



Draft Decision

**QR Network's Proposed
Standard Rail Connection Agreement**

June 2012

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SUBMISSIONS

This report is a draft only and is subject to revision. Public involvement is an important element of the decision-making processes of the Queensland Competition Authority (the Authority). Therefore submissions are invited from interested parties concerning its assessment of QR Network's proposed Standard Rail Connection Agreement. The Authority will take account of all submissions received.

Written submissions should be sent to the address below. While the Authority does not necessarily 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:

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The **closing date** for submissions is 10 August 2012.

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 (i.e. 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 information and information disclosure of which would be contrary to the public interest (within the meaning of the *Right to Information Act 2009 (RTI)*), it cannot guarantee that submissions will not be made publicly available. As stated in s187 of the *Queensland Competition Authority Act 1997* (the QCA Act), 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. Notwithstanding this, there is a possibility that the Authority may be required to reveal confidential information as a result of a RTI request.

Public access to submissions

Subject to any confidentiality constraints, submissions will be available for public inspection at the Brisbane office of the Authority, or on its website at www.qca.org.au. If you experience any difficulty gaining access to documents please contact the office (07) 3222 0555.

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.

PREAMBLE

This Preamble should not be read as a substitute for the detail contained in the body of the draft decision.

Background

On 1 October 2010, the Queensland Competition Authority (the Authority) approved QR Network's 2010 access undertaking. The access undertaking sets out the terms and conditions under which QR Network will provide access to the relevant parts of its rail infrastructure.

At the time the access undertaking was approved, a number of matters remained unresolved, including requiring QR Network to develop a standard rail connection agreement (SRCA) to be submitted to the Authority for approval. The access undertaking included processes to resolve this issue over the course of the undertaking period.

On 30 June 2011, QR Network submitted a proposed SRCA for the Authority's approval. The Authority has considered QR Network's proposal, in accordance with the requirements of clause 8.4 of the 2010 access undertaking.

Stakeholder Consultation

The Authority published QR Network's proposal, invited submissions on it and received five submissions from stakeholders.

Outline of Draft Decision

The Authority's draft decision is to not approve QR Network's proposed SRCA. In arriving at its decision, the Authority considered submissions from interested parties as well as QR Network's proposal and supporting claims.

The proposed SRCA requires substantial amendment to ensure that it includes a set of rights and obligations that are consistent with the access undertaking and that provide a better balance of QR Network's and private infrastructure owners' competing interests and risks.

The draft decision identifies the ways that QR Network's proposal should be amended in order for the Authority to approve it. This includes amendments to:

- (a) provide greater certainty for private infrastructure owners who wish to connect into QR Network's existing network;
- (b) better balance QR Network's and users' commercial interests;
- (c) ensure responsibilities are appropriately allocated between QR Network and private infrastructure owners;
- (d) address concerns that QR Network could delay interconnection and undermine the ability of users to connect private infrastructure to the existing network; and
- (e) be consistent with the 2010 access undertaking.

The Authority has also sought to address stakeholders' concerns regarding cost audits, treatment of late payment, reciprocity of accreditation requirements, interface risk assessment and emergency response plans, reciprocity of insurance requirements, security provisions, liability, indemnities and access to land owned.

The Authority has also proposed specific amendments to improve the transparency and clarity of the SRCA.

The Authority's decisions, and reasons for those decisions, are set out in the main body of this draft decision. The Authority has included detailed drafting to implement its proposed approach, which can be found in **Appendix A**.

Way Forward

The Authority seeks submissions in relation to this draft decision. In developing its final decision, the Authority will consider submissions provided, in addition to the information already provided.

If the Authority confirms its decision not to approve QR Network's proposed SRCA, it will issue a notice requiring QR Network to submit an amended proposal within 30 days. If QR Network complies with that notice, the Authority will approve the resubmitted proposal if it considers it appropriate to do so having regard to the requirements of clause 8.4(e) of the access undertaking.

If QR Network does not comply with the notice, or if the Authority decides not to approve QR Network's resubmitted proposal, the Authority may prepare its own SRCA. Under these circumstances, the Authority would be required to publish its proposal, conduct public consultation and prepare a final decision.

The SRCA will apply from the date of approval, or at a later date determined by the Authority.

Once approved, QR Network and a private infrastructure owner may agree to terms and conditions that differ from the SRCA. However, in the event of a dispute, the SRCA becomes the default agreement.

Submissions

Submissions must be received by no later than 10 August 2012. The Authority will consider any submission it receives within that time.

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1. BACKGROUND

QR Network has submitted a standard rail connection agreement for the Authority's approval as provided for in its 2010 access undertaking.

The Authority has considered QR Network's proposal in line with the criteria contained in the undertaking, taking into account stakeholder comments and QR Network's response to them.

The Authority has made a draft decision to not approve QR Network's proposal. The Authority has invited stakeholders to comment on this draft decision and will take into account any submissions it receives by the due date before making its final decision.

1.1 Context

The central Queensland coal network (comprised of the Blackwater, Goonyella, Moura and Newlands systems) has been declared for access under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act) – see s. 250 of the QCA Act for details of the declaration. This includes extensions to the network, with the exception of extensions:

- (a) to other coal basins; and/or
- (b) that are not owned or leased by QR Network or a related body corporate.

Regulation of the declared services applies as the rail network exhibits natural monopoly characteristics associated with the economies of scale and scope involved in its operation and expansion. While regulation can be relied on to address the (potential) use of monopoly power, a more effective means may be to rely on competition and contestability in another market.

The primary focus of QR Network's 2010 access undertaking is to set out the terms and conditions under which QR Network will provide access to its rail network, that are covered by the undertaking, with a view to promoting competition in the above-rail market.

In addition, the access undertaking (cl. 8.3) provides for the interconnection of the declared service with private infrastructure (i.e. rail infrastructure not owned or leased by QR Network). In doing so, the undertaking seeks to limit QR Network's ability to expand its monopoly power beyond the current geographical limits of its declared service. It does this by:

- (a) allowing other parties to construct, own and operate an elongation to the network; and
- (b) imposing certain obligations on QR Network to connect the private infrastructure to its declared service, including that:
 - (i) QR Network will consent to connect private infrastructure to the network when the connecting infrastructure: meets QR Network's technical specifications, has been constructed to a standard appropriate to the nature of the traffic, will not adversely impact on safety, will not reduce capacity by virtue of its existence, and is paid for by the access seeker/holder (i.e. initial construction costs and on-going operating costs);
 - (ii) QR Network will ensure that the connecting infrastructure is physically connected to its network in a timely manner and will facilitate the movement of trains between the connecting infrastructure and its infrastructure (including

offering to provide train control and planning services for the connecting infrastructure);

- (iii) QR Network can construct, maintain and upgrade the connecting infrastructure provided the standard of works are appropriate and that the access seeker/holder can comment on construction matters; and
- (iv) matters in dispute can be resolved through the dispute resolution processes contained in part 10 of the access undertaking.

While these requirements place very specific obligations on both QR Network and the access seeker/holder, it was deemed necessary to develop a standard rail connection agreement (SRCA) to further specify the various rights and obligations of the respective parties to ensure the timely and efficient connection of private infrastructure.

While the SRCA will set out standard terms and conditions for the connection of private infrastructure, the two parties can agree to other terms and conditions on a case by case basis. However, in the event of a dispute, the SRCA in effect becomes the default agreement.

The finalisation of a SRCA was one of a number of matters that remained unresolved at the time the 2010 undertaking was approved. Therefore cl. 8.4 of the undertaking required QR Network to develop and submit a SRCA for the Authority's approval.

On 30 June 2011, QR Network submitted a proposed SRCA for the Authority's approval.

1.1.1 Process for considering QR Network's proposal

The Authority has considered QR Network's proposal in accordance with the requirements of clause 8.4 of QR Network's 2010 access undertaking.

The 2010 access undertaking requires the Authority to either approve or refuse to approve the draft SRCA within 60 days of its submission, or such longer period as advised in writing by the Authority. The Authority has extended the time within which it must make its decision to 31 December 2012.

The Authority published QR Network's proposal on its website, invited stakeholders to comment and provided QR Network with an opportunity to respond to those comments. The Authority received five submissions on QR Network's proposed SRCA, including proposed drafting for an alternative SRCA.

In releasing a draft decision at this time, the Authority is seeking focused, detailed responses to its reasoning and proposed amendments.

If the Authority decides to reject QR Network's proposed SRCA, it will give QR Network a notice in writing stating the reasons for its refusal; and require QR Network to amend, and resubmit, its proposal.

If QR Network does not resubmit the proposed SRCA, or if the Authority refuses to approve a resubmitted proposal, the Authority has the ability to prepare its own SRCA.

1.2 QR Network's proposal

The proposed SRCA includes obligations on QR Network and private infrastructure owners regarding: the processes to be followed; information to be provided; the range of matters to be addressed in the SRCA; and how disputes are to be resolved.

The proposed SRCA is intended to cover the connection of private rail infrastructure to the declared facility for the purpose of loaded coal trains entering into the relevant individual coal system. It provides a right to connect and addresses the operational and maintenance requirements associated with the connection.

The proposed SRCA is based on connection agreements that QR Network has offered, and executed, to customers over the past two years, but also includes coal loss provisions (QR Network 2011, p. 6). It includes terms and conditions that seek to:

- (a) provide a safe connection, built, and upgraded over time, to a suitable standard – including allowing QR Network to inspect and require upgrades, modifications or replacements of the connecting infrastructure (cl. 6) and private infrastructure (cl. 7); and detailing the requirements regarding conduct of an interface risk assessment, and the subsequent development and operation of an Interface Risk Management Plan (IRMP) and Emergency Response Plan (cl.10);
- (b) provide reimbursement for providing connection services so there is no incremental cost to QR Network for the connection, now or in the future – including an annual service charge (cl. 3, cl. 14 & Sch. 5), payments to reflect specified modifications, upgrade or replacement costs and the cost of decommissioning and removing the connecting infrastructure (cl. 3 & cl. 6); and
- (c) ensuring trains are loaded to appropriately manage risk on the network – by binding private infrastructure owners to undertake the coal loss mitigation strategies and providing both QR Network and the private infrastructure owners with a ‘clear and defined pathway’ through verification, monitoring, reporting and rectification to ensure compliance (Sch. 7, cl. 7.4(e), 7.8(b), 11.3, 12.2), and through the IRMP (cl. 10) and train control and planning services (cl. 11).

The proposed SRCA also includes provisions relating to insurance (cl. 16, Sch. 3), security (cl. 20), liability, indemnity and consequential loss (cl. 21 & cl. 22), disputes (cl. 17) and termination (cl. 18).

The proposed SRCA provides for QR Network to be the rail manager of the connecting infrastructure to ‘enable the smooth operation of entry onto (the network) in a way that maximises capacity throughput due to QR Network’ (QR Network 2011, p.9).

QR Network said it would make the SRCA available for customer specific branch lines only, therefore excluding major new connections and expansions or connections for projects with more than one loading point (QR Network 2011, p. 3).

1.3 Stakeholders’ response

The Authority received submissions on QR Network’s proposed SRCA from the Queensland Resources Council (QRC), Anglo American Metallurgical Coal Pty Ltd (Anglo American – two submissions), Asciano and Vale.

All stakeholders objected to QR Network’s proposed SRCA. Anglo American argued that the structure of the proposed SRCA is ‘fundamentally flawed’ and fails to address basic issues that leave significant scope for disagreement, and so does little to reduce the scope for disputes relating to interconnection and is ‘not effective in constraining the market power of QR Network’ (Anglo American 2011a, p. 2). The QRC sought ‘substantial’ amendments to make the proposed SRCA agreement ‘fair and workable’ (QRC 2011, p. 2) and included detailed drafting to support its position. For the most part, Anglo American supported the QRC’s proposed drafting amendments, but also provided additional drafting to further

clarify the definition of connecting infrastructure, the design of connecting infrastructure, the exchange of safety and interface information and termination rights.

Key stakeholder concerns related to:

- (a) QR Network's intention to apply the SRCA only to a 'sub-set of expected connections' (QRC 2011, p. 4) – and not use the SRCA for major new rail expansions, projects relating to more than one loading point and non-coal services. On this, Asciano argued that the terms and conditions in the SRCA should act as a 'template' for major connections and non-coal services and should only be varied to address specific issues (Asciano 2011, p. 6);
- (b) the lack of detail on charges payable to QR Network and a concern the charges payable are not limited to 'reasonable and proper' costs and/or are already built into reference tariffs. Stakeholders sought greater guidance and certainty over how charges are determined, allocated and verified;
- (c) provisions that appear to establish QR Network as the 'sole judge' over what is appropriate for connecting infrastructure or private infrastructure – and give QR Network 'too much latitude' over the nature of works (upgrades, modifications or replacements) it can require to be carried out, at the private infrastructure owners' expense;
- (d) terms and conditions that do not appropriately reflect QR Network's risks, or do not appropriately balance QR Network's and private infrastructure owners' interests. This includes QR Network's 'extensive' termination rights and the possibility that 'minor' breaches of the SRCA may lead to termination and the owner being left with significant sunk costs that cannot be recovered (Anglo American 2011a, 2011b). The QRC also argued that there should be reciprocal arrangements for the insurances QR Network should be obliged to have for the connecting infrastructure in comparison to what the owner of the private infrastructure is required to obtain;
- (e) the lack of a clear process or timelines for exchanging safety and interface information that may allow QR Network to significantly delay interconnection; and
- (f) including coal loss management provisions that are 'not relevant' to the construction of connecting infrastructure and/or do not belong in a rail connection agreement.

1.4 The Authority's approach

In considering this issue, the Authority has had regard to the assessment criteria contained in the 2010 access undertaking, the information provided by QR Network supporting its proposal and stakeholders' comments, submissions and alternative drafting. Where approaches differ, the Authority has sought to weigh the arguments and information provided, taking account of the intended purpose of the SRCA.

With regard to the purpose of the SRCA, the Authority needs to be satisfied that the SRCA will:

- (a) provide greater certainty for private infrastructure owners who wish to connect into QR Network's existing network;
- (b) appropriately balance QR Network's and users' commercial interests;
- (c) ensure responsibilities are appropriately allocated between QR Network and private infrastructure owners;

- (d) address QR Network's ability to use the negotiation process to delay interconnection and undermine the ability of users to connect private infrastructure to the existing network; and
- (e) be consistent with the 2010 access undertaking.

Chapters 2 to 4 of the draft decision outline matters on which the Authority particularly seeks input from interested parties, and as such do not seek to address each of the elements of QR Network's proposal separately. Instead, the draft decision includes detailed drafting that is consistent with the Authority's approach and shows all of the amendments required by the Authority (Appendix A). Appendix A includes a number of amendments that are not discussed in detail, but that are nonetheless consistent with the Authority's approach. Interested parties should rely on their own analysis of the Authority's proposed amendments to determine whether there are additional matters they wish to comment on.

In addition the draft decision identifies several matters that the Authority considers should be addressed in the SRCA, but seeks stakeholders' comments on, before making its final decision. These are:

- (a) whether additional issues should be considered in the SRCA to reflect the nature of the more complex connections, and the principles and requirements that should be included in the SRCA to reflect these;
- (b) the types and amounts of insurance which should be detailed in a proposed schedule of the SRCA;
- (c) what the relevant liability clauses and liability cap should be;
- (d) whether there is a benefit from including a clause in the SRCA that seeks to ensure that nothing in the SRCA would require a Rail Infrastructure Manager to do something that was likely to result in it losing its accreditation, or having it suspended; and
- (e) the workability of the indemnity clauses as they stand.

There are also a number of areas of the proposed SRCA where QR Network has proposed drafting on items that is different to the drafting included in other agreements developed under the 2010 access undertaking, especially the existing standard access agreements and the proposed alternative standard access agreements.

The Authority is of the view that, where matters are effectively standard across different types of agreements, the common sense approach is to use consistent drafting. As a consequence, the proposed drafting contained in **Appendix A** attempts to standardise references to these items as much as is practically possible.

2. NEED FOR BETTER BALANCE

The approved SRCA will guide negotiations between QR Network and private infrastructure owners seeking to connect private infrastructure to the network. While a negotiated connection agreement can differ from the SRCA, the conditions in the SRCA form part of the access undertaking and will be relied upon by the Authority in resolving a dispute if negotiations fail.

All stakeholders raised concerns that the proposed SRCA exhibited a serious imbalance between the rights of QR Network and the rights of the private infrastructure owner.

While aspects of the SRCA are based on terms and conditions that have been used in negotiations for connections to the network over the past two years, this is not necessarily a useful indicator of the nature and content of an agreement that strikes an appropriate balance between QR Network's and users' interests.

Indeed, the Authority considers that a SRCA should not undermine the ability of users to construct and connect private infrastructure to the network. As such, the Authority considers that a key objective of the SRCA is to provide an appropriate balance between QR Network's and users' rights and commercial interests.

This chapter sets out the Authority's consideration of an appropriate balance of rights and obligations for QR Network and the private infrastructure owner in relation to infrastructure standards, termination and suspension clauses, security, interface risk assessment and emergency response plan, access to land, liabilities, indemnities and accreditation.

2.1 Infrastructure standards

Parts 6 and 7 of the proposed SRCA contain provisions that seek to ensure that infrastructure connected to the below-rail network provides a safe connection, both as built and upgraded over time. In particular, that the infrastructure meets a standard that 'will not impede safety or performance of the below rail network' (QR Network 2011, p. 6).

Connecting infrastructure

Part 6 of the proposed SRCA provides for QR Network to inspect, maintain and upgrade connecting infrastructure. In particular, QR Network may:

- (a) inspect connecting infrastructure constructed by a private infrastructure owner to determine whether it is 'suitable' and require modifications, upgrades or replacement, at the private infrastructure owner's cost (cl. 6.1);
- (b) design, construct and commission the connecting infrastructure, at the private infrastructure owner's cost (cl. 6.1);
- (c) maintain and repair the connecting infrastructure to a 'standard required to maintain the connection between the network and the private infrastructure' (cl. 6.4); and
- (d) require upgrades, modifications or replacements to the connecting infrastructure in particular circumstances (cl. 6.5).

Under these provisions, private infrastructure owners bear the costs of any works required by QR Network. For connecting infrastructure, the private infrastructure owner can dispute the amount of the costs payable but not the scope of the work or who QR Network chooses to carry out the work (cl. 6.6).

Private infrastructure

Part 7 of the proposed SRCA provides for QR Network to require upgrades, modifications or replacements to the private infrastructure in particular circumstances, including:

- (a) in the interests of safety or operational efficiency (cl. 7.1(a)); and
- (b) to bring connecting sections of private infrastructure to a standard consistent with other comparable parts of the network or connecting infrastructure (cl. 7.1(c)).

Required modifications and upgrades would be carried out at the private infrastructure owner's cost – and must comply with minimum technical and safety standards as determined by an independent, appropriately qualified person acceptable to both QR Network and the owner (cl. 7.2).

Private infrastructure owners also must ensure that private infrastructure is designed, constructed and maintained so it:

- (a) satisfies the minimum technical, engineering and safety standards (cl. 7.4(a));
- (b) enables trains to run onto / depart from the network at the speed the relevant sections of the network were originally designed (cl. 7.4(b));
- (c) maintains the integrity of all electrical, signalling and telecommunications interfaces (cl. 7.4(c));
- (d) maintains the integrity of any weighbridge or overload detector on the private infrastructure (cl. 7.4(d)); and
- (e) complies with the coal loss mitigation provisions (cl. 7.4(e)).

Stakeholder comments

Stakeholders said that the proposed infrastructure standards are unclear, overly broad and provide QR Network with 'too much latitude' to control development of core user infrastructure. In particular, Vale argued:

... the powers of OR Network to require enhancements to the connecting infrastructure are overly broad with significant risk of over specification, reducing flexibility, adding cost and potentially degrading network performance. ... (Vale 2011, p. 2)

Stakeholders argued that the connecting infrastructure and private infrastructure should be 'fit and proper for its purpose' – which is not necessarily to the same standard for the mainline network, connecting infrastructure and private infrastructure. On this, Vale argued that miners have a 'strong incentive' to construct and maintain private infrastructure in such a way as to ensure contracted coal output can be efficiently delivered (Vale 2011, p. 2).

A particular concern was that QR Network might require private infrastructure owners to build and maintain infrastructure to a standard beyond what is required by the access undertaking or what QR Network applies to its own infrastructure (Anglo American 2011b, QRC 2011a). Also, while Asciano accepted there was a need for safe operations, it warned that this should not be confused with other non-safety related issues (Asciano 2011, p. 7).

Stakeholders also argued the SRCA should provide private infrastructure owners with the right to dispute the scope of work and who carries out the work to upgrade, modify or replace infrastructure, not just the costs payable. Anglo American argued:

It is entirely inappropriate for there to be a limitation on Owners being able to dispute the scope of the work determined by QR Network or the identity of the third party who QR Network chooses to carry out the works. It is, in fact, necessary to be able to dispute the scope of the works to avoid any imprudent "gold-plating" of the infrastructure by QR Network. (Anglo American 2011a, pp. 5-6)

Stakeholders also sought greater clarity over the associated inspection and approval processes, in particular relating to how connecting infrastructure, once built, would be assessed as 'suitable' for connection and operation.

Asciano argued that the SRCA only required QR Network to maintain the connecting infrastructure to standard to maintain the connection (and not, for example, to the standard required by the needs of a daily train plan). In addition, Asciano noted that the SRCA did not include any 'safeguards' to ensure that QR Network could not require upgrades and modifications that were needed because of a failure of QR Network to properly maintain and repair the connection (Asciano 2011, p. 8).

Authority's analysis and decision

The 2010 access undertaking provides for private infrastructure to be connected to QR Network's infrastructure, subject to a number of terms and conditions, including:

- (a) setting up a framework for the infrastructure standards required for connecting infrastructure and private infrastructure (cl. 8.3 (a));
- (b) providing for QR Network to receive comments on design, construction and project management matters (cl. 8.3(c)(ii)); and
- (c) providing a dispute mechanism to resolve, among other things, issues around the standards of works (cl. 8.3(e)).

The Authority considers that the infrastructure standards in the SRCA should be better aligned with the access undertaking, including by:

- (a) requiring infrastructure standards for connecting infrastructure to reflect the related requirements in the access undertaking;
- (b) limiting QR Network's involvement in the standards of private infrastructure to the extent that the private infrastructure may affect QR Network's network (e.g. safety) or the operation of train services on QR Network's network; and
- (c) providing private infrastructure owners with greater input into the design, construction, upgrade, modification and replacement of infrastructure, including through the dispute resolution mechanism.

The Authority considers that these amendments will provide a better balance between QR Network's and private infrastructure owners' interests. These amendments are in addition to the Authority's proposals to improve the transparency and clarity of the associated inspection and assessment processes (see section 3.3 of this document). Detailed drafting is at Appendix A.

Connecting Infrastructure

The Authority considers that infrastructure standards required by the SRCA for connecting infrastructure should reflect the related requirements included in the 2010 access undertaking (cl. 8.3(a)(i)-(iii)). QR Network would then be required to use this standard:

- (a) to review and approve the designs of the connecting infrastructure proposed by the private infrastructure owner, if requested by the private infrastructure owner (see section 3.3 for detailed discussion);
- (b) to assess whether connecting infrastructure is ‘suitable’ for the purpose of connecting private infrastructure to the network (on inspection, once the connecting infrastructure is constructed) (also see section 3.3);
- (c) to assess whether upgrades, modifications or replacements to the connecting infrastructure are reasonably required;
- (d) to recover the costs of constructing, project managing and commissioning connecting infrastructure to a standard that meets, but does not exceed, the requirements for connecting infrastructure more generally; and
- (e) as a benchmark, to properly maintain the connecting infrastructure.

Private Infrastructure

The Authority shares the stakeholders’ view that private infrastructure should not be required to exceed the standards applied to the connecting infrastructure, nor the network more broadly. This position is consistent with the access undertaking.

The Authority notes that operators of private infrastructure are subject to the same technical and safety regulatory regime that applies to QR Network. It is therefore not necessary for QR Network to perform this role, either under the SRCA or through any other process.

It is not evident to the Authority why QR Network should be concerned about the standard of the private infrastructure, beyond where it adversely affects the connecting infrastructure or the network. The Authority accepts Vale’s argument that miners have a ‘strong incentive’ to construct and maintain private infrastructure so contracted coal output can be efficiently delivered – and that if they do not do so, they are the ones that will bear the majority of the consequences.

The Authority considers that private infrastructure should be:

- (a) built and maintained to a standard that meets minimum technical, operational and safety requirements - these are matters that will rightfully concern the rail safety regulator, and that is not QR Network; or
- (b) does not otherwise adversely affect the connecting infrastructure or the network (in particular safety or the operation of the connecting infrastructure or the network).

On that basis, the Authority proposes to require that private infrastructure be designed, constructed and maintained in a manner consistent with QR Network’s proposal (see clauses 7.4 (a)-(d) of the proposed SRCA), but only to the extent that failure to meet any of these requirements could have an impact on the safety or operation of the connecting infrastructure or the network.

Input into the design, construction, upgrade, modification and replacement of infrastructure

The Authority considers that private infrastructure owners should have greater input into the design, construction, upgrade, modification and replacement of connecting infrastructure and private infrastructure, including through the dispute resolution mechanism (see Appendix A for details).

For example, the Authority is proposing to amend the SRCA to provide for QR Network to consult with private infrastructure owners in design and project matters where QR Network is constructing connecting infrastructure. The Authority is also proposing to allow private infrastructure owners to dispute the scope of work and who carries out the work to upgrade, modify or replace connecting infrastructure, not just the costs payable.

Greater involvement of private infrastructure owners in these matters will recognise the operational importance to miners of maintaining their private infrastructure and connections to the network. It will also constrain the potential ability of QR Network to use its existing monopoly position to exert control over the nature, type and costs of works allowed. In particular, the Authority agrees with Asciano that if a private infrastructure owner is required to pay for such costs, it should have the ability to discuss such matters with QR Network and to take matters, where there is disagreement, to dispute resolution. This is consistent with the access undertaking.

Draft Decision 2.1

- **The Authority requires QR Network to amend Parts 6 and 7 of the SRCA such that:**
 - (a) **the infrastructure standards for connecting infrastructure reflect the related requirements in cl. 8.3(a)(i)-(iii) of the 2010 access undertaking;**
 - (b) **QR Network’s involvement in the standards of private infrastructure is limited to the extent that the private infrastructure may affect QR Network’s infrastructure (e.g. safety) or the operation of train services on QR Network’s network; and**
 - (c) **private infrastructure owners have more input into the design, construction, upgrade, modification and replacement of connecting infrastructure, including through the dispute resolution mechanism.**
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2.2 Consequences of failing to perform

The Authority is concerned that some of the consequences for failing to perform contained in the proposed SRCA are neither reciprocal nor symmetrical – i.e. they would result in the owner of the private infrastructure facing potentially serious consequences for non-performance of obligations while QR Network would face much less consequences for similar failings.

2.2.1 Termination and suspension clauses

Clause 18.1 of the proposed SRCA provides for QR Network to terminate the agreement by notice to the private infrastructure owner in certain defined circumstances. For instance termination can be:

- (a) immediate for cases of termination of operation of the private infrastructure, of insolvency, of environmental harm, of permanent closure of the connecting section of track, of suspension under the coal loss mitigation provisions, or of the termination of any other agreement between QR Network and the private infrastructure owner;
- (b) within 14 days for material matters related to overdue amounts, security amount or insurance; and
- (c) within 30 days to remedy default of ‘any other material obligation’ under the agreement.

As per clause 18.1(1), QR Network can also terminate the agreement if it has given the owner of the private infrastructure a suspension notice for failing to carry out an obligation under the coal loss mitigation provisions (set out in Schedule 7).

By comparison, clause 18.2 provides for the private infrastructure owner to terminate an agreement only if QR Network is in default of material obligations and has not remedied the default within 30 days.

Stakeholder comments

Stakeholders were concerned about QR Network's 'extensive termination rights' and that 'minor' breaches of the SRCA may lead to termination with the owner being left with significant sunk costs that cannot be recovered (Anglo American 2011b, p. 1).

Asciano said that there was no reason why QR Network should be entitled to extra time than private infrastructure owners to remedy a failure to perform a material requirement of the agreement (Asciano 2011, p.9).

The QRC argued that the timeframes available to the private infrastructure owner to rectify relevant defaults (and therefore avoid termination) should be increased from 14 to 30 days (QRC 2011a, p.13). The QRC also said that 'termination should only be possible where the Owner has not cured the default or where numerous rectification notices have been served on the Owner' (QRC 2011a, p.13).

Anglo American proposed a general cure period for all breaches, other than insolvency, of a minimum of 60 days and that any acts or omissions that are the subject of a dispute should not be grounds for termination by QR Network (Anglo American 2011b, p. 7). In summary:

Given the likely size of the investment being made by each Owner and the long duration of the RCAs, it is essential that the Owner is given ample opportunity to remedy any default (other than Insolvency) before QR Network is able to terminate the RCA. (Anglo American 2011b, p. 6.)

Anglo American argued that where there is a dispute over whether there is a default; termination should not be effective until after the dispute has been finally resolved (Anglo American 2011a, p.7).

Authority's analysis and decision

The Authority shares stakeholders' concerns that the 14 day notice periods contained in the proposed SRCA for rectification of defaults prior to termination is insufficient. The Authority considers that these timeframes should be increased to 30 days, as suggested by the QRC, which represents a more reasonable balance of the interests of QR Network and private infrastructure owners, and is also more consistent with similar provisions contained in other agreements (such as standard access agreements).

Detailed drafting changes to cl. 18.1 to increase these timeframes to 30 days in relation to a series of different circumstances are contained in Appendix A.

The Authority also proposes to clarify the circumstances under which termination rights may be exercised by QR Network with regard to the abandonment of the private infrastructure (cl.18.1(a)), such that this clause should be applicable if:

- (a) the private infrastructure owner has abandoned, terminated or permanently ceased operation of the whole of the private infrastructure (i.e. not just a part thereof); or

- (b) there are no entities holding access rights or seeking access rights to run trains on the connecting infrastructure, and no likelihood of continuing demand for the connection of the private infrastructure to the network.

In addition, the Authority accepts Anglo American's arguments that QR Network should not be able to terminate an agreement on the basis of a matter that is being considered as part of a dispute resolution process. Detailed drafting to this effect is contained in Appendix A (see clauses 18.2 and 18.7).

The Authority also considers that clause 18.1(l) should be deleted to be consistent with the deletion of the coal loss mitigation provisions from the agreement (explained in section 4 of this decision).

Draft Decision 2.2

- **The Authority requires QR Network to amend clause 18 of the proposed SRCA to**
 - (a) **increase the timeframes for rectification of defaults prior to termination from 14 days to 30 days; and**
 - (b) **provide that QR Network may not terminate an agreement on the basis of a matter that is the subject of an ongoing dispute resolution process.**
-

2.2.2 Security

Clause 20 of the SRCA proposes that the owner of the private infrastructure must deliver a bank guarantee prior to (or on) the commencement date of the agreement. Clause 20.2 specifies that QR Network will review annually the amount of the guarantee and can decide whether it needs to be increased or decreased.

Stakeholder comments

The QRC argued security should only be required if the private infrastructure owner (or its guarantor) does not have a BBB credit rating. The QRC stated the amount of security required should be standardised and specified in the SRCA (rather than being on an agreement by agreement basis). The QRC suggested the form of the security should be attached to the agreement as a schedule. The QRC also said QR Network should be required to give notice to the owner before calling on the security, so that the owner has an ability to remedy the breach and avoid the call on the security (QRC 2011a, p.14).

QRC said clause 20.2 allows QR Network to increase the amount of the security each year, for any reason. The QRC believes this right is unnecessary to ensure the private infrastructure owner's proper performance and is unnecessarily discretionary. The QRC said that this clause should be deleted (QRC 2011a, p.14).

Anglo American supported QRC's positions on security (Anglo American 2011a, p.7).

Vale suggested that a total security package should apply to a full suite of agreements (e.g. access agreements) between the private infrastructure owner and QR Network, rather than each agreement having a different amount and type of security required. Vale argued security should be negotiated as a whole, reflecting the net exposure and credit position of the user, during negotiation of the expansion deed (Vale 2011, p.2).

Authority's analysis and decision

The Authority considers the security clauses should reflect the level of risks undertaken by both parties entering into the agreement.

The Authority accepts the suggestion by the QRC to use credit rating as a benchmark to establish the requirement (or absence of requirement) for a bank guarantee. Therefore, if the private infrastructure owner (or a parent company of the owner offering guarantee on its behalf) has a credit rating of no less than BBB+ from Standard & Poors or of no less than Baa2 with Moody's Investor Services, they should not be required to provide security.

The Authority notes at the time of writing this decision the credit rating for QR National Limited with Standard & Poors is at BBB+.

Regarding clause 20.2, the Authority believes QR Network should not have the ability to unilaterally review and impose conditions and amounts. Rather, the terms and conditions should not change and the amount should be indexed to a relevant inflation index. The Authority is seeking submissions on an appropriate period to review the amount and an appropriate rate or indexation method.

Regarding Vale's comments on the various security provisions required in multiple agreements entered with QR Network, the Authority considers the SRCA is a standard agreement, and it is up to individual parties to seek to negotiate individual arrangements which may better suit their business if they wish to do so.

With regard to the amount of security required, the Authority considers that security from the private infrastructure owner could be capped at the estimated reasonable and prudent costs of decommissioning and removing the connecting infrastructure (including a reasonable and prudent contribution for QR Network's internal costs related to such decommissioning and removal) upon the expiry of a connection agreement.

Detailed drafting is at **Appendix A**.

Draft Decision 2.3

- **The Authority requires QR Network to amend clause 20 of the proposed SRCA to better reflect the level of risks undertaken by both parties entering into the agreement. This includes providing that:**
 - (a) **a private infrastructure owner (or a parent company offering guarantee on its behalf) with an acceptable credit rating (no less than BBB+) does not need to provide security;**
 - (b) **the terms and conditions of security should not change and the amount should be indexed – and not unilaterally reviewed (cl. 20.2); and**
 - (c) **the amount of security required from the private infrastructure owner be capped at the estimated reasonable and prudent costs of decommissioning and removing the connecting infrastructure upon expiry of a connection agreement.**
-

2.2.3 Interface risk assessment and emergency response plan

Clause 10 details the requirements regarding conduct of an interface risk assessment, and the subsequent development and operation of an interface risk management plan and emergency response plan. Clause 10.9 relates to an investigation following an incident arising on the

private infrastructure impacting on the connecting infrastructure or on QR Network's infrastructure.

Stakeholder comments

The QRC argued that the parties should be obliged to co-operate in developing interface arrangements between the parties and freely exchange information in relation to safety so far as it relates to the connecting infrastructure and the private infrastructure (QRC 2011a, p.12). The QRC proposed to extensively re-draft clause 10 (in QRC 2011b, p.12-13) by inserting an additional clause to cover "exchange of safety and interface information".

Anglo American said the key issue is whether the information provided under the QRC's suggested clause 10 will be sufficient to allow the private infrastructure owner to act as the rail infrastructure manager for the private infrastructure, where QR Network either refuses to act as the rail infrastructure manager or offers to do so for an unreasonable fee (Anglo American 2011b, p. 4).

Anglo American is concerned that the lack of a clear process or timelines for exchanging the information may allow QR Network to significantly delay interconnection. Anglo American's preferred option is to require QR Network to be the rail infrastructure manager for the private infrastructure (Anglo American 2011b, p. 5). However, if the QRC's approach were to be used, Anglo American proposed amendments to the QRC's proposed re-drafting of this clause, in particular by adding timelines (Anglo American 2011b, p. 5-6).

Authority's analysis and decision

The Authority considers the terms relating to investigation and exchange of information should be reasonable and reciprocal, where both parties have to share information in a timely manner. The Authority also sees benefit from parties working collaboratively on safety and interface matters, including participating in reviews, meetings and planning activities. Reflecting this, the Authority has considered the suggested drafting by the QRC and Anglo American in providing amended drafting to clause 10 (see Appendix A for details).

The Authority noted discrepancies in the QRC's suggested drafting relating to the timing of the interface risk assessment and emergency response plan, as it was not clear whether the plan was to be agreed upon prior to the commencement of the agreement or through the course of the agreement. To provide greater certainty to both parties, the Authority considers the SRCA should contain an initial plan, provided in a schedule. Variations to this schedule throughout the life of the agreement are to be dealt with as per suggested new drafting for the interface risk assessment and emergency response plan clause.

In addition, the Authority is proposing to insert criteria for incidents for which QR Network may conduct an investigation and is seeking stakeholders' submissions on what appropriate thresholds might be.

Detailed drafting is at **Appendix A**.

Draft Decision 2.4

- **The Authority requires QR Network to amend the SRCA to ensure reasonable and reciprocal obligations on both parties to share information on safety and interface matters.**
-

2.3 Access to land

The SRCA provides for QR Network (and relevant workmen and machinery) to enter and remain on the private infrastructure, so QR Network can exercise its rights and fulfil its obligations to maintain and repair connecting infrastructure (cl. 6.8).

Beyond this, the proposed SRCA excludes land issues from a connection agreement by requiring a private infrastructure owner and QR Network (and, where relevant, a third party) to enter into a separate agreement:

- (a) when part of the private infrastructure is on land owned or controlled by QR Network (cl. 26.1); and
- (b) so QR Network can secure reasonably required rights to enter the land when some part of the connecting infrastructure is on land owned or controlled by the private infrastructure owner (and / or third party) (cl. 26.2).

Stakeholder Comments

The QRC and Anglo American argued that the SRCA should address a number of land related matters, in addition to those set out in the proposed SRCA.

In particular, the QRC said it was critical to provide private infrastructure owners with reasonable access to land owned or controlled by QR Network (or another QR party) to limit the potential for ‘unnecessary’ delay in establishing connecting infrastructure (QRC 2011, p. 5). The QRC proposed that QR Network be required to:

- (a) provide access to land required to construct private infrastructure or connecting infrastructure and / or for the ongoing operation of private infrastructure, where it has the authority, and can do so; or otherwise
- (b) use its reasonable endeavours to procure access to land for the benefit of the private infrastructure owner.

The QRC argued that the detailed terms should be set out in a schedule to the SRCA.

Anglo American argued that the SRCA should specifically provide for a private infrastructure owner to enter and remain upon the property and rail infrastructure of QR Network in order to construct connecting infrastructure, since the SRCA provides for a private infrastructure owner to construct the initial connecting infrastructure (Anglo American 2011a, p. 6).

The QRC also sought to require QR Network to comply with site and safety obligations when on private land (QRC 2011b, p. 22).

Authority’s analysis and decision

The Authority proposes a number of amendments to the proposed SRCA to provide the relevant parties with a better balance in relation to their rights and obligations in relation to land access issues. In particular, it proposes to require QR Network to provide private infrastructure owners with rights to access land owned, or otherwise used by, QR Network. The Authority notes that private infrastructure owners may also need access to QR Network land to construct relevant infrastructure or to facilitate the ongoing operation of that infrastructure.

The Authority considers that the SRCA arrangements for land access should reflect the related requirements included in the 2010 access undertaking. This includes requiring QR Network to:

- (a) provide access to land where it has the power to do so (i.e. the land is owned or controlled by QR Network or a related body); and
- (b) provide information to assist the private infrastructure owner to obtain approval to access land where QR Network does not otherwise have authority to authorise access.

Formalising these access rights in the SRCA will ensure they are consistent with the provisions of the 2010 access undertaking (cl. 2.4 (d) and Schedule D, Part B.2)).

In addition, the Authority accepted the QRC's proposal to require QR Network to comply with the site and safety rules that apply to private land.

Draft Decision 2.5

- **The Authority requires QR Network to amend the SRCA to provide private infrastructure owners with reciprocal rights to access land owned, or otherwise used by, QR Network, to fulfil its obligations under the SRCA.**
 - **The Authority requires QR Network to amend the SRCA to require QR Network to comply with the site and safety rules that apply to private land.**
-

2.4 Liability

Clause 21 provides that neither party will be liable to the other for any consequential loss arising from, under, or in connection with, the agreement. Neither party will have any claim against the other except as provided in the agreement (cl. 21.2). Clause 21.3 limits QR Network's liability to a specific sum to be agreed between the parties, but not included in the SRCA. In clause 21.5, QR Network requires the owner to indemnify QR Network for the acts and omissions of the Owner's operator.

Stakeholder comments

The QRC argued the effect of clause 21.2 is to exclude all liability except as stated in the indemnity clauses or termination clauses. It may operate to exclude a breach of confidence because the confidentiality clause does not expressly acknowledge that a party has a claim against the other for a breach of confidence. The QRC argued this part of clause 21.2 should be removed so that claims not contemplated by the agreement are preserved.

The clause further states that no party will have any liability to the other except if a claim is brought within six months of the event arising. The QRC believes such a provision is unusual and not workable. For example, a party may not be aware of a personal injury claim until after the six month period expires. Therefore, the QRC suggested this part of the clause should be modified so that the time limitation commences on the later of the claim arising or the relevant party becoming aware of the claim.

The QRC argued that the agreement should provide guidance as to what the liability cap in clause 21.3 should be, so as to avoid dispute or delay in agreeing the connection agreement.

Asciano also argued that the value of the liability cap in clause 21.3 should be made explicit in either the agreement or the explanatory note. Asciano does not believe that a token value for the liability cap is appropriate.

The QRC stated clause 21.5, relating to conduct by train operators, is a matter for access agreements and should be deleted.

Anglo American supported QRC's positions on liability.

Authority's analysis and decision

The Authority has not included a definitive proposed position in this draft decision as to what the relevant liability clauses and liability cap should be. Rather, it is seeking further submissions from stakeholders on these matters. However, to guide those submissions, the Authority's preliminary views are set out below.

The Authority agrees with the QRC's view that clause 21.2, as included in QR Network's proposed SRCA, would have the effect of inappropriately excluding claims not contemplated by a connection agreement, including claims relating to breaches of confidence. As a consequence, the Authority proposes to amend the drafting of clause 21.2 (see Appendix A for details) to remove the restriction that claims for liability should be limited solely to items provided for in a connection agreement.

The Authority also believes that clause 21.2 should cater for the circumstance where a party is not aware of a personal injury claim arising from an event until later than six months after the event occurring. However, rather than lengthen the six month period, the Authority considers that this objective can be best met by providing for claims to be made within six months of the later of the claim arising or becoming reasonably apparent to the relevant party. Drafting to this effect has been included in Appendix A.

The Authority believes a liability cap as provided for in clause 21.3 should be reciprocal, so that the owner's liability is also capped at a certain amount. The Authority notes that, while stakeholders were generally agreed that the amount of the cap needs to be made explicit in the SRCA, no stakeholder made a clear suggestion as to what that amount should be. The Authority thus seeks specific comments from stakeholders as to the best way to make this cap amount explicit – which could be by suggesting a fixed amount or could be by suggestion of a relevant formula or methodology for its calculation.

The Authority agrees with the QRC that clause 21.5 should be deleted as it is a matter better dealt with in access agreements.

Draft Decision 2.6

- **The Authority requires QR Network to amend the liability clauses in the SRCA to provide more realistic obligations on parties, including:**
 - (a) **removing the restriction that claims for liability should be limited solely to items provided for in a connection agreement (cl. 21.2);**
 - (b) **providing for liability claims to be limited to six months after the later of the claim arising or becoming reasonably apparent to the relevant party (cl. 21.2);**
 - (c) **including an explicit liability cap; and**
 - (d) **deleting requirements relating to conduct by train operators (cl.21.5).**
-

2.5 Indemnities

Section 22 provides mutual indemnities to the owner and QR Network. The indemnities apply to “acts and omissions” of the other party.

Stakeholder comments

Asciano noted that the indemnity provided by the private infrastructure owner relates to the private infrastructure and the connecting infrastructure, but the indemnity provided by QR Network only relates to the Network – i.e. it does not give any indemnity in respect of the connecting infrastructure. Asciano argued that, as QR Network is the owner of the connecting infrastructure, and is responsible for maintaining and repairing that infrastructure, it should provide an indemnity in respect of any loss or damage it causes as a result of its acts or omissions in respect of that connecting infrastructure.

The QRC argued that both indemnities should only be triggered by the breach or negligence of a party. Additionally, the scope of the indemnity should be limited to claims arising as a consequence of breach or negligence (rather than the broader “in connection with”).

Anglo American supported QRC’s positions on indemnities.

Authority’s analysis and decision

The Authority considers that the indemnities provisions should be reasonable and reciprocal with regard to both parties to a connection agreement. In particular, indemnities should apply equally in terms of the obligations of the owner of specific infrastructure to the other party. This means that QR Network, as the owner of the connecting infrastructure, should provide an indemnity for loss or damage to the private infrastructure owner, in respect of the connecting infrastructure (as suggested by Asciano).

The Authority also agrees with the QRC’s view that the wording in QR Network’s drafting of clauses 22.1 and 22.2 (‘in connection with, either directly or indirectly’) is too broad for a commercial agreement and that the indemnities should be limited to acts or omissions which are negligent or in breach of the connection agreement. Drafting to this effect is included in **Appendix A**.

Draft Decision 2.7

- **The Authority requires QR Network to amend the indemnities clauses to:**
 - (a) **provide for QR Network to indemnify private infrastructure owners for loss or damage in respect of the connecting infrastructure; and**
 - (b) **limit indemnities to acts or omissions that are negligent or in breach of the agreement.**
-

2.6 Accreditation

Part 9 of the SRCA requires the private infrastructure owner to be accredited as the Rail Infrastructure Manager for the private infrastructure or to procure another person or entity to be accredited. The private infrastructure owner can reach an agreement for QR Network to be the accredited rail infrastructure manager for the private infrastructure under a separate written agreement.

Clause 13 of the SRCA provides that the agreement will not restrict accredited rail infrastructure managers in the performance of their roles for the relevant infrastructure.

Stakeholder comments

The QRC argued that QR Network should also be required to ensure that it, or another person, holds accreditation for both the connecting infrastructure and the network (QR 2011a, p. 13).

Authority's analysis and decision

The Authority considers that the requirements for accreditation should be reciprocal. Accordingly, the Authority proposes to require both QR Network and a private infrastructure owner to be required to ensure that they or another person or entity hold appropriate accreditation over the track that they own. Detailed drafting is at Appendix A.

The Authority is concerned that, in its current form, clause 13 of the SRCA has the potential to create significant uncertainty – indeed, it is not clear to the Authority what it is seeking to achieve. One option might be to delete this clause altogether. That said, there might be some benefit from ensuring that nothing in the SRCA would require a rail infrastructure manager to do something that was likely to result in it losing its accreditation, or having it suspended. Detailed drafting to that effect is included at Appendix A. The Authority is seeking stakeholder comments on the benefits of including a clause of this nature in the SRCA.

Draft Decision 2.8

- **The Authority requires QR Network to amend Part 9 of the SRCA to require both QR Network and a private infrastructure owner to be required to ensure that they or another person or entity hold appropriate accreditation over the track that they own.**
-

3. PROVIDING GREATER CERTAINTY

An effective SRCA should simplify and hasten the process of negotiating connection to the network by focusing negotiations and clarifying the points of issue.

The Authority notes stakeholders' desire for greater certainty in the SRCA, including in terms of the ability to connect and to do so on reasonable terms and in a reasonable time.

The Authority has proposed amendments that seek to provide greater certainty for both QR Network and private infrastructure owners over the default terms and conditions for connection. The Authority has also sought to provide sufficient scope to cover the different requirements of different connections.

Taken together, the Authority considers that these amendments will streamline the negotiation process and thereby allow connections to the network to be designed and developed more quickly and with greater certainty for all parties.

3.1 Scope and coverage

QR Network has proposed to apply the SRCA to customer specific branch lines only – being extensions that connect a single loading facility to the network. QR Network said that it does not intend for the SRCA to apply to the connection of major new expansions, on the basis that these may require varied terms and conditions (QR Network 2011, p. 3). Connection to the rail network for services other than coal services would also not be covered by the SRCA, but by other agreements (QR Network 2011, p. 3).

Stakeholder comments

Stakeholders were concerned that the proposed circumstances in which QR Network envisages the SRCA applying is too narrow in its application – i.e. the SRCA would apply ‘only to a sub-set of expected connections’ (QRC 2011, p. 4). Key types of connections that would be excluded from the SRCA under QR Network’s proposed approach include:

- (a) projects relating to more than one loading point (e.g. two loading points on a spur-line) (QRC 2011, p. 4);
- (b) major new connections or expansions (Asciano 2011, p. 5); and
- (c) non-coal services (Asciano 2011, p. 5).

In addition, Asciano was concerned that QR Network had ‘unilaterally’ reserved for itself the ability to substantially change the terms and conditions in those circumstances:

... the terms and conditions of the standard connection agreement should act as a template for major connections and for non-coal service connections and should only be varied to address the specific issues arising from the major connections or non-coal service connections following consultation. (Asciano 2011, p. 6)

Asciano also argued that, to the extent that connection of major expansions possibly require different terms and conditions, these are more likely in the construction phase, rather than continuing operation of the connection (Asciano 2011, p. 5).

Authority’s analysis and decision

The Authority shares stakeholders’ concerns with QR Network’s proposal to provide for the SRCA to apply only to customer specific branch lines. The Authority notes that clause 8.4(j)

of the 2010 access undertaking requires that, unless otherwise agreed between QR Network and a proponent of connecting infrastructure, any rail connection agreement entered pursuant to the access undertaking after a SRCA has been approved must be consistent with the terms of the SRCA.

The undertaking requires that a SRCA be developed and, in doing so, it does not distinguish between the types of connections to QR Network's network that the SRCA would apply to. The Authority does not consider that the proposal for the SRCA to only apply to single mine spur lines is consistent with the undertaking.

Accordingly, the Authority has proposed to require QR Network to broaden the application of the SRCA to include major connections, non-coal service connections and projects with multiple loading points.

In doing so, the Authority envisages that there might be circumstances where terms and conditions that are appropriate for a customer specific branch line may not be relevant for more complex connections, and vice versa. This could include, for example, train scheduling and control which could be expected to be more complex for multi-use, multi-mine connections in contrast to a single mine spur.

The Authority is proposing to require QR Network address these issues in the SCRA and is seeking stakeholder comments on specific issues, and remedies, that might arise given the nature of the more complex connections.

Beyond this, the Authority considers that, to the extent that terms and conditions are required to be varied because of the specific issues that arise from the nature of the connection (including customer specific branch lines), these should form part of the negotiations but should not invalidate the SRCA operating as the default agreement.

Draft Decision 3.1

- **The Authority requires QR Network to broaden the application of the SRCA to include major connections, non-coal service connections and projects with multiple loading points.**
-

3.2 Charges and payments

Part 3 of the proposed SRCA outlines the arrangements for charging, invoicing and paying for services, including:

- (a) an annual service charge (through a fixed base annual service charge which can be escalated or adjusted according to a formula defined in Schedule 5, and is open for review) (cl. 3.1(a));
- (b) specified modification, upgrade or replacement costs (cl. 3.1(b));
- (c) the costs of decommissioning and removing the connecting infrastructure (cl. 3.1(c)); and
- (d) the costs of providing other services to the private infrastructure owners (cl. 3.1(d)).

The proposed SRCA provides for owners to dispute amounts claimed by QR Network under the clause 17 dispute resolution provisions (cl. 3.4).

3.2.1 Annual service charge

The SRCA provides for an *annual service charge* to be a sum payable to cover the costs for QR Network to meet its obligations under the SRCA for the costs of operating and maintaining the connecting infrastructure (cl. 3.2(a)). The *annual service charge* is defined by reference to the *base annual service charge* that is escalated according to a formula, and open for review and ultimately dispute (Schedule 5). If the operating and maintenance costs are included in the cost build up for reference tariffs, the *annual service charge* will be a nominal fee of \$1.00 (cl. 3.2(b)).

Stakeholder comments

Stakeholders were concerned that the SRCA did not contain sufficient detail over what costs will be recouped through the allowed charges and payments, including whether those costs are already in reference tariffs and how the costs may be varied and escalated over time.

Stakeholders were particularly concerned over the lack of detail around the annual service charge contained in the charges schedule (Schedule 5) – and the possibility that it could, in fact, include operating and maintenance costs that are already recovered by QR Network through the cost build up for reference tariffs. In particular, Anglo American said that:

Schedule 5 provides for a fixed sum to be the Base Annual Service Charge which is then escalated. The Base Annual Service Charge does not contain any guidance or certainty as to how that sum will be determined. Clause 3.2(a) indicates that the Base Annual Services Charge includes an allowance for maintenance and inspection charges. This is inconsistent with clause 8.3(f) of UT3, which provides that QR Network will include operating and maintenance costs in the cost build up for Reference Tariffs and not through separate agreements with the Owner of the Private Infrastructure. (Anglo American 2011a, p. 4)

On this, the QRC argued that the *annual service charge* only needs to be determined and paid in the ‘unlikely’ case that efficient operating and maintenance costs were not considered in the development of reference tariffs. In that event, QR Network should be entitled to recover ‘the direct and proper costs, reasonably and actually incurred ... relating to the Connecting Infrastructure’ (QRC 2011, p. 4).

Stakeholders were also concerned that the SRCA provided for QR Network to recoup the costs of modifying, upgrading or replacing or decommissioning and removing connecting infrastructure beyond those that are otherwise ‘reasonable and prudent’ or ‘reasonable and proper’. For example, Asciano argued:

... if the user is to pay QR Network costs then the agreement should be more prescriptive as to what these costs should cover. For example, it would be unreasonable for QR Network to seek the payment of costs linked to an upgrade to a unilaterally determined standard or to seek payment of a cost which would benefit other users or operators (Asciano 2011, p. 5-6).

Anglo American and the QRC argued that it was not clear what ‘other costs’ could be reimbursed (cl. 3.1(d)) – and so this should either be removed (QRC 2011, p. 9) or refer to the costs of providing other services as agreed (Anglo American 2011a, p. 4).

Authority’s analysis and decision

The Authority sees a benefit from the SRCA providing greater clarity over the allowed charges and payments, in order to give infrastructure owners a better understanding of the upfront and ongoing costs of connection, and to ensure that costs are not double counted. In this regard, the Authority considers that the charges:

-
- (a) should not include amounts already built into the reference tariff, or have otherwise been recouped through other charges including through access charges for services that do not have reference tariffs;
 - (b) should not include costs which are incurred as a result of QR Network's breach or negligence;
 - (c) should only include corporate overheads to the extent that these are direct costs incurred by QR Network in meeting its obligations under a rail connection agreement; and
 - (d) must reflect reasonable costs, to limit incentives for 'gold plating'.

In addition, the Authority proposes to require that the SRCA provide for an audit of any costs, fees or charges, at the private infrastructure owner's request and cost. This will provide private infrastructure owners with an opportunity to verify that proposed charges have been properly valued and allocated.

Annual service charge

The Authority shares stakeholders' concerns that the proposed SRCA provides no details on how the *base annual service charge* is to be constructed – as currently proposed, it is unclear exactly what costs will be recouped through this charge, and whether these costs will be limited to 'reasonable' amounts and / or are already built into reference tariffs.

The Authority proposes to require the SRCA to provide prospective users with details around what will be taken into account in determining the *annual service charge*, how it will be calculated and how private infrastructure owners will be invoiced for it and when payment is required. The Authority proposes that this charge essentially be a 'pass through' of direct costs actually incurred by QR Network in meeting its obligations under the agreement (including maintenance and inspection charges) that are not included in the reference tariffs or have otherwise been recouped through other charges. On this basis, schedule 5 of the proposed SRCA is not required.

The Authority proposes to amend the definition of the Annual Service Charge to make explicit that this charge should be based on the reasonable and prudent incremental and direct costs actually incurred by QR Network in connection with performing its operation and maintenance activities in relation to the connecting infrastructure and should clearly not include any cost already built into the reference tariffs. Detailed drafting is at Appendix A.

Draft Decision 3.2

- **The Authority requires QR Network to amend the SRCA to provide greater certainty over the allowed charges and payments.**
 - **The Authority requires QR Network to amend the SRCA to provide for an audit of any costs, fees or charges, at the private infrastructure owner's request and cost.**
 - **The Authority requires QR Network to provide that the annual service charge be a pass through of direct costs actually incurred by QR Network in meeting its obligations under the agreement that are not included in the reference tariffs or have otherwise been recouped through other charges.**
-

3.3 Infrastructure Standards

Parts 6 and 7 of the proposed SRCA contain provisions that seek to ensure that infrastructure connected to the below-rail network provides a safe connection over time – both the initially built infrastructure and any subsequent upgrades. These provide for:

- (a) the initial design, construction and commissioning of connecting infrastructure by:
 - (i) the private infrastructure owner – subject to QR Network’s inspection and assessment of whether it is ‘suitable’ for connection; or .
 - (ii) by QR Network – in accordance with the terms of a separate construction agreement; and
- (b) QR Network to require upgrades, modifications or replacements to the connecting infrastructure or private infrastructure to meet certain standards, according to particular processes.

As discussed in section 2.1, the Authority’s assessment has focussed on providing a better balance of the standards applied to connecting infrastructure and private infrastructure. The following section seeks to address the associated inspection and approval processes, under which QR Network can:

- (a) inspect connecting infrastructure, constructed by a private infrastructure owner, to determine whether it is ‘suitable’ - and require modifications, upgrades or replacement, at the private infrastructure owner’s cost, to meet this standard (cl. 6.1); and
- (b) require upgrades, modifications or replacements of connecting infrastructure or private infrastructure, at the private infrastructure owner’s cost, over the course of the agreement (cl. 6.3, 6.4-6.7, 7.1-7.3).

It also considers specific matters around the terms on which QR Network undertakes to construct connecting infrastructure (cl. 6.1).

Stakeholder comments

Stakeholders accepted that the SRCA should provide certainty about how standards will be assessed. On this, Vale argued:

... the standards required for rail infrastructure should be well defined with a transparent, independent approval process in place that gives users certainty over the cost and operational protocols that accompany the connection and operation of coal logistics infrastructure. (Vale 2011, p.2)

However, stakeholders were particularly concerned that the SRCA provides no guidance over how connecting infrastructure, once built, would be assessed as ‘suitable’ for connection and operation. They argued that this lack of guidance imposes a significant risk to the private infrastructure owner (Anglo American 2011a, p. 5, Anglo American 2011b, p. 1). Of specific concern, was connecting infrastructure that had been constructed by a private infrastructure owner.

Stakeholders argued that any assessment of whether connecting infrastructure is ‘suitable’ should be subject to an objective test (and objective standards) (QRC 2011, p. 10) and not rely on QR Network’s ‘sole judgement’ (Vale 2011, p. 2).

To address this, stakeholders proposed that, as a minimum, the SRCA should require QR Network to provide, if requested, information and advice relating to design specifications and infrastructure standards before construction starts. Beyond this, the QRC and Anglo American argued that the SRCA should require a private infrastructure owner to submit the design of connecting infrastructure to QR Network for approval, according to specified timeframes and criteria (QRC 2011a, p. 2; QRC 2011b, p. 8; Anglo American 2011b, p. 5).

The QRC proposed that connecting infrastructure should be considered suitable where it meets the standard required by clause 8.3(a) of the access undertaking, i.e. it meets technical specifications reasonably required by QR Network; has been constructed to a standard appropriate to the nature of the traffic and the current service standards of the adjoining part of the network, with no adverse impact on safety; and will not reduce capacity or supply chain capacity (QRC 2011b, p. 8). Vale and Anglo American (2011a) argued that QR Network's inspection of completed infrastructure should be limited to determining whether it complies with the specifications provided before construction starts:

... the operational importance of efficient and safe spur line and connection rail infrastructure is well understood by all miners ... The appropriate approach is therefore to agree spur and connection design and operational standards and allow users a rapid connection process where they can provide independent certification of their infrastructure and operational protocols. To do otherwise reduces the efficiency with which miners can plan and execute substantial development projects. (Vale 2011, p. 3)

Construction agreement

The SRCA provides for QR Network to design, construct and commission connecting infrastructure. The QRC and Anglo American argued that the terms on which QR Network will do so form a 'key part' of any connection agreement and are a likely area for dispute and delay (QRC 2011a, p. 5; Anglo American 2011a, p. 6). To avoid such disputes, the QRC said that QR Network should be required to design, construct and commission connecting infrastructure on the basis that:

- (a) QR Network will complete the works expeditiously and within a reasonable timeframe;
- (b) the standard of construction will meet, but not exceed, the standard required by the access undertaking;
- (c) QR Network will only recover its reasonable and actual costs (as detailed in the SRCA), subject to QR Network not recovering costs arising as a result of unreasonable delay; and
- (d) QR Network will provide the private infrastructure owner with information about the development of the connecting infrastructure and will consult with the owner on substantial design, construction, project management and commissioning decisions (QRC 2011a, p. 5).

QRC argued that these requirements should be set out in a schedule to the SRCA (QRC 2011b, pp.34-39).

Authority's analysis and decision

The Authority accepts that QR Network needs to have confidence that infrastructure connected to its network meets the necessary Australian standards and will not adversely affect the safe operations of its network. At the same time, private infrastructure owners need to know that their proposed infrastructure (both private and connecting) will ultimately satisfy QR Network's obligations.

The Authority considers that the SRCA should provide private infrastructure owners with greater certainty over how, and whether, QR Network will determine whether or not infrastructure meets required standards.

The Authority agrees with stakeholders that standards and configurations of connecting infrastructure should be clearly defined prior to construction commencing – and that QR Network should be required to provide information and advice relating to design specifications and required infrastructure standards, when requested.

The Authority considers that it is appropriate for QR Network to inspect the connecting infrastructure once built, to assess whether it is suitable for connection and operation. Connecting infrastructure will be considered ‘suitable’ if:

- (a) it complies with an approved design (see below); or
- (b) it meets the related requirements included in the 2010 access undertaking (i.e. meets required technical specifications, is constructed to an appropriate standard having regard to safety, and will not reduce capacity –see section 2.1).

The Authority has proposed to provide the option for a private infrastructure owner to submit a design for connecting infrastructure for QR Network’s approval, early in the process, before the private infrastructure owner commits significant capital to construction. The design will be approved when it meets the related requirements included in the 2010 access undertaking (see section 2.1). This will provide private infrastructure owners with an early indication of the potential ‘suitability’ of the connecting infrastructure (and any details of modifications required) and confidence to start construction. If QR Network becomes aware of a material change in circumstances which would mean that a previously approved design would no longer meet the suitability requirements, it will be required to advise a private infrastructure owner of the nature of this change and the details of any modifications that would be required. The private infrastructure owner could then resubmit a new design for assessment and approval.

The Authority has also proposed that QR Network be required to inspect connecting infrastructure during construction, at the private infrastructure owner’s request and cost. These inspections would seek to assess whether construction is in accordance with an approved design and whether construction was going ahead as expected and planned. This will provide private infrastructure owners with an ongoing assessment of the likely ‘suitability’ of the connecting infrastructure.

This approach also improves the transparency of QR Network’s final assessment of whether the infrastructure is ‘suitable’ for connection.

Having an option for interim monitoring and assessment should provide further comfort to private infrastructure owners that construction is going ahead as expected.

In the event that QR Network inspects the completed connecting infrastructure and determines that it does not comply with an approved design and that modifications or upgrades are required, it must first consult with the private infrastructure owner over the required work. This would be particularly important for connecting infrastructure that has been monitored through the construction process, but that QR Network nevertheless considers unsuitable on completion. If, following consultation, QR Network still believes that work is required, then work would be undertaken according to a detailed written plan (which the private infrastructure owner can dispute under the dispute provisions of the agreement).

The Authority has also proposed to provide for private infrastructure owners to dispute the scope of the work and who carries out the work to upgrade, modify or replace connecting infrastructure, not just the costs payable (see section 2.1).

Construction agreement

The Authority considers that the SRCA should provide for QR Network to undertake the initial design, construction and commissioning of connecting infrastructure in accordance with the terms of a separate construction agreement.

The Authority has not accepted the QRC's proposal to include a new schedule to the SRCA that sets out the terms for a construction agreement for connecting infrastructure. The Authority understands stakeholders' concerns over the potential for dispute or delay around construction issues, but is not convinced that including a schedule to the SRCA is the appropriate vehicle to address these concerns.

In addition, to the extent that the SRCA could be used in this way, the Authority is concerned that the QRC's proposed terms for construction do not adequately address the complex and, in most cases, project specific nature of various construction agreements. That said, the Authority accepts that many of the principles raised in the QRC's proposal would go some way to ensure that, should QR Network undertake construction, it does so to an appropriate standard and without undue delay. Failing this, it is always open for a private infrastructure owner to construct the connecting infrastructure itself. The amendments described above (and in section 2.1) have sought to provide better balance and greater certainty over that process.

Draft Decision 3.3

- **The Authority requires QR Network to amend the SRCA to provide private infrastructure owners with greater certainty over how, and whether, QR Network will determine whether or not infrastructure meets required standards. This includes providing for:**
 - (a) **QR Network to inspect the connecting infrastructure once built to assess whether it is suitable for connection and operation;**
 - (b) **QR Network to provide information and advice relating to design specifications and required infrastructure standards, when requested by the private infrastructure owner;**
 - (c) **a private infrastructure owner to submit a design for connecting infrastructure for QR Network's approval;**
 - (d) **QR Network to advise a private infrastructure owner of a material change in circumstances which would mean that a previously approved design would no longer meet the suitability requirements and**
 - (e) **QR Network to inspect connecting infrastructure during construction, at the private infrastructure owner's request and cost.**
-

3.4 Connecting Infrastructure

QR Network's proposed SRCA defines 'connecting infrastructure' as:

... infrastructure (including, without limitation, track, signalling and overhead traction electricity (if applicable)) managed, controlled or owned by QR Network, which connects the

Network to the Private Infrastructure as shown on the Plan detailed in Schedule 2, and as modified or upgraded from time to time.

Schedule 2 of the SRCA is intended to provide a plan that identifies the boundaries between the connecting infrastructure, private infrastructure and network that includes a description and/or address of the location of the private infrastructure.

Stakeholder comments

Stakeholders said that it was important that ‘connecting infrastructure’ was correctly identified and defined – indeed, that it was important that there was no ambiguity over the definition, or the extent of the infrastructure. The QRC was especially concerned that the proposed SRCA was ‘not particularly useful’ in resolving an issue where parties do not agree with the proposed scope of the connecting infrastructure (QRC 2011, p. 6). Anglo American suggested that while it appears that the precise scope of the connecting infrastructure will be agreed by parties and set out in the plan in schedule 2, the current wording of the definition is potentially ambiguous. Further, in the absence of agreement to the contrary, connecting infrastructure should be limited to the first 20 metres of the spur line (and all associated infrastructure within that area) (Anglo American 2011b, p. 1).

Authority’s analysis and decision

The Authority considers that the definition of connecting infrastructure included in the SCRA should provide some flexibility to cover a number of different circumstances. This is consistent with the approach adopted in the 2010 access undertaking.

There is little benefit from requiring the SRCA to define connecting infrastructure to mean anything other than what is already defined in the access undertaking. The Authority considers that Anglo American’s suggestion of limiting connecting infrastructure to the first 20 metres (if parties cannot otherwise agree) is somewhat arbitrary and not particularly useful in assessing the range of circumstances that might be involved in connecting private infrastructure to QR Network’s infrastructure.

The Authority notes that the proposed definition relies on an agreed schedule (Schedule 2) as well as a set of principles. The Authority has proposed a number of amendments to give precedence to the plan in Schedule 2. In this way, the scope of the connecting infrastructure can be defined up front (and included in Schedule 2 of the SRCA).

Should a dispute over the scope of the connecting infrastructure arise before parties finalise an agreement, the dispute resolution provisions of the 2010 access undertaking would typically apply and thereby allow for the matter to be resolved effectively.

When there is any ambiguity over infrastructure included in Schedule 2 (once a connection agreement has been entered into) the SRCA dispute resolution provisions would then apply.

3.5 Train control

Clause 11 of the proposed SRCA specifies that QR Network is responsible for the scheduling and control of all train movements to and from the private infrastructure.

Stakeholder comments

Stakeholders argued that train control is a matter that should be included in access agreements and is not relevant to connection agreements.

The QRC argued that the clause should therefore be deleted because it:

... sits uncomfortably with the fact that the Owner and QR Network will need to separately enter into an access agreement which will deal with access rights and rejection of trains (QRC 2011a, p.12).

In contrast, Anglo American expressed the view that the SRCA needed to specifically deal with the provision of train control services for the private infrastructure by QR Network for a commercially reasonable fee because:

the Standard Access Agreement did not necessarily deal with this issue in circumstances where QR Network was not the Accredited Railway Manager in respect of the Private Infrastructure (Anglo American 2011b, p.4).

Authority's analysis and decision

The Authority considered both the QRC's and Anglo American's comments in the context of clause 8.3(b)(ii) of the 2010 access undertaking, which states that

(b) Where Connecting Infrastructure is constructed by an Access Seeker or Access Holder in accordance with Clause 8.3(a), QR Network must: [...]

(ii) offer to provide train control and planning services for the Connecting Infrastructure in a manner consistent with the QR Network operated network. These services must be provided by QR Network on a basis agreed by the parties or, in the event of a dispute, determined by the QCA in accordance with Clause 10.1.4.

Therefore, the Authority agrees with QR Network's inclusion of a train control clause in the SRCA, as this is consistent with the access undertaking's obligations.

The Authority notes, in this context, that the QRC's suggestion of addressing train control matters as part of access agreements could become problematic in cases where the private infrastructure owner, or a rail haulage operator it has contracted with, is not the access holder (e.g. where multiple mines with different owners are serviced by a single connection to the network).

The Authority agrees with Anglo American that QR Network should provide train control services for a reasonable fee, but considers that this can be ensured by virtue of the access undertaking obligation for disputes regarding the basis of provision of train control and planning services for connecting infrastructure to be determined by the Authority. As for the matter of providing train control on the private infrastructure, the Authority is not convinced that it would be appropriate to require QR Network to provide these services for infrastructure that it does not own.

The Authority has also proposed new clauses in the SRCA to ensure that: QR Network uses its best endeavours in train scheduling for the connecting infrastructure to utilise corresponding access rights (so that train paths 'line up'); and the owner of the private infrastructure cooperates with the scheduling process. Detailed drafting is at Appendix A.

Draft Decision 3.4

- **The Authority requires QR Network to amend the SRCA to ensure that QR Network uses its best endeavours in train scheduling to utilise corresponding access rights (so that train paths 'line up').**
 - **The Authority requires QR Network to amend the SRCA to ensure that the owner of the private infrastructure cooperates with the scheduling process.**
-

3.6 Insurance

Clause 16 of the proposed SRCA requires the private infrastructure owner to hold insurances as set out in Schedule 3, and provides that they are subject to review every three years. The private infrastructure owner must provide to QR Network evidence of these insurances. QR Network's proposal is deficient in that, while Schedule 3 is intended to provide details of the required owner insurances, it is blank in the proposed SRCA.^[1]

Stakeholder comments

The QRC suggested that the insurances taken out by the owner should be limited to insurance required by the law; public liability for no less than \$20 million per claim; and third party property damage insurance for the private owner's infrastructure (QRC 2011b, p.26).

The QRC argued that QR Network should be obliged to contract the same insurances in respect to the connecting infrastructure and recommended that the required insurances be detailed in Schedule 3 (QRC 2011a, p.13).

Anglo American supported QRC's positions on insurances (Anglo American 2011a, p.7).

Authority's analysis and decision

After considering stakeholders' feedback, the Authority considers that the SRCA should specify the types and amounts of insurances required, in order to provide greater certainty to the signatories of the SRCA. In addition, QR Network should also be required to demonstrate that it also holds the appropriate insurances.

The Authority has not included in this draft decision its view on what the relevant insurances, and amounts, should be. Rather, it is seeking further submissions on this matter. However, to guide those submissions, the Authority's preliminary views are set out below.

The Authority agrees with the QRC's suggestion that both parties should hold public liability and third party property insurance.

However, the Authority considers that the QRC suggestion to include 'any other insurance which is required by law' could become contentious if the negotiating parties had to populate Schedule 3 with types and amounts of insurance. For example, the additional types of insurances not included in the QRC's drafting, but which may be appropriate in the case of a SRCA, could be insurance of the physical works, business interruption and professional indemnity.

The Authority is also of the view that the SRCA should stipulate that, if certain insurances become unavailable in the market or the pricing of them becomes uncommercial, good faith discussions be held in regard to an alternative approach.

The QRC has sought public liability of no less than \$20 million per event, while QR Network's explanatory memorandum talks about an intended public liability amount of \$100 million, noting that this is less than the amount payable under the standard access agreement and suggesting that it is not unreasonable given public liability requirements elsewhere and given the limited interaction with passenger services.

^[1] In its explanatory memorandum, QR Network identified an insurance amount of \$100 million as commensurate with the general liability risk that is covered (QR Network 2011, p. 9).

The Authority considers that set value figures should be included in Schedule 3 of the SRCA for each type of insurance. The Authority is, therefore, seeking submissions on what the appropriate values might be. In this regard, the Authority notes that interested parties might already hold similar insurance (e.g. liability insurance) and that evidence in relation to this insurance, including the appropriate value, would assist the Authority in making a final decision on this matter.

Ultimately, the Authority considers that any hard value to be included in the SRCA at time of final decision should be adjusted for inflation, using the consumer price index, at the time of signing an agreement.

The Authority's proposed drafting regarding general requirements for insurance is contained in Appendix A, but the Authority is seeking specific stakeholder comments on the types and amounts of insurance which should be detailed in Schedule 3 of the SRCA.

Draft Decision 3.5

- **The Authority requires QR Network to amend the SRCA to reflect reciprocal insurance requirements.**
 - **The Authority requires QR Network to amend Schedule 3 of the SRCA to specify the types and amounts of insurances required for both parties.**
-

3.7 Disputes

Clause 17 of the proposed SRCA contains processes for resolution of disputes.

Stakeholders did not comment on these measures in any detail, with the QRC providing some very minor suggested editorial amendments to the drafting of clause 17.

Authority's analysis and decision

The Authority considers that an over-riding principle for the dispute resolution provisions is that matters already covered by the dispute resolution mechanism in QR Network's 2010 access undertaking should be resolved in accordance with the access undertaking. As a consequence, the Authority proposes to amend clauses 17.1 and 17.2 to make this point explicit in the SRCA (see Appendix A for detailed drafting).

The Authority has also proposed some minor amendments to the drafting of clause 17.3 of the SRCA, in order to more clearly delineate the circumstances in which a particular designated expert should be the default expert for determining a particular dispute – i.e. depending on the circumstances, the President of CPA Australia Ltd, the Institution of Engineers Australia (Queensland Division) or the Queensland Law Society.

Draft Decision 3.6

- **The Authority requires QR Network to amend the SRCA to make clear that disputes relating to matters covered by the dispute resolution mechanism in QR Network's 2010 access undertaking should be resolved in the manner set out in the access undertaking.**
-

4. MATTERS BEYOND THE SRCA

QR Network has environmental obligations regarding the loss of coal from trains operating on its network.

Schedule 7 of the proposed SRCA provides for the private infrastructure owner to have the primary responsibility to ensure wagons are loaded, profiled and veneered in accordance with required standards, and also provides for QR Network to investigate and verify the effectiveness of the private infrastructure owner's compliance with these obligations.

Stakeholders argued that the coal loss management provisions (CLMP) should not be part of the SRCA.

The Authority accepts that the private infrastructure owner should be responsible for managing coal loss on their infrastructure. Similarly, QR Network should be responsible for managing coal loss on its infrastructure, and the most appropriate way to do so is through the access agreement with the train operator and not through the SRCA with a private infrastructure owner.

4.1 Coal loss management

Stakeholder comments

Stakeholders strongly disagreed with the inclusion of CLMP in the SRCA. The QRC, Asciano and Anglo American (Anglo American 2011a, p.7) argued that the CLMP are not relevant to the construction of connecting infrastructure and do not otherwise belong in a rail connection agreement.

The QRC suggested removing all references to CLMP from the SRCA (QRC 2011a, p.15).

Asciano argued that CLMP should only apply in circumstances where they are required by the nature of the private infrastructure (Asciano 2011, p.6).

Vale believed that compulsory coal loss procedures as presented by QR Network are outside the scope of the SRCA and should be addressed in above-rail agreements negotiated between users and haulage companies (Vale 2011, p.2).

Vale argued that schedule 7 could either specify:

- (a) outcomes to be achieved, leaving users to put in place their own methods (in this case users are fully liable where they fail to achieve output requirements); or
- (b) detailed protocols users must put in place (in which case QR Network takes responsibility for designing protocols that will effectively deliver the outcomes to be achieved).

Vale argued that specifying the outcomes that are required to be achieved should be sufficient as both miners and haulage contractors are experienced in the management of coal loss issues (Vale 2011, p.3).

Authority's analysis and decision

The Authority is well aware that the issue of coal losses affects the whole coal chain and can have substantial negative impacts on the condition and maintenance requirements of the coal rail network.

The Authority recognises the common sense of Vale's arguments for specifying outcomes rather than protocols for coal loss prevention, but agrees with the QRC, Asciano and Anglo American that Schedule 7 as it was proposed by QR Network was outside the scope of the SRCA, as outlined in clause 8.3 of the access undertaking.

The Authority therefore rejects Schedule 7 of QR Network's proposed SRCA as drafted. However, if QR Network wishes to present alternative proposed drafting, which could incorporate Vale's suggestion to specify outcome requirements, the Authority will consider such drafting.

Draft Decision 4.1

- **The Authority requires QR Network to delete the coal loss management provisions from the SRCA.**
-

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