

New Hope Corporation Limited



**New Hope**  
Corporation Limited

Submission on Queensland Rail's 2015  
Draft Access Undertaking

Volume 3  
Access Undertaking

5 June 2015

## 1 Introduction

This Volume 3 of the NHC submission on QR's 2015 DAU comprises NHC's submissions on the body of the QR's 2015 DAU.

It should be read in the context of being part of NHC's 5 volume submission:

- (a) Volume 1 – Introductory Submission
- (b) Volume 2 – West Moreton Coal Reference Tariffs
- (c) Volume 3 – Access Undertaking
- (d) Volume 4 – Standard Access Agreement
- (e) Volume 5 – Responses to QCA Paper and Adjustment Charges

Consequently it does not seek to duplicate submissions made in each of those volumes, each of which relate to QR's 2015 DAU as well.

NHC considers that it is not appropriate for the QCA to approve QR's 2015 DAU under s. 138(2) of the QCA Act for the reasons set out in each of the 5 volumes. Accordingly it requests that the QCA make a decision to refuse to approve QR's 2015 DAU and set out the ways in which the 2015 DAU should be amended, in accordance with s. 140 QCA Act.

This volume sets out the amendments the NHC considers are required to the body of the access undertaking in order for it to be appropriate for the QCA to approve.

## 2 Executive Summary

NHC considers that QR's 2015 DAU is not appropriate having regard to each of the matters set out in s. 138(2) QCA Act. In particular, it fails to give sufficient weight to the following paragraphs in s. 138(2) QCA Act:

- (a) the object of Part 5 of the QCA Act – particularly regarding the efficient operation of and use of significant infrastructure (not just investment which appears to be QR's sole focus);
- (d) the public interest;
- (e) the interests of persons who may seek access to the service (not just the interests of QR as owner and operator which appears to be QR's sole focus);
- (g) the pricing principles mentioned in section 168A – include not just 168A(a) that QR incorrectly asserts is somehow 'paramount' but principles such as that in 168A(d), 'provide incentives to reduce costs or otherwise improve productivity'; and
- (f) any other issues the authority considers is relevant.

NHC makes a number of suggestions about how the 2015 DAU should be amended to more appropriately reflect the balancing of those factors.

## 3 Structure of this volume

The numbering and content throughout the body of this volume are identical to the structure of the 2015 DAU.

Annexure A to this volume is a summary table taken from Volume 1 of QR's supporting submissions to the 2015 DAU showing a comparison of QR's position to that of the QCA Draft Decision, but with a summary of New Hope's submissions also included. It is indicative only, the body of this submission provides greater detail of NHC's submissions. It should also be noted that, as QR's 2015 DAU has varied from that which was the subject of the QCA Draft Decision, this submission includes comments on other issues that were not covered in the QCA Draft Decision.

NHC notes that, in the time frame available, NHC's submissions have mostly had to be expressed as principles rather than being able to provide detailed amendments on each of the issues of concern. Accordingly, NHC requests that the QCA provide detailed drafting amendments in its draft decision such that NHC has a proper opportunity to comment on the drafting that is proposed.

#### **4 Preamble**

While not a major issue, NHC considers that the following wording proposed for inclusion in the preamble are (based on the current drafting of the 2015 DAU) unwarranted and misleading:

- (a) Developed following '*extensive*' consultation – QR has sprung major and adverse changes on access holders late in this process – clearly reneging on its previous promises and representations regarding the backdating of West Moreton system tariffs;
- (b) A '*balanced*' approach – for the detailed reasons set out in the NHC submission, there are numerous aspects of the 2015 DAU which do not provide a reasonable balance between QR and access holders or access seekers; and
- (c) Manage negotiations in an '*efficient and transparent*' manner – NHC is concerned that the access application process has been made difficult for an end user seeking access rights directly and that QR has sought to reduce transparency and reporting measures which will entrench information asymmetry in access negotiations.

If QR insists on such self-serving language, NHC would prefer the Preamble simply be deleted – as, given the operation of the proposed clause 7.2(f) 2015 DAU, it serves little if any purpose.

#### **5 Application and scope**

##### **5.1 Duration**

NHC has some concerns with the proposed longer term of the 2015 DAU until 30 June 2020. In particular, QR is seeking to make extensive changes to its undertaking and then 'lock' in a regulatory framework for a longer period than is typical.

New Hope's concerns about the longer term are driven by the asymmetrical nature of the amendment process that applies to undertaking where the infrastructure provider (QR) can submit draft amending access undertakings at any time, whereas the QCA has less ability (subject to the terms of the undertaking itself), and the access holders and seekers have no ability, to reopen the undertaking if it operates differently to anticipated.

If a long term is to be adopted, NHC suggests that an approach similar to clause 1.4(a) of the DBCT Access Undertaking is adopted, with a provision inserted to allow the QCA to require amendments to rectify significant inequity or unfairness arising to access seekers, access holder or QR, where that inequity or unfairness was not intended or foreseen.

Irrespective of the term adopted, revenue requirements (and therefore Western System reference tariffs and related Adjustment Charges) should be calculated by reference to the period commencing 1 July 2013 (since which time interim tariffs have been applying). Please see New Hope's detailed submissions on this issue and the legal advice from Allens regarding the QCA's power to require the inclusion of such Adjustment Charges in Volume 5 of the NHC submissions.

## 5.2 Scope

NHC has two concerns with the scope of the 2015 DAU proposed by QR subject to the following:

- (a) *Definition of Access* (7.1, relevance to 1.2.1-1.2.2) – NHC prefers the definition of Access that exists under QR's current access undertaking to make it clearer what below rail services are included within the definition of Access.
- (b) *Line Diagrams* (1.2.3) – Access holders should have a right, following raising concerns with QR (and giving QR an opportunity to review the line diagrams), to dispute the accuracy of the line diagrams. While it is true that the scope of the undertaking is not defined by reference to the line diagrams, as the line diagrams are supposed to demonstrate the parts of the rail comprising the 'Network' it will facilitate access negotiations if they are correct and frustrate access negotiations if a rail line that should be included is excluded from the diagrams.

## 5.3 Consistency and differentiation

NHC is willing to accept proposed clause 1.3, subject to suggesting it include a reference to the limits on price differentiation in clause 3.3, or also expressly including the requirement not to differentiate an Access Seeker's Access Charges from those of a relevant Reference Train Services except to reflect differences in cost and risk.

NHC considers this needs to be absolutely clear, particularly in light of the very significant discrepancy between the West Moreton system reference tariff and ceiling price that QR is proposing.

## 5.4 Extensions

NHC has a number of concerns with the extensions provisions. Given the complexities in this area, NHC has sought to comment on specific aspects of QR's proposed capacity investment framework below (all of which relate to clause 1.4 of the QR 2015 DAU, but noting that the sub-heading numbering does not necessarily reflect corresponding clauses in the 2015 DAU as in many cases the same issue is relevant to multiple clauses in 1.4 2015 DAU).

### (a) General issues regarding the Extension provisions

*'Extension Costs'* (used in numerous parts of 1.4.1-1.4.3) is defined in an extremely wide and vague manner – and there is no evidence that the wording in the QCA Act this is presumably supposed to reflect 'the costs of extending the facility' (s 119(2)(c)) is intended to cover anything other than direct and actual costs of development of the extension. QR's approach makes this into a major and uncertain limit on when QR will be required to invest in the Network.

*Interaction with maintenance* – the definition of Extension includes enhancements, augmentations and replacements of all or part of the network. NHC is concerned that these provisions have the potential to be used to justify not incurring expenses required to properly maintain the network. A carve out is required to ensure that QR is required to continue to maintain the network, and invest in sustaining capital expenditure, in accordance with its obligations under access agreements and to ensure it has the ability to continue to provide such contracted access rights (even if such maintenance could be regarded as an 'Extension'). To the extent such sustaining capital expenditure requires studies they should be funded by QR (and clause 1.4.8(a) would need modifying).

*Inappropriate use of legitimate business interests* – Clause 1.4.1(c)(iii) should be deleted. QR's legitimate business interests is one of a number of factors to be balanced along with the other

factors referred to in section 138(2) in determining the appropriate terms of an access undertaking (with other factors including the interests of access seekers). A vague carve out of the nature of clause 1.4.1(c)(iii):

- (i) Creates substantial and unwarranted uncertainty about when the Extension provisions will apply (as QR's legitimate business interest is not well defined, and based on the positions they have taken in the submissions regarding a new undertaking to date is not a matter which stakeholders or the QCA would agree with QR on the scope of); and
- (ii) Gives unwarranted priority to this factor over the other factors in section 138(2) – as QR's legitimate business interests will be taken into account by the QCA in determining the appropriate terms of the capacity investment framework provisions as a whole (such that it should not then be applied as a subsequent exception).

**(b) Circumstances in which investment in an Extension should occur (1.4.2)**

*QR's discretion and obligations* – NHC continues to have the concern (evident in the QCA's Draft Decision) that QR retains too great a level of discretion in relation to user funding (and thereby when Extensions can occur in circumstances where it refuses to fund them) and very limited obligations to assist an access seeker which needs investment in an Extension to obtain the required access. In particular:

- (i) The carve out from QR having any obligations to satisfy the conditions in clause 1.4.2(b) that is found in 1.4.2(f) is very limiting, given that many conditions (such as obtaining Authorisations and land) will be highly dependent on QR;
- (ii) The criteria in clause 1.4.2(b) should be objective standards rather than the results of QR's opinions. This is particularly the case for 1.4.2(b)(vii). This is particularly important so that an access seeker has the potential to bring a dispute with QR's assessment in relation to this issue (which would be much harder under QR's current drafting).
- (iii) Clause 1.4.2(d) is insufficient, providing QR with substantially too much discretion regarding when provision of user funding means that QR should be compelled to develop an Extension. This should provide that a Funding Agreement for Extensions must (as a mandatory obligation) include a requirement for QR to Extend the Network in accordance with the terms of that Funding Agreement

*A more detailed Investment Framework* – QR is seeking a lighter handed investment framework than what is ideal. To the extent the QCA was minded to accept that, it will be critically important that the QCA has the power to require a more detailed investment framework to be submitted during the term of the undertaking where it considers that is warranted (either by increased demand for new access or due to unanticipated flaws in the terms of the undertaking as approved). The need for this is heightened by the longer term for the undertaking that QR is seeking.

**(c) Planning and study funding (1.4.6 – 1.4.8)**

NHC considers that there needs to be a master planning process for, at least, major parts of the QR network (such as the West Moreton system), to provide visibility and transparency to end

users of the potential future capital requirements and a useful trigger for consultation with operators and end users. Clause 1.4.6 is not sufficient in that regard, and has the potential to result in in-efficient and ad-hoc investment decisions being made due to the absence of more rigorous planning being provided for.

NHC also has some concerns with QR's study funding principles (in clause 1.4.8), which seem to have the result of including study costs in the regulatory asset base where the Extension does not proceed. For user funded studies, the costs should only be included in the regulatory asset base if the Extension proceeds, otherwise they should be funded by the funding user.

**(d) User funding (1.4.2-1.4.5)**

Given the discretion QR retains to not make any future investments in the network, it is important (particularly given the obsolete nature of some of QR's network) that the user funding regime is appropriate. NHC's material concerns are noted below:

*Negotiation of User Funding agreements* – QR should be required to amend clause 1.4 as follows:

- (i) QR be required to negotiate Funding Agreements in good faith;
- (ii) 1.4.3(b)(i) should be subject to the QCA's ability to require amendments to the undertaking as part of the introduction of a Standard User Funding Agreement (see below);
- (iii) 1.4.3(b)(iii) be balanced with a mirror requirement to ensure the Funding Users' legitimate business interests are protected;
- (iv) 1.4(b)(iv) refer to a more appropriate definition of 'Extension Costs' (see submissions on that issue above)
- (v) 1.4.3(c) is deleted – it simply serves to exacerbate the issues caused by the unreasonably wide definition of 'Extension Costs' noted above. If additional costs are sought to be passed on to the funding user that should occur under the terms of the Funding Agreement to be negotiated not be pre-judged by provisions such as this;

*Disputes about terms of Funding Agreements* - It needs to be absolutely clear that where QR and a potential provider of user funding are:

- (i) unable to reach agreement on the terms of a Funding Agreement, they can raise a dispute and require the QCA to determine the appropriate terms of a Funding Agreement; or
- (ii) in dispute regarding an issue under an executed Funding Agreement, they can raise a dispute and require the QCA to arbitrate that manner in the same manner as disputes about access agreements.

Clause 1.4.10 is a good starting point, but needs to put it beyond any doubt that the QCA has power to determine the terms of a Funding Agreement (and compel an Extension occurring on the basis of that funding and the capacity investment framework in the approved undertaking), and the power to determine disputes under executed Funding Agreements.

*Power to require Standard User Funding Agreement (and consequential undertaking amendments)* – With a view to having an undertaking place, NHC is willing to concede that a standard user funding agreement (**SUFA**) not be required as part of the 2015 DAU. However, this is an important issue and QR should be required to submit a SUFA within 3 months of approval of the undertaking. The QCA should have the power to prepare a SUFA which will apply to QR's network in circumstances where QR fails to submit a proposed SUFA or fails to

make changes the QCA requires to the SUFA submitted. That power should also extend to consequential amendments to the approved undertaking. Given the long term of the undertaking that QR is proposing, and the constrained nature of the Queensland government's budget (and therefore presumably QR's willingness to invest) it seems highly likely a SUFA will be required at some stage during the term. It is preferable to start trying to resolve this issue sooner (particularly in light of how complex the Aurizon Network SUFA process is) rather than having to wait to the back end of the term. NHC does not agree with comments that QR has made since the QCA Draft Decision that this would be beyond the QCA's power. The QCA Act expressly acknowledges that an undertaking can include provisions regarding extending the facility and review of the undertaking (s 137(2)(g) and (k) QCA Act) and there is no reason to interpret the QCA Act as providing a limit of the type that QR is asserting.

*User funding for studies* - The provisions regarding Funding Agreements (should also exist in respect of funding agreements for studies or investigations (which QR has proposed are within the scope of Funding Agreements in clause 1.4.2(a) 2015 DAU). This should include the power to require a SUFA noted above as standard forms of these arrangements may also be warranted (and will potentially thwart even getting to the point of actually funding the Extension if they cannot be agreed). However, given the different nature of those arrangements, QR should be permitted to have a different form of SUFA for study funding and Extension funding.

## **6 Negotiation process**

### **6.1 Preparing and submitting an access application**

NHC has no specific comments on clause 2.1, except as it refers to the access application requirements in Schedule B.

Please see section 8.2 of this Volume for detailed comments on Schedule B.

### **6.2 Confidentiality**

NHC submits that clause 2.2.3 should be amended to allow the QCA to require the approved undertaking be amended to implement ringfencing provisions where:

- (a) QR does not submit a draft amending access undertaking in the time required by the QCA; or
- (b) the QCA rejects the draft access undertaking and QR fails to submit a revised draft amending access undertaking reflecting the changes the QCA has required.

QR's drafting in clause 2.2.3 2015 DAU is inadequate as, if QR does not submit a draft amending access undertaking with ringfencing provisions acceptable to the QCA, the process will come to a halt following the QCA's rejection (unless QR voluntarily resubmits which neither clause 2.2.3 2015 DAU, as drafted, nor the QCA Act, would require it to do).

### **6.3 Acknowledgement of an Access Application**

The right for QR to request additional information should be tightened up by the first sentence in clause 2.3.1 being amended to read:

'Queensland Rail may require the Access Seeker to provide additional or clarified information where that is reasonably necessary for the purposes of preparing an Indicative Access Proposal.'

That wording will make it clear that the reasonableness requirement is measured by what is necessary for the relevant purpose, namely preparing the Indicative Access Proposal.

#### **6.4 Provision of Indicative Access Proposal**

The timing period for provision of an Indicative Access Proposal is far too loose.

QR's drafting of clause 2.4.1 gives numerous 'outs' to allow QR to delay the provision of an Indicative Access Proposal, including:

- (a) allowing QR to specify an estimated time in the acknowledgement notice which automatically extends the period for responding (subject only to the access seeker raising an access dispute – which is likely to be highly counterproductive to successfully negotiating access); and
- (b) the time frame being a 'reasonable endeavours' obligation;

To facilitate efficient negotiations for access it is important that QR responds promptly to access applications. As a result, NHC suggests that the right to specify an estimated time longer than 20 business days should be limited to where each party can reasonably justify the extension and has agreed to the extended time.

In addition, NHC considers that the Capacity Information (in Schedule A to the 2015 DAU) should be made available as part of the Indicative Access Proposal provided to the access seeker, not as something that has to be requested during the Negotiation Period (as it currently appears under 2.7.2(a)(ii)). If there are any constraints or capital investment requirement, publication of capacity information as soon as possible will facilitate negotiations to determine how this should be resolved. This information has to be produced as part of undertaking the capacity analysis that is necessary for producing the Indicative Access Proposal in any case, so it is hard to see how this imposes a burden on QR.

#### **6.5 Notification of intent to negotiate**

NHC has no particular comments on clause 2.5.

#### **6.6 Competing Access Applications**

NHC has no particular comments on clause 2.6.

#### **6.7 Negotiation of an Access Agreement**

In relation to clause 2.7.1(b)(ii)(C), NHC suggests that there should be some guidance provided on the circumstances in which QR should agree to an extension of the negotiating period. For example, QR should not be permitted to unreasonably withhold agreement to an extension sought by an access seeker where:

- (a) there is limited prospects of realistic demand from other users of sufficient volume that QR would be unable to meet the access;
- (b) the negotiations are well advanced such that QR reasonably considers that an agreement is likely to be reached in the near future; or
- (c) there are special circumstances which reasonably justify the extension despite the protracted nature of negotiations.

NHC submits that clause 2.7.2 should be amended to provide for the information reflecting the requirements of section 101 to be disclosed with a specific minimum time period of providing the IAP (if not within the IAP itself). This is important because on QR's drafting of clause 2.7.2, the Preliminary Information does not cover some of the information required to be disclosed under s. 101 QCA Act, and there is no timeframe in clause 2.7.2 specified for its provision other than 'during the Negotiation Period'.



Please also see NHC's comments in relation to clause 2.4 above in respect of the appropriate timing for provision of the Capacity Information described in Schedule A 2015 DAU.

Please also see NHC's comment in relation to connection in section 2.11 below.

## **6.8 Cessation of negotiation process**

NHC considers that it would be preferable for the undertaking to provide greater guidance on the factors QR is to have regard to in forming the opinion that 'there is no reasonable likelihood of material compliance with the Access Seeker with the terms and conditions of an Access Agreement' under clause 2.8.1(a)(ii)(A) (as this is not a view that should be formed lightly and it has serious consequences if it is used to cease negotiations with an access seeker).

If the intention is to limit it to the matters in clause 2.8.3 that should be expressly done. If QR intends to cover an alternative scenario then those circumstances should be expressly provided for so stakeholders can consider their legitimacy.

NHC considers that it should be limited to the matters in clause 2.8.3 and that clause 2.8.3 itself also requires less strict application. Clause 2.8.1(b) should provide for the matters in clause 2.8.3 to be 'had regard to' in making the assessment, not effectively be deemed to demonstrate there being no reasonable likelihood of material compliance (as QR proposes they would be under clause 2.8.1(b)). In particular, allowance needs to be made for past defaults that were the subject of bona fide disputes.

## **6.9 Access Agreement**

### **(a) Competing Access Applications**

New Hope remains concerned with QR's proposed approach to dealing with competing access applications, which will allow QR to make discriminatory and non-transparent decisions regarding the priority given to competing access applications.

In particular:

- (i) QR's proposed principles for reordering the queue provide QR with inappropriate levels of discretion, particularly by virtue of clause 2.9.2(h)(iv) which allows this to be done solely on the basis of what is more favourable to QR's 'legitimate business interests';
- (ii) Competing 'ready and able' access applications which would pay reference tariffs should be prioritised based on date of application, unless one access application is materially differentiated in terms of risk to QR;
- (iii) Difference in NPV contribution or subjective assessments of how favourable an access application is to QR's legitimate business interests, should clearly not be relevant as between competing coal haulage access applications on the West Moreton system which would both pay a reference tariff.

NHC notes that reference tariffs are designed to provide an appropriate rate of return that, among other things, reflects the infrastructure providers legitimate business interests, such that there is no justification for separate re-prioritising on the basis of paying more than the reference tariff or otherwise somehow being more favourable to QR's legitimate business interests.

**(b) Renewals**

NHC acknowledges that clause 2.9.3 is an improvement on QR's previous positions regarding renewal rights.

However, NHC submits that each of the following are important to provide legitimate protections to existing users, which have made major sunk investments in mining or industrial facilities and would suffer major investment stranding in the absence of effective renewal rights:

- (i) a process under which QR notifies the access holder of the need to renew (a specified period of days before the Renewal Timeframe where the timeframe is not triggered by a non-renewal access application); and
- (ii) the renewal rights should not automatically end on the expiry of the period referred in clause 2.9.3(b)(ii), which should instead refer to the later of three date, being the two dates listed and 'where an access dispute was commenced before the later of the periods referred to in (1) and (2) above, the earlier of the finalisation of that dispute through the Renewal Access Seeker agreeing to terms of an access agreement (including, but not limited to, term arbitrated by the QCA) or the dispute is finalised without any access agreement being entered by the Renewal Access Seeker'.

**(c) Split form access agreements**

In its previous submissions NHC has sought for QR to produce a 'split-form' access agreement under which end users can directly hold access rights. It continues to consider that the ability for an end user to hold capacity directly is critically important.

To the extent this can be provided under the tripartite access arrangements that QR is proposing, NHC is willing to work within that framework – but significant amendments will be needed to the current standard access agreement in order to give the end users direct capacity rights (rather than the very limited rights they would hold under the proposed standard access agreement). See Volume 4 of NHC's submissions for further details.

**6.10 Cost recovery where no Access Agreement**

NHC queries why a provision of this nature is required when the reference tariffs already include an allowance for overhead and management costs (which presumably include costs relating to managing access rights negotiations). It appears to be permitting 'double-dipping' unless this provision is restricted to negotiations for access rights for which no reference tariff applies. If this provision is included then NHC expects to see a deduction from the West Moreton system reference tariff to reflect the overhead allocation for access negotiations that QR will be able to recover through other means.

In any case, given some of the frustrating experiences NHC has had in relation to negotiating access arrangements with QR, NHC is concerned that a provision of this nature involves an access seeker effectively funding QR to argue against them (and certainly does not incentivise QR to engage in efficient negotiations).

**6.11 Connection**

NHC is concerned that there is very limited support in respect of connection to the QR Network, currently only being referred to in clause 2.7(b).

NHC considers that connection of private infrastructure is a clear part of providing access to the declared service. Without such a connection it may not be possible for many access seekers to practically access the declared service where QR declines to build the required balloon loop infrastructure on reasonable terms (and would allow QR to abuse its monopoly position in relation to the terms it provides for future connections).

NHC continues to support the undertaking, at a minimum, containing a reasonable set of principles which should apply to such negotiations – with the existing connection provisions of Aurizon Network's current access undertaking providing a useful example (having regard to how those principles were ultimately developed into a standard connection agreement).

NHC also supports the QCA having the power to require provision of a Standard Connection Agreement. As noted elsewhere, this position is within the QCA's power. Section 137(2)(k) specifically recognises that provisions regarding the review of an undertaking can be included within undertakings.

## **7 Pricing principles**

### **7.1 Pricing Principles**

Please see comments on the appropriate hierarchy of pricing principles in respect of clause 3.4 below.

In addition to those concerns, NHC notes that the existing undertaking provides for an entitlement to earn revenue:

*that is sufficient to achieve full recovery of Efficient Costs ... including an adequate rate of return on the value of assets reasonably required*

NHC considers that formulation is appropriate and that the formulation in 2015 DAU is not. The 2015 DAU formulation is, relevantly, to earn revenue that is:

*at least enough to:*

- (a) fully recover all Efficient Costs; and*
- (b) provide a return on the value of assets and investment commensurate with the regulatory and commercial risks involved.*

Firstly, it is appropriate for the revenue adequacy principle to be expressed as a cap (not a floor on pricing – as would be achieved by including the 'at least enough to' wording). Otherwise it appears the wording is suggesting that QR should be entitled to earn above a return commensurate with the risks involved.

Secondly the assets on which a return should be achieved should be the 'value of assets reasonably required' not just any asset of QR. There should not be wording which supports arguments for a full return on assets that are obsolete, unutilised or results of imprudent investments.

NHC does not take issue with the concept of trying to clarify that an adequate return is one commensurate with the regulatory and commercial risks involved.

### **7.2 Pricing Limits**

New Hope strongly believes that it is not appropriate to

- (a) apply a Depreciated Optimised Replacement Cost (**DORC**) valuation in relation to the West Moreton system (see Volume 2 of the NHC submissions for details); or

- (b) pre-determine that DORC values should be set as the asset values for determining a ceiling revenue limit as clause 3.2.3(c) (and 1.2(a)(ii) of Schedule E) 2015 DAU seeks to do.

As is recognised in the UNIQUEST Report (8 April 2015), other valuation methodologies satisfy the QCA's statutory requirements. As noted in Volume 2, there is existing regulatory precedent for not applying a DORC methodology.

It is possible that DORC or some form of modified DORC may be appropriate in particular cases outside of the West Moreton system. However, it is not appropriate to simply conclude that a DORC methodology should be used for all parts of the Network without giving it the consideration currently being applied in respect of the West Moreton system.

This is particularly the case for QR's network, given that there are numerous other parts of the network which have some of the characteristics of the West Moreton system (old lines with obsolete and life expired infrastructure and lines for which the design reflects historical use rather than current and likely future usage).

### **7.3 Limits on price differentiation**

NHC's existing services are covered by a reference tariff, and clause 3.3(b)(i) is appropriate in relation to limits on price differentiation for such services.

In relation to non-reference tariff services, NHC is concerned with:

- (a) The automatic 'pass through' nature of 3.3(b)(ii)(B) – which should refer to 'reasonably reflect' not just 'reflect' so that only appropriate changes are passed through;
- (b) the width of 3.3(b)(ii)(B)(1) that permits variations by QR to reflect changes that result in Queensland Rail no longer being able to commercially provide Access, when it should be restricted to circumstances beyond QR's control – such as changes to Transport Service Payments other than for QR's poor performance, so that QR is not simply permitted to pass on inefficiencies;
- (c) the width of 3.3(b)(ii)(B)(2) which refers to changes in cost, when it should refer to changes in Efficient Costs, so that QR is not simply permitted to pass on inefficiencies; and
- (d) the way that 3.3(c) could be used to 'lock in' a methodology to which an access holder had not agreed in the initial negotiations but where an access agreement had been entered based on being able to commercially agree the ultimate access price.

### **7.4 Conflict between pricing principles**

NHC continues to support reinstating the hierarchy of pricing principles from QR's existing undertaking, which apply the pricing principles in that undertaking in the following order of precedence:

- (a) Limits on price differentiation
- (b) Pricing limits
- (c) Rail infrastructure utilisation
- (d) Revenue adequacy

Of course there will be a relatively small range of circumstances in which such issues actually come into conflict, so in the vast majority of cases all four pricing principles will be satisfied. However, NHC continues to consider the previous undertaking provides an appropriate hierarchy (in contrast to QR's proposal in the 2015 DAU which seeks to make 'revenue adequacy' an unconstrained and paramount priority).

As noted in NHC's detailed submissions in Volume 2 (and the legal advice from Allens enclosed in Volumes 2 and 5) section 168A QCA Act does not make revenue adequacy paramount and QR's claims (in support of clause 3.1.1 2015 DAU and the West Moreton reference tariff) that it does are highly misleading.

The pricing principles in section 168A are only one of a number of factors the QCA must have regard to in determining whether it is appropriate to approve an undertaking (see s 138(2) QCA Act). There is no provision of the QCA Act which gives any single one of them or the pricing principles as a whole greater weight than other factors in section 138(2) let alone a position of being paramount.

In addition, section 168A provides a number of principles which there is a clear tension between (and which themselves must be balanced) of which 168A(a) is only one.

As a result QR's position is inconsistent with the balancing of factors that the QCA Act envisages taking place and should be rejected.

Even leaving aside those legal reasons, to take the obvious example it should be absolutely clear that earning a sufficient return should not 'trump' (i.e. effectively provide an exception to) the prohibitions on unfairly discriminatory pricing.

## **7.5 Reference Tariffs**

NHC considers that QR should be required to amend clause 3.5 to provide the QCA with the right to require it to submit a proposed reference tariff for a particular service if the QCA considers it is warranted.

NHC notes QR's submission on this point which alleges that such a requirement is beyond the QCA's power purely because the QCA Act does not expressly provide a power to amend an access undertaking in these circumstances.

However, interpreted properly, there is nothing in the QCA Act which limits the QCA's power in the way QR is asserting. The QCA Act expressly acknowledges that an undertaking can include provisions regarding how charges for access to the service can be calculated and provisions regarding review of the undertaking (s 137(2)(a) and (k) QCA Act).

Where the QCA considers it is appropriate to do so in accordance with section 138(2) it has a wide discretion as to the type of terms that can be included in an access undertaking and the power to include a provision of this nature.

It is also clear that such a provision is warranted given the concerns that numerous access holders and seekers appear to have about QR's pricing behaviour. A provision of this nature provides the potential for the QCA to deal with pricing concerns in a consistent way across relevant access seekers and will, in some circumstances, be highly preferable to simply relying on access disputes where the QCA arbitrated terms are only binding on QR in respect of a single access seeker.

This is not merely a hypothetical issue for NHC. NHC owns the Colton coal project which would, if developed, use QR rail infrastructure that is not covered by the West Moreton coal reference tariff. The QCA should ensure it has the right to consider requiring a reference tariff for such projects when they are closer to development. The prospect of this being needed is heightened by the longer term of the undertaking that is being sought by QR.

## **7.6 Rate Review provisions**

NHC is concerned that clause 3.6 may potentially be used to change, during the term of an access undertaking, the applicable Reference Tariff.

NHC is supportive of 3.6(b), namely that as Reference Tariffs change that change should be incorporated into access agreements. However, it should be made clear that 3.6(a) should not apply to Access Charges based on reference tariffs. QR should not simply be entitled to pass on increases in costs (which may have resulted from QR's inefficient operation).

## **7.7 QCA Levy**

NHC has no specific comments on clause 3.7 of QR's 2015 DAU.

However, NHC notes that it would expect the QCA Levy to QR (which is allocated to train services, so effectively paid by haulage operators and ultimately end users) to reflect a small proportion of the QCA's costs, given the limited services provided in respect of QR, particularly in comparison to Aurizon Network.

## **7.8 Maintenance of Regulatory Asset Base**

Please see detailed comments on Schedule E of QR's 2015 DAU later in this submission.

## **8 Operating requirements**

NHC has a number of concerns with the proposed Operating Requirements, but these are principally concerned with the Network Management Principles and Operating Requirements Manual, submissions in relation to which can be found in:

- (a) Section 8.6 of this Volume for submissions on the Network Management Principles; and
  - (b) section 8.7 of this Volume for submissions on the Operating Requirements Manual.
- NHC's concern with the body of Part 4 of the 2015 DAU relates to clause 4.2 and the issue of 'through running trains'.

Conscious of various possible futures for the West Moreton system (such as connection to an inland rail project, a bypass of the metropolitan system or a separation of ownership of the West Moreton and metropolitan systems), and that if NHC's Colton project was developed it would be likely to utilise both the QR and Aurizon networks, NHC considers that 4.2 should provide for:

- (a) mandatory consultation with other railway managers (not the current reasonable endeavours); and
- (b) Reasons endeavours to achieve the coordination and alignment of maintenance activities, other outages, development of MTPs and applicable operating requirements with a view to minimising adverse effects in relation to Through Running Trains.

NHC also considers that changes to the MTP/DTP that cannot be accommodated by the adjoining network railway manager should require access holders' consent (subject to exceptions for possession related changes). QR's position (where such consent is not required) allows QR to make changes that result in the access rights for Through-Running Trains becoming unable to be utilised.

Given the long term being sought by QR, NHC considers it is important both of these issues are rectified in the current access undertaking even though it may not currently be an issue in many parts of QR's network.

## 9 Reporting

### 9.1 Quarterly reporting

NHC is strongly supportive of separate reporting for the West Moreton network and the Metropolitan network.

In that regard, NHC acknowledges QR's proposal in clause 5.1.2(b), but considers that that separate reporting should extend to the matters referred to 5.2.3(a)(vi) to (ix), not just those in (a)(ii) to (v) as QR has proposed. In particular, speed restrictions and track quality ((vi) and (vii) respectively) are issues that would be anticipated to be specific to parts of the network and potentially indicate maintenance or operating issues in relation to particular parts of the network for which the data is outside of a normal range. Similarly, the explanation of material changes in (ix) should be specific enough to occur on a system by system basis, as NHC anticipates that the causes of the material changes will often be specific to parts of QR's network rather than generally applicable.

In relation to 5.1.2(a)(vi), NHC notes that the measures of average percentage and average km under temporary speed restriction do not adequately indicate the full impact of the speed restriction on operators. It is suggested that in addition to what is proposed, 5.1.2(a)(vi) should provide for reporting of the number of individual restrictions and the percentage below normal line speed, which would provide a better indication of impact on train operations. NHC is otherwise supportive of the matters to be reported on.

### 9.2 Annual reporting

NHC continues to support the position in the QCA Draft Decision 5.1, namely that:

*5.1 The QCA requires Queensland Rail to amend its proposal so that its annual report on the negotiation process includes:*

- (a) the time taken by Queensland Rail to provide preliminary information and issue IAPs to access seekers, and by access seekers to provide their intent to negotiate, broken down into less than 10 business days, 10 to 20 days, 21 to 40 days and more than 40 days; and*
- (b) the yearly number of disputes arising in relation to the access application form and the operating plan template.*

NHC acknowledges that clause 5.2.2 provides similar information, but considers that reporting on response times solely based on averages (as QR proposes) can produce somewhat misleading figures (as a number of quick responses can reduce the impact on the average of a number of IAPs which required a substantial period of time to issue).

NHC also continues to support the position in the QCA Draft Decision 5.3, namely that:

*5.3 The QCA requires Queensland Rail to amend its proposal so that for systems with reference tariffs it reports annually for the relevant financial year on:*

- (a) maintenance costs of its system and scope of maintenance, compared with the maintenance forecasts used to develop the tariff ;*
- (b) operating expenditure, compared with the forecasts used to develop the tariff;*
- (c) capital investment and a roll-forward of its regulatory asset base; and*
- (d) system volumes (broken down by type of traffic).*

In particular, NHC considers that the characteristics of the West Moreton system (as an old network with high operating and maintenance costs arising as a result of obsolete and life expired parts of the network and a network that is not optimised for coal services) make it critically important to report on a comparison of actual costs to the forecast costs used to develop the tariff.

Similarly, to the extent that the quantity of non-coal traffic is relevant to how costs are allocated to coal services on the West Moreton system, it is important to report on the volume of non-coal traffic and the volume of coal traffic.

Clause 5.2.2(k) 2015 DAU needs to be amended to produce those outcomes.

In relation to clause 5.2.2(j), NHC suggests that information on the negotiation period for agreements renewed (rather than just those executed) would be useful information to be reported. NHC is happy for that to be reported separately so as not to 'skew' the information in relation to non-renewal access applications. [REDACTED]

### **9.3 General reporting obligations**

NHC has substantial concerns with QR's continued attempts to 'water down' the QCA's audit rights.

NHC continues to support the position in the QCA Draft Decision 5.5, namely that:

*The QCA requires Queensland Rail to amend its proposal so that the regulatory audit requirements:*

- (a) allow the QCA, acting reasonably, to require an audit of compliance with any aspect of the undertaking or QCA Act; and*
- (b) allow the QCA to publish a report from an auditor that includes not just the auditor's opinion, but also enough information on the audit process and conclusions for access holders and seekers and other interested parties to understand how that conclusion was reached.*

NHC notes that, contrary to QR's submissions, s 150AA QCA Act (as referred to in clause 5.3.3 2015 DAU) does not make an audit function unnecessary. That section only gives a power to require stated information is made available. It does not allow the QCA to have an audit conducted where there are concerns about how particular matters were handled. An audit is a stronger regulatory protection and one which is highly appropriate in the context of QR seeking a lighter handed less prescriptive undertaking than it has previously been regulated under.

The results of such audits should be made public in sufficient detail to allow stakeholders to understand the finding. While clause 5.3.4(d) of the 2015 DAU provides for publication of an 'Audit Statement' and 'Audit Report' those only relate to auditing accuracy of annual and quarterly reports. In order to ensure the appropriate level of transparency, the audit right of the QCA needs to be wider (and the public disclosure of audits needs to cover the full wider scope of such audit rights).

## **10 Administrative provisions**

NHC has no particular comments on Part 6 of the 2015 DAU.

## **11 Definitions and Interpretation**

NHC's principal concerns with the definitions sections are noted in relation to the other parts of the 2015 DAU where those definitions are used.

## **12 Schedules**

### **12.1 Schedule A - Preliminary Information and Capacity Information**

NHC is supportive of the preliminary information being made continuously available on QR's website rather than only being provided as part of the access application and negotiation process.

The Master Train Plan should also be available on the website and updated regularly (as is already undertaken by ARTC).

It appears to NHC that the 'Capacity Information' which is to be made available on request should also include a clear indication of the surplus capacity that is available (not simply



the existing train plans and network control diagrams which detail existing/current proposing operations).

## **12.2 Schedule B - Access Application information requirements**

NHC is concerned that the access application requirements set out in Schedule B are overly burdensome in places and make it very difficult for an end user to seek access rights directly themselves (rather than seeking to procure an operator to contact those access rights).

In particular, NHC has concerns with each of the following:

*End user applicants* – The schedule needs to accommodate an end user (such as a mining company) applying for access, not just rail haulage operators. This requires:

- (a) A statement to make it clear that it can occur;
- (b) Amendments to clarify, where an end user is the applicant for access, which matters in the access negotiation process the end user is responsible for and which matters they must procure the rail haulage operator they have chosen to perform; and
- (c) The information which needs to be provided at the access application stage (clause 5) being reduced to that which is critical for QR to:
  - (i) complete its capacity assessment; and
  - (ii) allow an end user to apply for access prior to having contracted a rail operator (which it may do where it is running a tender process to appoint a rail operator).

In particular, where an end user is the access seeker they should not have to provide the details in 5.2(c)-(d) and 5.3. If that information is truly critical in order for QR to undertake a capacity analysis and provide an indicative access proposal, then QR should be permitted to assume a standard reference train service until a haulage operator is appointed and can provide that information.

*Form of access* (clause 4): An access seeker should not have to provide details of the 'form of access agreement' being sought at this early stage of the process (particularly in respect of the West Moreton system where there is proposed to be a single form of Standard Access Agreement).

## **12.3 Schedule C - Operating Plan Template**

Schedule C has the same issues as Schedule B, namely that it makes it difficult, if not impossible for end users (such as NHC) to apply for access independently of a rail haulage operator. Completion of the operating plan needs to be able to be delayed to the time when the end user has contracted an above rail operator.

NHC considers the rail haulage operators are best placed to comment on the details of the proposed template.

## **12.4 Schedule D - Reference Tariffs**

Please see NHC's detailed submissions on the West Moreton System Reference Tariff in Volume 2 of the NHC submission.

In addition to the West Moreton System Reference Tariff, NHC has concerns with the following parts of the Schedule D:

- (a) *Variation of Reference Tariffs* – The QCA should be given the power to require QR to submit a proposed reference tariff for an access service other than West Moreton system coal services where it considers that is warranted. That power has been in all

previous QR or Aurizon Network undertakings and is likely to be preferable to allow the QCA to facilitate resolving pricing issues for all relevant customers rather than forcing a number of access seekers to raise access disputes which have to be separately determined by the QCA.

- (b) *Adjustment Charges* – For the reasons noted in detail in Volumes 2 and 5 of the NHC submission, NHC considers the only appropriate outcome is for the tariffs to be approved as part of this undertaking to apply from 1 July 2013 such that clause 7 of Schedule D can provide for appropriate financial adjustments to be made.
- (c) *Take or Pay* – As discussed in more detail in Volume 2
  - (i) Take or pay should first be capped within mines on the same system which are under common ownership (so that amounts paid for use above contract for one set of access rights is a deduction from take or pay obligations for access rights which are being underutilised in respect of a commonly owned mine); and
  - (ii) There should be a system cap on take or pay revenues (so that QR does not over recover through take or pay revenue where the system transports equal to or more volume than contracted, such as through ad-hoc train services operating).

As per NHC's detailed submissions in relation to the Western System tariff, NHC considers QR's methodology for the proposed reference tariff and ceiling price are deeply flawed. An alternative way of seeking to deal with QR's over-recovery would be to set a different access price for railings in excess of contract (without any component for a return on and of investment, which is already being recovered against contract tonnes).

## **12.5 Schedule E - Maintaining the Regulatory Asset Bases**

Please see NHC's detailed submissions on the West Moreton System Reference Tariff in Volume 2 of the NHC submission in relation to what the Regulatory Asset Base for that system should be.

NHC continues to support the position that Schedule E should be aligned with the principles for maintaining the regulatory asset based on those contained in QR's existing undertaking (and the similar Schedule A of Aurizon Network's Access Undertaking).

In particular, the provisions in the proposed Schedule E are inconsistent with that approach in relation to the circumstances in which optimisation should occur. This is critically important, because (as will be evident from the submissions in response in Volume 2 of the NHC submission), NHC has concerns about much of QR's network including life expired and obsolete assets which should potentially be optimised out of the asset base.

QR has sought to remove the ability for the QCA to optimise the asset base if it 'becomes clear that there is a possibility of actual (not hypothetical) bypass'.

In the West Moreton System there may be real issues about potential bypass at some point in the future given current pricing and plans for infrastructure like the inland rail project and a bypass of the metropolitan system (particularly given the long term of the access undertaking that QR is now seeking).

While NHC accepts that positions from Aurizon Network's undertaking should not be adopted without consideration of whether that position is suited to QR's network – in this case there is nothing about QR's network which warrants different treatment (and a nearly identical approach to maintaining the regulatory asset base exists in QR's existing

undertaking). As a result, NHC submits that QR should adopt the existing regulatory precedent regarding the asset base principles to be included in this schedule.

In addition to the general comments above, NHC considers that clause 4.2(b)(ii) is inappropriate as it would restrict how the QCA can assess the prudence of a standard of work based on previous decisions (which is inappropriate in an aging network where there may well be circumstances where something above the previous standard is required to be prudent).

## **12.6 Schedule F - Network Management Principles (NMP)**

*Western System Calendar* – NHC considers that the NMP need to recognise and protect the Western System Calendar (the **WSAC**) which is developed on an ABCD timetabling approach from the Master Train Plan (**MTP**) as the criteria against which performance is measured. The WSAC should only be amended with agreement of the operators and major end users on the West Moreton system (other than for addition of new services where new access is contracted) and on at least 3 months' notice. The ABCD timetable means that the same number of paths are not available each week and this is to allow maintenance and enhancements to occur. NHC acknowledges that there will still be emergency possessions but this is the only possession which is not timetabled. In every rolling 4 week period the access holder is to receive 4 times its weekly nominated paths. It is also critical that the paths provided are usable paths i.e. not more than the loading or unloading facility is capable of accommodating.

*Through running trains* – please see the detailed comments on this issue in section 4.2 above. NHC considers that achieving those outcomes will also require the NMPs to be amended and supports the need for such amendments.

*Publication of Master Train Plan (MTP)* – NHC suggests that in addition to the MTP publication requirements in 2.1(h), an updated MTP should be published or at the request of an operator or end user where the MTP is modified between such regular updates (and that operators and major end users are notified when such updates occur). This replicates the requirements made of ARTC under its Hunter Valley rail access undertaking.

*Infrastructure Service Providers and supply chain participants* – For the purposes of achieving better coordination of scheduling in supply chains, the 'Infrastructure Service Providers' which are to be provided with a copy of the DTP should include terminal operators and other below rail operators that are impacted by the availability of QR's network. These entities should either be listed in the relevant parts of the NMP or the definition of Infrastructure Service Providers should be amended to include them. NHC is the owner of the Queensland Bulk Handling coal terminal at the Port of Brisbane (**QBH**), and considers that it would aid the efficiency of QBH to be provided with this information (and would impose no burden on QR who has to provide this information to others in any case). Similarly all changes to the MTP should be notified to such entities. This is not requiring QR to procure alignment

*Agreement and disputes to changes* – Where changes in scheduling from the MTP are proposed (other than for urgent or emergency possessions) impact on an access holder's train service entitlements and are not agreed to by access holders, they should not be implemented until the dispute is resolved. In most parts of QR's network there is only one or two operators, with the metropolitan system being the exception with three (including QR itself). As a result it is not unreasonable to provide for disputes to be resolved quickly, and for implementing to be postponed pending resolution of such disputes.

*Consultation on operational constraints* – QR should only be permitted to impose operational constraints without consulting access holders in cases of emergency possessions. If such operational constraints will be ongoing, rather than to deal with a particular incident, QR should be required to consult about such constraints and how they will impact on an access holder.

*Minimising adverse affects of operational constraints* – QR should be required to minimise the adverse affects of operational constraints in the same way they are required to do so for Possessions (see clause 2.3 NMP). Speed restrictions are obvious example of a type of operational constraints that can have a very material impact on the ability of above rail operator and end users to transport coal or other products as intended and it is just as appropriate for QR to seek to minimise the adverse impacts of such restraints.

*Notice period for access holder initiated changes* – As a specific example of the unbalanced nature of the current NMPs, NHC notes that the QR notice period to access holders for changes in the MTP is a minimum of 20 business days (2.1(d) NMP), whereas access holder initial changes require at least 3 months prior notice (2.1(f) NMP). NHC suggests that any change to the MTP requires at least 3 months prior notice.

## **12.7 Schedule G - Operating Requirements Manual (ORM)**

While NHC considers the rail haulage operators are best placed to comment on the more operational details in the ORM, on review NHC has concerns about each of the matters set out below:

*Relevant provisions in access agreement* – Please refer to NHC's comments in volume 4 regarding the interaction of the ORM (and particularly changes to the ORM) with the relevant provisions of the standard access agreement. In that regard, NHC notes that QR's proposed standard access agreement falls short of the recommendations in QCA Draft Decision 4.8 and continues to need other improvements. In particular, NHC considers that the standard access agreement needs to recognise that:

- (a) changes to the ORM may impose costs on an end-user, particularly if it changes loading/veneering requirements;
- (b) as a result of the above, the end user should, in those circumstances, receive equivalent compensation to that which the operator would receive where they are adversely impacted; and
- (c) more clearly provide for a dispute regime, which includes rights for the end user to raise disputes (and for changes not be made until disputes are resolved except in the case of urgent safety related changes).

*Risk profile* – QR's risk profile should not be altered by the decision to separate the ORM from the access agreement. NHC has no issue with the ORM being a separate document, provided that separation does not adversely or inappropriately impact on access seekers, access holder or end users, by the existing risk profile being changed in the process. As a result, NHC requests the QCA to carefully review whether the ORM has such an impact compared to the standard access agreement applicable under QR's existing access undertaking.

*Subsidiary documents* – The 'Introduction' section refers to a number of subsidiary documents, and seeks to incorporate the current version of such documents as part of the ORM. NHC appreciates it may make sense to incorporate these documents to allow greater flexibility and provide for improvement in standards and operational requirement over time. However:

- (a) NHC (and potentially other stakeholders) have not been given an opportunity to review those documents – and are therefore reliant on the QCA giving due consideration to whether they are appropriate; and
- (b) given many (if not all) of these subsidiary documents will be controlled by QR (as opposed to independent external standards) it is important that any changes to these subsidiary documents are treated as changes to the ORM and that the approval and compensation provisions (see comments above) are applied to such changes.

*Involvement of end user* – The ORM appears to ignore the role of the end user entirely, and only involves QR and the operator in operational issues. While the operator will clearly have a larger operational role than the end user, there are operational aspects that an end user should legitimately be involved in. In particular:

- (a) for issues like the interface risk assessment and interface risk management plan, the end user should have a role to play. By way of example, part of the interface risks to be controlled will relate to loading which is the end user's responsibility; and
- (b) for operational meetings as referred to in clause 7.3.1, major end users should have a right to attend such meetings in respect of matters relating to the parts of the network they are a major end user for.

*Noise measures not solely the responsibility of the operator* – Clause 2.3(b) seems to suggest that noise measures are imposed on the operator only, whereas it should refer to measures that the operator or QR must put in place (as below rail investment may be required or more efficient in order to meet the noise requirements).

*Comparison Train Length definition* – It should be recognised that some train designs (e.g. using fixed drawbars) do not need the same allowance for slack or drift. The additional measures given in the bullet points of this definition should be subject to the proviso of 'or such lesser allowance as can be reasonably substantiated as a prudent allowance'.

## **12.8 Schedule H Standard Access Agreement**

Please see NHC's detailed submissions on the Standard Access Agreement in Volume 4 of the NHC submission.

As NHC seeks reference tariff based access rights, QR not providing the Schedule containing principles to form part of access agreements for non-reference train service is not of particular concern to NHC, provided that the Standard Access Agreement makes the aspects of the agreement that might change as between West Moreton system coal services and coal services more generally clear.

**Annexure A – Summary comparison of QCA Draft Decision, QR 2015 DAU and NHC Submissions**

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<b>Part 1: Application and Scope</b>				
1.	<p>The QCA considers that Queensland Rail's proposed undertaking termination date of 30 June 2017 is in the interests of access seekers and in the public interest (ss. 138(2)(d) and (e) of the QCA Act). On this basis, the QCA proposes to accept Queensland Rail's proposal.</p>	No longer applicable.	<p>Queensland Rail proposes a terminating date of 30 June 2020.</p>	<p>New Hope has no issue with a proposed longer term of itself, subject to the concerns raised in the body of the submission regarding the extent of changes warranting either a shorter term or the ability for the QCA to reopen the undertaking.</p> <p>However, revenue requirements (and therefore Western System reference tariffs and related Adjustment Charges) should be calculated by reference to the period commencing 1 July 2013 (since which time interim tariffs have been applying).</p> <p>Please see NHC detailed submissions on this issue (particularly Volume 2 and 5) and the related Allens' legal advice regarding the QCA's power to require the inclusion of such Adjustment Charges.</p>
2.	<p>1.1 The QCA requires Queensland Rail to amend its proposal to align the definition of access with the definition of rail transport infrastructure in the TI Act and with the definition in Part 10 of the 2008 undertaking.</p>	Accepted	-	<p>NHC prefers the definition of Access that exists under QR's current access undertaking to make it clearer what below rail services are included within the definition of Access.</p>
3.	<p>1.2 The QCA requires Queensland Rail to amend its proposal to:</p> <ul style="list-style-type: none"> <li>(a) warrant the accuracy of the online line diagrams;</li> <li>(b) consult all existing access holders and access seekers of any proposed amendments to the line diagrams;</li> </ul>	Partially accepted	<p>Line diagrams are a means of providing information only and in contrast to the 2008 AU, do not define the rail infrastructure subject to access rights.</p> <p>The QCA's proposals create an unwarranted administrative</p>	<p>NHC would be willing to accept QR's drafting of clause 1.2.3 of the 2015 DAU provided it was supplemented by a right for access holders, following QR being given an opportunity to review the line diagrams, to dispute the accuracy of the line diagrams.</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	<p>(c) follow the Part 6 dispute resolution processes in the event an access holder or access seeker raises a dispute about the accuracy of the line diagrams;</p> <p>2) (d) update the online line diagrams, subject to the outcome of any dispute resolution process, and notify all access holders and seekers as soon as the line diagrams have been updated; and</p> <p>3) (e) update the online line diagrams if the QCA identifies any inaccuracy in them (either due to its own investigations or in response to complaints from access holders and access seekers).</p>		<p>burden given the role now played by the line diagrams. However, in the 2015 DAU, Queensland Rail undertakes to:</p> <ul style="list-style-type: none"> <li>• publish the line diagrams on its website</li> <li>• use reasonable endeavours to keep the line diagrams up to date and accurate in all material respects</li> <li>• review, and if applicable, amend the line diagrams at intervals of no more than 6 months</li> <li>• review them if requested by the QCA or an Access Seeker or Access Holders</li> <li>• notify the QCA at intervals of no more than 6 months of any amendments to the line diagrams.</li> </ul>	<p>While it is true that the scope of the undertaking is not defined by reference to the line diagrams, as the line diagrams are supposed to demonstrate the parts of the rail comprising the 'Network' it will facilitate access negotiations if they are correct and frustrate access negotiations if a rail line that should be included is excluded from the diagrams, such that there should be an obligation for them to be kept accurate and up to date in all material respects.</p>
4.	1.3 The QCA requires Queensland Rail to amend its proposal so that the 2013 DAU is consistent with s. 250 of the QCA Act, such that the 2013 DAU applies to all rail transport infrastructure for which Queensland Rail is the railway manager.	Partially accepted	The 2015 DAU applies to Queensland Rail where it is a railway manager except in the circumstance where it is providing railway manager services to the owner of the infrastructure and the terms of its contract with the owner do not allow Queensland Rail to	NHC is willing to accept the position proposed by QR in relation to the scope of the undertaking under clause 1.2.1(b)(C) 2015 DAU.



QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
		<p>comply with aspects of the 2015 DAU.</p> <p>The exception referred to above will not apply where the owner of the infrastructure is a related body corporate of Queensland Rail.</p> <p>Even where the exception applies access to the relevant services using that infrastructure will be subject to the QCA Act.</p>	
5. 1.4	Accepted	<p>The QCA requires Queensland Rail to amend its proposal so that it clearly sets out how it will be prevented from unfairly differentiating between access seekers and holders, by:</p> <p>(a) removing the reference to 'in the same circumstances' from cl. 1.3(a); and</p> <p>(b) amending cl. 1.3(b) to specify that, consistent with s. 100 and s. 168C of the QCA Act, Queensland Rail will:</p> <p>(i) not engage in conduct for the purposes of preventing or hindering an access seeker's or access holder's access;</p> <p>(ii) not provide access to related operators on more favourable terms than the terms on which it provides access to competitors of related operators; and</p> <p>(iii) ensure all access seekers, irrespective of whether they are a Queensland Rail party or a third party, are provided with a consistent level of service and given an equal</p>	<p>NHC is willing to accept the position in QR's clause 1.3.2015 DAU, subject to limits on price differentiation in clause 3.3, or also expressly including the requirement not to differentiate an Access Seeker's Access Charges from those of a relevant Reference Train Services except to reflect differences in cost and risk.</p> <p>NHC considers this needs to be absolutely clear, particularly in light of the very significant discrepancy between the West Moreton system reference tariff and ceiling price that QR is proposing.</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	opportunity to obtain access rights, subject to the express provisions of the QCA Act, the TI Act and this undertaking.			
6.	1.5 The QCA requires Queensland Rail to amend its proposal so that it is required to implement arrangements for ring-fencing information from its related party above-rail operator, if it enters a market in competition with third parties.	Accepted in principle	See new clause 2.2.3	<p>New Hope is willing to accept the position proposed by QR in respect of clause 2.2.3 2015 DAU, subject to it being amended to allow the QCA to require the undertaking be amended to implement ringfencing provisions where:</p> <ul style="list-style-type: none"> <li>QR does not submit a draft amending access undertaking in the time required by the QCA; or</li> <li>the QCA rejects the draft access undertaking and QR fails to submit a revised draft amending access undertaking reflecting the changes the QCA has required.</li> </ul> <p>QR's drafting in clause 2.2.3 2015 DAU is inadequate as, if QR does not submit a draft amending access undertaking with ringfencing provisions acceptable to the QCA, the process will come to a halt following the QCA's rejection (unless QR voluntarily resubmits which neither clause 2.2.3 2015 DAU, as drafted, or the QCA Act would require it to do).</p>
<b>Part 2: Negotiation and Capacity Management</b>				
7.	2.1 The QCA requires Queensland Rail to amend its proposal so that: (a) for the access application form and operating plan template:	<b>Draft Decision 2.1(a)</b>	<b>Draft Decision 2.1(a)</b> The approach in respect of the requirements for an Access Application and an Operating	New Hope is willing to accept the approach of listing the requirements for an access application and the operating plan template as scheduled to the access undertaking.

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>(i) the undertaking provides that the operating plan template will be published on Queensland Rail's website;</p> <p>(ii) the QCA approves the first version of the access application and operating plan templates published on Queensland Rail's website;</p> <p>(iii) any amendment to a template is undertaken after Queensland Rail reasonably justifies the need for amending it and consults its customers;</p> <p>(iv) any dispute about an amendment is resolved through the dispute resolution process in the undertaking;</p> <p>(v) if an amendment takes effect, Queensland Rail publishes a marked up version of the template on its website and notifies its customers about the amendment; and</p> <p>(vi) Queensland Rail reports separately the yearly number of disputes arising in relation to the access application form and the operating plan template; and</p> <p>(b) Queensland Rail can seek additional information from an access seeker if it can reasonably demonstrate the need.</p>	<p>No longer applicable.</p> <p><b>Draft Decision 2.1(b)</b> Accepted in principle.</p>	<p>Plan have reverted to the approach taken under the 2008AU. The requirements for an access application and an Operating Plan template have been included as Schedules to the 2015 DAU.</p> <p><b>Draft Decision 2.1(b)</b> Queensland Rail can only request additional information if it acts reasonably and the information is needed for the purpose of preparing an Indicative Access Proposal.</p>	<p>However, New Hope has a number of concerns with the content of Schedule B and C as included in the 2015 DAU. In particular:</p> <ul style="list-style-type: none"> <li>• It needs to be made clearer in Schedule B that an end user (such as a mining company) can apply for access (not only rail haulage operators)</li> <li>• Clause 4 Schedule B should be deleted – an access seeker should not have to provide details of the form of SAA being sought (given there is only one SAA)</li> <li>• The information to be provided (i.e. clause 5 of Schedule B) needs to be reduced to that which is critical for QR to do its capacity assessment and to allow an end user to apply for access prior to having contracted a rail operator (which it may do where it is running a tender process to appoint a rail operator). In particular, where an end user is the access seeker they should not have to provide the full details in 5.2(c)-(d) and 5.3 (with QR assuming a standard reference train service until a haulage operator is appointed and can provide that information)</li> <li>• Similarly Schedule C is mostly information which only a rail operator</li> </ul>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
			<p>could complete and there needs to be a way for completion of the operating plan to be delayed to the time when an above rail operator is appointed.</p> <p>The right for QR to request additional information should be tightened up by the first sentence in clause 2.3.1 being amended to read:</p> <p>'Queensland Rail may require the Access Seeker to provide additional or clarified information where that is reasonably necessary for the purposes of preparing an Indicative Access Proposal.'</p>
8. 2.2	<p>The QCA requires Queensland Rail to amend its proposal so that:</p> <p>(a) for rail corridors where no reference tariffs apply, the undertaking specifies the cost and pricing information that Queensland Rail will provide for each corridor to an access seeker consistent with s. 101(2) of the QCA Act and Schedule D of the 2008 undertaking;</p> <p>(b) the undertaking specifies the capacity, technical and operating information that Queensland Rail will provide to an access seeker for each rail corridor it manages consistent with s. 101(2) of the QCA Act and Schedule D of the 2008 undertaking;</p> <p>(c) the undertaking specifies that Queensland Rail will provide additional information to access seekers that it can reasonably provide consistent with s. 101(1) of the QCA Act and</p>	<p>New Schedule A lists the proposed "Preliminary Information" and "Capacity Information" to be made available, whether or not a reference tariff applies.</p> <p>Clause 2.7.2(a)(i) has been included based on sections 101(1) and (2) of the QCA Act and equivalent provisions previously approved by the QCA.</p> <p>Clause 2.4.2 is also relevant in addressing the QCA's draft decision.</p>	<p>New Hope is willing to accept QR's proposed position, subject to clause 2.7.2 being amended to provide for the information reflecting the requirements of section 101 to be disclosed with a specific minimum time period of providing the IAP (if not within the IAP itself).</p> <p>This is important because on QR's drafting, the Preliminary Information does not cover some of the section 101 information, and there is no timeframe in clause 2.7.2 other than 'during the Negotiation Period'.</p>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
9. 2.3 (a)	No longer applicable.	<p>Preliminary Information will be made available on Queensland Rail's website. Timeframes are therefore not relevant.</p> <p>Prior to the Negotiation Period commencing, Capacity Information will be provided within 10 Business Days after being requested.</p> <p>During the Negotiation Period, Capacity Information will be provided on request.</p> <p>Clause 5.2.2 requires Queensland Rail's annual report to include the average time taken to provide Capacity Information.</p>	<p>New Hope supports the Preliminary Information being made available on QR's website.</p> <p>New Hope submits that Capacity Information should be made available as part of the IAP, not as something that has to be requested during the Negotiation Period.</p>
10. 2.3 (b)	Not accepted – addressed by a	<p>Similar to, but improving on the position in the 2008 AU, the 2015 DAU provides that:</p> <ul style="list-style-type: none"> <li>Queensland Rail will use reasonable endeavours to</li> </ul>	<p>NHC supports the stricter timelines previously proposed by the QCA. QR's drafting of clause 2.4 gives numerous 'outs' to allow QR to delay the provision of an IAP, including allowing QR to specify</p>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>20 days and an access seeker can extend the time for notifying Queensland Rail of its intent to negotiate, if each party can reasonably justify its decision and the other party agrees to the extended time;</p> <p>(b) Queensland Rail's annual report includes the time taken by Queensland Rail to provide the IAP to an access seeker and by an access seeker to notify its intent to negotiate, broken down into less than 10 business days, 10 to 20 days, 21 to 40 days, and more than 40 days.</p>	<p>different means.</p>	<p>provide the IAP within 20 business days or such longer period as specified in the acknowledgement notice.</p> <ul style="list-style-type: none"> <li>• A longer period than 20 business days may be proposed by Queensland Rail only in specified circumstances;</li> <li>• The access seeker may dispute before the QCA any proposal by Queensland Rail to provide the IAP in period longer than 20 business days.</li> </ul> <p>The 2015 DAU provides the access seeker with a specified reasonable timeframe following the provision of an IAP within which to provide a notice of intent to negotiate..</p> <p>The 2015 DAU includes an obligation to annually report on the:</p> <ul style="list-style-type: none"> <li>• number and percentage of IAPs provided within the applicable timeframe;</li> <li>• average delay in providing IAPs by the applicable timeframe.</li> </ul>	<p>an estimated time in the acknowledgement notice which automatically extends the period for responding (subject only to the access seeker raising an access dispute – which is likely to be highly counterproductive to successfully negotiating access).</p> <p>NHC supports the more detailed reporting previously proposed by the QCA on time taken to respond to IAPs (given that an average can be misleading with efficient responses 'masking' the number of delayed responses).</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
11.	2.3 (c) The QCA requires Queensland Rail to amend its proposal so that for Execution of access agreement: Queensland Rail and an access seeker can agree to a different timeframe within which to execute an access agreement if the party seeking the extension can reasonably justify it.	Accepted in principle	Agreement of the parties alone should be enough given that both parties will be subject to their good faith obligations under the QCA Act.	NHC considers there should be clear guidance given about circumstances where it would be unreasonable for QR to withhold its agreement to an extension (such as where there was a lack of other competing demand, negotiations were close to completion or special circumstances justified the protracted negotiations).
12.	2.3 (d) Consequences for non-compliance with negotiation timeframes: Queensland Rail must replace 'absolute discretion' in determining the consequence of access seeker's non-compliance with timeframes with the term 'reasonable discretion'.	Accepted in principle	The discretion around consequences for the Access Seeker failing to execute on time has been removed. In accordance with normal contractual principles, if execution does not occur on time, then Queensland Rail's offer will lapse. However, in those circumstances Queensland Rail would remain subject to negotiation obligations in accordance with the Undertaking.	NHC is willing to accept QR's position
13.	2.4 The QCA requires Queensland Rail to amend its proposal so that: (a) the 2013 DAU deletes the clauses for the purpose of ceasing negotiations: (i) passenger safety and passenger operations (cl. 2.6.5); and	<b>Draft Decision 2.4(a)(i)</b> Not accepted <b>Draft Decision 2.4(a)(ii)</b>	<b>Draft Decision 2.4(a)(i)</b> While Queensland Rail has a variety of safety responsibilities, the safety of persons using or intending to use passenger Train Services is paramount to Queensland Rail. Passenger safety is not a matter of choice.	NHC considers that it would be preferable for the undertaking to provide greater guidance on the factors QR is to have regard to in forming the opinion that there is no reasonable likelihood of material compliance with the Access Seeker with the terms and conditions of an Access Agreement' (as this is not a view that should be formed lightly and it has serious

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>(ii) frivolous application (cls. 2.6.3(a)(ii)(C) and 2.6.4).</p> <p>(b) for the purpose of ceasing negotiations the circumstance 'unlikely to comply materially with an access agreement' includes the assessment of prudential requirements (cls. 2.6.3(a)(ii)(A)) and 2.6.3(a)(iii).</p>	<p>Accepted</p> <p><b>Draft Decision 2.4(b)</b></p> <p>Accepted – see clause 2.8.1(b)</p>	<p>The 2015 DAU has removed the right to cease negotiations on the basis of passenger operational issues.</p> <p>The drafting has also been simplified.</p>	<p>consequences if it is used to cease negotiations with an access seeker). Clause 2.8.3 also requires less strict application.</p>
<p>14. 2.5</p> <p>The QCA requires Queensland Rail to amend its proposal to reinstate the mechanism for allocating capacity in the cases of competition for mutually exclusive paths and competitive tendering as contained in cl. 7.4.1 and related clauses of the 2008 undertaking.</p>	<p>Accepted in principle</p>	<p>See clauses 2.6 and 2.9.2.</p>	<p>NHC remains concerned with QR's proposed approach to dealing with competing access applications. In particular:</p> <ul style="list-style-type: none"> <li>• QR's proposed principles for reordering the queue (see 2.9.2(h)) provide QR with inappropriate levels of discretion</li> <li>• Competing 'ready and able' access applications which would pay reference tariffs should be prioritised based on date of application, unless one access application is materially differentiated in terms of risk to QR</li> <li>• Difference in NPV contribution or subjective assessments of how favourable an access application is to QR's legitimate business interests, should not be relevant as between competing coal haulage access applications which would both pay a reference tariff.</li> </ul>



QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>15. 2.6 The QCA requires Queensland Rail to amend its proposal for renewal of access rights so that it places access holders for western system coal train services and Mount Isa bulk mineral train services in front of a queue, provided the relevant access holder (and its customer):</p> <p>(a) retains access rights for an existing mine or a replacement mine as long as the renewed access rights use substantially the same train paths;</p> <p>(b) matches the contract period of the competing access seeker up to 10 years or alternatively the remaining life of its existing mine if less than 10 years (in which case it gets a 'one-off' renewal right);</p> <p>(c) executes an access agreement on terms that are consistent with the standard access agreement (in case of reference train services) or access agreement principles (in case of non-reference train services);</p> <p>(d) in the case of Mount Isa bulk mineral train services, accepts a price consistent with the renewal pricing rule recommended in Section 3.8; and</p> <p>(e) applies for renewal negotiations to begin no less than two years and no more than three years before the expiry of its access agreement, regardless of a competing access application.</p>	<p>Partially accepted</p>	<p>See amended clauses 2.9.3(b) and (c) and clause 2.9.2(m). These clauses give a window of time during which the relevant Renewal Access Seekers have priority regardless of any queue. However, after that window closes it would still be possible for a Renewal Application to move to the top of the queue through the normal application of the queuing rules.</p> <p>Queensland Rail accepts that special rights for renewals are appropriate where the origin and destination for the Train Service (and other characteristics) remain the same – particularly having regard to the substantial long term investments associated with mining operations. However, it is not appropriate for a renewals process to effectively allow an Access Holder to leapfrog access rights to new origins under the guise of a renewal. These circumstances would not commonly be considered a 'renewal' – they relate to different access rights.</p> <p>Treating the circumstances described above as a renewal</p>	<p>Clause 2.9.3 2015 DAU is an improvement on QR's previous positions on renewal.</p> <p>NHC considers that it should be further amended to include:</p> <ul style="list-style-type: none"> <li>• a process under which QR notifies the access holder of the need to renew (a specified period of days before the Renewal Timeframe where the timeframe is not triggered by a non-renewal application).</li> <li>• the renewal rights should not automatically end on the expiry of the period referred in clause 2.9.3(b)(ii), which should instead refer to the later of three dates, being the two dates listed and 'where an access dispute was commenced before the later of the periods referred to in (1) and (2) above, the earlier of the finalisation of that dispute through the Renewal Access Seeker agreeing to terms of an access agreement (including, but not limited to, term arbitrated by the QCA) or the dispute is finalised without any access agreement being entered by the Renewal Access Seeker'.</li> </ul>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
		<p>would operate to potentially unfairly advantage the "renewing" access seeker over other access seekers in a queue.</p> <p>The pricing rule proposed by the QCA for Mt Isa bulk mineral train services pre-determines an access charge under a contract and does so without regard to the pricing principles in section 168A. This is beyond the QCA's power to require.</p> <p>However, Queensland Rail has included clause 3.3(c) in response to the QCA's concern. That clause limits Queensland Rail's discretion to price for renewals by modifying the effect of clauses 3.3(a) and (b) so that, subject to those clauses, the price differentiation principles will be applied as between the existing agreement and the proposed renewed access agreement.</p>	
16. 2.7	Accepted.	<p>The QCA requires Queensland Rail to amend its proposal to:</p> <p>(a) include reference to commercial damage in the definition of confidential information as contained in clause 3.3(a) of the 2008 undertaking; and</p>	<p>NHC supports the deletion of clause 2.7.4 (as now accepted by QR). QR can be compelled to invest in capacity in order to contract access in certain circumstances through approved access undertakings, access determinations and through agreement.</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	(b) delete clause 2.7.4 that does not oblige Queensland Rail to enter into an access agreement if there was insufficient capacity.		agreement or requirement to extend the facility exists.	
<b>Part 3: Pricing Principles</b>				
17. 3.1	The QCA requires Queensland Rail to amend its proposal to reinstate the hierarchy of pricing principles for developing access charges as contained in cl. 6.1 of the 2008 undertaking.	Partially accepted	If there is to be a hierarchy, the hierarchy proposed by the QCA in the draft decision is not consistent with the QCA Act. Revenue adequacy must be paramount as contemplated by section 168A. Without revenue adequacy, an access provider will not have the ability to provide access, maintain the facility or invest in the facility.	<p>NHC continues to support reinstating the hierarchy of pricing principles from the 2008 undertaking.</p> <p>As noted in NHC's detailed submissions (and the enclosed legal advice from Allens) section 168A does not make revenue adequacy paramount and QR's claims that it does are highly misleading. The pricing principles in section 168A are only one of a number of factors the QCA must have regard to in determining whether it is appropriate to approve an undertaking (see s 138(2) QCA Act). There is no provision of the QCA Act which gives them greater weight let alone a position of being paramount. Section 168A then provides a number of principles which there is a clear tension between of which 168A(a) is only one.</p> <p>As a result QR's position is inconsistent with the balancing of factors that the QCA Act envisages taking place and should be rejected.</p>
18. 3.2	The QCA requires Queensland Rail to amend its proposal so that the pricing principles in the undertaking for developing access charges specify that Queensland Rail can	Partially accepted	The 2015 DAU satisfies the QCA's proposal in paragraph 3.2(a). In respect of draft decision 3.2(b), consistent with the 2008	NHC is willing to accept QR's approach to differentiation from reference services in clause 3.3(b)(i), subject to a process being included for the introduction of new reference train services (with references to

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>only seek to differentiate access charges between access seekers/holders:</p> <p>(a) where a reference tariff is applicable, to reflect differences in cost or risk to Queensland Rail of providing access for the train service compared to the reference train service; and</p> <p>(b) where there is no reference tariff applicable for the relevant train service type, subject to requirements reinstated from cl. 6.1.1(c) of the 2008 undertaking.</p>		<p>AU, the restriction applies in relation to differentiation between access seekers.</p> <p>Where no reference tariff applies, the list of circumstances in which price differentiation can occur, includes a circumstance where the access can no longer be commercially provided at the current access charge. This broadens the equivalent circumstance in the 2008 AU which concentrated on Transport Service Payments.</p>	<p>the rail safety regulator where QR raises safety issues).</p> <p>NHC is concerned with the width of QR's new provision regarding access no longer being commercially able to be provided – which it considers should be restricted to matters outside of QR's control (to prevent changes in pricing based on QR's own inefficiencies).</p>
<p>19. 3.3 The QCA requires Queensland Rail to amend its proposal so that it is required to act reasonably when seeking to increase an access charge to offset a reduction in a transport service contract (TSC) payment.</p>	<p>Not accepted</p>	<p>Queensland Rail should not be exposed to a dispute process over whether it is acting reasonably where it is seeking to set an access charge for a service that would previously have been subsidised by a Transport Service Payment.</p> <p>Queensland Rail has an existing obligation under the QCA Act to act in good faith and its right to recover at least its efficient costs of providing the service.</p> <p>If an Access Charge is effectively being subsidised and made commercial by means of a Transport Service Payment and the Transport Service Payment is reduced or eliminated,</p>	<p>New Hope supports the requirement to act reasonably – this reasonableness requirement should in fact apply to all of 3.3(b)(ii)(B).</p> <p>QR's refusal to meet the low threshold of 'act reasonably' in seeking to increase charges in these circumstances is not justified. In the sorts of circumstances QR refers to, the obligation to act reasonably would not be likely to restrict QR's ability to increase the access charges.</p>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
		Queensland Rail should be entitled to set a new access charge taking into account the loss of the Transport Service Payment.	
20. 3.4	Not accepted	<p>The QCA requires Queensland Rail to amend its proposal so that:</p> <p>(a) It can only require take or pay on the western system up to the amount required to lift its annual revenue to 100% of the target revenue used in developing the western system reference tariffs; and</p> <p>(b) the annual target revenue relating to this take or pay limit is published with the western system reference tariff in schedule A.</p> <p>4) In its 2015 DAU Queensland Rail is proposing a Reference Tariff well below the price ceiling. In those circumstances there is no justification to limit the revenue that Queensland Rail should be entitled to recover through take or pay and access charges.</p> <p>5) For a more detailed discussion on this issue see section 2.2.3 of Volume 2 of</p>	<p>NHC considers that the following variations are required to make the take or pay system fair and reasonable:</p> <ul style="list-style-type: none"> <li>Take or pay should first be capped within mines on the same system which are under common ownership (so that amounts paid for use above contract for one set of access rights is a deduction from take or pay obligations for access rights which are being underutilised in respect of a commonly owned mine)</li> <li>There should be a system cap on take or pay revenues.</li> </ul> <p>As per NHC's detailed submissions in relation to the Western System tariff, New Hope considers QR's methodology for the proposed reference tariff and ceiling price are deeply flawed.</p> <p>An alternative way of seeking to deal with QR over-recovery would be to set a difference access price for railings in excess of contract (without any component for a return on and of investment, which is already being recovered against contract tonnes).</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
21.	3.5 The QCA requires Queensland Rail to amend its proposal to remove the requirement that the asset value for determining a ceiling revenue limit be set through a depreciated optimised replacement cost methodology, by deleting cl. 3.2.3(c) and cl. 1.2(a)(ii) in Schedule AA.	Not accepted.	Queensland Rail's submission on 2015 DAU.  See Volume 2 of Queensland Rail's submission on 2015 DAU.	NHC strongly believes that it is not appropriate to <ul style="list-style-type: none"> <li>Apply a DORC valuation in relation to the Western System; or</li> <li>pre-determine that DORC values should be set as the asset values (for determining a ceiling revenue limit).</li> </ul> As is recognised in the UNIQUEST report (8 April 2015), other methodologies satisfy the QCA's statutory requirements.  NHC's submission contains detailed reasoning supporting this position.
22.	3.6 The QCA requires Queensland Rail to amend its proposal so that the QCA can require it to submit a proposed reference tariff if the QCA considers it is warranted.	Not accepted.	The QCA's proposal is effectively seeking a right to require an amendment to the access undertaking. The QCA Act does not empower the QCA to force an amendment to an access undertaking in these circumstances.	There is nothing in the QCA Act which limits the QCA's power in the way QR is asserting.  The QCA Act expressly acknowledges that an undertaking can include provisions regarding how charges for access to the service can be calculated and provisions regarding review of the undertaking (s 137(2)(a) and (k) QCA Act) .  Where the QCA considers it is appropriate to do so in accordance with section 138(2) it has the power to include a provision of this nature.
23.	3.7 The QCA requires Queensland Rail to amend its proposal so that the price for a renewing access holder on the Mount Isa line is limited to no more than:	Not accepted – addressed by a	2015 DAU addresses the QCA's concerns in a different way. For a renewing access seeker on the Mt Isa line, Queensland Rail	Not applicable to NHC

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	<p>(a) the tariff agreed between Queensland Rail and its access holder in the expiring access agreement, increased annually by CPI plus 2 percentage points per year of the expiring agreement; plus</p> <p>(b) the normal regulatory return (consistent with cl. 3.2.3) on incremental capital expenditure incurred to increase capacity on the network, including:</p> <p>(i) spending on infrastructure specifically built for the access holder's service; and</p> <p>(ii) a reasonable allocation of incremental spending for all services with the accumulation of the maximum renewal price for an existing access contract starting on the approval date of this undertaking.</p>	<p>different means.</p>	<p>has included clause 3.3(c) which limits Queensland Rail's discretion to price for renewals by modifying the effect of clauses 3.3(a) and (b) so that, subject to those clauses, the price differentiation principles will be applied as between the existing and the proposed renewed access agreement.</p> <p>This effectively means that a price increase can only be applied to a renewing access seeker's access charge where there is an increase in risk or cost as between the existing access agreement and the renewing access agreement.</p> <p>Where there is more than one access seeker for the same commodity in the same geographical area, the normal price differentiation principles would apply.</p> <p>The QCA's proposal would in any case be beyond the QCA's powers under the QCA Act. It is, for example, inconsistent with the application of section 168A of the QCA Act.</p>	

**Part 4: Network Management Principles and Operating Requirements Manual**

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>24. 4.1 The QCA requires Queensland Rail to amend its proposal so that the network management principles:</p> <ul style="list-style-type: none"> <li>(a) require Queensland Rail to promptly notify access holders, affected infrastructure service providers and supply chain participants including, where relevant, ports and other below-rail operators, of proposed or implemented changes to the master train plan (MTP) or daily train plan (DTP);</li> <li>(b) only allow Queensland Rail to impose operational constraints without consulting access holders in cases of urgent and emergency possessions;</li> <li>(c) require Queensland Rail use best endeavours to mitigate the impact of possessions and other operating constraints on access holders;</li> <li>(d) require that Queensland Rail secure agreement from access holders where changes to planned possessions in the MTP affect their train service entitlements (TSEs);</li> <li>(e) provide that, where an MTP amendment other than an urgent or emergency possession is disputed by an access holder, the change to the MTP should take effect after the dispute is resolved;</li> <li>(f) require in Schedule B, cl. 1.1(g)(iv) that 'in Queensland Rail's reasonable opinion no access holders are adversely affected by the modification, and any access holders that</li> </ul>	<p>Partially accepted.</p>	<p>In relation to draft decision 4.1(a), Queensland Rail is not performing supply chain coordination services for access holders. Coordination services are not part of the declared service.</p> <p>The MTP will be published on the website and any changes will be advised to access holders within a specified timeframe, well before the change takes effect.</p> <p>The DTP will be advised to all access holders at least one day before the relevant train service runs. Once scheduled, Queensland Rail cannot vary the DTP so as to adversely affect the access holder except where an Emergency Possession is required.</p> <p>In relation to draft decision 4.1(b), an obligation to consult as proposed by the QCA is not practical. Not all operational constraints involve a "possession". For instance, there may be an urgent need to impose a speed restriction for safety reasons.</p> <p>In relation to draft decision 4.1(c), Queensland Rail has</p>	<p>NHC supports the need for QR to be more engaged in supply chain coordination and alignment activities. The rail network will not operate efficiently unless QR is properly engaged in alignment/coordination activities.</p> <p>NHC continues to support the changes proposed in QCA's previous draft decision 4.1(a) and (g) to facilitate efficient coordination.</p> <p>NHC continues to support the changes proposed in QCA's previous draft decision 4.1(b), subject to being willing to accept an extension for operational constraints required for safety reasons to address QR's concern.</p> <p>NHC continues to support the changes proposed in QCA's previous draft decision 4.1(c) – the reasonable endeavours obligation to minimise any material adverse effects should be applied to all operational constraints (not just unscheduled possessions).</p> <p>NHC continues to support the changes proposed in QCA's previous draft decision 4.1(d)-(f) in order to properly protect access holders from adverse impacts arising from unjustified changes.</p>



QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>may be affected have been notified and consulted"; and</p> <p>(g) amend the definition of 'Infrastructure Service Providers' to include ports and other below-rail operators that are affected by the availability of Queensland Rail's Network</p>		<p>agreed in 2015 DAU to use reasonable endeavours to minimise any material adverse effects arising from an unscheduled possession.</p> <p>In relation to draft decision 4.1(d), Queensland Rail agrees to consult with access holders whose train service entitlements will be adversely affected by a change.</p> <p>The change in draft decision 4.1(e) is not agreed. A dispute raised by one access holder should not hold up changes to the MTP.</p> <p>The change proposed in draft decision 4.1(f) is unnecessary as under 2015 DAU Queensland Rail is obliged to act reasonably.</p> <p>In relation to draft decision 4.1(g), Queensland Rail is not providing a supply chain coordination service.</p>	
<p>25. 4.2 The QCA requires Queensland Rail to amend its proposal so that it is required to:</p> <p>(a) publish a complete MTP for each system, either in train graph or tabular form, consistent with those published by ARTC, and update it every six months, or more often at an access holder's request, if the MTP is modified; and</p>	<p>Partially accepted.</p>	<p>The 2015 DAU obliges Queensland Rail to publish every six months the current MTPs on its website, and to provide MTPs to access holders on request.</p> <p>The DTP will be provided in a complete, un-redacted form to</p>	<p>NHC is willing to accept QR's position on this issue, subject to providing for updating the MTP that is made publicly available on request of an access holder following a change to the MTP and notifying all access holders and major ends users of changes to the MTP.</p>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
		(b) provide a complete DTP, showing all services, to an access holder on request.	
26. 4.3	Not accepted.	The QCA requires Queensland Rail to amend its proposal so that it is required to submit a DAAU, if requested by the QCA, to reinstate provisions for cyclic traffic equivalent to those in the 2008 undertaking, if necessary to accommodate an access request, or to address any scheduling and train control issues arising from the integration of its operations with a port or other supply chain entity.	Not applicable to the Western System (and NHC) given the interaction with the Metropolitan system will make anything other than scheduled services impractical.
27. 4.4	Accepted.	The QCA requires Queensland Rail to amend its proposal so that the NMPs in the undertaking clearly specify that they will apply to all services including Queensland Rail's own passenger services.	NHC supports QR's adoption of this position in the NMP in Schedule F.
28. 4.5	Accepted.	The QCA requires Queensland Rail to amend its proposal so that the NMPs and SAA restrict its ability to take pre-emptive action to avoid passenger trains being delayed to peak periods in the metropolitan region.	NHC supports QR's deletion of the previous provisions regarding this issue.

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
29.	<p>4.6 The QCA requires Queensland Rail to amend its proposal so that its NMPs:</p> <ul style="list-style-type: none"> <li>(a) require it to coordinate its maintenance activities with adjoining network managers so trains operating across both networks face minimal disruption;</li> <li>(b) require Queensland Rail to take into consideration through-running trains to and from adjoining rail infrastructure when developing its MTP;</li> <li>(c) provide for Queensland Rail's amendments to system-wide requirements to have regard to those of Aurizon Network, including its NMPs, the approved Capricornia system rules and any other approved system rules, where relevant; and</li> <li>(d) allow access holders to withhold consent to MTP/DTP amendments (with the exception of possession-related changes) by Queensland Rail that cannot be accommodated by the adjoining network manager.</li> </ul>	Partially accepted.	<p>In relation to draft decision 4.6(a) – (c), Queensland Rail agrees to use reasonable endeavours to consult with other railway managers in respect of those matters. (See clause 4.2 of the 2015 DAU.)</p> <p>In respect of draft decision 4(d), to the extent that the consent of an access holder is needed, no change is needed to the drafting proposed by the 2015 DAU as it would be reasonable for an access holder to withhold consent where the adjoining network manager cannot accommodate the change.</p>	<p>Clause 4.2 is an improvement on QR's previous position on this issue. However, it should provide for:</p> <ul style="list-style-type: none"> <li>• Mandatory consultation with other railway managers (not reasonable endeavours to consult); and</li> <li>• Reasonable endeavours to coordinate maintenance, MTPs and operating requirements with a view to minimising adverse effects in relation to Through-Running Trains.</li> </ul> <p>NHC considers that access holders' consent should be required (with exceptions for possession related changes) for changes to the MTP/DTP that cannot be accommodated by the adjoining network manager – as otherwise QR can make changes that result in the access rights relating to Through-Running Trains worthless/impractical.</p>
30.	<p>4.7 The QCA requires Queensland Rail to amend its proposal so that the risk allocation matrix applied to Aurizon Network's 2010 undertaking underpins the principles of the Operational Requirements Manual.</p>	Not accepted.	<p>Queensland Rail is not aware of the risk matrix to which the QCA is referring. Queensland Rail is also not aware of how a risk matrix for a completely different type of business will be applicable to Queensland Rail. Queensland Rail considers that the Operating Requirements</p>	<p>NHC supports the principle that QR's risk profile should generally be comparable to the risk profile of Aurizon Network under its SAA / Queensland Rail under its existing SAA.</p> <p>NHC has no issue with the Operating Requirements Manual being a separate document – but it needs to be ensured that that separation does not adversely and inappropriately impact on access</p>

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>31. 4.8</p> <p>The QCA requires Queensland Rail to amend its proposal so that the risk allocation between Queensland Rail and the operator is balanced. In this respect, the QCA requires Queensland Rail to implement the following amendments to its ORM:</p> <p>(a) Queensland Rail should notify all operators and their major customers of any proposed amendments to the ORM.</p> <p>(b) Queensland Rail should compensate the operator if a proposed amendment causes significant net material financial impacts of 1 % or greater.</p> <p>(c) Queensland Rail should make all amendments disputable, not only if a proposed amendment 'unfairly differentiates' between operators.</p> <p>(d) Queensland Rail should narrow its liability clause and limit the 'good faith' clause to urgent safety-related amendments.</p>	<p>Partially accepted.</p>	<p>Manual reflects an appropriate allocation of risk for its business.</p> <p>The matters listed are not appropriate for an access undertaking and have been addressed in the Standard Access Agreement (SAA).</p> <p>2015 DAU includes clause 4.3 which sets the ORM that applies as at the approval date, obliges Queensland Rail to:</p> <ul style="list-style-type: none"> <li>• make the then current version of the ORM applicable from time to time available to access seekers and access holders,</li> <li>• include an equivalent of clause 8 of the SAA (amendments and compensation rights) in all access agreements entered into after the approval date of the 2015 DAU</li> </ul> <p>Clause 8 of the SAA sets out the rights and obligations of the parties in relation to amendments to the ORM and compensation rights in respect of amendments. Queensland Rail has taken into account the QCA's draft decision and the position in the 2008 AU in formulating clause 8.</p>	<p>seekers by the existing risk profile being changed in the process.</p> <p>New Hope strongly supports the need for risk allocations to be balanced.</p> <p>Clause 8 of the SAA is an improvement on QR's previous position on this issue but needs to be amended to:</p> <ul style="list-style-type: none"> <li>• recognise that change to the ORM may impose costs on an end-user – particularly if it changes loading/veneering requirements (and that the end user should, in those circumstances, receive equivalent compensation to that which the operator receives under clause 8.3);</li> <li>• more clearly provide for a dispute regime (and for changes not to be made until disputes are resolved, except in the case of urgent safety related changes).</li> </ul> <p>(See NHC's volume 4 for further discussion on this issue).</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<b>Part 5: Reporting</b>				
32.	<p>5.1 The QCA requires Queensland Rail to amend its proposal so that its quarterly performance reports include information on:</p> <ul style="list-style-type: none"> <li>(a) the causes of significant changes in operating performance; and</li> <li>(b) the number of operational complaints by access holders, including those about: <ul style="list-style-type: none"> <li>(i) Queensland Rail's operating requirements manual and related documents, and other documents Queensland Rail posts on its website; and</li> <li>(ii) the application of the network management principles.</li> </ul> </li> </ul>	Accepted.	-	NHC is willing to accept the content of the quarterly report proposed in clause 5.1.2. 2015 DAU, but considers the separate reporting by system should apply to an extended range of the quarterly reporting information.
33.	<p>5.2 The QCA requires Queensland Rail to amend its proposal so that its annual report on the negotiation process includes:</p> <ul style="list-style-type: none"> <li>(a) the time taken by Queensland Rail to provide preliminary information and issue IAPs to access seekers, and by access seekers to provide their intent to negotiate, broken down into less than 10 business days, 10 to 20 days, 21 to 40 days and more than 40 days; and</li> <li>(b) the yearly number of disputes arising in relation to the access application form and the operating plan template.</li> </ul>	Draft decision 5.2(a) – See items 9 and 10 above. 6) Draft decision 5.2(b) – See item 7 above.	-	As per NHC's comments on the related decisions – NHC supports the previous QCA positions.
34.	<p>5.3 The QCA requires Queensland Rail to amend its proposal so that for systems with reference</p>	Partially accepted.	The maintenance costs, scope of maintenance and operating expenditure are reported on	NHC supports the position previously proposed by the QCA, including reporting

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>tariffs it reports annually for the relevant financial year on:</p> <ul style="list-style-type: none"> <li>(a) maintenance costs of its system and scope of maintenance, compared with the maintenance forecasts used to develop the tariff;</li> <li>(b) operating expenditure, compared with the forecasts used to develop the tariff;</li> <li>(c) capital investment and a roll-forward of its regulatory asset base; and</li> <li>(d) system volumes (broken down by type of traffic).</li> </ul>		<p>under 2015 DAU but without a comparison to forecasts. The QCA will be able to carry out the comparison as it holds the forecast information.</p> <p>The 2105DAU satisfies the requirements in draft decisions 5.3(c).</p> <p>Where a reference tariff applies the requirement in draft decision 5.3 (d) for a breakdown by type of traffic is not applicable. Queensland Rail will report on volumes where reference tariffs apply.</p>	<p>a comparison to forecasts to provide evidence of QR's efficiency. Otherwise, NHC would be willing to accept QR's position.</p>
<p>35. 5.4 The QCA requires Queensland Rail to amend its proposal so that for systems without reference tariffs it reports annually for the relevant financial year on:</p> <ul style="list-style-type: none"> <li>(a) maintenance costs of its system and scope of maintenance performed;</li> <li>(b) operating costs of its system;</li> <li>(c) the capital investment in the previous financial year and expected capital investment over one and five years;</li> <li>(d) volumes, in train paths, net tonnes and gross tonne kilometres (broken down by commodity, where appropriate), provided that, where a system includes multiple corridors, the reporting should include a</li> </ul>	<p>Partially accepted.</p>	<p>Queensland Rail will report on the matters listed in draft decisions 5.4(a), (b) and (d) on a regional network basis. (Obviously in respect of (d) only train paths will be reported on in respect of passenger services).</p> <p>In respect of draft decision 5.4(c), Queensland Rail will report on capital investment in the relevant year. Expected capex in a non-reference tariff based network is not relevant to the provision of access.</p> <p>It is not clear from the QCA's draft decision what "corridors" are being referred to or whether</p>	<p>Not applicable to NHC</p>

QCA Draft Decision		QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	breakdown by corridor, for all of the above categories of information.		it is practically possible to keep records on that basis.	
36.	<p>The QCA requires Queensland Rail to amend its proposal so that the regulatory audit requirements:</p> <p>(a) allow the QCA, acting reasonably, to require an audit of compliance with any aspect of the undertaking or QCA Act; and</p> <p>(b) allow the QCA to publish a report from an auditor that includes not just the auditor's opinion, but also enough information on the audit process and conclusions for access holders and seekers and other interested parties to understand how that conclusion was reached.</p>	Partially accepted.	<p>Queensland Rail has included in 2015AU clause 5.3.3 which expressly acknowledges Queensland Rail's obligations under section 150AA of the QCA Act and that the QCA has power under that section to require Queensland Rail to provide information regarding Queensland Rail's compliance with the undertaking.</p> <p>A third party audit right is not prescribed by the QCA Act and is not necessary given section 150AA.</p> <p>Clause 5.3.4(d) of 2015 DAU addresses draft decision 5.5(b).</p>	<p>NHC supports the requirement for the undertaking to give the QCA a right to require an audit of QR's compliance with any aspects of the approved access undertaking or the QCA Act. That goes further than s 150AA which only gives a power to require stated information to be made available, rather than to do an audit where there are concerns.</p> <p>It is highly misleading to say that clause 5.3.4(d) of the 2015 DAU addressed the issue in 5.5(b) of the QCA Draft Decision – as clause 5.3.4(d) only relates to audits of the quarterly and annual report. This is a wider issue relating to audits of QR's compliance more generally.</p>
<b>Part 6: Administrative Provisions</b>				
37.	<p>6.1 The QCA requires Queensland Rail to amend its proposal so that if Queensland Rail and an access seeker or holder select a particular dispute resolution option under the undertaking, that decision is binding, and the parties cannot subsequently elect to change the nature or outcome of the dispute resolution process, unless they appeal to the QCA on the grounds there has been a manifest error.</p>	Accepted.	-	New Hope is willing to accept QR's 2015 DAU in this regard (i.e. clause 6.1.1).
38.	<p>6.2 The QCA requires Queensland Rail to amend its proposal so that it will provide tariff-related</p>	No longer applicable.	Queensland Rail is not proposing to backdate the	NHC continues to consider that:

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	<p>reports for the western system to access seekers, as set out in the 2013 undertaking, backdated to the start of the undertaking period, once the undertaking has been approved.</p>		<p>application of the reference tariff and therefore the backdating of reports is not relevant.</p>	<ul style="list-style-type: none"> <li>The QCA has power to apply the Adjustment Charges regime to 'true up' the difference between the approved reference tariffs and those that have been applied in the interim period (see Volume 5 of the submission and legal advice from Allens);</li> <li>It is appropriate that they do so in this regard given the previous representations made by QR, and the fact that QR should not benefit from its delay in having its next access undertaking approved.</li> </ul> <p>If New Hope's position is accepted, then tariff related reports should be provided for the entire period which have been covered by interim tariffs to date.</p>
39.	6.3 The QCA requires Queensland Rail to amend its proposal so that the provisions on QCA decision-making apply to both Queensland Rail and other relevant parties (cl. 6.2).	Accepted	-	NHC is willing to accept QR's 2015 DAU in this regard (i.e. clause 6.2).
<b>Part 7: Standard Access Agreements</b>				
40.	7.1 The QCA requires Queensland Rail to amend its proposed access agreement principles to restore the access rights provisions (cl. 1) contained in Schedule E of the Aurizon Network 2010 access undertaking.	No longer applicable – addressed by a different means.	The SAA addresses this issue - see clauses 1.1, 1.2(b), 2, 4, 6.3(e), 7.3(a)(v) and 7.4(a)(v).	Not applicable to NHC – as the standard access agreement applies to its current services. However, provided the SAA indicates clearly how it would apply to other services, QR's position seems reasonable.



	<b>QCA Draft Decision</b>	<b>QR's Position</b>	<b>QR's Reasons (from 2015 DAU supporting submissions)</b>	<b>NHC Position</b>
41.	7.2 The QCA requires Queensland Rail to amend its proposed access agreement principles and restore the infrastructure management (cl. 6) and maintenance risk allocation provisions contained in Schedule E of the Aurizon Network 2010 access undertaking.	Partially accepted.	The SAA includes a provision obliging Queensland Rail to maintain the network to allow contracted train services to run in accordance with the access agreement. Queensland Rail is also obliged to comply with the IRMP. The combination of these two obligations provide appropriate protection for access holders and addresses the QCA's proposal.	As per response to Draft Decision 7.1 above.
42.	7.3 The QCA requires Queensland Rail to amend its proposal so that it deletes the risk and indemnity provisions in its access agreement principles and restore the risk and indemnity provisions (cl. 14) contained in Schedule E of the Aurizon Network 2010 access undertaking.	Partially accepted.	Queensland Rail has proposed a revised set of risk and indemnity provisions in its SAA taking into account the QCA's proposal – see clause 12 of the SAA.	As per response to Draft Decision 7.1 above.
43.	7.4 The QCA requires Queensland Rail to amend its proposal so that it deletes the limitation of liability provisions in its access agreement principles and restores the liability provisions (cl. 15) contained in Schedule E of the Aurizon Network 2010 access undertaking.	Partially accepted.	Queensland Rail has proposed revised limitation of liability provisions in its SAA taking into account the QCA's proposal – see clause 13 of the SAA.	As per response to Draft Decision 7.1 above.
44.	7.5 The QCA requires Queensland Rail to amend its proposal so that it restores the operational, maintenance, inspection and liability provisions in the same way they apply to dangerous goods (cl. 5, 6, 12, 14 and 15) contained in Schedule E of Aurizon Network's 2010 access undertaking.	Not accepted	The clauses referred to in the QCA's draft decision from Aurizon Network's undertaking do not deal with dangerous goods. It is not clear what is being referred to. 7) In any case, Queensland Rail has proposed new	As per response to Draft Decision 7.1 above.

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
45.	<p>7.6</p> <p>The QCA requires Queensland Rail to amend its proposal and restore the dangerous goods and liability provisions for train services (cl. 14 and 15) contained in Schedule E of Aurizon Network's 2010 access undertaking.</p> <p>The QCA invites Queensland Rail to propose a different liability regime for mixed goods train services and to provide supporting evidence to substantiate any proposed amendments based on cost and risk differences when compared to the liability regime for unit trains.</p>	Partially accepted	<p>indemnity and liability provisions in its SAA.</p> <p>The SAA submitted as part of 2015 DAU proposes a different liability regime – see clauses 12 and 13.</p> <p>8)</p>	As per response to Draft Decision 7.1 above.
46.	<p>7.7</p> <p>The QCA requires Queensland Rail to amend its proposal so that it removes any specific reference to noise mitigation provisions and restores the environmental protection provisions (cl. 8) contained in Schedule E of Aurizon Network's 2010 access undertaking</p>	Not accepted	<p>The 2008 AU, upon which the current SAA drafting on this issue is based, dealt with noise mitigation. Queensland Rail has proposed changes to the SAA (e.g. by removing the limitation tied to 'prudent practices'). However, the currently proposed drafting is appropriate to deal with the noise mitigation issue. It is inappropriate to simply default to Aurizon Network's position on any given issue – Queensland Rail is entitled to adopt an access undertaking that is appropriate to its own circumstances and legitimate business interests.</p>	As per response to Draft Decision 7.1 above.

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
47. 7.8 The QCA requires Queensland Rail to amend its proposal so that it restores the entirety of the access agreement principles contained in Schedule E of Aurizon Network's 2010 access undertaking.	No longer applicable	The 2015 DAU no longer has an equivalent schedule .	As per response to Draft Decision 7.1 above.
48. 7.9 The QCA requires Queensland Rail to amend its SAA so that it is consistent with: (a) Aurizon Network's Operator Access Agreement; and (b) the QCA's recommendations on other aspects of the 2013 DAU.	No longer applicable	The SAA is now a tri-partite agreement and addresses the relevant issues. In any case the SAA reflects the matters that are relevant to Queensland Rail's business, not Aurizon Network's business.	Please see NHC's detailed comments on the proposed SAA (Volume 4 of its submissions). New Hope is willing to accept QR's proposed tripartite format subject to the role of the end user/customer in the SAA being expanded to provide it with proper control over the capacity being contracted. The SAA needs to be consistent with the approved access undertaking.
49. 7.10 The QCA requires Queensland Rail to amend its proposal so that it retains the dangerous goods provisions in Aurizon Network's Operator Access Agreement (cl. 8.3) in Queensland Rail's SAA to apply to non-coal traffics on its network.	Not accepted	The SAA provisions on dangerous goods are appropriate for Queensland Rail's business.	Not applicable to NHC.
50. 7.11 The QCA requires Queensland Rail to amend its proposal so that it uses an amended cl. 13.1 to enable rail operators to obtain insurance from an insurance company with an insurance financial rating of A or better by Standard and Poor's or, a rating which most closely corresponds to that rating by an agency or person which is recognised in global financial markets as a major ratings agency.	No change required	Clause 15.2 (now 16.2) of the SAA does exactly what the QCA requires in draft decision 7.11.	NHC is willing to accept QR's approach in clause 16.2.

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
51. 7.12 The QCA requires Queensland Rail to amend its proposal so that it adopts schedule D of the ARTC 2011 access undertaking for the KPIs for inclusion in schedule 5 of the SAA.	Not accepted	ARTC's KPIs are a matter for it. KPIs attaching to contractual performance issues should be addressed contractually. They need to be symmetrical and therefore the subject of negotiation on a case-by-case basis.  It is also necessary to consider the impact of the recent High Court decision in <i>ANZ v Andrews</i> on any regime which imposes adverse financial outcomes based on performance. It is not appropriate to adopt a KPI regime based on adverse financial outcomes without proper consideration of the outcome of that case.	NHC agrees with QR that contractual performance issues should be addressed contractually. NHC considers that the key obligation of QR under the SAA is to provide access paths and this should be measured. NHC seeks a performance deduction from QR of \$500 per path (escalated by CPI) that is not provided and such failure is not otherwise excused. This figure is based on what it costs NHC with regard to wages of both staff and contractors when a train must be rescheduled.  <i>ANZ v Andrews</i> is a decision about penalties where charges were found not to reflect a reasonable estimate of the loss arising from non-performance of certain obligation – it does not stand for the proposition that KPIs are penalties or in any way prohibited. The figure of \$500 is a reasonable estimate of NHC's loss (excluding any lost sales/lost profits).
52. 7.13 The QCA requires Queensland Rail to amend its proposal to identify what clauses in the revised SAA do not apply to non-coal traffics.	No longer applicable	The proposed SAA applies to all train services.	NHC has no issues with the QR approach of a single standard access agreement for all train services.
53. 7.14 The QCA requires Queensland Rail to amend its proposal so that it: (a) includes a new section in its access agreement principles (Schedule C) to mirror the connecting infrastructure principles outlined in cl. 8.3 of Aurizon Network's 2010 access undertaking; and	Not accepted	The connection of private infrastructure is not part of the declared service. There is no legal requirement to have provisions in the undertaking dealing with it so as to enliven a dispute process that would not otherwise apply.	NHC considers that connection of private infrastructure is a clear part of providing access to the declared service. Without such a connection it may not be possible for many access seekers to practically access the declared service where QR declines to build the required balloon loop infrastructure on reasonable terms (and

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	(b) amends cl. 2.8 of the 2013 DAU to provide scope for the QCA to give Queensland Rail a notice requiring it to develop a SAA and/or proposed standard connection agreement that is consistent with the 2013 DAU.		The requirement to include a right for the QCA to require development of a SAA is not needed because one is submitted as part of 2015 DAU. In any case, the QCA does not have power to require an amendment to an access undertaking in the proposed circumstances.	would allow QR to abuse its monopoly position in relation to the terms it provides for future connections). As noted elsewhere, this position is within the QCA's power. Section 137(2)(k) specifically recognises that provisions regarding the review of an undertaking can be included within undertakings.
<b>Part 8: Western System Tariff</b>				
54. 8.1	The QCA requires Queensland Rail to amend its proposal to make Schedule AA in the 2013 DAU that relates to the maintenance of regulatory asset base, consistent with Schedule A in Aurizon Network's 2010 undertaking.	Partially accepted	Schedule E of 2015 DAU responds to the specific issues raised in the QCA's draft decision. It is not appropriate for Queensland Rail to simply adopt the schedule of another below rail provider as its own.	NHC supports the position that Schedule E should be aligned with Schedule A of Aurizon Network's existing access undertaking. In particular, the provisions in the proposed Schedule E are not consistent in relation to the circumstances in which optimisation should occur. While New Hope accepts that positions from Aurizon Network's undertaking should not be adopted without consideration of whether that position is suited to QR's network – in this case there is nothing about QR's network which warrants different treatment. In the Western System there may be real issues about potential bypass at some point in the future given current pricing and plans for infrastructure like the inland rail project and a bypass of the metropolitan system.

QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
<p>55. 8.2 The QCA requires Queensland Rail to amend its proposal to include a western system coal tariff of \$14.29/000gk, based on the assumptions and inputs set out in this Chapter 8. The tariff will be levied on the basis of:</p> <ul style="list-style-type: none"> <li>(a) for trains originating in the western system: <ul style="list-style-type: none"> <li>(i) an AT1 tariff component of \$7.15/000gk; and</li> <li>(ii) an AT2 tariff component of \$2,518.89 per train path for the western system and \$1,089.42 per train path for the metropolitan system (including the \$98.18 metropolitan asset tariff); and</li> </ul> </li> <li>(b) for trains originating in the metropolitan system: <ul style="list-style-type: none"> <li>(i) an AT1 tariff component of \$14.29/000gk; and</li> <li>(ii) an AT2 tariff component of \$98.18/train path (the metropolitan asset tariff).</li> </ul> </li> </ul> <p>For the purposes of the take or pay mechanism discussed in Section 3.5 of this draft decision, the annual target revenue for 2013–14 for the western system is \$38.8 million and for the metropolitan system it is \$17.2 million.</p>	<p>Not accepted</p>	<p>See the discussion on the Reference Tariff in Volume 1 and Volume 2 of Queensland Rail's submission in support of 2015 DAU.</p>	<p>NHC considers that there are substantial flaws in the methodology adopted by QR in producing the proposed reference and ceiling tariffs.</p> <p>Please see NHC's detailed submissions regarding the appropriate reference tariff and ceiling in Volume 2.</p>
<p><b>Part 9: Investment Framework, Planning and Coordination</b></p>			

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
56. 9.1	<p>The QCA requires Queensland Rail to amend the extensions provisions in its proposal (cl. 1.4.1) to:</p> <p>(a) remove all discretionary references in Queensland Rail's decision to extend; and</p> <p>(b) include an obligation on Queensland Rail to extend the network regardless of which party funds the extension.</p>	Not accepted	<p>In 2015 DAU Queensland Rail has reduced the number of instances in which Queensland Rail can exercise a discretion in relation to extensions.</p> <p>2015 DAU obliges Queensland Rail to apply the undertaking consistently to all access seekers. Queensland Rail is also subject to the prohibitions on unfair differentiation in the QCA Act.</p>	<p>NHC considers that while the QR 2015 DAU has gone some way to addressing this issue, it needs to be clearer that where user funding is provided, QR can be compelled in most circumstances to invest in an Extension</p>
57. 9.2	<p>The QCA requires Queensland Rail to amend the extension provisions in its proposal (cl. 1.4.1) to:</p> <p>(a) provide for third-party funding of an extension to the network; and</p> <p>(b) have regard to, as far as it is relevant to Queensland Rail, the SUFA developed, or which is being developed, by Aurizon Network.</p>	Partially accepted	<p>Queensland Rail will negotiate with access seekers and their customers who wish to fund an extension but cannot be compelled to negotiate funding arrangements under a regulated regime with a third party.</p> <p>It is not appropriate to adopt a third party's SUFA documents, particularly in circumstances where it is not clear which version of SUFA the QCA is referring to.</p>	<p>NHC is supportive of user funding provisions being included.</p> <p>However, it is willing to accept a SUFA not being an immediate part of the undertaking, provided that the undertaking contains:</p> <ul style="list-style-type: none"> <li>• a requirement to submit a SUFA (and related consequential amendments, if any) to the undertaking within 3 months of approvals; and</li> <li>• power for the QCA to require amendments to that submission and if QR fails to lodge or fails to make such amendments, power for the QCA to approve a SUFA/consequential amendments it prepares.</li> </ul>
58. 9.3	<p>The QCA requires Queensland Rail to amend its proposed extensions provisions so that its proposal (cl. 1.4.1) includes clear, objective</p>	Accepted	-	<p>NHC considers there is more to be done on this issue, and in particular considers the tests in 1.4.2(b)(vii) need to be made</p>

	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
	and transparent financial tests to be applied to investors in user funded extension projects.			objective rather than based on QR's opinion.
59.	<p>9.4 The QCA requires Queensland Rail to amend the extensions provisions in its proposal (cl. 1.4.1) to:</p> <p>(a) remove Queensland Rail's discretion to decide if an Access Agreement's terms and conditions are satisfactory to Queensland Rail where an extension is being funded by an access seeker or access seeker's customer or nominee;</p> <p>(b) acknowledge that an access seeker or an access seeker's customer or nominee can fund the design, development and construction of an extension with the execution of a funding agreement;</p> <p>(c) acknowledge that an access seeker or an access seeker's customer will fund the management, maintenance and operation of the network (inclusive of the extension) with the execution of an access agreement; and</p> <p>(d) oblige Queensland Rail to extend the network if funding and access agreements have been executed.</p>	Partially accepted	<p>The 2015 DAU removes the discretion referred to in draft decision 9.4(a).</p> <p>The 2015 DAU obliges Queensland Rail to negotiate funding arrangements with the access seeker or its customer where Queensland Rail is unwilling to fund an extension itself. For the reasons set out in item 57 it is not appropriate to extend this obligation to the access seeker's nominee.</p> <p>Under the 2015 DAU the access charges will cover the costs of managing, maintaining and operating a funded extension.</p> <p>The draft decision 9.4(d) is inappropriate. The funding agreement may be subject to conditions precedent and in any case, this is a contractual matter, not a matter for the undertaking.</p>	<p>QR's discretion and obligations – NHC continues to have the concern (evident in the QCA's Draft Decision) that QR retains too great a level of discretion in relation to user funding (and thereby when Extensions can occur in circumstances where it refuses to fund them) and very limited obligations to assist an access seeker which needs investment in an Extension to obtain the required access. In particular:</p> <ul style="list-style-type: none"> <li>The carve out from QR having any obligations to satisfy the conditions in clause 1.4.2(b) that is found in 1.4.2(f) is very limiting, given that many conditions (such as obtaining Authorisations and land) will be highly dependent on QR;</li> <li>The criteria in clause 1.4.2(b) should be objective standards rather than the results of QR's opinions. This is particularly the case for 1.4.2(b)(vii). This is particularly important so that an access seeker has the potential to bring a dispute with QR's assessment in relation to this issue (which would be much harder under QR's current drafting).</li> <li>Clause 1.4.2(d) is insufficient, providing QR with substantially too much discretion regarding when</li> </ul>



	QCA Draft Decision	QR's Position	QR's Reasons (from 2015 DAU supporting submissions)	NHC Position
				<p>provision of user funding means that QR should be compelled to develop an Extension. This should provide that a Funding Agreement for Extensions must (as a mandatory obligation) include a requirement for QR to Extend the Network in accordance with the terms of that Funding Agreement</p>
60.	<p>9.5 The QCA requires Queensland Rail to amend the extensions provisions in its proposal (cl. 1.4.1) to:</p> <ul style="list-style-type: none"> <li>(a) remove all discretionary language applied in decisions on whether an extension complies with the extension preconditions;</li> <li>(b) give Queensland Rail and an access seeker joint responsibility for complying with all the preconditions set for an extension; and</li> <li>(c) oblige the access seeker to reimburse all of Queensland Rail's reasonable costs expended in assisting (sic) the extension project complies with the extension preconditions.</li> </ul>	Partially accepted	<p>In relation to draft decision 9.5(a), the discretions that appeared in 2013 DAU have either been removed or made subject to a requirement for Queensland Rail to act reasonably in the exercise of that discretion.</p> <p>In respect of draft decision 9(b), 2015 DAU expressly contemplates that either the access seeker or Queensland Rail is to satisfy the relevant pre-condition.</p> <p>Draft decision 9.5(c) has the potential effect of imposing an extension cost on Queensland Rail. An access provider cannot be obliged by the QCA to accept any costs associated with extending the facility.</p>	<p>See NHC response to Draft Decision 9.4 above.</p> <p>NHC acknowledges that 1.4.2(e) goes part of the way to addressing the issues of concern.</p>
61.	<p>9.6 The QCA requires Queensland Rail to amend its proposal so that it inserts a new clause in the access undertaking (potentially in Part 4</p>	Partially accepted	<p>The SAA proposed by Queensland Rail obliges it to:</p>	<p>NHC is willing to accept the maintenance obligation being principally established by the SAA (rather than the undertaking).</p>

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<p>of the access undertaking) to oblige Queensland Rail to maintain the operational integrity of its network consistent with the:</p> <p>(a) Network Management Principles;</p> <p>(b) Operating Requirements Manual; and</p> <p>(c) access rights contracted with access holders.</p>		<ul style="list-style-type: none"> <li>maintain the network so as to allow contracted services to run;</li> <li>comply with the NMP, the ORM and IRMP.</li> </ul> <p>The most appropriate place for these types of obligations is the access agreements.</p>	
<p>62. 9.7</p> <p>The QCA requires Queensland Rail to amend the extension provisions in its proposal to:</p> <p>(a) include a new schedule which is similar to Schedule J of Aurizon Network's 2010 access undertaking; and</p> <p>(b) require any funding agreement negotiated between Queensland Rail and an access seeker or an access seeker's customer or nominee to be consistent with this new schedule.</p>	<p>Not accepted</p>	<p>Clause 1.4 of 2015 DAU addresses the majority of the QCA's requirements and the inclusion of a "Schedule J" from Aurizon Network's 2010 Undertaking is not warranted.</p> <p>Queensland Rail's business, is not the same as Aurizon Network's coal centric business. It is disproportionate to require Queensland Rail to adopt the prescriptive regime that applies to Aurizon Network.</p> <p>For example, having regard to the differences between Queensland Rail and Aurizon Network in terms of the nature of their respective rail infrastructure, customer bases and the likely mid-term need for extensions, a requirement for Queensland Rail to incur the cost and time needed to develop a standard funding agreement in</p>	<p>QR is seeking a lighter handed investment framework than what is ideal. To the extent the QCA was minded to accept that, it will be critically important that the QCA has the power to require a more detailed investment framework to be submitted during the term of the undertaking where it considers that is warranted (either by increased demand for new access or due to unanticipated flaws in the terms of the undertaking as approved). The need for this is heightened by the longer term for the undertaking that QR is seeking.</p>

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		<p>accordance with a "Schedule J" is simply not justified.</p> <p>In any case, many of the matters contained in Schedule J of the Aurizon Network undertaking are already expressly dealt with in the main body of the 2015 DAU. There is no need to include them again in a "Schedule J" equivalent in the 2015 DAU.</p>	
63. 9.8	Partially accepted	<p>The QCA requires Queensland Rail to amend its proposal so that the funding agreement provisions in its proposal (cls. 1.4.2 and 1.4.3):</p> <ul style="list-style-type: none"> <li>(a) remove all discretionary language;</li> <li>(b) establish the methodology for the rental stream from an investment, with mandatory distribution of rental returns to investors;</li> <li>(c) enable an investor to obtain an independent audit of the rental methodology and the returns paid over the economic life of the asset;</li> <li>(d) includes clauses consistent with cl. 6.5.2 and related clauses of the 2010 Aurizon Network undertaking to enable Queensland Rail and investors acting reasonably to include Access Conditions to an extension to mitigate the financial risks associated with an extension and</li> <li>(e) enable third-party investors in the rail network to trigger the regulatory pre-approval</li> </ul>	<p>NHC has a number of concerns regarding QR's user funding proposal, but accepts that most of the issues raised by this part of the QCA Draft Decision have been resolved in the 2015 DAU.</p>

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<p>processes to be included in Schedule AA to gain certainty over their investment returns.</p> <p>64. 9.9 The QCA requires Queensland Rail to amend its proposal so that it inserts a new section in the extension provisions (following cl. 1.4.3) which outlines the capacity and investment process Queensland Rail will follow to facilitate extensions to the network. This new section must include the following elements:</p> <p>(a) an annual master planning process for each of the major corridors in Queensland Rail's network in consultation with relevant stakeholders;</p> <p>(b) a reasonable staged pathway through which an access seeker or an access seeker's customer or nominee can require Queensland Rail to undertake/oversight the concept, prefeasibility and feasibility stages of an extension project;</p> <p>(c) study funding principles for access seekers to fund all of Queensland Rail's reasonable costs in managing/conducting each study stage of an extension project leading up to the execution of a SUFA and an access agreement; and</p> <p>(d) a regulatory pre-approval process through which Queensland Rail, an access seeker or an access seeker's customer or nominee can obtain QCA pre-approval to an extension to the network.</p> <p>65. 9.10 The QCA requires Queensland Rail to amend its proposal so that the funding agreement</p>	<p>Partially accepted</p>	<p>Clause 1.4.6 of the 2015 DAU sets out requirements for master planning and extension coordination. Any approved plan will be made available on the Queensland Rail website and any feedback from stakeholders will be considered.</p> <p>Master planning is not a matter which the QCA Act regulates.</p> <p>Clauses 1.4.7 to 1.4.8 of the 2015 DAU deal with the subject matter of draft decisions 9.9(b) and (c).</p> <p>Clause 1.4.9 provides an obligation on Queensland Rail to seek pre-approval of the cost of a proposed extension for inclusion in the RAB at the request of an access seeker or its customer.</p>	<p>NHC considers that there needs to be a master planning process for, at least, major parts of the QR network (such as the West Moreton system), to provide visibility and transparency to end users of the potential future capital requirements and a useful trigger for consultation with operators and end users. Clause 1.4.6 is not sufficient in that regard, and has the potential to result in in-efficient and ad-hoc investment decisions being made due to the absence of more rigorous planning being provided for.</p> <p>NHC also has some concerns with QR's study funding principles (in clause 1.4.8), which seem to have the result of including study costs in the regulatory asset base where the Extension does not proceed. For user funded studies, the costs should only be included in the regulatory asset base if the Extension proceeds, otherwise they should be funded by the funding user.</p> <p>NHC supports the changes proposed by the QCA in its previous draft decision.</p>
	Not accepted	See the comments in item 62. It is also beyond the QCA's power	

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	<p>provisions (cl. 1.4.2) include a review trigger to allow the QCA to:</p> <ul style="list-style-type: none"> <li>(a) reconsider the capacity and investment framework during the term of the undertaking and require Queensland Rail to submit an amended capacity and investment framework;</li> <li>(b) require Queensland Rail submit a SUFA and Standard Study Funding Agreement to the QCA for approval; and</li> <li>(c) to prepare an amended capacity and investment framework and SUFA (the framework documents) if Queensland Rail fails to submit these framework documents or the framework documents submitted by Queensland Rail are not approved by the QCA.</li> </ul>		<p>to require an amendment of the access undertaking in the circumstances detailed in draft decision 9.10.</p>	<p>NHC does not agree this is beyond the QCA's power. Section 137(2) of the QCA Act specifically recognises that the undertaking can contain provisions regarding review of the undertaking.</p> <p>It is also highly appropriate to include a review mechanism where the QCA is convinced that QR should not be obliged to provide a SUFA or more detailed user funding regime – as if that judgment turns out to be flawed, it is highly preferable for the resulting issues to be resolved mid-term rather than having to wait for the next undertaking approval process.</p>