 7 of the Undertaking will not need to be undertaken unless significant changes to the Train Services are proposed. Notwithstanding that the Undertaking does not require that internal Access Agreements for existing QR Train Services be consistent with the provisions of the Undertaking, the internal Access Agreements will be sufficiently consistent with the Undertaking to ensure that QR is not in breach of section 104 of the Act²⁴ in the event that a Third Party Operator seeks Access for the purpose of competing with a QR Railway Operator.

QCA Request for Comments

As QR is vertically integrated, the nature of the terms and conditions on which its below rail services are sold to its above rail business activities is a significant issue. There is arguably considerable scope for QR to favour its own operation at the expense of third party operators in the contestable market. This has the potential to distort the development of the above rail market, including raising barriers to entry for new operators, with associated implications for price levels and the quality of services provided to end users. Consequently, equivalence of the terms and conditions of internal and external access agreements is a key objective of the process.²⁵

QR is proposing to develop internal Access Agreements between Network Access and the respective above rail business groups for all its existing above rail services. The internal Access Agreements will be made available to the QCA for review if the QCA requires (although the undertaking is silent on the consequences of the QCA not accepting internal Access Agreements). QR includes a proposed timetable for the development of the internal Access Agreements (Schedule A of the draft undertaking). However, QR does not intend to observe the terms of the undertaking in developing these Access Agreements.²⁶

²⁴ Section 104 of the Act prohibits an access provider, such as QR, from engaging in conduct for the purpose of preventing or hindering a user's access under an access agreement.

²⁵ Sections 104 and 125 of the QCA Act prohibit an access provider (ie QR) providing access to itself on more favourable terms than to a competitor (such conduct being deemed under these provisions to hinder access). However, these sections provide that an act done in accordance with an approved undertaking will not contravene these provisions.

²⁶ Refer to clause 4.1.2 for a discussion of the implications of these internal arrangements.

The Authority seeks comments on whether:

- the proposed framework for establishing internal Access Agreements is sound
- the timetable set out in Schedule A is appropriate
- for seasonal traffics, end customers should have the option of unbundling to gain separate above and below rail contracts
- the life span of access contracts for existing services should be strictly limited to the duration of the end customer's haulage agreement with QR
- QR's proposal to allow the QCA to review QR's internal Access Agreements is sufficient to protect the legitimate business interests of those seeking access to QR's network given that section 104 of the QCA Act provides that an act done in accordance with an approved undertaking will not breach the hindering access provisions of the QCA Act

3.4.2 Internal Access Agreements for New or Renewed QR Train Services

- (a) Irrespective of the timetable identified in Schedule A, in the event that QR (as a Railway Operator) is developing new or renewed rail haulage arrangements, the following will apply in respect of the associated Access Rights:
- (i) internal Access Agreements will be developed on a basis consistent with the principles outlined in the standard Access Agreement summary which is contained in Schedule E;
 - (ii) pricing principles will be applied to Access for QR Train Services in a manner consistent with Part 5;
 - (iii) interface standards will be applied to Access for QR Train Services in a manner consistent with Part 7; and
 - (iv) Capacity Entitlements will be developed for QR Train Services in a manner consistent with Part 6.
- (b) These internal Access Agreements will be made available to the QCA for review if the QCA so requires.

QR's Explanatory Guide

Internal Access Agreements for Train Services relating to new or renewed QR rail haulage arrangements will need to be consistent with the provisions of the Undertaking as QR Railway Operators will potentially be competing with Third Party Operators at the time of negotiating such agreements. This requirement does not preclude QR taking advantage of any synergies that arise due to QR's integrated status, provided this does not lead to a breach of section 104 of the Act. Further, in respect of renewed rail haulage arrangements, QR recognises that a number of the interface issues outlined in part 7 of the Undertaking will have already been addressed prior to the commencement of the original Access Agreement, and accordingly, may not need to be addressed again unless significant changes to the Train Services are proposed. Importantly, the internal Access Agreements negotiated in accordance with this subclause must reflect an outcome consistent with that which would be reached through an application of the Undertaking in a negotiation with a Third Party Operator.

QCA Request for Comments

QR proposes that new or renewed Access Agreements be developed on a basis consistent with the principles outlined in QR's standard Access Agreement (Schedule E of the draft undertaking), as well as with respect to Part 5 (pricing principles), Part 6 (Capacity Entitlements) and Part 7 (interface standards) of the draft undertaking. Again, QR proposes to make such contracts available for review if the QCA requires. However, the undertaking is silent on the consequences of the QCA not accepting internal Access Agreements.

The Explanatory Guide proposes that QR is entitled to take advantage of the benefits of synergies from its vertically integrated structure. Nevertheless, an issue arises as to whether end customers should also enjoy a share of any benefits of QR's structure, and if so, how and in what circumstances. The potential appears to exist for QR's above rail groups to be provided with a competitive advantage relative to third party operators due to QR's integrated structure.

The Authority seeks comments on:

- **whether the proposed framework for establishing internal Access Agreements is sound**
- **whether it is appropriate that QR retains the benefits of synergies from vertical integration (Explanatory Guide)**
- **whether the principles of cost allocation are sufficiently clear to distinguish between Cross-Subsidies and genuine synergies from vertical integration**
- **how the benefits of vertical integration can be best passed on to end customers**
- **whether QR's proposal to allow the QCA to review QR's internal Access Agreements is sufficient to protect the legitimate business interests of those seeking access to QR's network, having regard to the fact that conduct in accordance with an undertaking will not be subject to section 104 of the QCA Act**

3.5 RINGFENCING GUIDELINES

- (a) In order to ensure that the processes and policies set out in Clauses 3.2, 3.3 and 3.4 are effective in assisting QR to meet its obligations under section 104 of the Act, QR will, within three (3) months of the Commencing Date, develop Ringfencing Guidelines. The Ringfencing Guidelines will reflect the principles and address the issues identified in Schedule B.
- (b) The Ringfencing Guidelines will be made available to the QCA for review if the QCA so requires. The QCA may require QR's performance in complying with the Ringfencing Guidelines to be audited on an annual basis.

The Explanatory Guide did not address this clause.

QCA Request for Comments

A major issue that has emerged in other jurisdictions concerns the propensity for the monopoly arm of the vertically integrated enterprise to share with its contestable arm sensitive information that might emerge in the context of access negotiations with access seekers or over the course of an access agreement. This information could provide the above rail business with a considerable commercial advantage in its market.

In this context it is important to remember that potential above rail competitors will only commit to the investment necessary to enter the market if they perceive profitable entry is feasible. Accordingly,

providing a credible and effective means of preventing the inappropriate transmission of information becomes critical. Therefore, measures to restrict the flow of access related information between the contestable and monopoly activities of the vertically integrated enterprise are likely to form an important part of the undertaking.

One option is to establish 'Chinese walls' within QR's operations such that it employs different personnel across below rail (monopoly) and above rail (contestable) activities and establishes internal mechanisms to prevent the sharing of sensitive commercial and customer information between its activities. Further measures include establishing credible audit processes to review the effectiveness of these arrangements and procedures for dealing with breaches of the confidentiality mechanisms.

QR is proposing to develop Ringfencing Guidelines concerning, amongst other things, the handling of Confidential Information provided to QR's Network Access by Third Party Operators within three months of the commencement of the undertaking. In this regard, the undertaking is silent on what would happen if QR and the QCA disagree on the terms of the Ringfencing Guidelines. The Authority is mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

QR also proposes to allow the QCA to require an annual audit be undertaken. The undertaking is silent on what would happen if QR and the QCA disagree on the identity of the person who is to conduct the annual audit. QR has indicated to the QCA that the Ringfencing Guidelines will address this issue.

The Authority seeks comment on whether:

- **the detail of QR's proposed Ringfencing Guidelines should be included in the undertaking (clause 3.5 & Schedule B)**
- **the parameters of the Ringfencing Guidelines proposed by QR are satisfactory (clause 3.5(b) & Schedule B)**
- **the undertaking should address the consequences of the Authority not accepting the Ringfencing Guidelines**
- **provision should be made for external review of alleged breaches of the Ringfencing Guidelines (clause 3.5(b) & Schedule B)**
- **auditing of QR's compliance with its ringfencing arrangements should be limited to an annual event as QR proposes (clause 3.5(b) & Schedule B)**
- **the undertaking should address the consequences of the Authority not accepting the identity of the person who is to conduct the audit**
- **the undertaking should address the implications of a finding of a breach of the Ringfencing Guidelines by QR**

PART 4. NEGOTIATION FRAMEWORK

QCA Request for Comments

The QCA Act makes it clear that commercial negotiation is to play a central role in the securing of third party access by an access seeker.²⁷ This requires that an effective negotiation framework be established. Such a framework is likely to have a number of key features including:

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

A negotiation framework which omits or insufficiently develops any of the above features may become a barrier to entry to third party operators. This is a concern because QR potentially has an incentive to inhibit entry to the contestable market to protect the revenues of its competitive arm. Therefore, one of the key goals of the negotiation framework must be to strike a balance between the legitimate business interests of QR and access seekers.

4.1 FRAMEWORK

This Undertaking specifies the process which will be followed to enable a Third Party Operator to gain Access. The framework provides for:

- (i) preliminary meetings and an initial exchange of information;
- (ii) submission of an Access Application by the Third Party Operator;
- (iii) preparation of an Indicative Access Proposal by QR; and
- (iv) negotiations to develop an Access Agreement for execution.

QR's Explanatory Guide

A flowchart illustrating the negotiation process is provided at Attachment A.

QCA Request for Comments

QR's undertaking proposes the establishment of a negotiation framework which incorporates:

- preliminary meetings and an initial exchange of information;
- an initial Access Application by the interested Third Party Operator;
- an Indicative Access Proposal by QR; and
- parameters within which negotiations to develop an Access Agreement are conducted.

²⁷ Commercial negotiation is particularly important in the content of access to rail infrastructure due to the varying nature of the service required by a user including frequency, timeliness etc.

4.1.1 Parties to Negotiation

- (a) Except as provided for in Paragraph (b) of this Subclause, negotiations for Access with Third Party Operators will be undertaken by Network Access. Where Access is required for Below Rail Services provided by a facility that is not managed by Network Access, Network Access will negotiate for Access to that facility by the Third Party Operator as agent for the business group that manages that facility.
- (b) Where a Third Party Operator is seeking Access to a station, platform or marshalling yard that is managed by a QR business group other than Network Access (referred to in this Paragraph as an “Operator Facility”), and the Third Party Operator’s sole purpose of seeking Access to the Operator Facility is to utilise an above rail facility that is managed by the same QR business group, Access to that Operator Facility will be negotiated directly between the Third Party Operator and the QR business group.
- (c) Where in this Undertaking reference is made to the negotiation of Access Agreements with Railway Operators or Third Party Operators, the terms “Railway Operator” and “Third Party Operator” shall be deemed to include a party with the capacity to secure the services of an Accredited organisation to operate the proposed Train Services, provided that only a party who is, or will become Accredited in respect of those Train Services may enter into an Access Agreement with QR.

QR’s Explanatory Guide

Paragraphs 4.1.1(a) and 4.1.1(b) specify when Network Access will negotiate Access to Below Rail Services (including stations, platforms and marshalling yards). Network Access will undertake negotiations for Access to Below Rail Services except in the circumstances set out in paragraph 4.1.1(b). With regard to such circumstances, it is unlikely that a Third Party Operator will seek Access to a station or platform managed by a QR business group other than Network Access for the sole purpose of also gaining access to an above rail facility (such as a workshop or terminal) managed by the same QR business group. It is more likely a Third Party Operator will seek Access to a marshalling yard²⁸ in these circumstances and where this does occur, the Undertaking provides that negotiations for Access will be conducted between the Third Party Operator and the relevant QR business group that manages the above rail facility.

The following examples illustrate some of the circumstances in which Network Access will negotiate with Third Party Operators seeking Access to marshalling yards:

- *a Third Party Operator seeks Access to a marshalling yard area used for queuing Trains for unloading at a port. The marshalling yard area is essential for the through running of Trains on the QR Rail Infrastructure and, consistent with the discussion on organisational structure, Network Access manages this area of the marshalling yard. Therefore, Network Access will negotiate with the Third Party Operator seeking Access to this marshalling yard area; and*

²⁸ Refer to the comments above under the heading, **3.2 Organisation Structure**, that explain which marshalling yards Network Access is responsible for managing.

- *a Third Party Operator seeks Access to a marshalling yard area used for shunting and marshalling of Trains in order to gain access to a private siding attached to that marshalling yard. This area of the marshalling yard is not necessary for the through operation of trains and, therefore, may be managed by a QR business group other than Network Access. As the purpose of gaining Access to the marshalling yard is to gain access to a facility owned by a party other than QR, Network Access will negotiate with the Third Party Operator for such Access.*

The following example illustrates an instance where Third Party Operators will negotiate Access to marshalling yards with QR business groups other than Network Access:

- *a Third Party Operator seeks Access to a marshalling yard for the purpose of unloading and storing freight in an adjoining terminal that is operated by the QR above rail business group that also manages the marshalling yard (or relevant section thereof). Because the Third Party Operator only wants Access for the purpose of unloading and storing freight in the above rail facility (the terminal) and will therefore be negotiating for access to that facility with the relevant QR above rail business group, the Railway Operator will also negotiate Access to the marshalling yard directly with the relevant QR above rail business group.*

In paragraph 4.1.1(c), the Undertaking envisages an end user, for example a coal mine, participating in the negotiation for Access Rights. The following scenario provides an example of how such a negotiation for Access to QR's infrastructure might proceed:

- *representatives from a coal mine lodge an Access Application with QR. QR provides an Indicative Access Proposal to the coal mine and the coal mine then calls for tenders for the operation of the relevant Train Services, consistent with the Train Service information in their Access Application. Competing Railway Operators submit tenders to the coal mine based on the Indicative Access Proposal. The coal mine then selects its preferred operator and nominates that party to finalise an Access Agreement with QR. The coal mine can continue to be involved in negotiations with QR, however, the Access Agreement will be signed by QR and the Railway Operator.*

QCA Request for Comments

QR proposes that stations, platforms and certain marshalling yards will be managed by its above rail business groups, on the grounds that these facilities are predominantly providing above rail services. Nevertheless, the services provided by stations, platforms and marshalling yards have been declared under the QCA Act for the purpose of providing transportation by rail.

QR proposes that Network Access will negotiate access to the below rail services of these facilities as an agent for the QR above rail business group that manages the facility, unless the Third Party Operator's sole purpose of gaining access to the station, platform or marshalling yard is to utilise another above rail facility managed by the same QR business group, such as a workshop or terminal.

The Explanatory Guide seeks to clarify this clause of the undertaking²⁹. It states that a Third Party Operator is unlikely to seek access to stations and platforms for the sole purpose of gaining access to another facility of the relevant business group (but does not provide examples). However, the Explanatory Guide provides a number of practical examples to explain how the threshold test would be applied for marshalling yards. A Third Party Operator seeking access to a marshalling yard area used for queuing trains for unloading at a port would negotiate access with Network Access. On the other hand, a Third Party Operator seeking access to a marshalling yard in order to unload and store freight in an adjoining terminal operated by a QR above rail group would negotiate access to that yard with that group, not Network Access.

²⁹ Pages 4 - 5

Neither the Explanatory Guide nor the draft undertaking addresses how disagreements with Third Party Operators over which QR business group should be negotiating access to the services of these facilities will be resolved. Another uncertainty is that the draft undertaking does not establish how access to the below rail services of the facilities managed by QR's above rail groups will be priced for internal or external purposes. In addition, the draft undertaking and Explanatory Guide do not make clear what level of control Network Access will be able to exert over the access negotiation process in its role as an agent for the above rail groups.

The Authority seeks comments on whether:

- **the nature of the proposed arrangement whereby Network Access will negotiate access to the below rail services of stations, platforms and marshalling yards as an agent for QR's above rail business groups is sufficiently clear in terms of the control Network Access will have over this process ie whether QR's above rail business groups should have any input into the negotiation of access to stations, platforms and marshalling yards (clause 4.1.1(a))**
- **the assignment of responsibility for the negotiation of stations, platforms and marshalling yards to QR's above rail business groups in the circumstances defined by QR is appropriate or whether control over these declared services should be assigned to Network Access (clause 4.1.1(b))**
- **the threshold test for determining which QR business group is responsible for negotiating access to these below rail services has sufficient clarity to remove the potential for disagreements with Third Party Operators. (The Explanatory Guide)**
- **the use of stations, platforms and marshalling yards by QR's above rail business groups should be priced, and if so, how**

4.1.2 Conditions to Negotiation

- (a) QR reserves the right to only negotiate with Third Party Operators who comply with the relevant obligations and applicable processes set out in this Undertaking. If a Third Party Operator does not comply with the relevant obligations and processes, and QR considers that such non-compliance is material, QR will not be obliged to continue negotiations regarding the provision of access for that Third Party Operator.
- (b) At any time, before or during the negotiation process, QR may require the Third Party Operator to demonstrate to QR's reasonable satisfaction that it is able to meet the prudential requirements set out in Paragraph (c) of this Subclause. In the event that the Third Party Operator cannot meet these prudential requirements, QR may refuse to commence negotiations or may cease negotiations with that Third Party Operator.
- (c) For the purpose of Paragraph (b) of this Subclause, the Third Party Operator will be required to meet the following prudential requirements:
 - (i) the Third Party Operator must be Solvent; and
 - (ii) the Third Party Operator, or a Related Party of the Third Party Operator, must not currently be, or have been in the previous two (2) years, in Material Default of any agreement with QR, or any agreement in accordance with which access to rail infrastructure, not managed by QR, has been provided to the Railway Operator or a Related Party.

(d) Where a Third Party Operator is:

- (i) seeking Access which will utilise Committed Capacity; and/or
- (ii) seeking Access that is required for Train Services carrying bulk consignments of commodities, where QR is of the reasonable belief that those bulk consignments will be otherwise carried by Train Services under an existing Access Agreement;

QR will only negotiate with that Third Party Operator with respect to that request for Access in the following manner:

- (iii) QR will prepare an Indicative Access Proposal as provided in Clauses 4.4 and 4.5; but
 - (iv) QR will not be obligated to enter into further negotiations for the Access Rights unless and until it is apparent that there is a process or arrangement in place (for example, as anticipated by Paragraph 6.4(d)) to make the Committed Capacity available, or to ensure that QR only has one Access Agreement for Train Services carrying the relevant bulk consignments; and
 - (v) QR will give priority to the preparation of Indicative Access Proposals for other Access Applications that relate to Available Capacity, and in doing so the preparation of the Indicative Access Proposal may exceed the time limits specified in Clauses 4.4 and 4.5.
- (e) If QR refuses to negotiate Access with a Third Party Operator in accordance with this Subclause, it shall provide written reasons to the Third Party Operator for its refusal.
- (f) If the Third Party Operator considers that QR has unreasonably refused to commence or subsequently unreasonably ceased negotiations in accordance with this Subclause, then the Third Party Operator may refer the matter to the QCA in accordance with Subclause 4.9.4. If the QCA determines that QR has unreasonably refused to commence or subsequently unreasonably ceased negotiations, QR will recommence negotiations immediately.
- (g) If at any time QR is of the view that the Third Party Operator's request for Access is frivolous in nature then QR may refer the request to the QCA in accordance with Subclause 4.9.4 for a determination. If the QCA determines that the request is in fact frivolous then QR will be entitled to cease negotiations and will not be obliged to comply with this Undertaking in respect of the request.

QR's Explanatory Guide

The Undertaking has been developed by QR to provide certainty, for both Third Party Operators and QR, regarding the processes that will govern the negotiation of Access to QR's Rail Infrastructure. Accordingly, paragraph 4.1.2(a) provides that if a Third Party Operator fails to comply with the relevant obligations and processes set out in the Undertaking, and that failure is assessed by QR to be material, QR will advise the Third Party Operator of its assessment (and the reasons behind that assessment) in ceasing negotiations. Paragraph 4.1.2(f) of the Undertaking provides the Third Party Operator with the right to refer the matter to the QCA if it disagrees with QR's assessment of the situation. Without being exhaustive, the examples listed below illustrate some instances of non-compliance that QR is likely to consider 'material' in terms of this subclause:

- *any breach of the provisions of clause 4.2 of the Undertaking relating to confidentiality of information exchanged during Access negotiations;*
- *a refusal to provide funding for detailed scoping of infrastructure enhancements prior to the execution of an Access Agreement as provided in paragraph 4.7.2(e) of the Undertaking;*

- failure to address all the issues in subclause 4.7.2 during negotiation; and
- a failure to provide additional information or clarification of the information provided in an Access Application, as provided in paragraph 4.4(b), within what would be considered a reasonable time bearing in mind the complexity of the task.

In paragraphs 4.1.2(b) and (c), QR reserves the right not to negotiate with Third Party Operators that fail to meet QR's prudential requirements. A Third Party Operator must be able to satisfy QR that it is Solvent and that it is not currently, nor in the previous two years has been, in Material Default of an agreement with QR or an access agreement with another railway manager. Accordingly, if a Railway Operator has materially defaulted on an access agreement with a railway manager in another state (for example, Rail Access Corporation in New South Wales) within the past two years, QR may decline to negotiate Access with them.

Paragraph 4.1.2(d) is intended to ensure that QR does not:

- (i) commit the same Capacity Entitlement to more than one Railway Operator/s; or
- (ii) have Access Agreements with more than one Railway Operator where it is feasible for only one of those Railway Operators to run the relevant Train Services.

For example, one Railway Operator has a contract with a mine for the transport of five million tonnes of coal per annum and QR has an Access Agreement with that Railway Operator to provide sufficient Access Rights to enable the Railway Operator to carry the contracted quantity of coal. If another Railway Operator seeks Access from QR for the carriage of five million tonnes of coal from the same mine to the same destination and the second Railway Operator's request for Access relates to the same five million tonnes of coal currently transported by the first Railway Operator then it will not be feasible for both Railway Operators to transport this coal. In this instance, QR would only negotiate with the second Railway Operator in the manner specified in paragraph 4.1.2(d).

This paragraph is not intended to allow QR to make an assessment of whether or not there is sufficient market demand, for example in the long distance passenger Market, to justify the entrance of an additional competitor. In such a situation, provided sufficient Capacity exists, both Railway Operators could feasibly operate their Train Services.

The Undertaking provides that, where QR receives an Access Application to which paragraph 4.1.2(d) relates, it will not be obliged to enter into negotiations with the Railway Operator unless and until the Railway Operator demonstrates that Committed Capacity can be made available or that QR will not be contracted more than once for Access for Train Services carrying the relevant bulk consignments. Paragraph 6.4(d) provides one avenue through which a Railway Operator may meet this requirement, however, it is not the only avenue. For example, an end customer, such as a mining company, may directly negotiate with its existing Railway Operator for the Access Rights to be surrendered to QR.

In the event that QR receives an Access Application to which paragraph 4.1.2(d) relates, and another Access Application in respect of Available Capacity, and QR is unable to prepare an Indicative Access Proposal for both within the time limits specified in clauses 4.4 and 4.5, priority will be given to the preparation of the Indicative Access Proposal for the Access Application relating to Available Capacity.

QCA Request for Comments

QR has a legitimate business interest in retaining a capacity to refuse to negotiate with parties who represent a poor commercial risk. In the context of the draft undertaking, there is a need to balance QR's legitimate business interests with the potential anti-competitive effect of imposing unnecessarily onerous conditions on access seekers.

QR reserves the right to refuse to negotiate with Third Party Operators who are not Solvent or where QR considers there is material non-compliance with the relevant obligations and applicable processes set out in the draft undertaking (clause 4.1.2(a)). The Explanatory Guide provides a discussion of instances of non-compliance which QR is likely to consider material.³⁰

QR also reserves the right to refuse to negotiate with any Third Party Operator where it, or a related party, is currently or has been over the last two years, in material default of any agreement with QR (ie above rail, below rail or integrated service) or any agreement relating to the provision of access to rail with any railway anywhere (clauses 4.1.2(b) and (c)).

The draft undertaking provides recourse for a Third Party Operator to take a refusal by QR to negotiate to the QCA if the Third Party Operator considers that QR has unreasonably refused to commence or subsequently unreasonably ceased negotiations. QR undertakes to immediately recommence negotiations if the QCA finds it has unreasonably refused to negotiate (although the circumstances in which QR could be “required” to negotiate would be limited to where it is obliged to do so under the undertaking (clause 4.1.2(f)).

QR proposes to provide written reasons to the Third Party Operator if it refuses to negotiate access on the grounds of its prudential requirements or Committed Capacity, but does not state a timeframe within which this information will be provided (clause 4.1.2(e)).

The Authority seeks comments on whether:

- **QR reserves to itself too much discretion to refuse to negotiate**
- **the prudential requirements are overly strict (clause 4.1.2(b))**
- **the term “material default” is sufficiently clear (clause 4.1.2(c))**
- **a timeframe within which QR provides written reasons for a refusal to negotiate should be given (eg. seven days) (clause 4.1.2(e))**
- **there should be barriers to instigating dispute resolution processes (for either party) at any time (clause 4.2.1 (f))**
- **a party should be restricted from seeking orders other than a requirement that QR recommence negotiations (clause 4.2.1(f))**

QR proposes that it will not be obligated to enter further negotiations beyond an Indicative Access Proposal where a Third Party Operator seeks access to Capacity already committed to another Railway Operator, and/or Capacity that QR reasonably believes is required for carrying a bulk commodity traffic already carried by another Railway Operator under an existing Access Agreement. Further negotiations would not occur until there is a process for releasing Capacity committed to the existing operator (clause 4.1.2(d)).

A potential practical effect of these provisions is that QR operated trains could entrench their priority on the network and block new entrants into the above rail market. QR argues in its Explanatory Guide that it does not intend to stifle above rail competition. Rather, as Railway Manager, it is required to dedicate significant amounts of capacity for the freighting of bulk commodities for each end user. Once an end user has entered into a (typically) medium to long term agreement with an operator and QR has made a commitment for sufficient capacity to be provided, it is not in QR’s business interest to negotiate with another operator seeking to freight the commodity in question.

³⁰ Page 5

One option to deal with this concern might be to provide customers of bulk commodities with access rights that they can manage with any above rail operator they desire. The price in any such contract would be dependent upon the precise characteristics of the rolling stock configuration that the railway operator ultimately chooses (eg to take account of wear and tear of particular configurations). This may provide a more competitively neutral transitional arrangement for QR's existing traffics that are not the subject of long term contracts.

The Authority seeks comment on whether:

- **it is necessary for QR to limit negotiation for access where there is an existing traffic in the manner proposed (clause 4.1.2(d))**
- **the current wording of clause 4.1.2(d) could unfairly enable QR to block entrants into the market**
- **customers should be able to exercise a greater degree of control over third party access for the transportation of their commodities than is provided in the undertaking and if so, whether there is a better mechanism for addressing the issue of contestability for existing traffics than that proposed by QR**

4.2 CONFIDENTIALITY

- (a) QR and the Third Party Operator will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged as part of the negotiation for Access under this Undertaking, without the approval of the party who provided it, except where disclosure is in accordance with Paragraph (c) of this Clause. If required by either party, the parties shall enter into appropriate confidentiality arrangements to reflect this obligation.
- (b) Both QR and the Third Party Operator will ensure that all Confidential Information provided by the other party is used only for the purposes for which the information was provided. The Ringfencing Guidelines will assist QR in meeting its obligations under this Paragraph.
- (c) Paragraphs (a) and (b) of this Clause shall not apply to disclosure of Confidential Information by the party receiving the Confidential Information in any of the following circumstances:
- (i) any disclosure required by law, the listing requirements of a stock exchange or the lawful requirements of any Authority;
 - (ii) disclosure to the recipient's solicitors, barristers or accountants under a duty of confidentiality;
 - (iii) disclosure to the recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality undertaking in favour of the party who originally disclosed the Confidential Information (the "Information Provider"); and
 - (iv) any disclosure of Confidential Information to the recipient's consultant or independent adviser, other than of the type referred to in Subparagraphs (ii) or (iii) of this Paragraph, where such disclosure is approved in writing by the Information Provider, provided that such approval shall not be unreasonably withheld in the case of disclosure to a reputable consultant or independent adviser who has executed a legally enforceable confidentiality undertaking in favour of the Information Provider.

The Explanatory Guide did not address this clause.

QCA Request for Comments

The draft undertaking proposes that QR and a Third Party Operator will, at all times, protect confidential information exchanged as part of Access negotiations, and not disclose that information without the other party's approval. In addition, both parties will ensure that all confidential information is used only for the purposes for which it was provided. It appears that QR's own confidentiality arrangements require the completion of its Ringfencing Guidelines (which do not currently form part of the undertaking) to be effective.

QR makes an exception to the confidential information disclosure provisions in specific certain circumstances, including where disclosure is to a range of advisers, including the recipient's lawyers, financial institutions, consultants.

QR reserves its right to cease negotiations with access seekers who do not observe this provision. However, the draft undertaking is silent on what happens if QR breaches this provision.

The Authority seeks comments on whether:

- **the Ringfencing Guidelines should form part of the undertaking, and if so, what form should they take in order to protect confidential information**
- **a Third Party Operator should be informed of any of its confidential information that is disclosed to persons not involved in the actual negotiations**
- **the confidentiality provisions are reasonable given that QR's solicitors and advisers may be acting on behalf of QR's above and below rail operations**
- **there should be a symmetry between the consequences if QR and a Third Party Operator breach the confidentiality provisions of the undertaking, and if so, what form this should take**

4.3 ACCESS APPLICATION

- (a) Requests for Access are to be submitted to QR in the form of an Access Application.
- (b) In order for QR to assess requests for Access, certain information will be required to be provided by the Third Party Operator as part of the Access Application. Details of the required information are set out in Schedule C. Prior to submitting the Access Application, the Third Party Operator may seek initial meetings with QR to discuss the Access Application and to seek clarification of the process as outlined in this Undertaking and in particular the information requirements set out in Schedule C.
- (c) If requested by the Third Party Operator, QR will provide to the Third Party Operator information relative to the corridor of interest to assist in the formulation of the Access Application. The information provided to the Third Party Operator will be in the form of Preliminary Information and will include the information outlined in Part 1 of Schedule D, or such items of the information outlined in Part 1 of Schedule D as required by the Third Party Operator.
- (d) QR will use reasonable efforts to make the Preliminary Information available to the Third Party Operator within fourteen (14) days of QR receiving the Third Party Operator's request if the information contained in the Preliminary Information has been previously compiled, otherwise within thirty (30) days of QR receiving the request.

- (e) QR will use reasonable efforts to ensure that any information provided under Paragraph (c) of this Clause will reflect the most current information available to QR. QR will identify the currency of the information provided.
- (f) For the provision of Preliminary Information under this Clause 4.3, QR will be entitled to levy an appropriate charge commensurate with the cost of preparation and supply of the Preliminary Information.

The Explanatory Guide did not address this clause.

QCA Request for Comments

In order to assess an Access Application, QR proposes that it will require the Third Party Operator to provide detailed information concerning its planned operations (refer Schedule C of the draft undertaking).

QR will provide to a Third Party Operator, on request, Preliminary Information with respect to the corridor of interest (refer Schedule D of the draft undertaking). QR will use reasonable efforts to make the information available to the Third Party Operator within 14 days of receiving the request if the information has previously been compiled, or within 30 days otherwise. QR will make reasonable efforts to ensure that the information is the most current available. QR proposes to levy a charge for providing the Preliminary Information based on the cost of its preparation and supply. In contrast to the arrangements in NSW, QR proposes that no financial information be provided to access seekers.

An important part of the negotiation process for a prospective third party operator is likely to be the interaction between its above rail operations and below rail costs (ie access charges) which may only emerge through negotiation. As a consequence, there may be merit in an interactive preliminary process prior to lodgement of an access application which provides an access seeker with the opportunity to get feedback on the likely costs of alternative arrangements.

The Authority seeks comments on whether:

- **the information set out in Schedule C is more extensive than is likely to be necessary for QR to prepare an Indicative Access Proposal**
- **the information that QR proposes to provide to access seekers is sufficient (Schedule D)**
- **QR should be under an obligation to provide any other operational information a prospective Third Party Operator reasonably requires if the Third Party Operator pays QR's reasonable costs in providing the information (clause 4.3(c))**
- **a "reasonable efforts" obligation to ensure that the information QR provides Third Party Operators is up-to-date and accurate is appropriate (ie what responsibility should QR take for the accuracy of information it provides to access seekers) (clause 4.3(e))**
- **it is reasonable for QR to charge fees for information it provides, and if so, should the basis for the charge be established as part of the undertaking (clause 4.3(f))**
- **a preliminary access process prior to the lodgement of an Access Application has merit**

4.4 ACKNOWLEDGMENT

- (a) Upon receiving an Access Application from a Third Party Operator, QR must acknowledge the Access Application in writing to the Third Party Operator within seven (7) days of its receipt or such longer period as specified in accordance with Paragraph (b) of this Clause. Subject to Paragraph (c) of this Clause, QR will use reasonable efforts to provide the Indicative Access Proposal to the Third Party Operator within thirty (30) days of such acknowledgment.
- (b) Prior to acknowledging the Access Application, QR may seek:
- (i) additional information where QR can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal; or
 - (ii) clarification of the information that has been provided in the Access Application.

In such circumstances, QR will advise the Third Party Operator of the additional information or the clarification required within seven (7) days of receipt of the Access Application. Upon receiving the required information or clarification from the Third Party Operator, QR must provide written acknowledgment of the receipt of the completed Access Application within seven (7) days.

- (c) In assessing an Access Application, QR may consider that, due to the complexity of the Access Application or due to other extenuating circumstances, it is not reasonable to provide an Indicative Access Proposal within thirty (30) days of acknowledgment of the Access Application. In these circumstances, QR will advise of such in its acknowledgment and within a further seven (7) days will advise the Third Party Operator of its estimate of the time required to deliver the Indicative Access Proposal. Where the Third Party Operator is of the view that the time estimated for preparation of the Indicative Access Proposal pursuant to this Paragraph is excessive, then the Third Party Operator may refer the matter to the QCA for a determination in accordance with Subclause 4.9.4. QR will use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by QR or as otherwise determined by the QCA pursuant to this Paragraph.

QR's Explanatory Guide

For the purposes of paragraph 4.4(b), QR is likely to seek additional information from a Third Party Operator where the Access Application is incomplete or the information provided begs another question that has not been answered by the Third Party Operator. For example, QR may require additional information where the Third Party Operator has not nominated the start date for its proposed operation, or if it does not require Access to QR stations but equally does not advise that it will require a connection to private infrastructure. For the purpose of paragraph 4.4(b), QR is likely to seek clarification where, for example, there appear to be errors in the data and/or calculations included in an Access Application, or a Third Party Operator requests something that varies greatly from existing standards (for no apparent reason) and will result in a disproportionately high indicative Access Charge.

The Undertaking provides, in paragraph 4.4(c), that in extenuating circumstances, QR may not be able to provide an Indicative Access Proposal within 30 days of acknowledging an Access Application. Such extenuating circumstances may include:

- *major impediments to the provision of sufficient Capacity to meet the requirements of a Third Party Operator;*

- *fundamental change in the technical or operating parameters for a corridor such as an increase in axle load or Train length, which requires a detailed investigation before any meaningful Access Charge can be calculated; and*
- *abnormal work commitments within Network Access.*

QCA Request for Comments

QR proposes to provide a number of commitments upon receiving an Access Application including:

- providing a written acknowledgment within seven days of receipt; or
- seeking additional information or clarifying existing information within seven days of receipt and acknowledging receipt of such information within a further seven days.

QR undertakes to provide an Indicative Access Proposal within 30 days of acknowledgment of an Access Application, unless extenuating circumstances exist. In these cases QR undertakes to notify the applicant of the expected delivery of the Indicative Access Proposal within 7 days of acknowledgment and use reasonable efforts to meet this timeframe.

The Authority seeks comments on whether:

- **the timeframes outlined in these clauses are reasonable**

4.5 INDICATIVE ACCESS PROPOSAL

(a) The Indicative Access Proposal will set out:

- (i) the Rollingstock and Rollingstock Configurations to which the Indicative Access Proposal applies;
- (ii) a summary of the applicable operating characteristics (e.g. frequency, transit time, commodity carried);
- (iii) an indicative assessment of whether there is sufficient Available Capacity to accommodate the requested Access Rights and, if not, either an outline of the works and an indicative estimate of the cost of such works, required to provide the additional Capacity necessary to accommodate the requested Access Rights, or an outline of the requirements for an investigation into the provision of sufficient Capacity for the requested Access Rights;
- (iv) advice in respect of the existence of other Railway Operators who have submitted an Access Application (except an Access Application in respect of which the time period specified in Paragraph 4.6(a) has expired without a notification of intent having been received by QR) in respect of Access which, if it were to be provided, would limit the ability of QR to provide Access in accordance with the Indicative Access Proposal.
- (v) a summary of the standard terms and conditions under which Access is offered, as set out in Schedule E;
- (vi) an initial estimate of the Access Charge for the requested Access Rights, based on the pricing principles set out in Part 5; and

- (vii) details of the additional information required for QR to progress the proposal and develop the Access Charge and terms and conditions for acceptance. Typical information requirements to be addressed are outlined in Paragraph 4.7.2(a).
- (b) The Indicative Access Proposal will, unless it contains specific provisions to the contrary, contain indicative arrangements only and does not oblige QR to provide Access in accordance with the specific terms and conditions, including Access Charge, contained within it.
- (c) If, after thirty (30) days following QR’s acknowledgment of the Access Application, or if applicable after expiration of the time estimated by QR or determined by the QCA in accordance with Paragraph 4.4(c), the Third Party Operator believes that QR is not making reasonable progress in the preparation of the proposal, then the Third Party Operator may refer the matter to the QCA for a determination in accordance with Subclause 4.9.4.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes to develop Indicative Access Proposals which will set out non-binding indicative arrangements in relation to:

- the relevant Rolling Stock and Rolling Stock Configurations;
- a summary of applicable operating characteristics;
- Available Capacity;
- advice as to other Railway Operators seeking Capacity;
- a standard Access Agreement;
- an initial estimate of the Access Charge for the requested Access Rights; and
- details of additional information required for QR to develop the terms and conditions of Access and the Access Charge.

If a Third Party Operator considers that QR is not making reasonable progress in preparing an Indicative Access Proposal, it may refer the matter to the QCA for a determination. However, it may only instigate this process after the time QR allows itself to provide the Indicative Access Proposal has expired.

The Authority seeks comments on whether:

- **QR should provide information on how the need for additional capacity has been determined and detailed costing estimates for the works (clause 4.5(a))**
- **A Third Party Operator should have its right to instigate dispute resolution processes limited as QR proposes (clause 4.5(c))**

4.6 NOTIFICATION OF INTENT

- (a) If the Third Party Operator intends to progress its Access Application under the negotiation process set out in this Undertaking on the basis of the arrangements outlined in the Indicative Access Proposal, the Third Party Operator must notify QR of its intention in writing, within ninety (90) days of the date it receives the Indicative Access Proposal (or such other period of time that the parties agree). In the event that a notification is given after this period of time, QR

will review the Indicative Access Proposal and, if considered necessary by QR, prepare a revised Indicative Access Proposal in accordance with Clause 4.5, and the negotiation process outlined in this Part 4 will recommence from that point.

- (b) Should the Third Party Operator be of the view that the Indicative Access Proposal has not been prepared in accordance with this Undertaking and would therefore not be an appropriate basis for continuing with the negotiation process under this Undertaking, then the Third Party Operator shall notify QR of its concerns in writing within thirty (30) days of the date of receipt of the Indicative Access Proposal.
- (c) QR will respond to these concerns including, where appropriate, the making of revisions to the Indicative Access Proposal, within a reasonable time frame. If the Third Party Operator is satisfied with the response received from QR, including any revision to the Indicative Access Proposal, it must notify QR of its intention to proceed with negotiations within thirty (30) days of receiving QR's response. In the event that the Third Party Operator is not satisfied with the response from QR, including any revision to the Indicative Access Proposal, the Third Party Operator may seek to resolve the dispute in accordance with the dispute resolution process outlined in Clause 4.9. The Third Party Operator must commence this dispute resolution process within thirty (30) days of receiving QR's response.
- (d) Where a dispute is referred for resolution in accordance with Paragraph (c) of this Clause, then the Third Party Operator must notify QR of its intentions in writing within fourteen (14) days of resolution of the dispute if the Third Party Operator wishes to proceed further with its Access Application, on the basis of the arrangements outlined in the Indicative Access Proposal including any amendments made as a result of the referral.

The Explanatory Guide did not address this clause.

QCA Request for Comments

The draft undertaking proposes that a Third Party Operator wishing to proceed to the access negotiation phase must notify QR of its intention in writing within 90 days of receiving an Indicative Access Proposal (unless otherwise agreed). If QR receives a notification of intent after this limit, it reserves the right to revise the Indicative Access Proposal. However, QR does not propose to provide the access seeker with written advice outlining the reasons for any revisions.

A prospective Third Party Operator concerned that an Indicative Access Proposal has not been prepared in accordance with the undertaking will need to notify QR within 30 days of its receipt. QR proposes to impose a further limitation of 30 days for a prospective Third Party Operator to trigger the dispute resolution process after receipt of a response from QR (whether that response takes the form of a revised Indicative Access Proposal or, if QR considers appropriate, a refusal to provide such a Proposal). In addition, the prospective operator must also notify QR in writing within 14 days of dispute resolution if it wishes to proceed with an Access Application.

The Authority seeks comment on whether:

- **the time limits imposed upon Third Party Operators are reasonable**
- **Third Party Operators should be restricted by the undertaking in relation to the triggering of dispute resolution or the issues to be resolved in the dispute resolution process**

4.7 NEGOTIATION PROCESS

4.7.1 Negotiation Period

- (a) If the Third Party Operator indicates its willingness to progress negotiations pursuant to Clause 4.6, then both parties shall commence negotiations as soon as reasonably possible to progress towards an Access Agreement.
- (b) The Negotiation Period shall commence upon the Third Party Operator providing a notification of intent pursuant to Clause 4.6.
- (c) The Negotiation Period will cease upon any of the following events:
 - (i) execution of an Access Agreement in respect of the Access sought by the Third Party Operator;
 - (ii) written notification by the Third Party Operator that it no longer wishes to proceed with its Access Application;
 - (iii) a reduction in Available Capacity resulting from another Railway Operator finalising an Access Agreement, where that reduction in Available Capacity adversely impacts upon QR's ability to offer Access to the Third Party Operator under the terms of the Indicative Access Proposal;
 - (iv) the expiration of nine (9) months from the commencement of the Negotiation Period, or if both parties agree to extend the Negotiation Period, the expiration of the agreed extended period, provided that agreement to extend the Negotiation Period is not unreasonably withheld by either party; or
 - (v) if QR is of the view that the negotiations are not progressing in good faith towards the development of an Access Agreement within a reasonable time period and QR refers the application to the QCA in accordance with Subclause 4.9.4 for a determination, a determination by the QCA in QR's favour.
- (d) Upon cessation of the Negotiation Period, QR will be entitled to cease negotiations with the Third Party Operator.
- (e) If at any time during the Negotiation Period, a dispute arises between the parties which, after reasonable negotiation, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process outlined in Clause 4.9.

QR's Explanatory Guide

Sub-paragraph 4.7.1(c)(iii) reflects the operation of paragraph 6.3.2(b) of the Undertaking: if two or more Railway Operators seek Access to mutually exclusive Access Rights, QR may finalise an Access Agreement with the Railway Operator willing to agree to terms and conditions of Access that are considered by QR to be most favourable to the commercial performance of Below Rail Services. Mutually exclusive Access Rights are Access Rights that overlap such that only one Railway Operator is capable of operating their proposed Train Services in the absence of Capacity expansion, the cost of which cannot be commercially achieved. For example, if there is Capacity for one Train per day available, and expanding Capacity would require the replacement of a major bridge, then if two Railway Operators sought Access for the operation of one Train per day and it was not commercially viable to replace the bridge so that both Railway Operators can operate, mutually exclusive Access Rights would exist. Once QR has signed an Access Agreement with one Railway Operator, it is no longer in a position to negotiate with the other Railway Operator in respect of the Access it has sought and accordingly, Access negotiations with that party in respect of that Access will cease.

QCA Request for Comments

The draft undertaking establishes a number of grounds for terminating a Negotiation Period including:

- a reduction in Available Capacity resulting from another Railway Operator finalising an Access Agreement with QR such that QR cannot offer access to the Third Party Operator under the terms of the Indicative Access Proposal; and
- the expiration of nine months (or an agreed extended period) from the commencement of the Negotiation Period provided agreement is not unreasonably withheld.

Cutting off negotiations with the access seeker where, for example, QR's reduction in available capacity is in respect of a QR above rail group whose contract was expedited to take up the available capacity, would raise significant sensitivities from a competition perspective (refer to discussion of clause 6.3.2). An auction process may provide a more efficient means of achieving the objective of allocating traffic to its highest value use or alternatively, where there is a reduction in available capacity, QR could perhaps continue to negotiate on revised terms (bearing in mind the propensity for queuing protocols to deal with this issue).

The Authority seeks comments on whether:

- **it is appropriate that any reduction in Available Capacity should allow QR to end negotiations completely (clause 4.7.1)**
- **an auction process would provide a better means of protecting QR's and access seeker's legitimate business interests whilst efficiently rationing scarce capacity**
- **capacity information should be publicly available, and if so, what aspects**

4.7.2 Issues to be addressed during Negotiation

- (a) During the Negotiation Period, QR and the Third Party Operator will negotiate and agree on the elements comprising the Access Agreement. In order to facilitate this process:
- (i) QR will provide Additional Information relative to the corridor of interest to the Third Party Operator, which will include any information outlined in Part 1 of Schedule D not provided as part of the Preliminary Information and the information outlined in Part 2 of Schedule D, to the extent that such information is required either by the Third Party Operator or as part of the Access Agreement;
 - (ii) an Operating Plan is to be prepared by the Third Party Operator in accordance with Clause 7.2;
 - (iii) a Safety Risk Assessment is to be undertaken by the Third Party Operator, jointly with QR, in accordance with Subclause 7.3.1;
 - (iv) a Safety Risk Management Plan is to be developed and agreed in accordance with Subclause 7.3.2;
 - (v) an Environmental Investigation is to be undertaken by the Third Party Operator in collaboration with QR in accordance with Subclause 7.4.1 and an Environmental Risk Management Plan is to be developed and agreed in accordance with Subclause 7.4.2;
 - (vi) an Access Charge, determined in accordance with the principles set out in Part 5, is to be provided by QR;

- (vii) a Capacity Analysis and an investigation of operational impacts are to be undertaken by QR and necessary Capacity enhancements to accommodate Access by the Third Party Operator are to be advised by QR;
 - (viii) the definition of the relevant Capacity Entitlement and advice of initial timetable are to be provided by QR, consistent with Part 6;
 - (ix) the Third Party Operator is to demonstrate that the Rollingstock and Rollingstock Configurations for which the Access Rights are applicable are consistent with the Rollingstock Interface Standards in accordance with Clause 7.1;
 - (x) an Interface Coordination Plan is to be prepared by QR in consultation with the Third Party Operator in accordance with Clause 7.6; and
 - (xi) other terms and conditions comprising the Access Agreement are to be provided by QR.
- (b) Where the Additional Information (or part thereof) is not available at the time of commencement of the Negotiation Period, QR will use reasonable endeavours to supply the information required by the Third Party Operator (to the extent the information required is consistent with Schedule D) as soon as practicable. QR will use reasonable efforts to ensure that any information provided will reflect the most current information available to QR. QR will identify the currency of the information provided.
- (c) For the provision of Additional Information under this Subclause 4.7.2, QR will be entitled to levy an appropriate charge commensurate with the cost of preparation and supply of the information.
- (d) In respect of the details required to be developed by the parties in accordance with Paragraph (a) of this Subclause, the parties may agree to finalise certain aspects after the execution of the Access Agreement. In such circumstances the parties may choose to address the issue in question in a preliminary manner only during the Negotiation Period and then provide a mechanism to address any subsequently identified cost or operating impact after execution of the Access Agreement.
- (e) QR will be responsible for the investigation and design of any necessary enhancements for the Rail Infrastructure. However, if prior to entering into an Access Agreement the Third Party Operator requires detailed scoping of the enhancements which are required directly to facilitate the Access Rights under negotiation, QR will be entitled to require that the Third Party Operator provide funding in respect of such investigation and design.
- (f) In the event that, at any time prior to the execution of an Access Agreement with the Third Party Operator, another Railway Operator (other than a Railway Operator that was the subject of advice provided in the Indicative Access Proposal pursuant to Subparagraph 4.5(a)(iv)) submits an Access Application where that Access would limit the ability of QR to provide Access in accordance with the Access Rights being negotiated, QR will notify the Third Party Operator of the existence of the Access Application prior to the provision of an Indicative Access Proposal to the other Railway Operator.

QR's Explanatory Guide

Paragraph (d) of this subclause allows QR and a Third Party Operator to agree to finalise certain aspects of the identified negotiation requirements after execution of the Access Agreement. For example, commitment to an Access Agreement may be required before it is possible to finalise all details, in order to secure financial backing for a project. Where the parties have agreed to finalise details following execution of the Access Agreement, the satisfactory finalisation of outstanding matters will be a condition precedent to the Third Party Operator commencing operations upon the Rail Infrastructure. Finalisation of outstanding issues after execution of an Access Agreement may result in consequential amendments to other terms and conditions of the Access Agreement (including Access Charge). For instance, it is possible that a Third Party Operator will not have possession of its Rollingstock at the time of negotiating and signing an Access Agreement. Although, it will contract on the understanding it has in relation to the specifications of its Rollingstock, amendment to Rollingstock design during construction may have the result that, once delivered, the Rollingstock differs to an extent that requires the terms of the Access Agreement to be altered. In this instance, the detail of the Rollingstock Interface Standards may only be able to be finalised following construction of the Rollingstock. Any variation to the Rollingstock Interface Standards may have cost implications to QR and would therefore require a change in the Access Charge. The Rollingstock will have to be authorised after execution of the Access Agreement but before operation of the Train Services.

Paragraph (e) of this subclause allows QR to require a Third Party Operator to provide the funding for a detailed investigation and the design of infrastructure enhancements necessary for the Access Rights sought by the Third Party Operator, if the Third Party Operator requires such investigation and design to occur prior to finalisation of the Access Agreement. If the Third Party Operator is happy to leave this work until after the Access Agreement has been signed (as would normally be the case), the cost of such work will be met by the Third Party Operator in the manner provided for in the Access Agreement. This paragraph provides QR with the security of being able to recover the cost of such project specific work notwithstanding the Third Party Operator in question subsequently declines to proceed with its Access Application.

Paragraph 4.7.2(f) provides that if, after providing an Indicative Access Proposal but prior to executing an Access Agreement with one Railway Operator, a second Railway Operator submits an Access Application in respect of Access that would adversely affect QR's ability to provide Access in accordance with the Indicative Access Proposal provided to the first Railway Operator, QR will notify the first Railway Operator of the existence of the second Railway Operator's Access Application prior to providing an Indicative Access Proposal to the second Railway Operator.

QCA Request for Comments

This clause outlines the matters the parties are to address during the negotiation phase. QR reserves the right to charge for the information it provides. QR undertakes to use reasonable efforts to provide the most current information available to QR.

Clause 4.7.2(f) provides that where another Third Party Operator seeks Capacity via submission of an Access Application and this usage affects the Access Rights being negotiated, the first Third Party Operator will be informed of the Access Application before provision of an Indicative Access Proposal to the other Railway Operator.

The draft undertaking proposes that QR will be responsible for the investigation and design of any necessary enhancements for the Rail Infrastructure. The practical implication of this proposal is that QR will be the sole arbiter of the capacity of its network and how it may be increased. An issue arises as to the merits of a greater involvement for access seekers in capacity enhancements. It is likely that the more information that is publicly available on QR's capacity, the less potential there will be for disputes to arise in relation to it.

The Authority seeks comments on whether:

- a “reasonable efforts” obligation to ensure that the information QR provides Third Party Operators is up-to-date and accurate is appropriate (clause 4.7.2(b))
- it is reasonable that QR charges fees for information it provides, and if so, should the basis for the charge be established as part of the undertaking (clause 4.7.2(c))
- QR should set specifications for its network rather than design interconnecting works to enable a Third Party Operator to design its own enhancements for approval by QR according to previously advised specifications (clause 4.7.2(e))

4.8 ACCESS AGREEMENT

- (a) The granting of Access will be underpinned by an Access Agreement which will be developed and finalised as part of the negotiation process. The parties to the Access Agreement will be QR and the Railway Operator for the relevant Train Services.
- (b) The Third Party Operator need not have received Accreditation as a Railway Operator prior to execution of the Access Agreement but must obtain such Accreditation prior to the commencement of Train Services and subsequently maintain its Accreditation for the duration of the Access Agreement.
- (c) The Access Agreement must, unless otherwise agreed between QR and the Third Party Operator, be consistent with the principles outlined in the standard Access Agreement summary which is contained in Schedule E. The summary of the standard Access Agreement does not provide an exhaustive list of the issues that may be included in an Access Agreement.
- (d) Once the Third Party Operator has notified QR that it is satisfied with the terms and conditions of the Access Agreement as drafted, QR will, as soon as reasonably practicable, provide a final Access Agreement (or, where appropriate, an amendment to an existing Access Agreement) to the Third Party Operator for execution.
- (e) The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after its completion by QR.

QR’s Explanatory Guide

The summary of the Access Agreement in schedule E does not provide a detailed summary of all issues addressed in an Access Agreement, although it is intended to outline all major issues likely to be dealt with in an Access Agreement. The different circumstances in which Railway Operators are likely to operate mean that there will be an indeterminate range of possible variations in approach to the relevant issues. The summary cannot and does not spell out all of these possible variations.

OCA Request for Comments

Unless otherwise agreed, the Access Agreement must be consistent with the principles outlined in the standard Access Agreement (Schedule E – discussed below), although QR allows itself flexibility to add further conditions. The undertaking also provides scope for other agreed conditions to be included in an Access Agreement. Other Australian rail access providers, such as the Rail Access Corporation (NSW) and Australian Rail Track Corporation (national), produce standard form access agreements.

The parties to an Access Agreement will be QR and the Third Party Operator (not the end customer). There is an issue as to whether the undertaking should also deal with customers seeking to organise access rights which they can then arrange for a third party operator to deliver on their behalf. This “unbundling” would provide customers who want additional control over their rail freight to gain it through the direct negotiation of access rights (refer to discussion at clause 4.1.2(d)).

Schedule E provides for the following:

- Access Charges, including the payment of a security deposit and resolution of disputed amounts owing;
- Train Service entitlements, including the possible reduction of Access Rights;
- day-to-day train movements, including conferring upon QR exclusive responsibility for train control;
- train operations, including QR reserving the right to vary Safeworking Procedures at any time and neither party being liable for delays not caused by wilful default. QR also reserves the right to change a Third Party Operator's performance levels if it consistently fails to meet those levels. QR may also prevent operation of a service where it has a reasonable belief that rolling stock is loaded in excess of allowed limits or in an unsafe or insecure manner (although QR is under no liability should its belief be wrong);
- infrastructure management;
- incident management, under which QR reserves the right to coordinate and manage all incident responses;
- environmental protection, under which QR can terminate an Agreement (following an environmental investigation, environmental risk management plan, or any independent audit) if it is reasonably satisfied that it will face an unacceptable risk of liability. Before terminating an Agreement, an independent expert review is required of the material upon which QR based its decision. However, QR is not bound by the findings of the expert report nor does the Third Party Operator have a right to see the report.
- each party to warrant it is accredited prior to the commencement of Train Services;
- Third Party Operator's staff – where QR requires the Third Party Operator to demonstrate the competence of its staff (including holding all necessary qualifications). QR reserves the right to temporarily suspend Third Party Operator's staff if they breach any law, a QR train control direction, or QR Safeworking Procedures and Safety Standards;
- risk management;
- the Third Party Operator must effect all insurances required by QR, with QR to approve the terms and conditions of insurance policies;
- indemnities and liabilities;
- limitation of liability, which provides that neither party will be liable for any consequential loss or damage or loss of profits and imposes a requirement that claims by either party be lodged within six months of the event;
- material change, where QR and a Third Party Operator will enter into good faith negotiations to determine if amendments to an Access Agreement are necessary as a result of changes which may give rise to an additional cost or variation to QR's performance of its contractual obligations. However, Access Charges are to be adjusted to reflect the impact of any material change including, but not limited to, changes in taxes, laws and government funding;
- dispute resolution;
- events of default (no details provided in the draft undertaking);
- the circumstances in which QR may suspend a Third Party Operator;

- force majeure events which are undefined but nevertheless require a Third Party Operator to continue to pay money to QR even though its rights to operate are suspended;
- termination events (again undefined);

The Authority seeks comments on whether:

- **Schedule E should incorporate a standard form Access Agreement**
- **the following principles are appropriate to underpin the formation of access agreements:**
 - **an efficient allocation of risk (which requires that any particular risk be assigned to the party who can most cost effectively minimise the contingency);**
 - **be even handed;**
 - **allow commercial negotiation; and**
 - **subject to the above, be consistent with rail contracts in other jurisdictions**
- **the payment terms and conditions are reasonable and even handed ie is the lodgement of an irrevocable bank guarantee necessary to protect QR's legitimate business interests? (Access Charges)**
- **Access Agreements should be designed so as to incorporate an incentive framework to improve performance and to compensate for bad performance (eg to avoid persistent failure by either party in meeting service standards and requirements) (Train Operations)**
- **QR should be able to amend Rolling Stock Interface Standards (Train Operations)**
- **an operator's obligations to QR should be subject to the overriding requirement that the operator and QR comply with the *Transport Infrastructure Act 1994* (Incident Management)**
- **it is appropriate that QR be capable of terminating Access Agreements on environmental grounds even though there may have been no breach of environmental legislation (Environmental Protection and Other Issues)**
- **QR's requirements in relation to Third Party Operator's staff are excessive (Third Party Operators Staff)**
- **insurances should be specified in the Access Agreement rather than be left to QR's discretion (Insurance by Operator)**
- **indemnities should be reciprocal (Indemnities and Liabilities)**

- QR should be liable for recently foreseeable consequential losses in facts or omissions (Limitation of Liability)
- events of default should be defined in the undertaking (Events of Default)
- the circumstances of suspension are reasonable (Suspension)
- the meaning of “force majeure” should be set out in the undertaking (Force Majeure)
- a party’s access charges should continue to apply even though its services are suspended through force majeure (Force Majeure)
- should QR compensate affected Third Party Operators for any of the following circumstances:
 - reassignment of Access Rights
 - adverse change in Safeworking Procedures
 - poor train operations and performance
 - frivolous investigations (including the cost of the audit)
 - QR taking possession of track
 - changes in a Third Party Operator’s rights which adversely affect its operations
 - consequential losses arising from QR’s conduct
 - changes in QR’s operational practices which adversely affect a Third Party Operator’s rights

4.9 DISPUTE RESOLUTION

4.9.1 Disputes

- (a) If any dispute or question (“Dispute”) arises under this Undertaking or in relation to the negotiation of Access between a Third Party Operator and QR then, unless otherwise expressly agreed to the contrary by both parties, such Dispute shall be resolved in accordance with this Clause 4.9 and either party may give to the other party to the Dispute notice in writing (“Dispute Notice”) specifying the Dispute and requiring that it be dealt with in the manner set out in this Clause 4.9.
- (b) Disputes in relation to an Access Agreement once executed shall be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking.

4.9.2 Chief Executive Resolution

Unless otherwise agreed by both parties or provided for in this Undertaking, any Dispute shall be referred in the first instance and in any event within seven (7) days of the Dispute Notice to the Chief Executive of QR (or their nominee) and the Chief Executive of the Third Party Operator (or their nominee) for the purposes of this Subclause 4.9.2 for resolution. Failing such resolution within fourteen (14) days, the relevant Dispute may, by agreement between QR and the Third Party Operator, be referred for resolution by an expert in accordance with Subclause 4.9.3. Failing such agreement, either party may refer the dispute to the QCA in accordance with Subclause 4.9.4.

4.9.3 Expert Resolution

Where a matter is referred to an expert then the following shall apply:

- (a) An expert shall be appointed by the parties, or where agreement cannot be reached by the parties within fourteen (14) days, in the case of financial matters, by the President for the time being of the Australian Society of Certified Practising Accountants and, in the case of non-financial matters, the President for the time being of the Institution of Engineers, Australia.
- (b) In any event the expert shall:-
 - (i) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
 - (iii) not be an employee of the Third Party Operator or QR or of a Related Party of either of them.
- (c) The expert appointed pursuant to this Subclause shall not act until the expert has given written notice of the acceptance of his or her appointment to both parties.
- (d) Any determination made by an expert in relation to a Dispute must be consistent with the provisions of this Undertaking.
- (e) The expert will provide both parties with a copy of the determination in relation to the Dispute within a reasonable time after his or her appointment.
- (f) The expert appointed pursuant to this Subclause shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties.
- (g) Any person nominated as an expert hereunder shall be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration including without limitation, the Commercial Arbitration Act 1990 (Qld), as amended, shall not apply to the expert or to the determination or to the procedures by which the expert may reach that determination.
- (h) In the absence of manifest error, the decision of the expert shall be final and binding upon the parties. If a party believes that there has been a manifest error it may refer the matter to the QCA for a determination. If the QCA determines that there has been a manifest error, then the parties may agree to refer the dispute to another expert in accordance with this Subclause 4.9.3, or failing such agreement, either party may refer the dispute to the QCA for resolution in accordance with Subclause 4.9.4.
- (i) The costs of the expert and any advisers shall be borne by the parties in such proportions as determined by the expert.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes to establish a three tiered approach to disputes arising under the undertaking. Initially disputes are to be referred to the chief executive of the respective parties or their nominees.

Failing resolution of the dispute by the chief executives, the dispute may be referred to either an expert or to the QCA. QR proposes that in the absence of manifest error, the decision of the expert shall be final and binding upon the parties.

If a party believes there has been a manifest error, it may refer the matter to the QCA for a determination. If the QCA finds that a manifest error has occurred, the parties may agree to refer the dispute to another expert or, failing agreement, either party may refer the dispute to the QCA. QR proposes that if a Third Party Operator does not comply with a decision of the expert, it will not be entitled to refer the dispute to the QCA and QR will no longer be obligated to continue access negotiations with the operator.

The Authority seeks comments on whether:

- **chief executive resolution is appropriate for QR given its vertically integrated status (clause 4.9.2)**
- **QR should be exposed to penalties if it does not comply with an expert's decision (clause 4.9.3)**

4.9.4 Determination by the Queensland Competition Authority

- (a) If a Dispute is referred to the QCA in accordance with this Clause 4.9, or as otherwise specified in accordance with this Undertaking, then Division 5 of Part 5 of the Act shall apply subject to any determination by the QCA being consistent with the provisions of this Undertaking.
- (b) Except in the circumstances outlined in Paragraph 4.9.3(h), if a Third Party Operator does not comply with a decision of an expert pursuant to Subclause 4.9.3 then the Third Party Operator will not be entitled to refer that dispute to the QCA and QR will no longer be obligated to continue negotiations regarding the provision of Access for that Third Party Operator.
- (c) If a Third Party Operator does not comply with a decision of the QCA pursuant to this Subclause, then QR will no longer be obligated to continue negotiations regarding the provision of Access for that Third Party Operator.
- (d) If an issue is referred to the QCA for determination as specified in accordance with this Undertaking, but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the Act, then the QCA will make a determination through any process that it considers appropriate, subject to any determination by the QCA being consistent with the provisions of this Undertaking.

The Explanatory Guide did not address this clause.

The Authority did not address this clause.

PART 5. PRICING PRINCIPLES

QCA Request for Comments

The pricing principles that are adopted in the undertaking will be critical to protecting the legitimate business interests of both QR and potential third party operators. For example, if QR is prevented from generating sufficient revenue, it will have no incentive to undertake investment in, and maintenance of, its infrastructure, which clearly is not in the long term interests of users. On the other hand, QR's access prices should not be set at such a level that the entry of third party operators into the above rail market is precluded. In addition, access prices which discriminate between QR's above rail groups and third party operators, or between different third party operators, on other than cost grounds are likely to hinder the development of competition in the above rail market.

Rail infrastructure (and its associated below rail services) exhibits economies of scale arising from the large fixed (and sunk) costs associated with investment in the rail infrastructure and associated facilities (eg signalling). Leaving aside congestion costs (which are discussed below), additional users impose few additional costs on the network. As traffic increases in a rail corridor, costs remain essentially unchanged and can be spread over the greater volume of traffic, thus reducing unit costs. Consequently, setting prices on the basis of recovering the cost of production of an additional unit would not allow QR to break even.

This position is further complicated by the fact that different traffics have differing capacities to pay. In order to address this problem, QR is proposing to adopt what is known as a constrained market pricing or a 'floor/ceiling' approach to the setting of access prices. Access prices are negotiated within the band set by the price floor and price ceiling. The floor/ceiling approach to pricing has been adopted by the NSW Rail Access Corporation as part of the NSW Rail Access Regime and is common in the United States.

5.1 PRICING OBJECTIVES

In developing Access Charges, QR's overriding objective is, over time, to achieve revenue adequacy (as defined in Subclause 5.1.1). In order to do this, QR will endeavour to maximise the commercially viable utilisation of the Rail Infrastructure through observing the processes identified in Subclause 5.1.3, however, within this context, QR will observe the constraints on price differentiation identified in Subclause 5.1.2.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes that its overriding objective, over time, is to achieve revenue adequacy. It proposes to pursue this objective by maximising the commercially viable utilisation of the Rail Infrastructure. QR also proposes to observe a constraint on price differentiation.

A particularly sensitive issue is that the constrained market pricing approach provides QR with the discretion to charge third party operators different prices for similar services depending on QR's assessment of their ability to pay. In practice, QR could potentially engage in price differentiation to entrench its own traffics at the expense of third party operators.

The Authority seeks comments on:

- **the appropriateness of QR's proposed pricing objectives (clause 5.1)**
- **how conflicts between the pricing objectives (eg between revenue adequacy and ensuring that Railway Operators are treated on an equal basis) should be resolved**

5.1.1 Revenue Adequacy

- (a) QR will be entitled to earn revenue from the provision of Access, including both Access Charges and Infrastructure Payments, that is sufficient to achieve full recovery of reasonable costs, including a commercial rate of return on the value of assets reasonably required for the long term sustainable provision of Rail Infrastructure.
- (b) In order to achieve the objective identified in Paragraph (a) of this Subclause, QR is entitled to target earning a revenue stream such that:
- (i) QR is able to recover all costs incurred in the provision and management of the Rail Infrastructure (including business and corporate overheads), provided that such costs reflect the reasonably expected improvements in efficiency that QR should achieve; and
 - (ii) QR is able to, on average, earn a risk-adjusted commercial rate of return on the value of all assets reasonably required for the provision of Access, taking account of the investment requirements for Rail Infrastructure enhancements and, where there is an ongoing requirement for the Rail Infrastructure, asset replacement.

The Explanatory Guide did not address this clause.

QCA Request for Comments

The draft undertaking defines revenue adequacy as revenue that is sufficient to achieve full cost recovery of 'reasonable costs' (which is defined to include all costs, provided that such costs reflect 'reasonably expected improvements in efficiency that QR should achieve'), including a risk-adjusted commercial rate of return on the value of assets 'reasonably required' for the long term sustainable provision of Rail Infrastructure.

The Authority seeks comments on whether:

- **it is reasonable that QR recovers costs which reflect the "reasonably expected improvements in efficiency that QR should achieve", and if so how might such costs be determined (clause 5.1.1(b)(i))**
- **users should pay for Government directions to QR (eg relating to there being no forced relocations or redundancies of QR staff)**
- **the appropriate test should be what is "reasonably required" or what is "efficiently required" in the context of the provision of Rail Infrastructure**

5.1.2 Limits on Price Differentiation

- (a) Subject to Paragraph (c) of this Subclause, where Railway Operators are directly competing with each other for the purpose of providing a specified transport service, these Railway Operators will be offered consistent Access Charges when they negotiate for Access. A specified transport service is one which carries a specified commodity between a specified origin and destination. For the purpose of this Paragraph, Access Charges are considered to be consistent when differences in the Access Charges only reflect differences in the costs or risks to QR of providing Access as a result of, for example, the standard or type of Train Service, the Rollingstock used or the conditions of Access.
- (b) Subject to Paragraph (c) of this Subclause, where Railway Operators are not directly competing with each other as contemplated in Paragraph (a), but are providing Train Services for the same commodity type within the same Geographic System, when these Railway Operators negotiate

for Access, QR will take a consistent approach to the determination of Access Charges for such Train Services, taking into account the characteristics of the Rail Infrastructure and the Train Services operating on that Rail Infrastructure.

- (c) Access Charges may vary over time. Paragraphs (a) and (b) of this Subclause relate to Access negotiations that occur at a similar time and does not require QR to develop Access Charges in a current negotiation with regard to Access Charges incorporated in existing Access Agreements. Rather, QR will give Railway Operators the opportunity to incorporate rate review provisions in Access Agreements to reflect, for example, changes in an applicable Reference Tariff.

QR's Explanatory Guide

Paragraph 5.1.2(a) requires, subject to paragraph 5.1.2(c), that where different Railway Operators are competing to provide the same specified transport service they will be offered consistent Access Charges.

A 'specified transport service' is one which carries a specified commodity between a specified origin and specified destination. For example:

- *the haulage of grain from grain terminal X to port Y;*
- *the carriage of commuter passengers from A to B in the peak period; or*
- *the haulage of coal from coal mine D to port E.*

A 'consistent Access Charge', for the purposes of this subclause, is an Access Charge which differs (from the Access Charge it is being compared to) only to the extent that it reflects differences in the costs (including risks) to QR in providing Access. For example where two Railway Operators are competing to provide a specified transport service:

- *if one Railway Operator proposes to use a different Train consist, which (for example) results in more Capacity being used to transport the same quantity of the commodity, QR will reflect the value of the additional Capacity required for that operation in the Access Charge it offers to that Railway Operator;*
- *if one Railway Operator wishes to use Rollingstock that will give rise to greater wear and tear on the Track (eg different wheel profile or hardness), QR will reflect the additional cost impact of that Rollingstock in the Access Charge it offers to that Railway Operator; or*
- *if one Railway Operator proposes a different operation that does not result in any appreciable change in costs to QR, for example, where there is little demand for the Available Capacity, proposing to use a longer Train (ie less numbers of trains) or using Rollingstock that is more efficient in terms of gross to net weight (ie less gross tonnes), QR will keep the amount of the Access Charge constant between the two Railway Operators. This may, however, result in a change to the unit rate of Access Charge applied for the Railway Operator proposing the different operation.*

It is relevant to note that the cost (including risk) impact/s of certain Railway Operator requirements (such as the use of certain Rollingstock and Train consists as illustrated above) will not always be discernible with great certainty or precision, nor capable of formulated calculation. QR will reflect its assessment of the cost (including risk) impact/s of different operations in the Access Charge offered, based on its commercial judgement.

Paragraph 5.1.2(b) provides that where Railway Operators are providing Train Services in relation to the same commodity type and within the same Geographic System, when these Railway Operators negotiate for access, QR will take a consistent approach to the determination of Access Charges, taking into account the characteristics of the Rail Infrastructure and the Train Services operating on that Rail Infrastructure.

For the purposes of the Undertaking, a 'commodity type' will be identified by a particular product, and where such a product has different discernible characteristics at particular stages of production, by the particular stage of its production. Examples of commodity types are provided below:

- *sugar cane;*
- *sugar syrup;*
- *processed sugar;*
- *copper concentrate;*
- *copper metal;*
- *ilmenite;*
- *magnesite; and*
- *coal.*

The term 'commodity type' will also be applicable to passenger traffics and in this regard a distinction can be made between the types of passenger services available. For example:

- *long distance passengers; and*
- *commuter passengers.*

A 'Geographic System' is a part of the network that can be logically distinguished on the basis of location, dominant traffic type and/or dominant traffic operations (in terms of origin/destination, for example). The following are examples of Geographic Systems:

- *the Goonyella system;*
- *the Brisbane metropolitan system;*
- *the Mount Isa system;*
- *the Moura system; and*
- *the Blackwater system.*

The precise boundaries of these Geographic Systems (and other applicable Geographic Systems) will be identified in the Cost Allocation Manual.

The reference to a 'consistent approach' in paragraph 5.1.2(b) does not require that Access Charges calculated by QR be identical, but rather that QR calculate those charges in a consistent manner, taking into account the characteristics of the Rail Infrastructure and the Train Services operating on that Rail Infrastructure.

The requirement to develop Access Charges using a consistent approach does not imply that Access Charges will be mechanistically derived based on a pre-determined set of formulas and parameters. There are many factors which influence rail costs and QR's commercial risk, and cost and service inter-relationships are complex and not able to be defined with precision. In recognition of these factors, QR has retained a degree of flexibility in the way it develops Access Charges, however its obligation to adopt a consistent approach disciplines the application of its pricing flexibility.

The requirement that Access Charges be developed on a consistent basis for Train Services carrying the same commodity type within the same Geographic System means that QR will not differentiate between such Train Services on grounds such as the perceived capacity on the part of one end user to pay more than another end user for reasons such as market incumbency, financial liquidity or product quality characteristics. Rather, Access Charge determination will take into account factors impacting on the Incremental Costs attributable to the specific Train Service as well as factors impacting on the Common Costs which that Train Service will contribute towards. Variations in the relevant factors applicable to different Train Services (for the same Geographic System and commodity type) will lead to variations in the applicable Access Charge, even though the approach used for determination is consistent.

For example, two of the factors that will be considered in determining an Access Charge include the characteristics of the Rail Infrastructure utilised by the Train Services and the inter-relationships between Train Services operating in the relevant Geographic System. This will include appraisal of the potential for variations in each of these Train Services' contribution to Common Costs having regard to the location of origins and destinations, the layout of the various corridors within the Geographic System, and the different traffic densities on each corridor.

Such considerations could potentially lead to the application of a distance taper in the Access Charge for Train Services travelling over a longer distance or utilising lower density branch lines. In effect, Train Services benefiting from a distance taper may make lesser contribution to Common Costs for those sections of the Rail Infrastructure which are traversed by a number of Railway Operators (referred to as "the common corridor") than Train Services which make greater use of the common corridor as a proportion of distance travelled. Such tapers are implicit in the determination of Reference Tariffs for the Reference Train Services identified in schedule G of the Undertaking. Taking into account the characteristics of the relevant Rail Infrastructure and the Train Services operating on that Rail Infrastructure, the extent to which a distance taper is applied in determining an Access Charge may vary from case to case.

Another factor that will impact on the determined Access Charge is the characteristics of the relevant Train Service. Typical Train Service characteristics that may impact on the Access Charge determined for a Train Service include those matters outlined in clause 1.3 of schedule G.

Paragraph 5.1.2(c) provides that the requirement to develop Access Charges consistently (as set out in paragraphs 5.1.2(a) and (b)) does not require QR to develop Access Charges in a current negotiation with regard to Access Charges incorporated in existing Access Agreements. The operation of this paragraph is illustrated by the following example:

- *In August 1999, one Railway Operator signs an Access Agreement with QR in respect of Train Services operating in a particular Geographic System for the purpose of hauling a particular commodity. In June 2000, another Railway Operator lodges an Access Application with QR in respect of Train Services operating in the same Geographic System and for the purpose of hauling the same commodity as the first Railway Operator. In determining the appropriate Access Charge for the second Railway Operator, QR does not look back to the Access Charge paid by the first Railway Operator under its Access Agreement, but instead looks forward and considers the contribution the Railway Operator should make to the cost of providing the relevant Rail Infrastructure, bearing in mind the pricing principles in part 5 of the Undertaking. If applicable, the rate review provisions, in the existing Railway Operator's Access Agreement, will address any need for an adjustment in the Access Charge payable by that Railway Operator as a result of, for example, a change in the anticipated cost of infrastructure provision due to an increase or decrease in the volume of traffic on the line.*

QCA Request for Comments

QR's proposed constraint on its exercise of discriminatory access pricing is that where access negotiations occur at a similar time (clause 5.1.2(c)):

- Railway Operators *directly competing* to provide a specified commodity between a specified origin and destination will be offered Access Charges that differ only as a result of differences in costs (including risks) faced by QR, for example, as a result of the type of Rolling Stock used (clause 5.1.2(a)). QR explains its intent in relation to clause 5.1.2(a) in its Explanatory Guide. Essentially, QR will assess consistency in Access Charges only with respect to the costs (including risks) to QR of providing Access according to QR's commercial judgement. In practice, this may allow QR to charge Third Party Operators significantly more than it charges itself for identical services negotiated at different times.
- where Railway Operators are not competing directly with each other but providing Train Services for a specified commodity within the same Geographic System, QR proposes to take a consistent approach to the determination of Access Charges for such services. (clause 5.1.2(b)).

Clause 5.1.2(a) refers to a 'consistent Access Charge', whilst clause 5.1.2(b) refers to a 'consistent approach'. This means that very different rules may apply in practice. For example, paragraph (b) could allow QR to set a higher Access Charge to a Third Party Operator than applied to its own operations simply because of the former's more efficient operations. Moreover, QR effectively reserves the right to charge substantially different Access Charges in relation to directly competing services when Access is negotiated at different times. QR has included a provision to allow Third Party Operators a right to incorporate rate review provisions in Access Agreements. However, the undertaking does not specify how the provision would apply in practice.

The Authority seeks comments on whether:

- **the draft undertaking provides QR with excessive pricing latitude**
- **the draft undertaking should define a more prescriptive methodology that QR would apply for the calculation of Access Charges, provided that it does not compromise its legitimate business interests**
- **it is appropriate that QR charge two different prices for similar services at two different points in time, even though the services may be competing "head to head" during the respective terms of the contracts**
- **QR's proposal to limit the making of 'consistent access charges' to a 'similar time' is sufficiently clear (clauses 5.1.2(a) & (c))**

- the undertaking should define the circumstances in which rate review provisions will apply and how they will operate (clause 5.1.2(c))

5.1.3 Rail Infrastructure Utilisation

- (a) Railway Operators serve a number of different Markets which have different abilities to support Access Charges that contribute in excess of the Incremental Cost and towards the Common Costs of providing the Rail Infrastructure. Accordingly, QR will be entitled to establish Access Charges with different levels of contribution to Common Costs for Railway Operators serving different Markets in order to maximise the commercially viable use of Capacity while meeting, in aggregate, the Common Costs of providing the Rail Infrastructure.
- (b) Capacity will be allocated in accordance with Clause 6.3. Capacity will be augmented where QR reasonably considers that the achievable Access revenues are sufficient to commercially justify the required expenditure.
- (c) Where Available Capacity is limited QR may establish an Access Charge based on the highest Access Charge it is likely to achieve from potential Railway Operators, i.e. the Access Charge which incorporates the highest contribution to the Common Costs of providing the Rail Infrastructure. This Access Charge may then be quoted to all Railway Operators seeking Access in respect of that Available Capacity, irrespective of a particular Railway Operator's ability to contribute to the Common Costs of providing the Rail Infrastructure or the Access Charges payable in existing Access Agreements for similar Train Services.
- (d) In assessing Access Charges for the purposes of Paragraph (c) of this Subclause, where Infrastructure Payments are made conditional upon the benefit of those Infrastructure Payments being available only for Train Services serving a specified Market, the Access Charge assessable in respect of Train Services serving that Market will be identified by adding together the Access Charges actually paid in respect of those Train Services and the proportion of the Infrastructure Payments that is directly related to those Train Services.

QR's Explanatory Guide

Whilst price differentiation between Railway Operators competing in the provision of Train Services in respect of the same commodity type in the same Geographic System is subject to the limitations outlined above, QR may price differentiate between Railway Operators serving different Markets, subject only to the pricing limits imposed by clause 5.2.

The following example illustrates the operation of paragraph 5.1.3(a):

- *a number of Railway Operators seek Access to the same section of Rail Infrastructure. One of the Railway Operators wants to transport grain, another Railway Operator wants to transport coal, and a third Railway Operator wants to transport passengers. In determining Access Charges for the three Railway Operators, QR may take into account the characteristics of the Markets that the respective Railway Operators serve. These characteristics might include a strong customer demand base and a comparatively high end price for the service or the commodity for which the service is being provided, or strong competition for the business of end users from providers of alternative transport services. These factors will reflect the Railway Operators' ability to pay Access Charges and, based on the different ability of the Railway Operators to pay Access Charges, QR may provide Access Charges to each of the Railway Operators which provide different levels of contribution to Common Costs.*

The price limits and cost allocation rules will ensure that, while different traffics may make different contributions to Common Costs, no Cross Subsidy will exist.

The principle in paragraph 5.1.3(a) assumes that there is adequate Capacity for all Railway Operators seeking to use the relevant Rail Infrastructure, or that increased Capacity can be funded by all Railway Operators.

Paragraph 5.1.3(c) deals with the situation where there is inadequate Capacity and insufficient commercial justification to expand Capacity to meet all demands. Paragraph 5.1.3(c) envisages scenarios such as the following:

- *the same three Railway Operators described above seek Access to Rail Infrastructure where there is limited Available Capacity. There is only enough Capacity to enable one of the three Railway Operators to operate their Train Service and it is not commercially justifiable to increase the Available Capacity. QR may assess the Access Charge that would be payable by each Railway Operator as if there was sufficient Capacity to provide Access to all three Railway Operators, and then identify which of those Access Charges would provide QR with the highest contribution to Common Costs. QR may then quote all of the Railway Operators an Access Charge which is consistent with the Access Charge which provides the highest contribution to the Common Costs of providing the Rail Infrastructure (notwithstanding they are serving different Markets). In essence, this ensures that the highest value user, or the user willing to make the greatest contribution to the cost of providing the necessary Rail Infrastructure, obtains the limited Available Capacity.*

Paragraph 5.1.3(d) acknowledges that in certain circumstances, Queensland Transport may provide Infrastructure Payments for the specific purpose of assisting a specified type of traffic. In the Brisbane metropolitan region, for example, Queensland Transport may nominate in its agreement with QR that its primary purpose in providing Infrastructure Payments is to enable an effective commuter rail transport system to operate in the Brisbane area. In this example, in determining the Access Charge to be paid by a Railway Operator providing a commuter rail transport service, QR will include the proportion of the Infrastructure Payment related to that service. This 'notional' Access Charge (taking into account the relevant proportion of the Infrastructure Payment) will be utilised for the purpose of making comparisons of the Access Charges payable by the Railway Operator of the commuter rail transport service compared with alternative Railway Operators.

QCA Request for Comments

The draft undertaking reserves QR's right to establish Access Charges with different levels of contribution to the Common Costs for Railway Operators serving different markets (reflecting QR's perception of respective operators' ability to pay), in order to maximise use of its Available Capacity (clause 5.1.3(a)). Where there is limited capacity, the pricing principles allow QR to direct that capacity towards its highest value use (ie establish an Access Charge which incorporates the highest contribution to the Common Costs of providing the Rail Infrastructure) (clause 5.1.3(c)).

An alternative to this 'auctioning' of available capacity would be to ensure that any person prepared to make a greater contribution to common costs of providing rail infrastructure be given priority relative to a current user who is not prepared to make that similar contribution. However, the draft undertaking does not currently make provision for priority or queuing arrangements for access seekers.

Infrastructure Payments (ie CSO payments from Government) that are only available for Train Services serving a specified market will be attributed to the Access Charges for the relevant services.

The Authority seeks comments on whether:

- **priority and queuing arrangements should be established for the purpose of rationing capacity**

- congestion and opportunity costs should be incorporated into Access Charges, and if so, what role should priority arrangements play in the process
- a newcomer, who is prepared to make a greater contribution to Common Costs, should gain priority over a current user who is given the opportunity to match the newcomer's contribution but declines to do so
- QR should undertake to comply with the principle of competitive neutrality in attributing Infrastructure Payments to Train Services

5.2 PRICING LIMITS

QCA Request for Comments

As noted above, QR is proposing to adopt a constrained market pricing approach as the basis upon which its access prices will be set.

5.2.1 Definition of Pricing Limits

Pricing limits will be applied in respect of the following elements:

- (i) upper and lower limits for Access Charges for individual Train Services, established at levels which ensure there is no Cross Subsidy between individual Train Services; and
- (ii) upper and lower limits for Access Charges in respect of combinations of Train Services, established at levels which ensure that there is no Cross Subsidy between combinations of Train Services.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes to develop upper and lower limits for Access Charges to ensure that there is no Cross Subsidy between:

- individual Train Services; and
- combinations of Train Services.

A 'Cross Subsidy' is defined to occur where any Train Service or combination of Train Services pays Access Charges which are insufficient to meet:

- the Incremental Cost imposed on the Rail Infrastructure by that Train Service or combination of Train Services; and
- the Common Costs related specifically to sections of Rail Infrastructure that are used solely for the purpose of Train Services within that combination of Train Services; and

the shortfall is contributed to by another Train Service or combination of Train Services.

The proposed definition of Cross Subsidy attempts to limit Common Costs to those specifically related to Rail Infrastructure. However, many of QR's costs are unlikely to specifically relate to Rail Infrastructure (eg many overheads).

The Authority seeks comments on whether:

- **it is necessary for a shortfall to be contributed by another Train Service for there to be a Cross Subsidy**
- **it is necessary for Common Costs to be related specifically to sections of Rail Infrastructure for the purposes of defining a Cross Subsidy**

5.2.2 Price Limits for Individual Train Services

- (a) Price limits will apply in respect to Access Charges to be established for each individual Train Service (referred to as “Individual Train Service”) such that, over the Evaluation Period, the relevant Access Charge for the Individual Train Service:
- (i) will not fall below the level that will recover the expected Incremental Cost of providing Access for the Individual Train Service; and
 - (ii) will not exceed the level that will recover the expected Stand Alone Cost of providing Access for the Individual Train Service.
- (b) Where it is necessary to assess whether Access Charges are consistent with the limit identified in Subparagraph (a)(ii) of this Subclause, a Revenue Limit will be established for the Individual Train Service. The Revenue Limit for an Individual Train Service will reflect the Stand Alone Cost of providing Access for the Individual Train Service over the Evaluation Period. The Revenue Limit will be determined in accordance with Subclause 5.2.4.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes to limit its pricing so that every service covers its Incremental Cost (the costs that would be avoided if the Access was not provided) to ensure that prices are not set so low that some Third Party Operators do not pay for the services they use. However, QR’s proposed definition of Incremental Cost makes no allowance for either congestion costs or the opportunity costs of foregone traffic (refer 5.1.3 above).

The clause also limits the maximum Access Charge to the Stand Alone Cost of providing access for the Train Service (the costs QR would incur if the Train Service were the only Train Service provided access). This aims to prevent QR receiving excessive returns.

5.2.3 Price Limits on Train Service Combinations

- (a) In addition to Subclause 5.2.2, price limits will apply in respect of Access Charges to be established for Individual Train Services such that, over the Evaluation Period, the expected Access revenue (determined in accordance with Paragraph (c) of this Subclause) for any combination of Train Services incorporating the Individual Train Service:
- (i) will not fall below the level that will recover the expected Incremental Cost of providing Access for that combination of Train Services after giving consideration to the level of contribution provided by Infrastructure Payments towards the relevant Rail Infrastructure; and
 - (ii) will not exceed the level that will recover the expected Stand Alone Cost of providing Access for that combination of Train Services.

- (b) Where it is necessary to assess whether Access Charges are consistent with the limit identified in Subparagraph (a)(ii) of this Subclause, a Revenue Limit will be established for identified Train Service Groups. The Revenue Limit for a Train Service Group will reflect the Stand Alone Cost of providing Access for the Train Service Group over the Evaluation Period. The Revenue Limit for the Train Service Group will be determined in accordance with Subclause 5.2.4.
- (c) Expected Access revenue for a combination of Train Services will be determined as the aggregate of revenue reasonably expected from the application of Access Charges for all the Train Services comprising the combination of Train Services, where the Access Charges for different Train Service types will be identified as follows:
 - (i) where a Reference Tariff is to be developed for certain Train Service types, expected Access Charges will be developed for Train Services falling within those Train Service types on a consistent basis to the Reference Tariff proposed; and
 - (ii) where a Reference Tariff is not intended to be developed for certain Train Service types, expected Access Charges will be developed for Train Services falling within those Train Service types on a consistent basis to current applicable Access Charges.

QR's Explanatory Guide

Paragraph 5.2.3(a) provides that, in principle, the price limits for Train Service combinations relate to any combination of Train Services that operate on the Rail Infrastructure. A single Train Service may potentially be incorporated in a significant number of combinations of Train Services, for example it could be included in a combination of: two (2) Train Services operating over the same corridor; all Train Services operating over that corridor; and all Train Services operating in a specified region. This prevents monopoly rents being extracted by charging each individual user at or below the price ceiling but in total earning an excessive return (because of the sharing of costs between users).

(i) Floor Test

Queensland Transport may make Infrastructure Payments in relation to specified sections of Rail Infrastructure. The purpose of these Infrastructure Payments is, where Access Charges alone are not sufficient for QR to commercially justify continuing to provide a section of Rail Infrastructure, to ensure that the Rail Infrastructure continues to be provided for the benefit of all Railway Operators. In making these payments, Queensland Transport has recognised that, although the Access Charge for each Train Service will meet the test set out in Paragraph 5.2.2(a)(i), the Access Charges for a combination of Train Services travelling over certain parts of the network may not, on their own, meet the Incremental Cost of providing Access for that combination of Train Services. Therefore, in assessing whether QR has sufficient revenue to continue to provide the section of Rail Infrastructure which supports a particular combination of Train Services, any Infrastructure Payments for the relevant section of Rail Infrastructure will be added to the aggregate Access revenue for that combination of Train Services.

(ii) Ceiling Test

As for the price floor test, the ceiling test of Stand Alone Cost for Train Service combinations relates to any combination of Train Services that operate on the Rail Infrastructure.

Although the price ceiling test specified in Paragraph 5.2.3(a)(ii) allows for a Revenue Limit for all possible combinations of Train Services that operate over QR's Rail Infrastructure, provided that QR is complying with the principles set out in Subclause 5.1.2, there are only a limited number of combinations of Train Services which realistically may need to be reviewed to ensure that QR is complying with the price ceiling test. In paragraph 5.2.3(b), QR has nominated the specific combinations of Train Services identified as Train Service Groups as being those combinations of Train Services that may need to be assessed against the relevant Revenue Limit. Provided that QR is within the Revenue Limit for each of these Train Service Groups, QR will have complied with the price ceiling test set out in paragraph 5.2.3(a)(ii) of the Undertaking.

Paragraph 5.2.3(c) recognises that the purpose of the price limits, identified in paragraph 5.2.3(a), is to ensure that the Access Charges being negotiated at any one point in time are reasonable in the current circumstances. They are not intended to provide a limit on the actual revenue that QR may earn from Access.

QR enters into Access Agreements with Railway Operators based on each party assuming certain risks. If, for example, QR has previously made a poor business decision in entering into an Access Agreement with a particular Railway Operator, this will not enable QR to, in a current negotiation, charge another Railway Operator more than would otherwise be justified in the current circumstances. Similarly, if QR earns a greater return from one of those existing Access Agreements as a result of the manner in which risks are shared in that agreement, this will not result in a requirement that, in a current negotiation, QR provide Access to a Railway Operator at a lower price than would otherwise be justified in the current circumstances.

Therefore, in assessing aggregate Access revenue for the purpose of assessing the appropriateness of an Access Charge that QR is currently negotiating, the Access Charges currently payable with respect to all other Train Services will be ignored and it will be assumed that those other Train Services are paying Access Charges determined on a basis consistent with how they would currently be determined.

QCA Request for Comments

In addition to the constraint imposed in clause 5.2.2, QR proposes to limit the expected revenue it will earn from any combination of Train Services to the Stand Alone Cost of providing Access for that combination of Train Services. QR further proposes a revenue limit for the Train Service Groups identified in Schedule F of the undertaking (which relate to the Goonyella, Moura, Blackwater, Newlands and Mt Isa train systems, as well as the Central Queensland coal systems together as a group). Expected revenue will be based on current applicable Access Charges unless Reference Tariffs are in place, in which case expected revenues will be based upon Reference Tariffs.

In the case of a group of operators, the stand alone test should apply such that revenue from any group of operators cannot exceed the economic cost of the services provided to them if they were provided on a stand alone basis. In order to meet this 'combinatorial' test for multiple users of a line section, or group of line sections, it would not be possible for QR to charge *all* operators the Stand Alone Costs of their individual operations.

However, it appears that QR's proposed use of Stand Alone Cost in the context of an Individual Train Service could recover very high amounts in Access Charges from Third Party Operators whilst (perhaps) charging itself relatively modest sums in comparison for similar services negotiated at different times (refer to the discussion of clause 5.1).

Given the multi-line section nature of the track and multi-user pattern of demand for below rail services, calculating all potential cost combinations could become a very complicated task. QR is proposing to deal with this complexity by applying the price ceiling to certain geographical areas dominated by coal and mineral carrying services. Schedule F of the draft undertaking (referred to in the definition of Train Service Group) specifies six Train Service Groups for the purposes of the combinatorial test. QR's rationale is that these sub-networks are the only areas in which QR has the potential to charge access prices close to the ceiling.

The Authority seeks comments on whether:

- **revenue limits should be limited to those Train Service Groups specified in Schedule F**

5.2.4 Definition of Revenue Limit

- (a) The Revenue Limit will be determined as the maximum amount of expected Access revenue (determined consistent with Paragraph 5.2.3(c)) that may be earned from Access Charges over the Evaluation Period measured such that the net present value of the cashflows associated with providing Access for the Individual Train Service or the Train Service Group (as appropriate) over the Evaluation Period is zero. This measurement can be expressed as:

$$0 = -AV_0 + \sum_{t=1}^n \frac{(RL_t - C_t - M_t)}{(1 + ROA)^t} + \frac{AV_n}{(1 + ROA)^n}$$

where:

AV_0 is the depreciated replacement value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service or Train Service Group (as appropriate) at the commencement of the Evaluation Period;

n is the number of years in the Evaluation Period;

t is each year within the Evaluation Period from 1 to n ;

RL_t is the Revenue Limit for the Train Service or Train Service Group (as appropriate) expressed as revenue that may be earned in each year of the Evaluation Period;

C_t is the capital expenditure for assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service or Train Service Group (as appropriate) in each year of the Evaluation Period;

M_t is the operating, maintenance and any other costs, including business and corporate overhead costs, reasonably expected to be incurred for the Stand Alone provision of Access for the Train Service or Train Service Group (as appropriate) in each year of the Evaluation Period;

ROA is the maximum allowable rate of return expressed in nominal pre tax terms, as agreed by QR and the QCA or, failing such agreement, as determined by the QCA; and

AV_n is the depreciated replacement value of assets reasonably expected to be required for the Stand Alone provision of Access for the Train Service or Train Service Group (as appropriate) at the end of the Evaluation Period.

- (b) The values identified for the variables set out in Paragraph (a) of this Subclause should reflect improvements in efficiency (in terms of both operating costs and asset utilisation) that QR should reasonably be able to achieve in each year of the Evaluation Period.

- (c) In order to determine the amount of each of the variables set out in Paragraph (a) of this Subclause, it will be necessary to identify the expected traffic task resulting from the Train Service or Train Service Group (as applicable) over the Evaluation Period. The expected traffic task shall be determined as a forecast of the traffic task resulting from the Train Service or Train Service Group (as applicable) which can be reasonably expected over the Evaluation Period, except where changes in traffic task are the result of the commencement or discontinuation of major projects which individually impact significantly on the traffic task. In such circumstances, increases in traffic task shall be built into the forecast at the time of service commitment and decreases in traffic task shall be excluded from the forecast at the time of expected service termination.

QR's Explanatory Guide

In order to assess what assets are reasonably expected to be required for the Stand Alone provision of Access in paragraph 5.2.4(a), the following types of assets will be considered:

- *Rail Infrastructure assets: for example Track, signalling and Train control assets; and*
- *other assets owned by QR which are reasonably expected to be required for the provision of Access: for example computer systems and office equipment.*

In assessing the operating, maintenance and other costs reasonably expected to be incurred in the provision of Access, other costs may include:

- *business and corporate overheads;*
- *the implied cost of self insurance;*
- *recognition of previously incurred abnormal expenses (for example, expenses associated with moving electrical and telecommunication assets owned by other organisations where such movements are required to give effect to Rail Infrastructure enhancements.*

Paragraph 5.2.4(c) provides that where changes in traffic task are the result of the commencement or discontinuation of a major project, increases in the traffic task shall be built into the forecast at the time of service commitment and decreases excluded from the forecast at the time of expected service termination. The intent of this can be illustrated by the following examples:

- *where there is speculation that a new metal refinery will be built and metal concentrate will be transported to that refinery by rail, QR will not include the transport of that metal concentrate in its forecast traffic task. If a commitment is made to the construction of the metal refinery, QR will then include the transport of the metal concentrate in its forecast traffic task. The profile of the forecast traffic task will reflect the lead time prior to the commencement of any railings to the refinery;*
- *where it is known that a particular mine's reserves will be fully depleted at a certain time, the forecast traffic task will reflect the discontinuation of haulage from that mine from that time.*

QCA Request for Comments

QR proposes that it will establish Revenue Limits for Individual and/or group Train Services which reflect the Stand Alone Cost of providing Access for the respective services over the course of an Evaluation Period. The Evaluation Period can be no longer than 10 years (except in the case of an Individual Train Service in which case the Evaluation Period is the life of the proposed Access Agreement).

Basically, the Revenue Limit seeks to ensure that the Access Charges over the Evaluation Period cover all operational and maintenance costs and capital related costs (including return on assets and depreciation).

The formula proposes that:

- the return on assets will be determined in nominal pre-tax terms;
- depreciated replacement cost will be the asset valuation methodology; and
- there will be no explicit incentive regulation arrangements applied (for efficiency and growth).

The Authority will be releasing background papers on each of these issues.

The concepts expressed in the formula refer to “reasonably expected” rather than “efficient” costs for both capital expenditure and operating and maintenance costs. The potential problem with such a definition has already been discussed (refer to discussion of clause 5.1).

QR proposes that the costing of capital expenditure and operating and maintenance costs will be on the basis of stand-alone provision. This has the potential to allow ‘double dipping’ because the Stand Alone Cost needs to also be considered in the context of all of the traffic for the network as a whole rather than just individual Train Service Groups. For example, it will enable recovery of one set of system wide overhead costs for each Train Service Group.

For the purposes of calculating Revenue Limits, QR proposes to exempt all impacts, including expenditure and revenue, from traffics for new projects that are not committed at the time of calculation. A concern is that QR could benefit from a mine commencing during the life of a Reference Tariff (which is based upon the revenue cap), because the traffic was not included in the modelling.

The Explanatory Guide refers to the cost of self-insurance as a cost to be recovered.³¹ This could potentially lead to ‘double dipping’ in cost recovery (via increased maintenance costs in addition to insurance costs).

The Authority seeks comments on whether:

- **any provision should be made for incentive regulation of QR’s revenues (eg. cpi-x mechanisms), including what arrangements should be introduced in case QR exceeds its cap in any period**
- **the undertaking potentially allows “double dipping”**
- **the cost of self-insurance should be recovered, and if so, how double dipping could be prevented**
- **it is appropriate for QR to exempt revenue from traffics for new projects in its calculation of Revenue Limits (clause 5.2.4 (c))**

5.3 REFERENCE TARIFFS

5.3.1 Establishment of Reference Tariffs

- (a) It is recognised that, for individual Train Services, there may be a large range between the price limits established in Clause 5.2 within which Access Charges may be determined. Therefore, to assist in the facilitation of an efficient Access negotiation process, QR may develop Reference Tariffs for certain types of Train Services.

³¹ Page 15

- (b) Each Reference Tariff will be developed as an Access Charge for a Reference Train Service. The Access Charge for a specific Train Service which is the subject of an Access Application may, depending upon the specific issues associated with the provision of Access for that Train Service, be higher or lower than the Reference Tariff applicable for that type of Train Service.
- (c) Reference Tariffs will be established in a manner consistent with the pricing principles set out in this Undertaking, including the price limits identified in Clause 5.2.
- (d) Reference Tariffs will not be required to be consistent with the actual Access Charges for the relevant type of Train Services applicable under existing Access Agreements. However, QR will give Railway Operators the opportunity to incorporate rate review provisions in Access Agreements to reflect, for example, changes in Reference Tariffs.
- (e) Reference Tariffs will be developed for those types of Train Services identified in Schedule G. Reference Tariffs for those types of Train Services will be applied in the manner set out in Schedule G.
- (f) Reference Tariffs for other types of Train Services will be developed as and when QR and the QCA agree necessary, taking into account the level of demand for Access for that type of Train Service by Third Party Operators. QR will submit a Draft Amending Undertaking varying Schedule G to identify the manner in which Reference Tariffs will apply to these Train Services within one (1) month of agreeing to develop the additional Reference Tariffs.
- (g) The Reference Tariffs for those types of Train Services identified in Schedule G at the Commencing Date will be submitted to the QCA for endorsement within three (3) months of the Commencing Date. Where Schedule G is varied in accordance with Paragraph (f), QR will submit to the QCA Reference Tariffs for the types of Train Services added to Schedule G within three (3) months of the QCA accepting the relevant Draft Amending Undertaking. In considering whether to endorse a Reference Tariff the QCA must be satisfied that the Reference Tariff is consistent with the pricing principles established in this Part of the Undertaking.

The Explanatory Guide did not address this clause.

QCA Request for Comments

In recognition of the potential for a wide band to emerge between the price floor and price ceiling under the constrained market pricing approach, QR proposes to develop, and have approved by the QCA, Reference Tariffs for certain types of Train Service. Reference Tariffs are aimed at promoting access price transparency and, as a result of the regulatory approval process, giving Railway Operators confidence that access prices have been set at a reasonable level. In this way, Reference Tariffs can potentially save the time (and costs) of the access provider and access seekers by reducing the duration of access negotiations.

In the first instance, the draft undertaking proposes that Reference Tariffs for the coal carrying services will be developed (refer Schedule G). QR proposes to submit to the QCA Reference Tariffs for the services mentioned in Schedule G within 3 months of the QCA's approval of the undertaking. In this regard, the QCA is mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

Each Reference Train Service will have technical (eg axle load/configuration, train length, gross tonnage) and operational (eg compliance with nominated sectional running times, availability for operation, loading/unloading time on network) train characteristics so that actual Access Charges for a particular Train Service will vary depending on how the characteristics of that Train Service compares to the Reference Train Service characteristics.

Reference Tariffs will be structured along the lines of: a \$/000 gross tonne kilometres (gtk) charge, with fixed and escalation components. The validity of the Reference Tariff will be conditional on a nominated annual traffic volume range (measured as gtk resulting from Train Services operating on the track between all loading and unloading points within the relevant Geographical Area). Actual traffic volumes falling outside the nominated range for a particular Reference Tariff are grounds for its review.

The draft undertaking proposes that Reference Tariffs will not be required to be consistent with the actual Access Charges for the relevant Train Services under existing Access Agreements. However, QR will allow Railway Operators to incorporate rate review provisions in new Access Agreements to reflect changes in Reference Tariffs.

QR proposes that Reference Tariffs will be submitted to the QCA for endorsement within three months of the QCA's approval of the undertaking. Given the potential interest of Third Party Operators in QR's coal carrying services, an issue arises as to whether this time frame is appropriate.

It is proposed that Reference Tariffs for other types of Train Services will be developed by agreement between QR and the QCA, and will depend on the level of demand for access to those Train Services. The undertaking is silent on the issue of a disagreement between the QCA and QR concerning the need for a Reference Tariff for a particular Train Service (ie where the QCA considers that a Reference Tariff should be developed but QR declines to do so).

The Authority seeks comments on whether:

- **the undertaking should set out a process to be followed in the event that the QCA does not endorse Reference Tariffs submitted by QR**
- **the undertaking should establish a process if QR and the QCA disagree on the need for Reference Tariffs**
- **there are services beyond those mentioned in Schedule G which justify Reference Tariffs being developed**
- **there are Reference Tariffs which should be settled before an undertaking is accepted**

5.3.2 Review of Reference Tariffs

- (a) A Reference Tariff will be effective for a maximum period of three (3) years from the date upon which the QCA endorses the Reference Tariff. Three (3) months prior to the expiry of a Reference Tariff, QR will submit to the QCA a revised Reference Tariff. In considering whether to endorse a Reference Tariff the QCA must be satisfied that the Reference Tariff is consistent with the pricing principles established in this Part of the Undertaking.
- (b) Within its effective life of three (3) years, a Reference Tariff may be reviewed upon the occurrence of a Material Change Event. Upon the occurrence of a Material Change Event that could reasonably be expected to result in QR materially exceeding its Revenue Limit, QR will notify the QCA of the occurrence of a Material Change Event. QR may notify the QCA of the occurrence of any other Material Change Event. QR's notification of a Material Change Event will include details of the Material Change Event and the required revisions to the existing Reference Tariff to reflect the impact of the Material Change Event. Such revisions will not reflect a full review of the Reference Tariff, but rather will be limited to revising the Reference Tariff to reflect the impact of the specific Material Change Event. The QCA shall consider the appropriateness of the changes to a Reference Tariff through assessing whether the changes adequately preserve the financial position of QR compared to the position QR would be in if the

Material Change Event did not occur. If assessed as appropriate by the QCA, the revised terms of the Reference Tariff will apply for the remaining effective life of that Reference Tariff.

QR's Explanatory Guide

QR will be expected to materially exceed its Revenue Limit, for the purposes of paragraph 5.3.2(b), when it expects to recover an amount that exceeds the Revenue Limit by a certain percentage of the Revenue Limit to be agreed between QR and the QCA.

QCA Request for Comments

The undertaking provides for Reference Tariffs to be effective for a maximum period of three years after approval by the QCA. Three months prior to the expiry of a Reference Tariff, QR proposes that it will submit a revised Reference Tariff to the QCA for its consideration and approval.

QR proposes that a Reference Tariff may be reviewed at any time within its life upon the occurrence of a Material Change Event, the definition of which is extremely wide and includes:

- any changes to QR's regulatory environment including any changes to any law or the interpretation of any law; and
- a change in the Commonwealth Government 10 year bond rate of more than 100 basis points.

The key issue concerning QR's definition of Material Change Event is whether it protects QR's legitimate business interests or goes beyond what is necessary to meet that objective and rather attempts to push QR's commercial risks onto Third Party Operators. Moreover, it is unclear whether the terms of the draft undertaking clearly provide for the QCA to instigate a review of Reference Tariffs upon the occurrence of a Material Change Event (ie where a Material Change Event is to QR's benefit). QR proposes that the QCA should assess whether the changes to the Reference Tariff adequately preserve the financial position of QR compared to the position it would have been in if the Material Change Event had not occurred.

The Authority seeks comments on whether:

- **the definition of Material Change Event sets out appropriate triggers for a review of Reference Tariffs (Part 8 – Definitions and Interpretations)**
- **the QCA should be able to instigate a review of Reference Tariffs on the occurrence of a Material Change Event**
- **how revenue fluctuations from price or tonnage effects should be incorporated into Reference Tariffs (refer clause 5.2.4 (c))**

5.4 STRUCTURE OF ACCESS PRICES

- (a) The structure of Access Charges will be negotiated with individual Third Party Operators depending on their particular requirements and may include:
- (i) an initial up-front component as a pre condition to being granted Access Rights;
 - (ii) an ongoing periodic fixed component independent of the level of usage of the Rail Infrastructure;
 - (iii) an ongoing variable component based on usage of the Rail Infrastructure; or
 - (iv) any other structure or combination as agreed by QR and the Third Party Operator.

- (b) Notwithstanding Paragraph (a) of this Clause, QR shall not require an Access Charge structure from a Third Party Operator that is significantly different from the Access Charge structures for existing Railway Operators providing Train Services for the same commodity type within the same Geographic System unless the different Access Charge structure is reasonable taking account of the costs and risks to QR of providing Access to that Third Party Operator compared to the costs and risks of providing Access to existing Railway Operators providing Train Services for the same commodity type within the same Geographic System.

QR's Explanatory Guide

Once the level of required Access revenue has been determined for a Train Service in accordance with the principles set out in clause 5.2 of the Undertaking, the Access Charge may be structured to individually suit the requirements of QR and the Third Party Operator. The Access Charge may be structured to include:

- (a) *an initial up front component. This may represent some or all of the incremental investment that QR is required to undertake in order to ensure that there is sufficient Capacity for the Access Rights required by the Third Party Operator. Such incremental investment would typically be required to be funded upfront if it is specific to that Third Party Operator's operation and would have limited alternative use for QR. Alternatively, there may be other specific circumstances which the Third Party Operator and QR agree are best addressed through the payment of an up front component;*
- (b) *an ongoing periodic fixed component. This would not necessarily reflect the fixed costs to QR of providing Access to the Third Party Operator, but rather may be established at a level which provides appropriate price signals with respect to the Third Party Operator's ongoing usage of the Rail Infrastructure. In determining the appropriate price signals, QR will consider issues such as the fixed cost of providing the Rail Infrastructure, incremental investment which is not recovered through an upfront charge, and alternative demand for the Capacity;*
- (c) *an ongoing variable component based on usage of the Rail Infrastructure which may also be established at a level which provides appropriate price signals regarding ongoing usage of the Capacity; and*
- (d) *any combination of the above elements, or any other structure as agreed by QR and the Third Party Operator.*

The operation of paragraph 5.4(a) is illustrated by the example below:

- *Two (2) Railway Operators want Access Rights for Train Services in respect of the same commodity type and within the same Geographic System. Both require some project specific Rail Infrastructure enhancements to be carried out to allow for the operation of their respective Train Services. The first Railway Operator requires a long spur line to be built. The second Railway Operator requires Track strengthening work to be undertaken in order to enable it to use Rollingstock with a higher axle load. The first Railway Operator is likely to pay a high upfront component to recover the significant project specific capital investment (which has no alternative use to QR) required for its operation. The second Railway Operator may also pay a high upfront component. Alternatively, it's Access Charge may be structured to include a high fixed component if QR is satisfied that it may have an alternative use for the investment in the absence of that Railway Operator, or that there are a number of Railway Operators prepared to contribute to the costs of the Rail Infrastructure enhancement.*

Paragraph 5.4(b) provides that QR will not impose upon a Third Party Operator an Access Charge structured significantly differently from that provided to other Railway Operators providing Train Services for the same commodity type within the same Geographic System. (Refer to the discussion above on subclause 5.1.2 in relation to the meaning of the terms 'commodity type' and 'Geographic System'). 'Significantly different' means different in a real and substantial sense. QR reserves the right to structure an Access Charge differently if such an approach is reasonable in light of the different costs (including risks) to QR of providing Access to the respective Railway Operators. The example above, insofar as it relates to the Railway Operator requiring a long spur line to be built for its operations, illustrates an instance where a different Access Charge structure may be reasonable, if existing Railway Operators in the same Geographic System did not themselves require similar project specific capital investment.

QCA Request for Comments

QR proposes that there be no limitation on the structure of Access Charges except that it reserves the right to impose an Access Charge structure on a Third Party Operator which differs from other Railway Operators (including QR above rail groups) to take account of the costs and risks QR perceives is associated with providing access.

5.5 COST ALLOCATION

- (a) QR shall within the first three (3) months following the Commencing Date prepare and submit to the QCA for its approval a Cost Allocation Manual, which will set out:
 - (i) the process for identifying the cost base for Below Rail Services, separate from other services provided by QR;
 - (ii) within the cost base for Below Rail Services, the process for identifying costs attributable to specified line sections (line section costs), costs not attributable to specified line sections but attributable to specified geographic regions (regional costs), and costs not attributable to specified line sections or any specified geographic region (network costs); and
 - (iii) the process for identifying pricing limits identified in Clause 5.2.
- (b) If the QCA approves the Cost Allocation Manual prepared by QR in accordance with Paragraph (a) of this Clause it will not be necessary for the QCA to prepare and distribute a Cost Allocation Manual in accordance with Division 9 of Part 5 of the Act.
- (c) QR shall comply with the procedures and protocols of the Cost Allocation Manual in determining the Revenue Limits for particular Train Services or Train Service Groups.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes to develop and submit for the QCA's approval a Cost Allocation Manual three months after the commencement of the undertaking.

The manual will set out the methodology for identifying the cost base for Below Rail Services attributable to: specified line sections; specific geographic regions; and costs not attributable to either. The process for identifying the upper and lower pricing limits will also be set out.

QR has indicated that the Cost Allocation Manual will explain the process by which it identifies and, where appropriate, allocates costs rather than including information on actual costs (disclosure of which will be limited to a profit and loss statement and balance sheet for the whole of the below rail business). QR considers that the development of Reference Tariffs better addresses the information asymmetry problem facing third party operators than would detailed cost disclosure.

The QCA, in approving Reference Tariffs, will need to make a number of decisions concerning cost allocation between the various services QR provides. Accordingly, as part of the development of these tariffs, a basis of cost allocation will need to be developed and the QCA's decisions regarding these cost allocations would be published in conjunction with the Reference Tariffs themselves. Accordingly, the timing of the development of Reference Tariffs could have implications for the timing of the development of a Cost Allocation Manual. The QCA is also mindful of the desirability of approving an undertaking in as complete a form as is reasonably practical.

The Authority seeks comments on whether:

- **it is necessary for a Cost Allocation Manual to be finalised before the undertaking is accepted (depending upon the approach that is taken to Reference Tariffs)**

PART 6. CAPACITY MANAGEMENT

QCA Request for Comments

The draft undertaking defines Capacity as the capability of a specified section of Rail Infrastructure to accommodate Train Services within a specified time period, after providing for QR's reasonable requirements concerning exclusive use of that infrastructure for repair or enhancement purposes.³²

The allocation of a rail network's capacity is achieved through the development of train schedules/timetables. A train schedule for a particular section of the rail network can be considered as a series of train paths (or slots) with a time and distance dimension. Each train path has a departure, transit and arrival time between origin and destination points. The train paths reflect the priorities established in the schedule for different types of traffic (eg. passenger trains generally receive priority over coal and general freight trains when each seeks to move over a particular section of QR's network at the same time). In theory, such a decision should reflect an estimation and comparison of the flow-on effects on the train timetable of delaying each train, and the respective costs incurred as a result of the delay. In practice, the efficient allocation of capacity also requires account be taken of the railway operator's willingness to pay for priority.

The constraints on the capacity (and hence available train paths) of a rail network reflect a range of factors including:

³² The draft undertaking defines Train Services as the operation of a train between a specified origin and destination on the rail infrastructure.

- the condition of the track and associated infrastructure (eg. the size and spacing of sleepers and depth of ballast under the track affect axle loads and train speeds, the length of passing loops affects train length);
- the type of train services operating on the network (eg. passenger trains generally travel faster than freight trains); and
- the need to observe safeworking procedures on and around the track (eg. trains must travel at safe distances from each other).

Available capacity could be expected to vary quite significantly across different parts of QR's network. Demand for train paths on certain parts of QR's network may be relatively uniform throughout each day (eg the Goonyella and Blackwater coal sub-systems), while other parts of the network are characterised by significant variations in train path demand depending on the time of day (eg the peak and off-peak demands on the Brisbane metropolitan sub-system). During peak times, the existing capacity of a particular sub-system may be fully utilised.

To increase capacity, the range of investment options includes:

- investment in new infrastructure (eg longer passing loops, track duplication, signalling);
- investment in improved train scheduling techniques; and
- investment in improved track maintenance scheduling techniques.

6.1 SERVICE SPECIFICATION AND TRAIN SCHEDULING

- (a) The Capacity Entitlement of a Third Party Operator will be defined in terms of a number of Train Services that can be operated in a given time period subject to constraints agreed with the Third Party Operator. The application of constraints is likely to vary significantly between different types of Train Services and may include, but will not necessarily be limited to, the following:
- (i) a specified origin and/or destination time and where appropriate, specified arrival/departure times at intermediate locations, with an allowable variation around these specified time(s);
 - (ii) maximum time period between Train Services;
 - (iii) minimum time period between Train Services;
 - (iv) average travel time and acceptable variations to travel time;
 - (v) regularity of timetable reviews and the applicable review process; and
 - (vi) allowable modifications of timetable, e.g. cancellation or deferral of services.
- (b) As outlined in Clause 4.7, as part of the negotiation process, QR will develop an initial specification of the Third Party Operator's Capacity Entitlement. This specification of Capacity Entitlement will be further refined by QR and the Third Party Operator during the negotiation process. The Capacity Entitlement will be incorporated into the Access Agreement.
- (c) The Capacity Entitlement will be used to develop an initial timetable, which QR and the Third Party Operator will then be required to adhere to unless and/or until such time as the timetable is varied in accordance with the Third Party Operator's specified Capacity Entitlement and QR's Scheduling and Train Control Protocols.

- (d) QR will, subject to the Third Party Operator's Capacity Entitlement and the Scheduling and Train Control Protocols, be able to manage the development of timetables to optimise the use of the Rail Infrastructure as circumstances change from time to time. The dispute resolution provisions in the Third Party Operator's Access Agreement will provide an avenue for a Third Party Operator to challenge a decision by QR to make Train scheduling changes that result in an alteration to that Third Party Operator's timetable, if it believes QR's decision was inconsistent with the terms of its Capacity Entitlement and/or the Scheduling and Train Control Protocols.

QR's Explanatory Guide

The Capacity requirements of Railway Operators will vary for any number of reasons. QR's approach to defining Capacity is sufficiently flexible to meet the different requirements of various Railway Operators. To a large extent, the priorities of end customers will dictate the key priorities of a Railway Operator. For example, the key objective of a Railway Operator carrying coal is likely to be the maximum utilisation of its Rollingstock and the haulage of a certain tonnage over a given time period. Such a Railway Operator is likely to be less concerned with meeting a pre-agreed timetable than with meeting objectives such as turnaround time and maximum or minimum time between Train Services.

However, for a Railway Operator of passenger services, which are more sensitive to timetable reliability, the agreed constraints for timetabling are more likely to reflect issues such as ensuring departure and arrival times are appropriate for that Railway Operator's passengers and ensuring that timetable reviews occur at reasonable intervals (in terms of frequency and regularity). It is also likely that a Railway Operator of passenger services will require substantial prior notice for a timetable change to allow for the implementation of marketing and other associated strategies.

The Capacity Entitlements of individual Railway Operators may be tailored according to some or all of the items identified in paragraph 6.1(a) of the Undertaking, and any other constraints which a Railway Operator identifies as critical to its operation. An initial timetable will then be developed consistent with this Capacity Entitlement. Train Services will be operated in accordance with this timetable unless and until the timetable is varied. Any variations from the initial timetable must be made in a manner consistent with the Capacity Entitlement.

QCA Request for Comments

QR proposes that the Capacity Entitlement of a Third Party Operator will be defined in terms of the number of Train Services that can be operated in a given time period, subject to constraints agreed with the operator. The constraints may include:

- specified origin/destination times with allowable variations around these times;
- maximum/minimum periods between Train Services;
- average travel time including acceptable variations;
- the applicable process for timetable reviews and their regularity; and
- allowable modifications of the timetable.

The draft undertaking provides that a Third Party Operator's Capacity Entitlement will be used to develop an initial timetable, which QR and the operator will be required to adhere to. QR reserves the right to manage the development of timetables to optimise the use of rail infrastructure as circumstances change from time to time, subject to Third Party Operators' Capacity Entitlements and QR's proposed Scheduling and Train Control Protocols.

The QCA understands that QR's train scheduling process has broadly three phases:

- a master timetable for the whole network is prepared six to nine months in advance by a set of planning officers in its respective above rail groups;
- the preparation of 24/48 hour 'in advance' schedules is undertaken by different planning officers in the respective above rail groups; and
- QR's train control centres manage traffic movements in real time utilising the 24/48 hour plans, but train controllers can use their discretion to change these plans in response to unforeseen events eg unloading delays at a port, loading delays at a mine, and a level crossing accident.³³

As manager of the network, QR has a legitimate interest in making changes to timetables/schedules in response to unforeseen events such as accidents and flooding. On the other hand, the possibility of arbitrary changes in agreed train timetable/schedules is likely to be a very sensitive issue for potential third party operators given that such changes impact directly on the quality of service they can offer their customers. The more time sensitive the freight or passenger traffic carried, the greater the risks faced by a third party operator potentially subject to such timetable/scheduling changes.

Recognising the potential conflicts that can arise, an important issue will be the amount and nature of information QR is prepared to release to third party operators concerning train schedules and scheduling changes.³⁴ The development of Scheduling and Train Control Protocols by QR are important in this regard (refer to the discussion of Part 3 of QR's undertaking).

Third party operators' confidence in QR's scheduling and train control arrangements are likely to be enhanced if they are able to monitor (in real time) the movement of their trains through QR's network. The QCA understands that QR has a mainframe based operational information system (the freight management system (FMS)) which its train control centres continually update with data concerning all train movements on the network. The FMS can be accessed by all QR business groups and selected customers.

The draft undertaking provides that a Third Party Operator affected by QR's train scheduling changes will be entitled to use the dispute resolution provisions of its Access Agreement if it believes QR's decision was inconsistent with the operator's Capacity Entitlement and/or Scheduling and Train Control Protocols.

The Authority seeks comments on whether:

- **compensation (if any) should be paid in the event of a re-assignment of train scheduling**
- **queuing and priority arrangements should be established as part of the undertaking**
- **information about train movements, such as master timetables, '24/48' hour plans and train control diagrams should be publicly available**

6.2 CAPACITY ANALYSIS

- (a) An Initial Capacity Assessment will be undertaken by QR as part of the preparation of an Indicative Access Proposal. The Initial Capacity Assessment will identify the amount of

³³ The QCA understands that the 24/48 hour train schedules are more subject to change by the train controllers on the coal and minerals sub-systems than on the metropolitan sub-system, reflecting the different nature of freight services compared to passenger services.

³⁴ In NSW, the Rail Access Corporation makes its master timetable publicly available and is developing a timetable protocol. QR's draft undertaking is silent on the issue of a public release of its master timetable/schedule.

Capacity that is not required to preserve existing Capacity Entitlements. The Initial Capacity Assessment is designed to determine if there is sufficient Available Capacity to meet the Third Party Operator's requirements and, if not, the extent to which additional Capacity is required.

- (b) Where it is believed that there are major impediments to the provision of sufficient Capacity to meet the requirements of the Third Party Operator, and that the Capacity enhancements that might be necessary would have a significant bearing on the economics of the proposed operation, then the Initial Capacity Assessment will be conducted in more detail. This may add some time to the preparation of the Indicative Access Proposal and may be a reason for QR advising, in accordance with Paragraph 4.4(c), that an Indicative Access Proposal will not be available within thirty (30) days of QR's acknowledgment of the Access Application.
- (c) The results of the Initial Capacity Assessment will be indicative only and will be subject to confirmation by a Capacity Analysis undertaken as part of the negotiation process. As outlined in Clause 4.7, as part of the negotiation process QR will undertake a Capacity Analysis, including an investigation of operational impacts for the proposed Access. The Capacity Analysis will be conducted in a more comprehensive manner than the Initial Capacity Assessment and will be based on the further detail provided by the Third Party Operator in its Operating Plan. The Capacity Analysis will confirm whether there is sufficient Available Capacity to meet the Third Party Operator's requirements and, if not, detail the requirements for Capacity enhancements. The Capacity Analysis will enable the finalisation of the resultant Capacity Entitlement, initial timetable, applicable Access Charges and associated funding arrangements (subject to other variations identified in the negotiation process).

The Explanatory Guide did not address this clause.

OCA Request for Comments

QR proposes that it will undertake an Initial Capacity Assessment as part of the preparation of a potential Third Party Operator's Indicative Access Proposal. The Initial Capacity Assessment will identify whether there is sufficient Capacity to meet the Third Party Operator's requirements while preserving existing Capacity Entitlements, and if not, the extent to which additional Capacity is required. If additional Capacity is required which would have a significant bearing on the Third Party Operator's proposed operation, QR proposes to conduct a more detailed Indicative Capacity Assessment.

The draft undertaking indicates that a more comprehensive Capacity Analysis will be undertaken as part of the negotiation process between QR and the potential Third Party Operator, including using information from the latter's Operating Plan. The Capacity Analysis will enable finalisation of: the Third Party Operator's Capacity Entitlement; an initial timetable; applicable Access Charges; and funding arrangements. However, the draft undertaking makes no reference to the interaction of the Capacity assessment and queuing protocols.

There is a significant information asymmetry between QR and third party operators concerning available capacity on the network. An issue arises as to how the capacity analysis process could be made more transparent given QR's commercial incentive as a vertically integrated rail service provider to protect the revenues of its above rail operations. This is a critical issue for time sensitive freight services.

The Authority seeks comments on whether:

- **QR should make sufficient information available for access seekers to conduct their own Capacity analysis**
- **explicit recognition should be given to queuing protocols in the context of Capacity assessments**

6.3 CAPACITY ALLOCATION

6.3.1 Register of Interested Parties

- (a) No Railway Operator is to assume that it has Access Rights beyond the term of its Access Agreement. However, where a Railway Operator requests Access which will utilise Capacity that will only become available following the expiration of an existing Access Agreement, QR will, prior to providing an Indicative Access Proposal, use reasonable endeavours to notify the parties who are identified in the register established in accordance with Paragraph (b) of this Subclause as having an interest in the existing Access Rights of the existence of the Access Application. Failure to give notification in accordance with this Subclause will not constitute default under this Undertaking or invalidate or prejudice any Access Agreement which may have been entered into by QR provided that such failure was not willful and QR has acted in good faith.
- (b) QR will maintain a register of parties who have an interest in existing Access Rights. The register will identify:
- (i) the party who has an interest in the Access Rights;
 - (ii) the Access Rights in which they have an interest; and
 - (iii) the nature of that interest.

A Railway Operator with Access Rights under an Access Agreement will be automatically placed on the register. If any other party considers that it has an interest in existing Access Rights and wishes to be included in the register it must notify QR in writing.

QR's Explanatory Guide

For the purposes of this subclause, an interest in Access Rights will include, but not be limited to:

- *an interest held by the producer of a commodity that is transported or hauled by a Railway Operator using those Access Rights under an existing Access Agreement;*
- *an interest held by a Railway Operator looking to acquire those Access Rights (which are currently the subject of another Railway Operator's Access Agreement); and*
- *the interest held by the current Railway Operator in respect of those Access Rights under an existing Access Agreement. Note, the current Railway Operator will automatically be placed on the register of interested parties.*

QCA Request for Comments

QR proposes to maintain a register of parties who have an interest in existing Access Rights. Railway Operators with Access Agreements will be automatically placed on the register. Other parties who consider that they have an interest in existing Access Rights and wish to be included on the register must notify QR in writing. Where an Access Application will utilise Capacity only becoming available following the expiration of an existing Access Agreement, QR will use reasonable endeavours to notify any parties on the register with an interest in those Access Rights of the Access Application. While the undertaking is silent on the issue, QR has indicated to the QCA that it does not intend that the register will be a public document.

The Authority seeks comments on whether:

- the register of interested parties should be a public document (clause 6.3.1(b))
- a person who considers its request to be included on the register of interested parties has been unjustifiably refused should have some right of recourse
- the undertaking should articulate the rights (if any) that are conferred upon a prospective Third Party Operator by the entry of its name on the register

6.3.2 Allocation of Capacity

- (a) Subject to Paragraph (b), Access Rights will be allocated to the first Railway Operator with whom QR can negotiate and execute an acceptable Access Agreement.
- (b) If, at any time, two or more Railway Operators are seeking access with respect to mutually exclusive Access Rights, each of the Railway Operators who has received an Indicative Access Proposal with respect to those mutually exclusive Access Rights will be advised, either in accordance with Subparagraph 4.5(a)(iv) or Paragraph 4.7.2(f), that there is one or more other Railway Operators seeking to negotiate for mutually exclusive Access Rights. In such circumstances, QR is entitled to seek to finalise an Access Agreement in respect of those Access Rights with the Railway Operator with whom QR can agree to terms and conditions, including an Access Charge, which are considered by QR to be the most favourable in terms of the commercial performance of Below Rail Services. Failure to give notification in accordance with this Subclause will not constitute default under this Undertaking or invalidate or prejudice any Access Agreement which may have been entered into by QR provided that such failure was not wilful and QR has acted in good faith.

QR's Explanatory Guide

Paragraph 6.3.2(b) notes that where two (2) or more Railway Operators seek Access to mutually exclusive Access Rights, each Railway Operator will be advised that there is one or more other Railway Operator/s wishing to negotiate in respect of Access Rights that are mutually exclusive. (Refer to the discussion on 4.7.1 with respect to the meaning of mutually exclusive Access Rights.) Where this is the case, each of the Railway Operators will be advised of the existence of the Access Applications for mutually exclusive Access Rights and of QR's intent to finalise an Access Agreement with the Railway Operator willing to agree to terms and conditions of Access considered by QR to be 'most favourable' to the commercial performance of QR's Below Rail Services. No further details of a Railway Operator's Access Application will be provided to another Railway Operator without the agreement of the Railway Operator who lodged the Access Application.

The following factors indicate the types of considerations that QR would be likely to take into account in assessing the 'most favourable' terms and conditions for QR's Below Rail Services:

- *the length of the Access Agreement (and depending on the circumstances, a longer or a shorter contract may be more favourable to QR in particular instances);*
- *the Access Charge and resultant contribution to Common Costs having regard to the Incremental Costs of the particular Train Service;*
- *terms and conditions relating to interface issues which result in minimum inconsistency (and therefore cost and/or risk to QR and other Railway Operators) with other Railway Operators on the Rail Infrastructure (unless such terms and conditions actually represent a more efficient and/or effective approach or process); and*

- *an approach to Capacity Entitlement definition that is conducive to the optimisation of the utilisation of the Rail Infrastructure.*

Importantly, this provision does not permit QR to price Access inconsistently with the pricing principles in part 5 of the Undertaking.

QCA Request for Comments

The draft undertaking notes that Access Rights will be allocated to the first Railway Operator with whom QR can negotiate and execute an “acceptable” Access Agreement. If two or more Railway Operators are seeking access with respect to mutually exclusive Access Rights, QR will finalise an agreement with the operator which QR considers is most favourable to the commercial performance of its Below Rail Services.

The Explanatory Guide provides an indication of the factors QR will take into account in making such as assessment including: the length of the Access Agreement; the Access Charge and resultant contribution to Common Costs having regard to the Incremental Costs of the particular Train Service; terms and conditions relating to interface issues; and an approach to Capacity Entitlement definition that is conducive to the optimisation of the utilisation of the Rail Infrastructure.³⁵

Whilst the Authority recognises the need for a clause which reserves QR’s right to execute access agreements which are most favourable in terms of the commercial performance of its below rail services, an issue arises as to how QR intends to ensure that competitive neutrality is observed between third party operators and its own above rail groups. The development of an objective, transparent decision making procedure for the allocation of train paths in the undertaking may assist in this regard. Such a procedure is likely to be particularly important where competition for a train path is between a QR above rail group and a third party operator.

The Authority seeks comments on whether:

- **QR should establish protocols to ensure competitive neutrality is observed between the third party operators and its own traffic concerning the allocation of train paths**
- **public reporting is an appropriate vehicle to facilitate transparency of capacity allocation and if so, what reporting arrangements could be established to achieve this**
- **capacity auctions should be undertaken for the allocation of mutually exclusive capacity demands (eg as part of queuing and priority protocols)**

6.4 CAPACITY TRANSFER

(a) Where a Railway Operator:

- (i) has consistently underutilised the Access Rights allocated to it under an Access Agreement for a period of six (6) months; and
- (ii) cannot reasonably demonstrate to QR a future requirement for those Access Rights;

the terms of the Access Agreement will provide that QR may reduce the Railway Operator’s Access Rights, provided that the adjusted Access Rights are sufficient to meet the Railway Operator’s maximum monthly usage over that six (6) month period. In such event, the Access Charge payable by the Railway Operator will be varied in accordance with the terms of the Access Agreement.

³⁵ Pages 18-19

- (b) Where QR makes a decision to reduce a Third Party Operator's Access Rights in accordance with Paragraph (a) of this Clause, and the Third Party Operator believes that QR's decision is not justified in the circumstances after having regard to the factors specified in Paragraph (a) of this Clause, the Third Party Operator may challenge the decision through the dispute resolution procedure provided in its Access Agreement. QR will not implement the reduction unless and until the dispute resolution procedure has been exhausted in favour of its decision, provided it is not otherwise required to do so by law.
- (c) Where a Railway Operator wishes that its Access Rights be reduced, it may seek to surrender the unwanted Access Rights to QR. QR will use reasonable endeavours to reassign the unwanted Access Rights to another Railway Operator. Such unwanted Access Rights allocated to the Railway Operator under its Access Agreement will be reduced if and to the extent that QR allocates those Access Rights to another Railway Operator or as otherwise agreed between QR and the Railway Operator.
- (d) Where a Railway Operator seeks Access Rights that are already utilised by another Railway Operator, but in the reasonable opinion of either the first Railway Operator or QR, such Access Rights will not be required by the other Railway Operator after the time from which Access is being sought by the first Railway Operator, QR will approach the other Railway Operator to seek to negotiate an amendment to its Access Agreement so as to facilitate Access for the Train Services of the Railway Operator seeking Access.
- (e) Where a Railway Operator's Access Rights are reduced in accordance with Paragraphs (c) or (d) of this Clause, and where QR is able to reassign those Access Rights, the Railway Operator's Access Charge will be adjusted as agreed between the parties.
- (f) Access Rights may only be transferred by a Railway Operator assigning the whole of its respective rights and obligations under an Access Agreement in accordance with the assignment provisions of that Access Agreement.

QR's Explanatory Guide

Where a Railway Operator has consistently under-utilised its Access Rights for six months, it may be able to demonstrate a future requirement for those Access Rights, in accordance with subparagraph 6.4(a)(ii), by, for example:

- *providing evidence of a contract between the Railway Operator and another party, which will require the Railway Operator to utilise the relevant Access Rights; or*
- *providing evidence of short term extenuating circumstances affecting demand for its Train Services.*

If a Railway Operator can demonstrate that its usage of its Access Rights will increase, but cannot demonstrate that it will fully utilise its existing Access Rights, QR may reduce the Railway Operator's Access Rights to a level that will allow it to meet its anticipated level of demand.

Paragraph 6.4(d) provides that, in certain circumstances, QR may approach a Railway Operator to seek to negotiate an amendment to its Access Agreement so as to facilitate Access by another Railway Operator. The following examples illustrate how paragraph 6.4(d) may operate:

- *a Railway Operator wishes to negotiate Access in respect of Capacity that is currently contracted to another Railway Operator, but that second Railway Operator is not utilising the full amount of its contracted Capacity. The first Railway Operator may request QR seek to negotiate a reduction of the second Railway Operator's Capacity Entitlement so as to allow it to operate its Train Services. If the circumstances described in paragraph 6.4(a) exist, QR may reduce the second Railway Operator's Access Rights regardless of whether the second Railway Operator agrees to such a reduction. If the circumstances described in paragraph 6.4(a) do not exist, the second Railway Operator's Access Rights will only be reduced if the second Railway Operator agrees to such reduction; and*
- *if an end user wants to secure the services of a different Railway Operator, it may request QR seek to negotiate a reduction (possibly to occur in the future) in the Capacity Entitlement currently held by the existing Railway Operator to allow that Capacity to be contracted to the new Railway Operator. QR's ability to contract the requested Capacity to the new Railway Operator will be conditional upon the existing Railway Operator agreeing to the corresponding reduction in its Access Rights, unless, as noted above, the circumstances in paragraph 6.4(a) exist.*

Paragraph 6.4(f) prevents a Railway Operator from buying Access Rights from QR and then on-selling them to other parties. Transfer of Access Rights may only occur in accordance with the assignment provisions of the Railway Operator's Access Agreement.

QCA Request for Comments

QR reserves the right to reduce a Third Party Operator's Access Rights where the operator has consistently under-utilised its rights under its Access Agreement for a six month period and cannot reasonably demonstrate to QR a future requirement for those Access Rights (clause 6.4(a)). QR proposes that it would not adjust the operator's Access Rights below its maximum usage over the six month period. Access charges would be varied in accordance with the terms of the Access Agreement.

The Explanatory Guide notes that a Third Party Operator could meet the 'reasonably demonstrate' test if it provides evidence of a contract it has with another party which will require it to utilise the relevant Access Rights, or evidence of short term extenuating circumstances affecting demand for its Train Services. Nevertheless, if the operator does not demonstrate that it will increase the use of its Access Rights to their full extent, QR may reduce those rights to a level that QR considers will meet the operator's anticipated level of demand.

The draft undertaking provides for QR to approach a Third Party Operator to seek to negotiate an amendment to its Access Agreement in order to facilitate access by another operator. The Explanatory Guide indicates that if QR was satisfied that an operator's Access Rights had been under-utilised (in line with clause 6.4(a)), QR may reduce those rights without the agreement of the operator concerned. On the other hand, if the circumstances of clause 6.4(a) did not exist, the Railway Operator's Access Rights would only be reduced with its agreement.

QR proposes that if an end user wants to secure the services of a different Railway Operator, it may request QR to negotiate with the incumbent operator to attempt to re-allocate that capacity to the new Railway Operator. Such a re-allocation of Access Rights would be conditional on the agreement of the incumbent operator, unless the circumstances of clause 6.4(a) applied.

The draft undertaking proposes to prevent a Third Party Operator from on-selling its Access Rights to another party, with QR reserving this brokerage function to itself, including for traffics within the same market. Moreover, QR would appear unlikely to assign a Third Party Operator's rights where it can benefit from negotiating a fresh agreement with a new Third Party Operator. As a consequence, the development of a secondary market in rail access rights may be constrained.

Secondary markets potentially introduce competition into the re-sale market for access rights and promote the transfer of those rights to parties who can make best use of them. Section 106 of the QCA Act seeks to facilitate the ability of users to transfer all or part of their access rights (for declared services) without requiring the infrastructure owner's or the QCA's approval.³⁶ However, allowing the transfer of a user's interests in an access agreement will not be appropriate in all circumstances, such as where it would present arbitrage possibilities which undermine the efficient utilisation of the infrastructure. Arbitrage may not be a concern where a potential transferor and transferee each operate in the same market.

The Authority seeks comments on whether:

- **the capacity reassignment procedure could become a barrier to entry for newcomers by preventing them building up their business over time**
- **Third Party Operators should be able to reassign their Access Rights to another accredited rail operator, and if so, whether arrangements should be made to protect QR's legitimate business interests in such a situation (eg. to prevent arbitrage)**

PART 7. INTERFACE CONSIDERATIONS

QCA Request for Comments

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 owner/manager and third party operators.³⁷ Key interface issues include the establishment of safety, technical and operational standards. It is important that the introduction of competition on QR's network does not compromise safety 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. QR argues that in order to retain the integrity of the rail infrastructure, it has an interest in ensuring that the interface is closely managed on a consistent basis. On the other hand, as a vertically integrated rail provider, QR could potentially use interface standards to hinder access to its below rail services, thereby protecting the revenues of its above rail operations. This could be achieved by imposing unnecessarily restrictive interface conditions on potential third party operators and/or by QR taking on technical regulatory functions instead of them being performed by regulatory bodies that are independent of the commercial operator³⁸.

7.1 ROLLINGSTOCK INTERFACE STANDARDS

7.1.1 Development of Rollingstock Interface Standards

- (a) To ensure the integrity of the Rail Infrastructure, it is essential that all Rollingstock and Rollingstock Configurations operated on the Rail Infrastructure are compatible with the Rail Infrastructure and that they are operated in a manner consistent with the applicable Safeworking

³⁶ However, section 106 may be overridden by an access code, undertaking or an access agreement (if approved by the QCA).

³⁷ Interdependencies include how:

- the design of a track impacts on train speed limits;
- track condition affects rolling stock performance and vice versa;
- length of passing loops affects maximum train lengths; and
- derailments may cause damage to both rail infrastructure and rolling stock.

³⁸ Clause 4(2) of the Competition Principles Agreement states that "before a party introduces competition to a sector traditionally supplied by a public monopoly, it will remove from the public monopoly any responsibilities for industry regulation. The Party will re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its (existing and potential) rivals".

Procedures and Safety Standards. Accordingly, only Rollingstock and Rollingstock Configurations complying with the Rollingstock Interface Standards may operate on the Rail Infrastructure.

- (b) The Rollingstock Interface Standards incorporate:
- (i) Rollingstock Standards, addressing:
 - safety constraints including all aspects of the Rail Infrastructure, Safeworking Procedures and other applicable Safety Standards that constrain Rollingstock design and performance; and
 - commercial constraints including other aspects of Rollingstock design and performance that impact on the cost or risk to QR of providing Access; and
 - (i) Train Standards, addressing:
 - safety constraints including all aspects of the Rail Infrastructure, Safeworking Procedures and other applicable Safety Standards that constrain the configuration of Rollingstock to form a Train; and
 - commercial constraints including other aspects of the configuration of Rollingstock to form a Train that impact on the cost or risk to QR of providing Access.
- (c) QR will adopt a consistent approach in the application of the Rollingstock Interface Standards to all Railway Operators, having regard to Paragraphs (e) and (h) of this Subclause.
- (d) As provided in Clause 4.3, the Preliminary Information that may be provided by QR to Third Party Operators will include preliminary information on applicable Rollingstock Interface Standards for the purpose of assisting a Third Party Operator to make an initial assessment of its Rollingstock requirements. As provided for in Subclause 4.7.2, detailed Rollingstock Interface Standards will be advised by QR to the Third Party Operator as part of the provision of Additional Information to enable the Third Party Operator to finalise its Rollingstock requirements and Operating Plan.
- (e) QR acknowledges that variations to the Rollingstock Interface Standards may be made without sacrificing system safety, although they may have commercial consequences for QR. During the negotiation process QR may consider variations to the Rollingstock Interface Standards and/or the development of additional Rollingstock Interface Standards in response to particular requirements of the Third Party Operator with respect to either its proposed Rollingstock requirements or Operating Plan.
- (f) Proposed variations to the initially advised Rollingstock Interface Standards will be assessed by QR in terms of their likely impact on:
- (i) the risks likely to arise at the interface between the Third Party Operator's operations and the Rail Infrastructure;
 - (ii) the financial implications for QR in regard to the management and maintenance of the Rail Infrastructure; and
 - (iii) the financial implications for other Railway Operators in regard to the operation of their Train Services.
- (g) QR's acceptance of variations to the initially advised Rollingstock Interface Standards will be dependent upon:
- (i) the development by the Third Party Operator, in collaboration with QR, of an appropriate Safety Risk Management Plan in accordance with Clause 7.3;

- (ii) QR's ability to commercially negotiate variations to its Access Agreements with other Railway Operators adversely impacted upon by the proposed variation to the Rollingstock Interface Standards; and
 - (iii) agreement on an Access Charge or other payments from the Third Party Operator to compensate QR for any financial implications associated with the proposed variation.
- (h) Where a Railway Operator (or group of Railway Operators) and QR agree to vary Rollingstock Interface Standards in accordance with this Clause and such variation(s) involve an additional cost funded exclusively by that Railway Operator (or group of Railway Operators), QR will be entitled to restrict other Railway Operators from benefiting from the variation in the Rollingstock Interface Standards unless and until they make an appropriate contribution to the costs thereof.

QR's Explanatory Guide

Clause 2.1 of schedule D of the Undertaking provides that Rollingstock Standards will be based on:

- *parameters necessary to manage risks of incidents involving the Rail Infrastructure/Rollingstock interface;*
- *parameters necessary to manage risks of incidents with adverse consequences for the Rail Infrastructure integrity related to Rollingstock integrity; and*
- *Rollingstock characteristics used in formulating Access Charges.*

The following are examples of what will be included in the Rollingstock Standards:

- *wheel profile characteristics;*
- *Rollingstock kinematic outline;*
- *wheel flat limits;*
- *maximum axle load;*
- *impact loading on the Rail Infrastructure;*
- *wheel diameter;*
- *bogie and wheel spacing; and*
- *wheel to wheel electrical resistance.*

Clause 2.2 of schedule D of the Undertaking provides that Train Standards will be based on parameters necessary to reasonably manage risks of incidents involving the Rail Infrastructure and Rollingstock Configuration interface.

The following are examples of what will be included in the Train Standards:

- *Train-radio type;*
- *braking distance;*

- *braking deceleration rate;*
- *maximum Train length; and*
- *maximum Train speed.*

The Rollingstock Interface Standards are not intended to specify detailed implementation methods or processes, unless such methods or processes are critical to the effective management of risks. Rather the Rollingstock Interface Standards are intended to specify the outcome that must be achieved to maintain compatibility with the Rail Infrastructure.

Paragraphs 7.1.1(e),(f) and (g) allow for variations to the Rollingstock Interface Standards to be negotiated. This flexibility allows for variation and/or addition to the initially advised Rollingstock Interface Standards to suit the particular requirements of Railway Operators. For example, a Railway Operator may wish for QR to upgrade the applicable axle load on a relevant piece of Rail Infrastructure from 20 tonne to 25 tonne. Subject to the factors in paragraphs 7.1.1(f) and (g), a variation to effect such a change may be made to the Rollingstock Interface Standards.

Paragraph 7.1.1(h) provides that where a Railway Operator exclusively funds the works necessary for the implementation of a variation to Rollingstock Interface Standards, QR will be entitled to restrict any other Railway Operator from taking advantage of the variation in question, until it has made an appropriate contribution towards the cost of implementing the variation. For example, a Railway Operator who wishes to utilise longer Trains on the Rail Infrastructure, may agree to pay for longer passing loops. QR may then restrict other Railway Operators from running longer Trains until they also contribute to the cost of lengthening the passing loops. Similarly, one Railway Operator may wish to run Trains with a heavier axle load than the Rail Infrastructure currently permits. If it agrees to pay for the necessary strengthening of the infrastructure, other Railway Operators may not be permitted to run heavier axle loads over the Track until they make a contribution to the cost of the strengthening work undertaken.

QCA Request for Comments

Rolling stock standards are an important component of the Safety Management System for a railway operator. The rail safety accreditation process in Queensland, including Safety Management Systems, is discussed under clause 7.2 below. As an accredited railway operator, QR must provide evidence to the Rail Safety Accreditation Unit (RSAU) of Queensland Transport that suitable rolling stock standards for the network are in place.

Under the *Transport Infrastructure Act 1994* (the TI Act), the RSAU must be satisfied that a third party operator's management process for the rolling stock is appropriate for its proposed rail operations. QR goes through a similar process for its own rolling stock. The RSAU has indicated to the QCA that it would accept rolling stock interface validation undertaken by qualified engineers.

In addition to the above process, QR is proposing to develop Rolling Stock Interface Standards concerning Rolling Stock design and performance and the configuration of Rolling Stock to form a train as part of the undertaking.

QR indicates that during the negotiation process it may consider variations to the Rolling Stock Interface Standards in response to particular requirements of the Third Party Operator with respect to either its proposed Rolling Stock requirements or Operating Plan. The draft undertaking recognises that a particular Rolling Stock Configuration chosen by a Third Party Operator may impose additional costs on QR, such as greater wear and tear on the track. QR reserves the right to recover such additional costs from the operator.

On the other hand, where a Third Party Operator exclusively funds the additional costs of an agreed variation in Rolling Stock Interface Standards, QR reserves the right to restrict the benefits of the variation flowing to other rail operators until they make an appropriate contribution to the costs thereof.

In considering the development of rolling stock standards, an issue arises as to what extent the onus should be placed on third party operators to ensure rolling stock standards are maintained to a sufficiently high standard.

The Authority seeks comments on whether:

- **QR's proposed Rolling Stock Interface Standards should be a part of the undertaking**
- **Railway Operators who contribute to upgrades etc should be compensated where other Third Party Operators (including QR's above rail groups) seek to benefit (clause 7.1.1(h))**

7.1.2 Compliance with Rollingstock Interface Standards

- (a) In order to ensure that only Rollingstock and Rollingstock Configurations complying with the Rollingstock Interface Standards operate on the Rail Infrastructure:
- (i) all Rollingstock must be authorised by QR; and
 - (ii) all Rollingstock Configurations must be authorised by QR:
- prior to operation on the Rail Infrastructure.
- (b) To obtain authorisation of Rollingstock, a Railway Operator must satisfy QR that Rollingstock has been constructed or modified to comply with the Rollingstock Standards. In order to demonstrate such compliance, a certificate of compliance must be prepared by a party who QR accepts as being competent to give the certification. The certificate of compliance may, on the request of QR, be required to be supported by reports on trials or commissioning tests.
- (c) To obtain authorisation of Rollingstock Configurations, a Railway Operator must satisfy QR that authorised Rollingstock has been configured in a manner which complies with the Train Standards. In order to demonstrate such compliance, a certificate of compliance must be prepared by a party who QR accepts as being competent to give the certification. The certificate of compliance may, on the request of QR, be required to be supported by reports on trials or commissioning tests.
- (d) Authorisation of Rollingstock and Rollingstock Configurations may be sought concurrently.
- (e) The Access Agreement will incorporate provisions to ensure the ongoing compliance of Rollingstock and Rollingstock Configurations with the Rollingstock Interface Standards, including the requirement for audit, as set out in Clause 7.5.

The Explanatory Guide did not address this clause.

QCA Request for Comments

The draft undertaking provides that only Rolling Stock and Rolling Stock Configurations authorised by QR may operate on the Rail Infrastructure. This requires a certificate of compliance must be prepared by someone QR accepts as being competent to give certification (which may require commissioning tests to be undertaken).

The Authority seeks comments on whether:

- **the undertaking effects a desirable arrangement in terms of how QR, Third Party Operators and RSAU will interact in order to ensure safety is not compromised, QR's legitimate business interests are protected and unnecessary barriers to entry are not created**
- **the undertaking reflects an appropriate role for QR in authorising Rolling Stock and Rolling Stock Configurations (clause 7.1.2(b) & (c))**
- **QR should be able to refuse an accredited Third Party Operator from gaining access to its track**

7.2 OPERATING PLAN

- (a) In order to analyse the impacts and requirements of the operations proposed by a Third Party Operator on the Rail Infrastructure, an Operating Plan must be submitted to QR by the Third Party Operator during the negotiation process. The Operating Plan is an enhancement of the initial information provided in the Access Application. During the negotiating process, the Operating Plan must be developed to the reasonable satisfaction of QR.
- (b) Details of the contents typically required in an Operating Plan for new or varied Train Services are set out in Schedule H.
- (c) The Operating Plan will be utilised by QR to refine and finalise the Capacity Entitlement, Interface Coordination Plan, Access Charge and other terms and conditions of the Access Agreement. It will also form the basis for the Third Party Operator's Safety Risk Assessment and Environmental Investigation and for QR's Capacity Analysis.
- (d) The Access Agreement will incorporate provisions ensuring the Third Party Operator's ongoing compliance with the Operating Plan.

QCA Request for Comments

This clause requires a Third Party Operator to develop an Operating Plan to QR's reasonable satisfaction. An Operating Plan will be relevant to several aspects of the parties' relationship such as Capacity Entitlements and interface issues.

7.3 SAFETY MANAGEMENT**QCA Request for Comments**

In order to manage a rail network and/or operate train services in Australia, it is necessary to hold safety accreditation. Safety accreditation is granted by the respective State and Territory Transport Departments. Under the provisions of an intergovernmental agreement between the Commonwealth, States and Territories, processes have been established to mutually recognise accreditations granted in another jurisdiction, subject to any specific local requirements and the rail owner/operator carrying out similar operations.

The Queensland rail safety framework is established in 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 of the Act. Rail safety policy, accreditation and performance monitoring functions have been delegated to the Rail Safety Accreditation Unit (RSAU) within the Land Transport and Safety Division of QT.

Legislative Provisions

Under the provisions of Part 4 of the TI Act, QT is required to accredit an applicant as a 'railway operator' to operate rolling stock on a railway if satisfied of the following criteria:

- the applicant is accredited in another State to operate rolling stock on a railway for a similar type of service or has the competency and capacity to operate rolling stock on the railway safely;
- the applicant has an agreement with the railway's manager to operate particular rolling stock on the railway, and the agreement includes appropriate arrangements for the safe operation of the rolling stock, unless the applicant is applying for accreditation as a railway manager and operator;
- 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.

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, QT may consider any matter it considers appropriate but is required to consider:

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

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.

QT'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.³⁹

³⁹ AS 4292 is the benchmark standard used by all Australian rail safety regulators.

The underlying safety management principles on which the railway safety requirements of AS 4292 are based are:

- identification and management of risk;
- ensuring that emergencies and incidents can be properly managed;
- ensuring that interfaces between different organisations and organisational elements are properly defined and managed;
- protection of passenger, worker and public health and safety; and
- protection of property from damage.

Implementation of the safety management principles requires compliance with a range of operational, infrastructure and rolling stock 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).

Auditing of safety management systems is undertaken by the RSAU at its discretion, which typically means within the first six months of commencement of an accreditation, and subsequently on an annual basis. However, audits may be undertaken at any time, including where RSAU has reason to believe compliance concerns warrant such action. This is supplemented by on-going monitoring (for example, every month the RSAU prepares a summary of rail incidents).

7.3.1 Safety Risk Assessment

- (a) As outlined in Clause 4.7, as part of the negotiation process the Third Party Operator shall, jointly with QR, conduct a Safety Risk Assessment of its operations insofar as they interface with the Rail Infrastructure.
- (b) The parties may agree that a preliminary assessment need only be conducted prior to execution of the Access Agreement but a final Safety Risk Assessment must be completed, and a Safety Risk Management Plan agreed and implemented, prior to the operation of Train Services on the Rail Infrastructure.
- (c) The Safety Risk Assessment must be conducted by a suitably qualified person(s), reasonably acceptable to both parties.
- (d) The Safety Risk Assessment should identify all reasonably foreseeable hazards relating to the interface between the Third Party Operator, QR and other Railway Operators arising out of the proposed operation of Train Services, the risks of such hazards occurring and the implications of such hazards occurring.

The Explanatory Guide did not address this clause.

QCA Request for Comments

Against the background of the above rail safety framework, QR's draft access undertaking is proposing that a Third Party Operator will, jointly with QR, conduct a Safety Risk Assessment of its operations insofar as they interface with the Rail Infrastructure. The Safety Risk Assessment must be conducted by a suitably qualified person who is reasonably acceptable to both parties.

The Authority seeks comment on whether:

- **QR's legitimate business interests would be protected and rail safety not jeopardised if its participation in Safety Risk Assessments and in the development of risk management strategies were constrained to the interface issues agreed with a Third Party Operator in the relevant Interface Co-ordination Plan. (Clauses 7.3.1 and 7.6)**

7.3.2 Safety Risk Management Plan

- (a) To address the results of the Safety Risk Assessment, a Safety Risk Management Plan is to be developed and agreed between the Third Party Operator and QR. QR must be reasonably satisfied that the Safety Risk Management Plan is appropriate and compatible with the existing management systems for the Rail Infrastructure.
- (b) Prior to the operation of the Third Party Operator's Train Service on the Rail Infrastructure, the Third Party Operator shall incorporate in its Safety Management System:
 - (i) the elements agreed in the Safety Risk Management Plan, for which the Third Party Operator is responsible for implementing; and
 - (ii) necessary processes for ensuring that the Third Party Operator, its Rollingstock and Train Services, at all times comply with the safety requirements of the Access Agreement, including the Safeworking Procedures and other applicable Safety Standards.
- (c) Similarly, prior to the operation of the Third Party Operator's Train Service on the Rail Infrastructure, QR shall ensure that its Safety Management System incorporates the elements agreed with the Third Party Operator in the Safety Risk Management Plan, for which QR is responsible for implementing.
- (d) The implementation of the Safety Risk Management Plan may necessitate changes in the terms and conditions of the Access Agreement, including variations to the Access Charge and the Rollingstock Interface Standards.
- (e) Clause 7.5 provides for audit of the Third Party Operator's ongoing compliance with the Safety Risk Management Plan.

The Explanatory Guide did not address this clause.

OCA Request for Comments

The draft undertaking states that a Third Party Operator will need to implement a Safety Risk Management Plan agreed upon by QR prior to the commencement of operation of its Train Services on the Rail Infrastructure. Each party must incorporate this plan into their respective Safety Management Systems before commencement of Train Services.

The Authority seeks comment on whether:

- **the undertaking provides for an appropriate relationship between the Rail Safety Accreditation Unit of Queensland Transport, QR and Third Party Operators concerning the development and enforcement of rail safety standards**
- **QR should provide assistance to Third Party Operators in fulfilling the requirements of the undertaking with respect to rolling stock, safety management and interface standards (clauses 7.1 and 7.2)**

7.4 ENVIRONMENTAL MANAGEMENT PLAN

7.4.1 Environmental Investigation

- (a) As outlined in Clause 4.7, as part of the negotiation process the Third Party Operator shall, in collaboration with QR, conduct an appropriate Environmental Investigation of its operations insofar as they interface with the Rail Infrastructure. QR may, in recognition of its legal obligations in relation to the environment (in particular those obligations arising from the *State Development and Public Works Organisation Act 1971*, and the *Environmental Protection Act 1994*) require that the Environmental Investigation take the form of an Impact Assessment Study in circumstances where the operation proposed is substantially different to existing operations or if it will result in significant increases in traffic levels.
- (b) The parties may agree that a preliminary investigation need only be conducted prior to execution of the Access Agreement but a final Environmental Investigation based on the findings of the preliminary investigation must be completed, and appropriate controls agreed and implemented, prior to the operation of Train Services on the Rail Infrastructure.
- (c) The Environmental Investigation must be conducted by a suitably qualified party who is reasonably acceptable to both parties.
- (d) The Environmental Investigation must assess the environmental impact of Access by the Third Party Operator relating to the interface between the Third Party Operator, QR and other Railway Operators including risks related to those issues identified in Schedule I. The Environmental Investigation should use recognised techniques and procedures in assessing such environmental impacts including the assessment of the associated environmental risks and shall comply with all legislative requirements.

The Explanatory Guide did not address this clause.

OCA Request for Comments

The draft undertaking requires a Third Party Operator to conduct jointly with QR an Environmental Investigation (which QR may require be in the form of an Impact Assessment Study). The study is to be undertaken by a person suitable to QR and the Third Party Operator.

The Authority seeks comments on:

- **what requirements QR should adopt to ensure that any restrictions on access to its network on environmental grounds are consistent with the public interest, having regard to the public interest in competition and environmental protection**

7.4.2 Environmental Management System

- (a) In response to the findings of the Environmental Investigation, an Environmental Risk Management Plan is to be developed and agreed by the Third Party Operator and QR. QR will need to be reasonably satisfied that the Environmental Risk Management Plan is appropriate and compatible with the existing management systems for the Rail Infrastructure.
- (b) Prior to the operation of the Third Party Operator's Train Services on the Rail Infrastructure, the Third Party Operator shall have developed an Environmental Management System which is accredited in accordance with the relevant ISO 14000 standards for environmental management systems and shall incorporate in this Environmental Management System:

- (i) all legislative requirements including any requirements in respect of Environmental Authorities held by QR from time to time as appropriate;
 - (ii) the elements agreed with QR in the Environmental Risk Management Plan, for which the Third Party Operator is responsible for implementing; and
 - (iii) necessary processes for ensuring that the Third Party Operator, its Rollingstock and Train Services, at all times comply with the environmental requirements of the Access Agreement.
- (c) Similarly, prior to the operation of the Third Party Operator's Train Services on the Rail Infrastructure QR shall ensure that the elements agreed in the Environmental Risk Management Plan, for which QR is responsible for implementing, are incorporated in its environmental management system.
- (d) The implementation of the Environmental Risk Management Plan may necessitate changes to the terms and conditions of the Access Agreement, including variations to the Access Charge and the Rollingstock Interface Standards.
- (e) Clause 7.5 provides an audit procedure for the Third Party Operator's ongoing compliance with the Environmental Risk Management Plan and its Environmental Management System.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR's draft access undertaking requires the Third Party Operator to develop an Environmental Risk Management Plan to QR's satisfaction and gain accreditation under ISO 14,000 before operating Train Services. The Environmental Risk Management Plan is to be based on the Environmental Investigation. The Third Party Operator and QR are then responsible for implementing the Environmental Risk Management Plan and incorporating its requirements into their respective Environmental Risk Management Systems.

In addition to the proposed requirements of the draft undertaking, the operations of Third Party Operators would need to comply with the relevant provisions of the *Environmental Protection Act 1994*, administered by the Environmental Protection Agency.⁴⁰ Schedule I of the draft undertaking lists the minimum requirements to be addressed in Environmental Investigations and Environmental Management Systems.

Schedule E (Environmental Protection and Other Issues) indicates that Access Agreements may contain a provision that allows QR to terminate an Access Agreement if it considers (to its reasonable satisfaction) that it will be placed at an unacceptable risk of liability from possible environmental harm or of breaching environmental laws. Accordingly, this would appear to result in QR reserving the right to terminate an Access Agreement even though there may not have been a breach of environmental requirements.

The Authority seeks comments on whether:

- **QR's environmental requirements are excessive having regard to the public interest and the need for QR to protect its legitimate business interests (clauses 7.4.1 & 7.4.2)**
- **the undertaking reflects an appropriate allocation of responsibility between the Environmental Protection Agency, QR and Third Party Operators (clause 7.4)**

⁴⁰ Formerly known as the Department of Environment and Heritage

- **it is necessary for every Third Party Operator to gain accreditation under ISO 14,000 in order to operate Train Services**
- **QR should provide assistance to prospective Third Party Operators to fulfil the requirements of the undertaking**
- **QR should be entitled to terminate an Access Agreement if it believes (to its reasonable satisfaction) that it would be placed at an unacceptable risk of environmental liability (Schedule E)**

7.5 AUDITS

- (a) The Third Party Operator must be able to establish to QR's reasonable satisfaction that it is complying with the Rollingstock Interface Standards, the items identified in Paragraph 7.3.2(b), and the items identified in Paragraph 7.4.2(b), in its operations on the Rail Infrastructure. Therefore, the Third Party Operator will be required to have its operations on the Rail Infrastructure, including relevant systems, audited on an annual basis for compliance with these items.
- (b) In addition, QR may, at any time, require the Third Party Operator to have specific elements of its operations audited for compliance, where QR has reasonable grounds for believing that the Rollingstock Interface Standards, the items identified in Paragraph 7.3.2(b), and/or the items identified in Paragraph 7.4.2(b), have not been complied with and the Third Party Operator has not taken appropriate measures to rectify such non compliance.
- (c) Audits undertaken in accordance with Paragraphs (a) and (b) of this Clause, insofar as they relate to the Rollingstock Interface Standards and the items identified in Paragraph 7.3.2(b), may at the option of the Third Party Operator and subject to QR's reasonable satisfaction, be undertaken in conjunction with an audit required by the Safety Regulator. In any event, all audits must be conducted by a suitably qualified and competent person, who is independent of the Third Party Operator and reasonably acceptable to both parties.
- (d) The audit report(s) must advise whether the Third Party Operator is complying with the Rollingstock Interface Standards, the items identified in Paragraph 7.3.2(b), and the items identified in Paragraph 7.4.2(b), and provide details of any non-compliance. A copy of the audit report(s) must be provided to QR.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes that a Third Party Operator will be required to have its rail operations audited on an annual basis in order to demonstrate to QR's reasonable satisfaction that the operator is complying with:

- the Rolling Stock Interface Standards;
- the Safety Management System; and
- the Environmental Management System.

In addition, QR reserves the right, at any time, to require a Third Party Operator to have specific elements of its operations audited where QR has reasonable grounds for believing that these interface requirements have not been complied with and appropriate measures to rectify such non-compliance have not been undertaken.

QR proposes that subject to its reasonable satisfaction, audits concerning Rolling Stock Interface Standards and Safety Management Systems may be undertaken in conjunction with an audit required by the Safety Regulator.

The Authority seeks comments on whether:

- **it is necessary for QR to undertake audits, or to arrange for the preparation of audits, of a Third Party Operator's Safety Management System and compliance with Rolling Stock Standards given the Rail Safety Accreditation Unit's responsibilities in this area (Clause 7.5(c))**
- **it is necessary for QR to undertake audits of Third Party Operator's environmental performance, given the Environmental Protection Agency's role**
- **QR should pay for the cost of an audit it requires if it finds no deficiencies (Clause 7.5(a) & (b))**

7.6 INTERFACE COORDINATION PLAN

- (a) Prior to the commencement of Train Services by the Third Party Operator, QR will develop, in consultation with the Third Party Operator, an Interface Coordination Plan. Both parties shall comply with the Interface Coordination Plan in exercising the rights and obligations of the Access Agreement. However to the extent any inconsistency arises between the Interface Coordination Plan and the Access Agreement the requirements of the Access Agreement shall prevail.
- (b) The Interface Coordination Plan will supplement the provisions of the Access Agreement and be consistent with such plans in existence for other Railway Operators and may include:
- (i) operational procedures;
 - (ii) emergency procedures and incident management;
 - (iii) track possession procedures;
 - (iv) train control contacts;
 - (v) train schedule variation procedures;
 - (vi) service recovery procedures; and
- (c) any other issues considered necessary in respect of the procedures to be followed in administering the Access Agreement.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes that prior to the commencement of the Third Party Operator's Train Services, both parties will collaborate in the development of an Interface Co-ordination Plan to supplement the provisions of the Access Agreement. The plan will address issues such as operational procedures, emergency procedures and incident management, track possession procedures, train control contacts, train schedule variation procedures and service recovery procedures.

The development of an Interface Co-ordination Plan is a requirement of the rail safety accreditation process. The agreed responsibilities of QR and a Third Party Operator at the interface should be addressed in their respective Safety Management Systems for the RSAU's consideration and approval.

7.7 ADJOINING INFRASTRUCTURE

- (a) Unless otherwise agreed, where a Third Party Operator proposes to construct infrastructure which connects to the Rail Infrastructure but for which QR will not be Railway Manager, QR shall either design, or approve the design of, and supervise the construction of the connection and those elements of adjoining infrastructure essential to the operation of safeworking systems on the Rail Infrastructure including the connection itself.
- (b) The Third Party Operator shall reimburse QR's reasonable costs for such design and supervision work and, unless otherwise agreed, shall be responsible for funding all costs associated with the construction of the adjoining infrastructure and the connection.

The Explanatory Guide did not address this clause.

QCA Request for Comments

QR proposes that where a Third Party Operator proposes to construct adjoining infrastructure for which QR will not be Railway Manager, QR will design and supervise the construction of the connection and other elements of the adjoining infrastructure essential to the operation of safeworking systems on the Rail Infrastructure. QR proposes that the Third Party Operator will reimburse QR's design and supervision costs and fund all construction costs associated with the adjoining infrastructure and connection.

The Authority seeks comments on:

- **what does the protection of QR's legitimate business interests require in relation to connecting infrastructure**
- **whether QR's proposal potentially enables it to require that adjoining infrastructure be constructed to a higher standard than QR's current infrastructure**

PART 8. DEFINITIONS & INTERPRETATIONS**8.1 DEFINITIONS**

In this Undertaking, unless inconsistent with the context, the following words and expressions shall have the respective meanings:

"Above Rail Services" means those activities, other than Below Rail Services, required to provide and operate Train Services including Rollingstock provision, Rollingstock maintenance, non train control related communications, train crewing, terminal provision and services, freight handling and marketing and administration of those services;

“Access” means the non-exclusive utilisation of a specified section of Rail Infrastructure for the purposes of operating Train Services;

“Access Agreement” means an agreement between QR and a Railway Operator for the provision of Access and will include arrangements between Network Access and other QR business groups for the provision of Access for the purpose of QR operated Train Services;

“Access Application” means a request for Access by a Third Party Operator which has been prepared in writing and which complies with the information requirements of Paragraph 4.3(b);

“Access Charge” means the price paid by a Railway Operator for Access under an Access Agreement;

“Access Rights” means the entitlement of a Railway Operator to Access in accordance with a specified Capacity Entitlement;

“Accreditation” means accreditation in accordance with Part 4, Chapter 6 of the *Transport Infrastructure Act 1994 (Qld)* and “Accredited” has a similar meaning;

“Act” means the *Queensland Competition Authority Act 1997 (Qld)*;

“Additional Information” means that information that is to be provided by QR to a Third Party Operator during the Negotiation Period as set out in Schedule D, excluding any information that is provided as part of the Preliminary Information, but only to the extent required either by the Third Party Operator or as part of the Access Agreement;

“Authority” means the Crown, a minister of the Crown, a federal, state or local government department, a corporation or authority constituted for a public purpose, a holder of an office for a public purpose, a local authority, a court, a tribunal and any officer or agent of the foregoing acting as such that lawfully exercise jurisdiction over QR;

“Available Capacity” means Capacity that is not Committed Capacity and includes Capacity which will cease being Committed Capacity prior to the time in respect of which Capacity is being assessed;

“Below Rail Services” means the activities associated with the provision and management of Rail Infrastructure, including the construction, maintenance and renewal of Rail Infrastructure assets, and the network management services required for the safe operation of Train Services on the Rail Infrastructure, including train control and the implementation of Safeworking Procedures;

“Capacity” means the capability of a specified section of Rail Infrastructure to accommodate Train Services within a specified time period after providing for QR’s reasonable requirements for the exclusive utilisation of that specified section of Rail Infrastructure for the purposes of performing activities associated with the repair or enhancement of the Rail Infrastructure, including the operation of work trains;

“Capacity Analysis” means an assessment of the extent a specified section of Rail Infrastructure has Available Capacity and whether that Available Capacity is sufficient for the proposed Access requirements and, if the Available Capacity is not sufficient for the proposed Access requirements, an assessment of Rail Infrastructure expansion or other Capacity enhancement required to meet those proposed Access requirements;

“Capacity Entitlement” means a Railway Operator’s entitlement under an Access Agreement to operate a specified number and type of Train Services over the Rail Infrastructure within a specified time period and in accordance with specified scheduling constraints for the purpose of either carrying a specified commodity or providing a specified transport service, and, until such time that Access

Agreements have been developed for all existing QR operated Train Services, includes the Capacity that is demonstrably required for the purpose of QR operated Train Services and in respect of which Access Charges are applicable;

“*Committed Capacity*” means that portion of the Capacity that is required to meet the Capacity Entitlements of Railway Operators;

“*Common Costs*” means those costs associated with provision of Rail Infrastructure that are not Incremental Costs for any particular Train Service using that Rail Infrastructure;

“*Confidential Information*” means any information, data or other matter marked confidential by a party when disclosed to the other party or disclosed to the other party with an express requirement in writing that the information, data or other matter be treated as confidential, where such information, data or other matter:

- (i) is not already in the public domain;
- (ii) does not become available to the public through means other than a breach of confidentiality;
- (iii) was not in the other party’s possession prior to such disclosure; and
- (iv) is not received by the other party independently from a third party free to disclose such information, data or other matter;

“*Corporations Law*” has the meaning given to that term in the *Corporations (Queensland) Act 1990*;

“*Cost Allocation Manual*” means a manual prepared by QR which identifies the matters outlined in Paragraph 5.5(a);

“*Cross Subsidy*” means where one Train Service or combination of Train Services pays Access Charges which are insufficient to meet:

- (a) the Incremental Cost imposed on the Rail Infrastructure by that Train Service or combination of Train Services; and
- (b) in respect of a group of Train Services, the Common Costs related specifically to sections of Rail Infrastructure that are used solely for the purpose of Train Services within that combination of Train Services;

and the shortfall is contributed to by another Train Service or combination of Train Services;

“*Draft Amending Undertaking*” means a document specifying amendments to the relevant provisions of this Undertaking, which is submitted to the QCA in the circumstances envisaged in Part 5 of the Act;

“*Environmental Authorities*” has the meaning given to that term in the *Environmental Protection Act 1994 (Qld)*;

“*Environmental Investigation*” means a study of the likely short term and long term beneficial and detrimental effects on the environment of the Third Party Operator’s operations insofar as they interact with the Rail Infrastructure and other Train Services;

“*Environmental Management System*” means the Third Party Operator’s plan of management to address all environmental risks and to ensure compliance with all environmental laws and licenses;

“*Environmental Risk Management Plan*” means a plan identifying the set of controls and measures agreed between QR and the Third Party Operator to address risks identified through the Environmental Investigation, and identifying the party responsible for implementation of those controls and measures;

“*Evaluation Period*” means, when in reference to an Individual Train Service, the period which is equal to the length of the expected duration of the existing or proposed Access Agreement in respect of the relevant Train Service or, when in reference to a group of Train Services, the period which is equal to the length of the expected duration of the longest existing or proposed Access Agreement in respect of any of the Train Services comprising the combination of Train Services, provided that such period does not exceed ten (10) years;

“*Explanatory Guide*” means the document developed for the purpose set out in Paragraph 1(d) of this Undertaking;

“*Geographic System*” means sections of the Rail Infrastructure identified as such in the Cost Allocation Manual;

“*Impact Assessment Study*” means a detailed study of the short and long term beneficial and detrimental effects on the environment of the Third Party Operator’s operations insofar as they interact with the Rail Infrastructure and which includes an assessment of all relevant environmental factors, including social, economic and biophysical factors related to such operations;

“*Incremental Costs*” means those costs of providing Access, including capital (renewal and expansion) costs, that would not be incurred (including the cost of bringing expenditure forward in time) if the particular Train Service or group of Train Services (as appropriate) did not operate;

“*Indicative Access Proposal*” means a non-binding response from QR to an Access Application of a Third Party Operator, prepared in writing and including the information set out in Clause 4.5;

“*Infrastructure Payments*” means payments to QR from the Queensland Government to enable QR to provide specified sections of Rail Infrastructure;

“*Initial Capacity Assessment*” means a preliminary Capacity Analysis undertaken in a manner to give an indicative assessment only and which will require further analysis as part of the final Capacity Analysis;

“*Interface Coordination Plan*” means a plan which identifies the procedures to be followed and the responsible officers from both QR and the Third Party Operator, in respect of all regular operational interfaces between the parties that arise in the exercise of rights and the performance of obligations under the Access Agreement;

“*Market*” has the meaning given to that term in section 71 of the Act;

“*Material Change Event*” means the occurrence of any of the following events on or after the date upon which the QCA approved the relevant Reference Tariff/s:

- (a) any amendment, repeal, modification or enactment of any acts, ordinances, regulations, by-laws, proclamations and subordinate legislation made under, by or pursuant to any Commonwealth or State statute or any relevant Authority (“Legislation”);
- (b) any binding change in the interpretation or application of any Legislation resulting from a decision of a court or tribunal;

- (c) the making of any new policy, instruction, direction or order (“Directive”) of an Authority (including without limitation QR’s shareholding ministers) which impacts on QR, or the modification, extension or replacement of any existing Directive;
- (d) the imposition of a requirement for any license, permit, approval, consent or other authority (“Authorisation”) not required as at the date upon which the QCA approved the relevant Reference Tariff;
- (e) after the date of grant of any Authorisation, a change in the terms and conditions attaching to that Authorisation or the attachment of any new terms or conditions;
- (f) the imposition or abolition of, increase or reduction in the rate of, or change in the basis of calculating, any Commonwealth, State or Local Government imposed tax, charge, levy, duty, impost, rate, royalty or imposition (“Tax”) imposed on, or payable by, QR including, without limitation, any Tax relating to the protection of the environment imposed on users of electricity or imposing a form of consumption, value added or sales tax, but excluding any income tax; or
- (g) a change in the Commonwealth Government ten (10) year bond rate of more than one hundred (100) basis points from the time that the Reference Tariff:
 - (i) was endorsed by the QCA; or
 - (ii) was varied in accordance with Paragraph 5.3.2(b) to reflect a change in the Commonwealth Government ten (10) year bond rate;

whichever is the later;

“*Material Default*” means:

- (a) repeated failure to comply with the terms and/or conditions of any of the agreements specified in Paragraph 4.1.2(c); or
- (b) any breach of a fundamental term and/or condition of any of the agreements specified in Paragraph 4.1.2(c);

“*Negotiation Period*” means the period during which the terms and conditions of an Access Agreement will be negotiated and which commences upon the Third Party Operator providing QR with a notification of intent to proceed with negotiations pursuant to Clause 4.6 and concludes upon any of the events set out in Paragraph 4.7.1(c);

“*Network Access*” means the business group established within QR to manage the provision of Below Rail Services with the exception of stations, platforms and selected marshalling yards;

“*Operating Plan*” is a description of how the proposed Train Services are to be operated, including the matters identified in Schedule H;

“*Preliminary Information*” means that information that, prior to the submission of an Access Application, QR will be required to provide to a Third Party Operator, if and to the extent requested by the Third Party Operator, where the scope of such information is as set out in Part 1 of Schedule D;

“*QCA*” means the Queensland Competition Authority as established by the Act;

“*Queensland Transport*” means the Department of Transport for the State of Queensland;

“*Rail Infrastructure*” means Rail Transport Infrastructure as defined in the *Transport Infrastructure Act 1994 (Qld)* for which QR is the Railway Manager;

“*Railway Manager*” has the meaning given to that term in the *Transport Infrastructure Act 1994 (Qld)*;

“*Railway Operator*” means a person who has, or is seeking, Access from QR to operate Train Services on the Rail Infrastructure and who is, or who will become, Accredited in respect of those Train Services;

“*Reference Tariff*” is an Access Charge applicable for a specified Reference Train Service, established in accordance with Clause 5.3, the purpose of which is to provide information to Third Party Operators as to the likely level of Access Charge for Train Services of a similar type as the specified Reference Train Service;

“*Reference Train Service*” means a notional Train Service conforming to certain criteria, including carrying a specified commodity type, operating between specified geographical areas and conforming to specified technical characteristics, operational characteristics and contract terms and conditions;

“*Related Party*” has the meaning given to Related Body Corporate in the Corporations Law;

“*Revenue Limit*” is the maximum revenue which QR should be entitled to earn from the provision of Access to the Train Service or Train Service Group (as appropriate) over the Evaluation Period;

“*Ringfencing Guidelines*” means guidelines prepared by QR in accordance with Clause 3.5;

“*Rollingstock*” means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle which operates on or uses the Track;

“*Rollingstock Configuration*” means the description of the combination of Rollingstock comprising a Train including identification number and gross mass of individual items of Rollingstock and the order in which those Rollingstock items are placed in the Train;

“*Rollingstock Interface Standards*” are the minimum standards relating to the interface between Rollingstock and the Rail Infrastructure with which the Rollingstock and Rollingstock Configurations must comply in order for them to be able to be operated on the relevant parts of the Rail Infrastructure and which include standards relating to the criteria identified in Part 2 of Schedule D;

“*Rollingstock Standards*” are those Rollingstock Interface Standards that relate to the design and performance of Rollingstock;

“*Safety Management System*” means:

- (a) in respect of a Railway Operator, a system developed by the Railway Operator to manage all risks associated with the operation of Train Services including specifically those risks identified in the Safety Risk Assessment; and
- (b) in respect of a Railway Manager, a system developed by the Railway Manager to manage all risks associated with the provision of Rail Infrastructure and safe management of Train operations on the Rail Infrastructure, including specifically those risks identified in the Safety Risk Assessment;

and which forms the basis upon which the Railway Operator or Railway Manager becomes Accredited;

“*Safety Regulator*” means the Chief Executive of Queensland Transport (or his delegate) operating in accordance with Part 4 of the *Transport Infrastructure Act 1994*;

“*Safety Risk Assessment*” means an assessment of the operational and safety risks associated with the Third Party Operator’s operations insofar as they interface with the Rail Infrastructure and other Train Services;

“*Safety Risk Management Plan*” means a plan identifying the set of controls and measures agreed between QR and the Third Party Operator to address risks identified through the Safety Risk Assessment, and the party responsible for the implementation of those controls and measures;

“*Safety Standards*” means all standards relating to safety, including occupational health and safety, established in published guidelines, industry practice or QR policies and all standards relating to safety, including occupational health and safety, prescribed by any laws;

“*Safeworking Procedures*” means the procedures and systems, including supporting communications systems, for the safe operation of Trains and protection of work sites on the Rail Infrastructure;

“*Scheduling and Train Control Protocols*” means protocols prepared by QR outlining the approach QR will adopt with respect to the matters outlined in Paragraph 3.2(e);

“*Solvent*” means none of the following events have happened in relation to the Third Party Operator:

- (a) the Third Party Operator is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the Corporations Law;
- (b) a meeting is convened to place it in voluntary liquidation or to appoint an administrator;
- (c) an application is made to a court for it to be wound up and the application is not dismissed within one month;
- (d) the appointment of a controller (as defined in the Corporations Law) of any of its assets; or
- (e) the Third Party Operator proposes to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement;

“*Stand Alone Costs*” means those costs that QR would incur if the relevant Train Service or combination of Train Services (as appropriate) was the only Train Service or group of Train Services provided Access by QR and “*Stand Alone*” has a similar meaning;

“*Standard Gauge*” means a nominal gauge between rails of 1435 mm;

“*Third Party Operator*” means a Railway Operator other than QR;

“*Track*” means that part of the Rail Infrastructure comprising the rail, ballast, sleepers and associated fittings upon which Trains operate;

“*Train*” means any configuration of Rollingstock operating as a unit on the Track;

“*Train Service*” means the operation of a Train between specified origins and destinations on the Rail Infrastructure;

“*Train Service Group*” means a specified combination of Train Services that operate over discrete parts of the Rail Infrastructure and which is nominated as such in Schedule F;

“*Train Standards*” are those Rollingstock Interface Standards that relate to Rollingstock Configurations; and

“*Undertaking*” has the meaning given to that term in the Act.

8.2 INTERPRETATION

In this Undertaking unless the context otherwise requires:

- (a) reference to a person includes any other entity recognised by law and vice versa;
- (b) reference to “dollars” or “\$” means a reference to Australian dollars;
- (c) words importing the singular number includes the plural number and vice versa;
- (d) words importing any gender include the other gender;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) any reference to any parties by their defined terms includes that party’s executors, administrators, permitted assigns or permitted subcontractors or, being a company, its successors, permitted assigns or permitted subcontractors and the obligation of any party extends to those persons;
- (g) a reference to conduct includes a benefit, remedy, discretion, authority or power;
- (h) a reference to conduct includes any omission and any representation, statement or undertaking, whether or not in writing;
- (i) every agreement or undertaking expressed or implied by which more than one person agrees or undertakes any obligations or derives any benefit binds or ensures for the benefit of those persons jointly and each of them severally;
- (j) clause headings are for reference purpose only;
- (k) any reference to an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;
- (l) any reference to the words “include” or “including” must be read as if they are followed by the words “without limitation”;
- (m) any reference to time is to local time in Queensland;
- (n) reference to a Clause, Subclause, Paragraph or Schedule is a reference to the corresponding Clause, Subclause, Paragraph or Schedule to this Undertaking as amended or replaced from time to time;
- (o) this or any other document or agreement includes the document or agreement as varied, amended or replaced from time to time and notwithstanding any changes in the identity of the parties;
- (p) reference to any legislation includes all legislation under and amendments to that legislation and any legislation passed in substitution for that legislation or incorporating any of its provisions to the extent that they are incorporated;
- (q) if there is any inconsistency between matters contained in a Schedule and the body of this Undertaking, the provisions of the Undertaking prevail.

SCHEDULE A

Timetable for Internal Access Agreements

Date for Completion	Products
4 months after the Commencing Date	<ul style="list-style-type: none">• unit trains of coal and major industrial products (e.g. minerals, bulk fertilizer, bulk acid)
6 months after the Commencing Date	<ul style="list-style-type: none">• unit trains of containers• unit trains of primary industry products (e.g. grain, sugar)• Brisbane urban and interurban passenger• long distance and country passenger
9 months after the Commencing Date	<ul style="list-style-type: none">• other traffics, e.g. small freight, livestock

SCHEDULE B

Ringfencing Guidelines

A. Ringfencing Principles

- assist in meeting QR's obligations under section 104 of the Act, namely that having regard to the relevant criteria Access is not provided to QR business groups operating Train Services on more favourable terms than the terms on which QR intends to provide Access to Third Party Operators;
- ensuring that QR business groups operating Train Services are not placed at a competitive disadvantage in relation to the negotiation and provision of Access, by virtue of QR's status as a vertically integrated railway; and
- ensuring that, as far as possible taking into account QR's obligations under the Undertaking and under the QCA Act, QR retains the economic and other benefits which come from being a vertically integrated railway.

B. Ringfencing Issues

- the provision of a framework for the movement of information within QR to ensure that the confidentiality of information provided by Railway Operators, including both Third Party Operators and QR Railway Operators, is maintained consistent with Clause 4.2 of this Undertaking. This framework will ensure that Confidential Information provided to QR by Third Party Operators will not be made available to those areas of QR responsible for the commercial arrangements associated with QR operated Train Services;
- the protection of QR's intellectual property and the intellectual property rights of Third Party Operators;
- requiring all Network Access employees, contractors and other relevant QR employees (including staff employed by QR business groups operating Train Services) dealing with Access to undergo training in relation to QR's Ringfencing Guidelines in order to ensure they are aware of QR's obligations with respect to Confidential Information and the importance of complying with QR's Ringfencing Guidelines;
- establishing procedures for staff transfer and secondment to assist in meeting QR's obligations in relation to the Confidential Information belonging to Third Party Operators whilst not unreasonably limiting the potential career paths of QR employees;
- establishing a register to identify ringfencing issues and the actions taken to resolve them. Specifically, the register will deal with questions of interpretation raised in relation to compliance with QR's Ringfencing Guidelines, suggestions for improvement to the Ringfencing Guidelines, changes to procedures or controls that may be implemented over time, action taken in response to audits of QR's compliance with the Ringfencing Guidelines, and notification of breaches, potential breaches and complaints (internal or external) received;
- establishing procedures to conduct investigations into any complaints received from third parties that QR had breached its Ringfencing Guidelines and to report the outcome of the investigation to the complainant. A system of investigating possible breaches of the Ringfencing Guidelines reported by QR employees will also be established; and
- providing for audits of QR's compliance with the Ringfencing Guidelines.

SCHEDULE C

Summary of Information Requirements as part of Access Application

A. Third party operator's name and contact details

(if the Third Party Operator is an unincorporated joint venture, all parties should be identified)

B. Train service description for freight services

- Route of operation (include diagram if necessary)
- Required term of Access Agreement
- Method of transporting freight (e.g. containers, louvered wagons, bulk wagons)
- Description of freight
- Net tonnes per annum for years 1 to 4 and onwards from year 4. Seasonal peak tonnages should be noted.
- Access to station yards required, including load/unload and storage time
- Storage/servicing locations, repositioning requirements
- Required frequency of train services, including specific daily requirements, weekly requirements, seasonality variations and any trends over the agreement term
- General train details:
 - ◆ Proposed number of locomotives per train
 - ◆ Proposed number of wagons per train
 - ◆ Type and class of locomotive
 - ◆ Mass of each locomotive (includes full sand and fuel load)
 - ◆ Type and class of wagons
 - ◆ Nominal gross mass of wagon
 - ◆ Tare mass of each wagon
 - ◆ Tare mass per container
 - ◆ Average number of containers per wagon
 - ◆ Average proposed load (of product) per wagon
 - ◆ Maximum proposed gross tonnes per wagon
 - ◆ Axle load/spacing
 - ◆ Wheel size
 - ◆ Gross tonnes per train service, forward and return

- Maximum operation speed of loaded and empty train

C. Train service description for passenger services

- Route of operation (include diagram if necessary)
- Required term of Access Agreement
- Type of passenger traffic (e.g. long distance, commuter, tourist)
- Embarking and disembarking stations enroute, facilities required at stations and estimated dwell time
- Stabling/servicing locations, empty returning/repositioning requirements
- Required frequency of train services, including specific daily requirements, weekly requirements, seasonality variations and any trends over the agreement term
- General train details:
 - ◆ Total number of locomotives per train
 - ◆ Total number of carriages per train
 - ◆ Total number of passenger multiple units (PMU) per train
 - ◆ Type and class of locomotive
 - ◆ Mass of each locomotive (including full sand and fuel load)
 - ◆ Type and class of carriage
 - ◆ Nominal gross mass of each carriage
 - ◆ Tare mass per carriage
 - ◆ Type and class of PMU
 - ◆ Nominal gross mass of PMU
 - ◆ Tare mass per PMU
 - ◆ Axle load/spacing
 - ◆ Wheel size
 - ◆ Gross tonnes per train service, forward and return
- Maximum operation speed of loaded and empty train

SCHEDULE D

Preliminary and Additional Information

Part One: Preliminary Information

1.1 Introduction

This section defines the extent of the Rail Infrastructure to which this information is applicable ('Nominated Network') and details the criteria for use of the data and purpose of the document.

1.2 Technical Information

- (a) Civil Infrastructure
 - description of track
 - operational constraints (e.g. ruling grades)
- (b) Signals and Operational Systems
 - description of safeworking systems
- (c) Telecommunications
 - description of communications system used
- (d) Electric Traction
 - general system description
- (e) Rollingstock Interface Requirements
 - track gauge
 - axle load/s
 - train speed/s
 - minimum structure gauge
 - noise limits
- (f) Locality information
 - terrain information
 - environmental conditions, including temperature ranges, rainfall, exposure to floods, cyclones etc.
- (g) Committed and/or potential corridor upgrades
- (h) Relevant maps and drawings
 - corridor maps
 - working plan and section drawings
- (i) Level crossings
 - number of level crossings
 - type of protection used

1.3 Operational Information

- (a) Capacity
 - indication of Capacity utilisation for the Nominated Network
 - general description of known Capacity constraints
 - committed Capacity upgrades
- (b) Train operation
 - sectional running times
 - maximum train length
- (c) Description of systems
 - operational
 - safeworking

1.4 Commercial Information

- (a) Reference Tariffs (if applicable Reference Tariffs have been approved by the QCA)
- (b) Cost Allocation Manual

1.5 Policies

- (a) Undertaking
- (b) Ringfencing Guidelines
- (c) Process for authorisation of Rollingstock
- (d) Process for authorisation of Rollingstock Configurations
- (e) Scheduling and Train Control Protocols

Part Two: Additional Information

2.1 Rollingstock Standards

This section will identify the Rollingstock Standards currently applicable for the Nominated Network. The Rollingstock Standards shall be based on:

- parameters necessary to manage risks of incidents involving the Rail Infrastructure/Rollingstock interface;
- parameters necessary to manage risks of incidents with adverse consequences for the infrastructure integrity related to Rollingstock integrity; and
- Rollingstock characteristics used in formulating Access Charges.

2.2 Train Standards

This section will provide information on the Train Standards applicable to the Nominated Network. The Train Standards shall be based on parameters necessary to reasonably manage risks of incidents involving the Rail Infrastructure/Rollingstock Configuration interface.

SCHEDULE E

Summary of Standard Access Agreement

Operative Provisions - Access Rights

- Access Rights granted are for non-exclusive rights for the operation of Train Services in terms of agreed service levels over the nominated network and are for Access only to those parts of the infrastructure specifically included in the nominated network.
- Access Rights do not include Above Rail Services such as carrying out any provisioning, inspection, testing, maintenance of rollingstock, marshalling, shunting or other relocation or storage of rollingstock.
- The Agreement is to be for the specified term.

General Conditions of Contract

1. Definitions and Interpretation

2. Access Charges

- The Third Party Operator is to pay Access Charges (together with costs for any ancillary services) in accordance with the Agreement. Periodic review of Access Charges may be agreed in the case of longer term agreements.
- QR renders accounts on a monthly billing basis with payment required 5 business days from receipt of invoice.
- Late payments will bear interest at the default rate (Commonwealth Bank Reference Rate for overdrafts of \$100,000.00 or more, plus 2%).
- In the case of a dispute over any amount payable the Third Party Operator is to pay the non-disputed amount together with 50% of the disputed amount pending resolution of the dispute by expert determination.
- Any reimbursement required from QR to the Third Party Operator will be made by way of deduction from subsequent accounts for Access Charges.
- The Third Party Operator is required to lodge a security deposit in the form of an irrevocable bank guarantee for an amount specified in the Agreement to secure performance by the Third Party Operator of its obligations under the Agreement.

3. Train Service Entitlements

- The Third Party Operator must operate Trains of the nominated specification for the transport of the nominated product over the nominated network.
- The operation of Train Services must be in accordance with agreed scheduling procedures subject to the constraints specified in the Agreement;

- Where the Third Party Operator fails during any 6 consecutive months (other than for reasons of Force Majeure or default by QR) to operate the Train Services which it is entitled to operate under the Agreement, QR may seek a reduction in the Third Party Operator's entitlements to a level commensurate with demonstrable requirements.

4. Day to Day Train Movements

- QR is to have exclusive responsibility for train control and will use reasonable efforts to ensure efficient utilisation of the nominated network having regard to the entitlements of all users and safety and maintenance requirements.
- The Third Party Operator is required to comply with all QR train control directions.

5. Train Operations

- All Train Services are to comply with all laws, Safety Standards, Safeworking Procedures, the Interface Coordination Plan and other requirements of the Agreement. QR may vary the Safeworking Procedures at any time following consultation with, and the giving of reasonable notice to, the Third Party Operator.
- The Third Party Operator is to use reasonable endeavours to ensure that its Train Services conform to the train schedule and must notify QR of any circumstances which may affect compliance with the train schedule. QR will use reasonable endeavours to provide an alternative time for any Train Service unable to operate in accordance with the train schedule however if it is unable to do so then the Train Service may be cancelled by either party.
- Except as otherwise prescribed in the Agreement neither party has any liability for delays to train movements unless arising from the willful default of either party.
- The Third Party Operator must provide the necessary communication links with QR's information systems and provide the specified details of Train Services prior to operation.
- The Third Party Operator must provide an Operating Plan detailing all procedural aspects relevant to its Train Services and must comply with that plan at all times. No alteration to the Operating Plan will be permitted without the prior approval of QR.
- The parties are required to meet specified performance levels and liquidated damages may be applied where these performance levels are not met. Performance levels may be reviewed periodically and QR may adjust the Third Party Operator's performance levels, the Access Charges and/or the service levels where the Third Party Operator consistently fails to meet its performance levels.
- The Third Party Operator 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 laws, the Rollingstock specification and Rollingstock Interface Standards specified in the Agreement.
- Only Rollingstock and Rollingstock Configurations authorised by QR may operate on the nominated network. For Rollingstock and Rollingstock Configurations to be authorised by QR the Third Party Operator must demonstrate to QR's reasonable satisfaction that Rollingstock and Rollingstock Configuration complies with the Rollingstock Interface Standards. Such authority to operate may be withdrawn if at any time Rollingstock or Rollingstock Configurations fail to comply with the Rollingstock Interface Standards.

- The Third Party Operator must ensure all loadings of Rollingstock are secure and comply with the requirements of the Rollingstock specification in the Agreement. QR may require discontinuance of any service and appropriate remedial action where it has a reasonable belief that Rollingstock is not properly loaded.
- QR may vary the Rollingstock Interface Standards at any time and where this necessitates modification of the Third Party Operator's Rollingstock, the cost of such modifications are to be borne in the manner agreed by the parties or, failing agreement, as determined by an expert.
- All Rollingstock must be equipped with the equipment necessary for compliance with the Safeworking Procedures and the Third Party Operator is responsible for providing any additional equipment required due to changes in the Safeworking Procedures required by QR from time to time.
- QR and the Third Party Operator must comply with the Interface Co-ordination Plan.

6. Infrastructure Management

- QR is responsible for the management and control of the nominated network and in developing and maintaining its Safety Management System shall have regard to the Rollingstock Interface Standards.
- QR will carry out maintenance work on the nominated network to the standard required to maintain its Accreditation as a Railway Manager and consistent with its Safety Management System.
- QR may impose operational constraints (such as speed or load restrictions) for the protection of persons or property or to facilitate maintenance work or enhancements and has reasonable entitlements to take possession of the track for the purpose of maintenance work, emergency repairs and enhancements. Except for emergency possessions QR will comply with the specified notification procedures and, subject to compliance with those procedures, QR has no liability for delays or cancellations of Train Services caused by the imposition of operational constraints.

7. Incident Management

- The Third Party Operator is required to develop and comply with an Emergency Response Plan containing procedures for dealing with incidents such as derailments, breakdowns and accidents. The Plan must be consistent with QR's emergency procedures.
- The Third Party Operator must not cause any obstruction on the nominated network and must notify QR of any obstruction or breach of Safeworking Procedures of which it becomes aware or anything which may cause or contribute to an incident or obstruction.
- QR is responsible for the overall co-ordination and management of incident responses and, except for action required to avoid imminent risk of injury or damage, the Third Party Operator is not to take any action without the prior approval of QR.
- In the event of an incident the Third Party Operator is required to arrange recovery of Rollingstock and to co-operate and assist with the restoration of train movements, comply with the directions of QR and alter or divert Train Services as directed by QR.

- The Third Party Operator is to provide reasonable assistance to QR (including the provision of Rollingstock or equipment) to deal with circumstances which could delay train movements subject to the Third Party Operator being reimbursed its reasonable costs.
- The parties must use all reasonable endeavours to minimise damage arising from restoration of services or recovery of Rollingstock however QR is entitled to take any action it considers necessary to recommence services as soon as possible.
- Investigations into incidents are to be carried out in accordance with the process specified in the Agreement with the parties to co-operate in any investigation and the implementation of any recommendations.

8. Environmental Protection and Other Issues

- Prior to the commencement of Train Services the Third Party Operator is required, in collaboration with QR, to procure an Environmental Investigation to be conducted by a suitably qualified person reasonably acceptable to both parties to identify all risks of environmental harm arising out of the use of the nominated network. The Third Party Operator and QR will then develop and agree specific controls and measures to address the risks identified in the environmental investigation and incorporate them into the Environmental Risk Management Plan.
- The Third Party Operator is required to incorporate the Environmental Risk Management Plan so developed into its Environmental Management System and at all times ensure compliance with the Environmental Risk Management Plan and all environmental laws.
- If the Environmental Investigation, the Environmental Risk Management Plan or any independent audit identifies environmental factors preventing the provision of access as envisaged or indicate to the reasonable satisfaction of QR that it will be placed at an unacceptable risk of liability from possible environmental harm or of breaching environmental laws, QR may terminate the Agreement. Before QR may terminate the Agreement it must first have the material or report on which it has based its assessment of risk subjected to an independent review by an expert.
- If Train Services are to carry dangerous goods, the Third Party Operator is to comply with the Dangerous Goods Code (including obtaining the necessary authorisations and providing details to QR prior to the commencement of each Train Service) and must include procedures for the handling of any incident in its Emergency Response Plan.
- The Third Party Operator must comply with the Noise Guidelines specified in the Agreement and any other documents prepared by QR in accordance with the relevant Environmental Protection Policy. Where the Train Services of the Third Party Operator exceed permitted noise levels the Third Party Operator, at its cost, may be required to participate in noise abatement measures and further monitoring of noise levels.
- The Third Party Operator is responsible for taking measures to prevent contamination and to deal with any spillage or leakage which could result in contamination.
- The Third Party Operator is required to have an independent environmental compliance audit conducted at least annually by a suitably qualified person reasonably acceptable to QR and provide a copy of the audit report to QR.

9. Accreditation

- Both parties are required to warrant that prior to the commencement of Train Services they are accredited under the *Transport Infrastructure Act 1994* to the extent required to perform their obligations and exercise their rights under this Agreement. The parties must also notify each other of any conditions, variations, amendment, investigation, suspension or cancellation affecting their Accreditation relevant to operating the Train Services on the nominated network.

10. Third Party Operator's Staff

- The Third Party Operator is responsible for the health and safety of its staff and their property.
- The Third Party Operator is required to demonstrate the competence of all of its staff involved in safety related work and to ensure that they hold and keep current all necessary qualifications and accreditations.
- The Third Party Operator is to ensure that all staff comply with QR train control directions, Safeworking Procedures and Safety Standards and QR may temporarily suspend the right of staff to operate on the nominated network in the event of breach.

11. Risk Management

- Prior to the commencement of Train Services the Third Party Operator is required, jointly with QR, to procure a Safety Risk Assessment to be conducted by an appropriately competent person reasonably acceptable to both parties to address the risks (other than environmental risks) of operations over the nominated network. The Third Party Operator and QR will then develop and agree on a Safety Risk Management Plan to be included in the Third Party Operator's Safety Management System.
- The Third Party Operator is required to have an audit undertaken and produce a certificate of compliance with the Safety Risk Management Plan at least annually. All audits are to be undertaken by an independent appropriately qualified person reasonably acceptable to QR or may be undertaken as part of an audit required by the Safety Regulator.

12. Reporting and Inspection Rights

- Upon reasonable notice QR is entitled to inspect and audit those aspects of the Third Party Operator's operation, procedures and documentation relevant to the Third Party Operator's compliance with this Agreement.
- QR is also entitled to inspect any trains or Rollingstock to review compliance with the Rollingstock specification and the Rollingstock Interface Standards and the Agreement without liability for delays to Train Services caused by such inspection provided that QR uses its reasonable efforts to minimise any disruptions.

13. Insurance by Third Party Operator

- Prior to the commencement of Train Services the Third Party Operator must effect the required insurance policies noting the interests of the Third Party Operator, any contractor and QR and provide evidence of such insurance to QR upon commencement and renewal. The terms and conditions of the policies must be approved by QR.

14. Indemnities and Liabilities

- The Third Party Operator is required to indemnify QR in respect of:
 - claims arising from non-compliance with environmental obligations although indemnity reduced proportionately by extent of QR's default or negligence (if any);
 - claims in respect of damage to property or injury to or death of any person to the extent that such claims arise from the deliberate or negligent act or omission of, or default by, the Third Party Operator; and
 - claims in respect of damage to property or injury to any person carried on Train Services.
- The Third Party Operator is to release QR from all claims for damage to property or injury to persons associated with the use of the nominated network except where they arise from the deliberate or negligent act or omission of, or default by QR.
- Except as provided above QR is required to indemnify the Third Party Operator in respect of claims brought against the Third Party Operator in respect of any damage to property or personal injury or death to the extent that such claims arise from the deliberate or negligent act or omission of QR.
- QR is to release the Third Party Operator from all claims for damage to property or injury to persons associated with the use of the nominated network except where they arise from the deliberate or negligent act or omission of, or default by the Third Party Operator.

15. Limitation of Liability

- The liabilities of the parties for default are limited to the amount specified in the Agreement.
- Neither party has any liability for consequential loss or damage or loss of profits.
- Claims by either party must be lodged within six months of the occurrence of the event or circumstance giving rise to the claim.

16. Material Change

- QR will give the Third Party Operator notice of the occurrence of a material change which may give rise to an additional cost or variation to it of performing its obligations under the Agreement and the parties will enter into good faith negotiations to determine if any amendments to the Agreement are necessary as a consequence.
- Access charges are to be adjusted to reflect the impact of any material change which includes, but is not limited to, changes in taxes, laws and QR's Government Infrastructure Payments.

17. Disputes

- Any dispute between the parties is to be firstly referred to the respective Chief Executives for resolution. If the dispute is not resolved then the parties may agree to refer the dispute for resolution by an expert or arbitration. If there is no agreement to resolve the dispute in this manner then the dispute is to be determined by a court.

18. Events of Default

- Events of Default and Material Events of Default are as defined in the Agreement.
- An Event of Default or Material Event of Default must be remedied within the time specified in a Notice of Default otherwise access rights can be suspended and/or a court order sought however only a Material Event of Default can result in termination of the Agreement.

19. Suspension

- QR may immediately suspend Access Rights where the Third Party Operator fails to comply with its obligations under the Agreement and such failure is likely to cause disruption to Train movements or create risks to the safety of any person or property. QR may also suspend Access Rights for default in payment of money, maintenance of security or maintenance of insurance.
- QR may suspend the authorisation of any Rollingstock or Rollingstock Configurations where the Rollingstock or Rollingstock Configurations do not comply with the requirements of the Agreement until the non-compliance is rectified.
- Train Services will be suspended if the Third Party Operator's Accreditation is suspended or cancelled however QR may approve the operation of Train Services by another Accredited operator. The original Third Party Operator remains liable to pay the Access Charges during any period of suspension.
- If QR's Accreditation is suspended or cancelled payment of Access Charges is suspended during the period of suspension or cancellation provided such suspension or cancellation is not contributed to by the Third Party Operator.

20. Force Majeure

- The obligations of either party (other than an obligation to pay monies) will be suspended where by reason of Force Majeure that party is delayed in or prevented from carrying out its obligations under the Agreement.
- In the event that infrastructure on certain specified corridors of the nominated network is damaged or destroyed by an event of Force Majeure and in QR's reasonable opinion the cost of repairing the damage is not economic, QR may elect not to proceed with repairs or replacement unless the parties agree as to the funding of the cost of that work.
- In the event of a Force Majeure which prevents performance for a period of six months the other non-affected party may terminate the Agreement.

21. Termination

- The parties will have the right to terminate the Agreement for specified Material Events of Default.
- Upon termination of the Agreement for a Material Event of Default the parties are released from further obligations or liabilities under the Agreement except in respect of any antecedent breaches.

22. General

- The Agreement contains standard provisions in relation to jurisdiction, variation, waiver etc.
- The Third Party Operator may assign the whole of its respective rights and obligations under the Agreement to a related body corporate Accredited to operate Train Services and otherwise capable of performing its obligations under the Agreement or to a non-related body corporate with the prior written consent of QR (such consent not to be unreasonably withheld). A change in control of a Third Party Operator not a publicly listed corporation will be deemed to be an assignment of the Agreement.
- The respective Chief Executive Officers are to consult on all media releases and public statements on any issues which are in the parties' common interests provided that neither party is to disclose Confidential Information without the other party's approval.
- The parties are obliged to keep confidential the terms of the Agreement and any information disclosed to the other on a confidential basis except where disclosure is required by law. Confidential Information can only be used by the Third Party Operator for the purpose of operation of Train Services pursuant to the Agreement.
- All notices and communications must be in writing and effective on receipt.
- The Agreement relates only to the use of QR infrastructure and it is the responsibility of the Third Party Operator to obtain the necessary consent from the owners of any land which is not controlled by QR.
- The Third Party Operator is to ensure that QR is entitled to enter upon any of its land, premises or Rollingstock for the purpose of exercising any rights under the Agreement.

SCHEDULE F

Train Service Groups

1. The **Central Queensland Train Service Group**, which comprises all Train Services operating on the Rail Infrastructure comprising rail corridors:
 - from the ports at Hay Point and Dalrymple Bay to Blair Athol mine, North Goonyella mine and Oaky Creek mine;
 - from the port of Gladstone to Oaky Creek mine;
 - from the port of Gladstone to Moura mine;
 - from the port of Abbot Point to Newlands mine; and
 - all branch lines directly connecting coal mine loading facilities to the abovementioned corridors.

2. The **Goonyella Train Service Group**, which comprises all Train Services operating on the Rail Infrastructure comprising rail corridors:
 - from the ports at Hay Point and Dalrymple Bay to Blair Athol mine, North Goonyella mine and Oaky Creek mine; and
 - all branch lines directly connecting coal mine loading facilities to the abovementioned corridors with the exception of any branch lines south of Oaky Creek.

3. The **Moura Train Service Group**, which comprises all Train Services operating on the Rail Infrastructure comprising the rail corridor:
 - from the port of Gladstone to Moura mine; and
 - all branch lines directly connecting coal mine loading facilities to the abovementioned corridor.

4. The **Blackwater Train Service Group**, which comprises all Train Services operating on the Rail Infrastructure comprising the rail corridor:
 - from the port of Gladstone to Oaky Creek mine; and
 - all branch lines directly connecting coal mine loading facilities to the abovementioned corridor with the exception of any branch lines north of Oaky Creek.

5. The Newlands Train Service Group, which comprises all Train Services operating on the Rail Infrastructure comprising the rail corridor:

- from the port of Abbot Point to Newlands mine; and
- all branch lines directly connecting coal mine loading facilities to the abovementioned corridor.

6. The Mount Isa Train Service Group, which comprises all Train Services operating on the Rail Infrastructure comprising the rail corridor:

- from Townsville to Mount Isa; and
- all branch lines directly connecting mine loading/unloading facilities to the abovementioned corridor.

SCHEDULE G

Application of Reference Tariffs

Part A - Coal Carrying Services

1. Reference Train Services

1.1 Commodity type

Reference Train Services identified in accordance with this Part A will be defined as Train Services operated for the purpose of transporting coal. Any reference to Train Services in the remainder of this Part A of this Schedule will, unless otherwise specified, be taken to be a reference to a Train Service operated for the purpose of transporting coal.

1.2 Geographical Scope

Each Reference Train Service will be defined with respect to operation between any loading point within the relevant geographical area nominated as origin and any unloading point in the relevant geographical area nominated as destination. Reference Train Services will be developed as follows:

(a) Newlands Reference Train Service:

- Origin: geographical area within 2 km of the Rail Infrastructure corridor that exists between the loading points at Newlands and McNaughton;
- Destination: geographical area within 2 km of Abbot Point Coal Terminal;

(b) Moura Reference Train Service:

- Origin: geographical area within 2 km of the Rail Infrastructure corridor that exists between the loading points at Boundary Hill, Dunn Creek and Moura Mine;
- Destination: geographical area within 2 km of the Rail Infrastructure corridor that exists between the unloading points at Queensland Alumina Limited, Clinton, Barney Point, Gladstone Power Station, and Queensland Cement Limited;

(c) West Moreton Reference Train Service:

- Origin: geographical area within 2 km of the Rail Infrastructure that exists between the loading points at Ebenezer and Box Flat;
- Destination: geographical area within 2 km of Fisherman Islands;

(d) Blackwater Reference Train Service:

- Origin: geographical area within 2 km of the Rail Infrastructure that exists between the loading points at Boonal, Koorilgah, Curragh, Boorgoon, Kinrola, Ensham, Gordonstone, and Gregory;
- Destination: geographical area within 2 km of the Rail Infrastructure corridor that exists between the unloading points at Queensland Alumina Limited, Clinton, Barney Point, the Gladstone Power Station, and Queensland Cement Limited;

(e) Goonyella South Reference Train Service:

- Origin: geographical area within 2 km of the Rail Infrastructure corridor that exists between the loading points at Coppabella, Peak Downs, Saraji, Norwich Park, German Creek, Oaky Creek, and Gregory;
- Destination: geographical area within 2 km of Dalrymple Bay coal terminal and Hay Point;

(f) Goonyella North Reference Train Service:

- Origin: geographical area within 2 km of the Rail Infrastructure corridor that exists between the loading points at Burton, Moranbah North, Goonyella, Riverside, and North Goonyella;
- Destination: geographical area within 2 km of Dalrymple Bay coal terminal and Hay Point; and

(g) Goonyella West Reference Train Service:

- Origin: geographical area within 2 km of Blair Athol;
- Destination: geographical area within 2 km of Dalrymple Bay coal terminal and Hay Point.

1.3 Train Service Characteristics

Each Reference Train Service nominated in Clause 1.2 will also be defined in accordance with other characteristics as follows:

(a) Train Technical Characteristics including:

- axle load/configuration;
- train length;
- gross tonnage (loaded and unloaded);
- traction type;
- terminal configuration; and
- compliance with other existing Rollingstock Interface Standards applicable for the relevant Rail Infrastructure.

(b) Train Operational Characteristics including:

- compliance with nominated sectional running times;
- availability for operation (e.g. 24 hours/day, 7 days/week);
- loading/unloading time on network;
- capacity entitlement defined according to specified regularity on weekly basis, specified intervals between train cycles and specified transit times;
- compliance with QR's coordinated corridor scheduling process; and
- variability of operation.

(c) Contract Terms and Conditions including:

- consistency with the principles incorporated in the summary of the standard Access Agreement at Schedule E;
- term; and
- incorporation of an Access Charge review provision in the Access Agreement which relates movement in the Access Charge to movements in the Reference Tariff.

2. Reference Tariff applicable to Reference Train Services

Reference Tariffs will be defined for each Reference Train Service nominated in Clause 1.2 of:

- (a) amount of Reference Tariff identified as \$/,000 gtk;
- (b) proportion of Reference Tariff payable as a fixed charge; and
- (c) escalation of Reference Tariff.

3. Other Conditions applicable to Reference Tariffs

The validity of the Reference Tariff for each Reference Train Service nominated in Clause 1.2 will be conditional upon:

- (a) Traffic Volume Range

The Reference Tariff for each Reference Train Service nominated in Clause 1.2 will be valid within a nominated annual traffic volume range. Traffic volume will be measured as gross tonne kilometres resulting from Train Services operating on the Track between all loading points within the relevant loading geographical area and all unloading points within the nominated unloading geographical area (including from Train Services that are not subject to the relevant Reference Tariff).

4. Development of Access Charges for actual Train Services

4.1 Where there is an applicable Reference Tariff

The Access Charge for a Train Service that is consistent with the specified commodity type and geographic area nominated in a Reference Train Service will only differ from the relevant Reference Tariff where the Train Service characteristics differ from the Reference Train Service characteristics. In such circumstances, QR will determine the Access Charge by assessing variations to the Reference Tariff to ensure that the change in the revenue that would be received by QR reasonably reflects the change in costs (including the impact of changes in risks) to QR arising from the operation of the Train Service compared to the operation of it if it matched the Reference Train Service.

In doing so, QR will endeavour to ensure that variations in Access Charges from the Reference Tariff to reflect variations in Train Service characteristics from the Reference Train Service characteristics will be assessed consistently for all Train Services within the same specified commodity type and geographic area of the Reference Train Service.

4.2 Where there is no applicable Reference Tariff

(a) Development of Applicable Reference Tariff

Where a proposed Train Service is not consistent with the geographic scope of an existing Reference Train Service as identified in Clause 1.2, QR may, depending on the significance of the traffic flows arising from the proposed Train Service:

- develop an additional Reference Train Service to those identified in Clause 1.2 which identifies a geographic scope that incorporates the loading/unloading points for the proposed Train Service, and develop an associated Reference Tariff for this additional Reference Train Service;
- extend the geographic scope of an existing Reference Train Service identified in Clause 1.2 to incorporate the loading/unloading points for the proposed Train Service; or
- not develop a Reference Train Service incorporating the loading/unloading points for the proposed Train Service due to the relative insignificance of the resultant traffic flows.

QR will not extend the geographic scope of an existing Reference Train Service to incorporate an additional loading/unloading point, if the inclusion of this additional loading/unloading point would result in an increase in the applicable Reference Tariff.

Where it is proposed to extend the geographic scope of an existing Reference Train Service, or develop an additional Reference Train Service, QR will incorporate in its Indicative Access Proposal for the proposed Train Service its estimate of the expected Access Charge to apply. QR will also submit to the QCA for its approval the Reference Tariff to apply to the existing Reference Train Service (as geographically extended) or the additional Reference Tariff (as applicable). When the Reference Tariff for the Reference Train Service applicable to the proposed Train Service is approved by the QCA, the quoted Access Charge will be replaced by the Reference Tariff, adjusted as necessary for changes in the actual Train Service characteristics from the specified Reference Train Service characteristics in the manner outlined in Clause 4.1.

(b) Amendment of Schedule G

Where an applicable Reference Tariff is to be developed in accordance with Paragraph (a) of this Clause, QR will submit to the QCA a Draft Amending Undertaking amending this Schedule G to reflect the amendment to the existing Reference Train Service or the identification of a new Reference Train Service, whichever is applicable.

5. Review of Reference Tariffs

For the purpose of Reference Tariffs subject to this schedule, a Material Change Event will include:

- (a) actual traffic volume falling outside the volume range nominated for the relevant Reference Train Service pursuant to Paragraph 3(a) of this Schedule.

SCHEDULE H

Operating Plan

1. Area of Operation

- Origin
- Destination
- Route Description
- Entry and exit points onto Network

2. Business Plan

- Tonnage profile
- Passenger loading and unloading profile
- Anticipated project life
- Seasonality of haulage

3. Operation

- Type of service (passenger, freight)
- Commodity
- Train Consist Configuration
- Load and Length of train service
- Operational constraints
- Dangerous goods
- Overload management system
- Timing of scheduled servicing activities

4. Service Levels

- Frequency requirements, including specific daily and weekly requirements
- Maximum train services per year
- Dwell times at loading facility
- Dwell times at unloading facility
- Enroute operational requirements
- Rollingstock operational speed
- Indicative timetable requirements
- any connecting services
- any critical timings at specified locations

5. Train Service Planning/Ordering

- Train service ordering preference
- Train service canceling preference

6. Train Information

- Type
- Class and number of locomotives per train
- Gross tonnage of train
- Tare of train
- Method of operation
- Traction type
- Fuel range
- Safety systems
- Communication system

- Train length
- Achievable operating speeds

7. Crewing Plan

- Train service crew requirements
- Location of crew depots
- Crew change points
- Dwell times at change points

8. Recovery Methods

- Recovery of marked off rollingstock at loading/unloading locations/enroute
- Recovery of derailments
- Recovery of failed locomotives

SCHEDULE I

Environmental Investigation

This list is to be taken as the minimum requirements to be addressed and the Environmental Investigation and the Environmental Management System should not be restricted to the elements included in this list.

1. Water Quality Management

The Third Party Operator must consider the impact on storm water systems and natural waterways. In doing so, all relevant water quality standards and regulations must be met.

2. Air Pollution Management

The Third Party Operator must consider the impact on air quality. In doing so, all relevant air quality standards and regulations must be met.

3. Contaminated Land Management

The Third Party Operator must consider the impact of the operation on land contamination. In doing so, all practicable control measures to prevent the contamination of land must be undertaken.

4. Nature Conservation

The Third Party Operator must consider the impact of the operation on the flora and fauna.

5. Management of Hazardous Substances and Dangerous Goods

The Third Party Operator must consider the environmental impacts associated with the management of hazardous substances and dangerous goods by the Third Party Operator. In particular, the Third Party Operator must ensure that QR's requirements for the management of hazardous substances and dangerous goods are complied with.

6. Waste Management

The Third Party Operator must consider the impact of any waste produced by the operation. In doing so, all relevant government and local authority requirements must be met.

7. Environmental Noise Management

The Third Party Operator must consider the impact of any noise produced by the operation. In particular, the Third Party Operator must meet the requirements of the Rail Noise Plan referred to in the Environmental Protection Policy (Noise) and, where appropriate, must comply with QR's requirements for meeting the Rail Noise Plan referred to above.

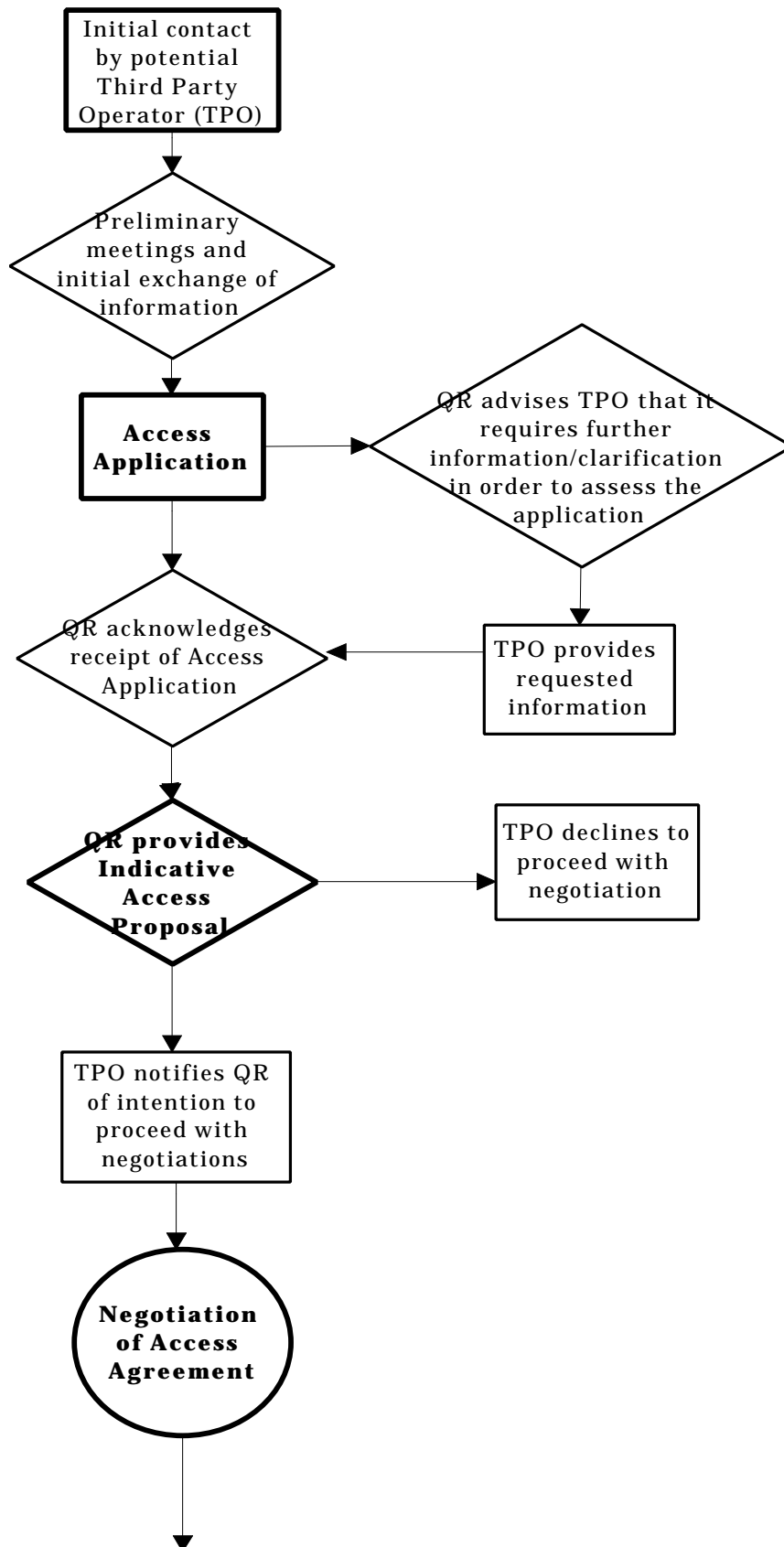
8. Environmental Monitoring

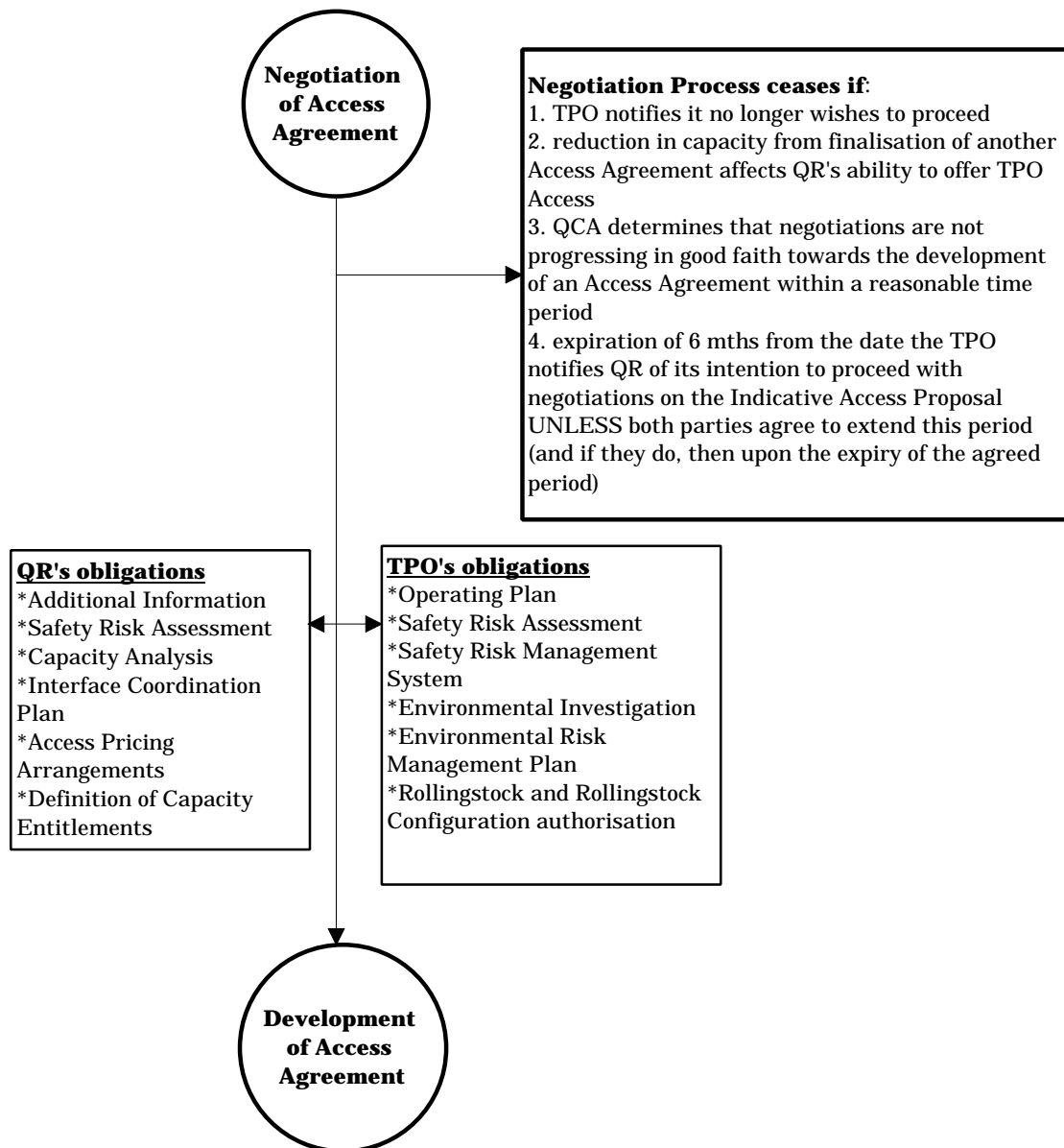
The Third Party Operator must address the requirements of environmental monitoring to ensure that the environmental standards are met.

9. Education, Awareness and Training

The Third Party Operator must consider the impact of the level of employee training with particular emphasis on the implementation of the Environmental Management System.

Attachment A (from the Explanatory Guide)





Other points to note

1. QR may cease negotiations at any time if the QCA determines that an Access Application is frivolous.
2. QR may cease negotiations if the TPO cannot satisfy QR's prudential requirements.
3. The TPO can approach the QCA if it believes QR unreasonably ceased negotiations as a result of either 1 or 2.