

***APPLICATION TO THE NATIONAL COMPETITION
COUNCIL FOR A RECOMMENDATION TO EXTEND
THE CERTIFICATION OF AN ACCESS REGIME***

**Queensland's third party access regime for rail
services provided by Queensland's rail
networks**

January 2021



Table of Contents

1.	Application details	4
2.	Basis for application for re-certification.....	6
3.	Background	7
4.	Overview of Queensland’s rail sector infrastructure and operators	10
5.	Overview of Queensland’s third party rail access regime	17
6.	Approach to analysis of Clause 6 principles	21
7.	Clause 6(2): jurisdictional issues.....	23
8.	Clause 6(3): significant infrastructure	24
9.	Clauses 6(4)(a)–(c): negotiated access	42
10.	Clause 6(4)(d): regular review.....	51
11.	Clause 6(4)(e): reasonable endeavours.....	54
12.	Clause 6(4)(f): access on different terms.....	57
13.	Clause 6(4)(g): independent dispute resolution processes ..	59
14.	Clause 6(4)(h): binding decisions	63
15.	Clause 6(4)(i): principles for dispute resolution	65
16.	Clause 6(4)(j): facility extension.....	69
17.	Clause 6(4)(k): material change in circumstances	72
18.	Clause 6(4)(l): compensation	73
19.	Clause 6(4)(m): hindering access	74

20.	Clause 6(4)(n): separate accounting.....	77
21.	Clause 6(4)(o): access to financial information	80
22.	Clause 6(4)(p): multiple access regimes	82
23.	Clause 6(5)(a): promote efficiency and effective competition.....	83
24.	Clause 6(5)(b): pricing should promote efficiency	84
25.	Clause 6(5)(c): merits review of decisions	86
26.	The objects of Part IIIA	87
27.	Abbreviations	88

1. Application details

This application is made under section 44NA(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The following information is provided in accordance with regulation 6B of the *Competition and Consumer Regulations 2010* (Cth).

Applicant

The application is made on behalf of the State of Queensland.

Responsible Minister

The responsible Minister for the State of Queensland is the Honourable Anastacia Palaszczuk MP, Premier and Minister for Trade.

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Description of the access regime

The third party access regime for rail in Queensland (**the Regime**) comprises the following:

- (a) the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) (**Attachment 1**);
- (b) Aurizon Network Pty Limited's access undertaking as accepted by the Queensland Competition Authority (**QCA**) under the provisions of the QCA Act and amended from time to time. The current undertaking is the 2017 access undertaking (**Attachment 2**);

- (c) Queensland Rail Limited's access undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. The current undertaking is the 2020 access undertaking (**Attachment 3**); and
- (d) the rail safety regime in Queensland which is established by the *Rail Safety National Law (Queensland) Act 2017 (Rail Safety National Law Act)* (**Attachment 4**), the Rail Safety National Law (**Attachment 5**) and provisions under the *Transport Infrastructure Act 1994 (Qld) (TIA)* (**Attachment 6**).

Description of the services

The relevant services to which the Regime currently applies are *the use of a coal system for providing transportation by rail and the following parts of the Queensland Rail service, which are each a service:*

- (a) *the North Coast Route service;*
- (b) *the Mount Isa Route service;*
- (c) *the West Moreton Route service;*
- (d) *the Central Western Route service;*
- (e) *the Western Route service;*
- (f) *the South Western Route service.*

A detailed discussion regarding the scope of the services is provided at Chapter 8 below.

Grounds in support of the application

The grounds in support of the application are set out below in this application.

2. Basis for application for re-certification

The Queensland Government previously applied for certification of the Queensland rail access regime in June 2010. On 19 January 2011, the Commonwealth Minister decided to certify the Regime as effective for a period of ten years. This decision was consistent with the National Competition Council's final recommendation.

Under section 44NA(2) of the CCA, an application can be made asking the National Competition Council (**Council**) to recommend that the Commonwealth Minister decide to extend the period for which the decision certifying the effectiveness of an access regime is in force.

To ensure certainty for government and industry about whether the third party access regime under Part IIIA of the CCA could be applied to govern third party access in Queensland to the services in addition to the current Regime, the Queensland Government is requesting that the Council assess the effectiveness of the Regime and make a recommendation to the Commonwealth Minister that the decision to certify the access regime as effective be extended. An extension period of 20 years is sought for certification of the effectiveness of the Regime. This period reflects the period for which the Treasurer and Minister for Infrastructure and Planning, the Honourable Cameron Dick MP, declared the use of a coal system for providing transportation by rail as a service under the QCA Act.

The Queensland Government considers that the principles outlined in clause 6 of the Competition Principles Agreement continue to remain satisfied in respect of the Regime.

Consequently, this application updates the material contained in the previous application for certification, taking into account changes to the Regime since 2011, including relevant amendments to the QCA Act and updated rail safety legislation. Where relevant, these changes are discussed in further detail in this application.

3. Background

The Competition Principles Agreement¹ (**CPA**) provides that States and Territories may establish statutory regimes for regulating third party access to significant infrastructure within their respective jurisdictions. Where a State or Territory regime is certified by the designated Commonwealth Minister, it applies to the exclusion of the third party access regime under Part IIIA of the CCA (**National Access Regime**). An effective access regime is one that conforms to the principles outlined in clause 6 of the CPA (**Clause 6 principles**).

Division 2A of Part IIIA of the CCA details the process for access regimes to be certified as effective. A State or Territory can apply to the Council for a recommendation to be made to the responsible Commonwealth Minister that the Minister decide that a regime is an effective access regime. Where a decision by the Commonwealth Minister to certify an access regime as effective is in force, a State or Territory can also apply for an extension of the certification period.

In 1997, the Queensland Government passed the QCA Act, which contains a third party access regime in Part 5. This third party access regime, as amended from time to time, is modelled on the National Access Regime.

In 1998, the Queensland Government declared a service for the use of rail transport infrastructure where Queensland Rail was the railway manager.² On 8 September 2010, the ability to declare a service by regulation was removed from the QCA Act.³ As a result, the declaration was removed from the QCA Regulation and new declarations in relation to rail transport infrastructure were made in a new Part 12 of the QCA Act.

In 2010, the Queensland Government separated the Government Owned Corporation QR Limited into two separate entities – QR National and Queensland Rail. QR National (now Aurizon Holdings Limited), which operates and manages the Central Queensland Coal Network (**CQCN**), was subsequently privatised and floated. Part 12 of the QCA Act reflected this by providing for the declaration of the CQCN and the Queensland Rail services separately.

Section 250(1) of the QCA Act provided that the ‘use of a coal system for providing transportation by rail’ and the ‘use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited,

¹ The Competition Principles Agreement is an intergovernmental agreement dated 11 April 1995 between the Commonwealth of Australia and the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, and the Australian Capital Territory and the Northern Territory (as amended to 13 April 2007).

² *Queensland Competition Authority Amendment Regulation (No. 1) 1998* (Qld) (QCA Regulation).

³ The *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld) amended the QCA Act and the QCA Regulation.

or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager' are each taken to be a service declared by the Minister under Part 5, Division 2 of the QCA Act. In accordance with section 250(2) of the QCA Act, these declarations expired on 8 September 2020.

On 31 May 2020, the Treasurer and Minister for Infrastructure and Planning, the Honourable Cameron Dick MP, as the responsible Minister for the QCA Act, declared the use of a coal system for providing transportation by rail as a service under section 84(1)(a) of the QCA Act. For the purposes of this application, this service will be referred to as the 'Aurizon Service' as the operator of this service is currently Aurizon Network Pty Ltd (**Aurizon Network**). The declaration in relation to the Aurizon Service started to operate on 9 September 2020 and expires at the end of 8 September 2040 (a period of 20 years).⁴

The Minister also declared⁵ the following parts of the Queensland Rail service, which parts are each a service, under section 84(1)(b) of the QCA Act:

- (a) the North Coast Route service;
- (b) the Mount Isa Route service;
- (c) the West Moreton Route service;
- (d) the Central Western Route service;
- (e) the Western Route service;
- (f) the South Western Route service.⁶

For the purposes of this application, these services will be referred to as the 'Queensland Rail Services' as these services are currently operated by Queensland Rail Limited (**Queensland Rail**). The declaration in relation to the Queensland Rail Services started to operate on 9 September 2020 and expires at the end of 8 September 2035 (a period of 15 years).⁷

This has the effect of making these declared services subject to the continued operation of the third party access regime in Part 5 of the QCA Act.

⁴ *Notice of a decision to declare a service under sections 84-87 (Aurizon Decision)*, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 203, <https://www.publications.qld.gov.au/dataset/extraordinary-gazettes-june-2020/resource/9c57ea19-3f3f-4650-8836-6ff45f1a9439>.

⁵ *Notice of a decision to declare parts of a service that are themselves a service under section 84-87 (Queensland Rail Decision)*, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 216, <https://www.publications.qld.gov.au/dataset/extraordinary-gazettes-june-2020/resource/9c57ea19-3f3f-4650-8836-6ff45f1a9439>.

⁶ These terms are defined in Chapter 8 of this application.

⁷ Queensland Rail Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 216.

Part 5 of the QCA Act provides two methods of regulating access to declared services:

- (a) a 'negotiate/arbitrate' model under which the QCA Act imposes an obligation upon the provider of the service to negotiate with access seekers for the making of an access agreement⁸ and, if agreement cannot be reached, allows a dispute to be arbitrated, and a determination made, by the QCA in respect of the access dispute⁹; and
- (b) an 'access undertaking' model which allows the provider of the service to voluntarily submit an undertaking which sets out in detail the terms and conditions upon which the provider will give access to the declared service.¹⁰ The QCA also has the power under the regime to require a provider of a declared service to submit an undertaking.¹¹

The access undertaking which currently applies in respect of the Aurizon Service is the 2017 access undertaking (known in the industry as **UT5**). This access undertaking was due to expire on 30 June 2021. Aurizon Network and its coal customers developed a range of consensus amendments that were approved by the QCA on 19 December 2019, including arrangements that extended the regulatory arrangements until 30 June 2027. Aurizon Network can seek to vary its approved access undertaking at any time by submitting a draft amending access undertaking (**DAAU**) to the QCA under the QCA Act. The most recent DAAU was approved by the QCA on 22 October 2020. The current version of UT5 is provided at **Attachment 2**.

The access undertaking which currently applies in respect of the Queensland Rail Services is the 2020 access undertaking (known in the industry as **AU2**). AU2 came into effect on 1 July 2020 and is due to expire on 30 June 2025. As outlined above, the undertaking is subject to amendment through a DAAU process under the QCA Act. To date, no DAAUs in relation to AU2 have been submitted to the QCA. The current version of AU2 is provided at **Attachment 3**.

Queensland's rail access regime has been in place for more than two decades and is the most comprehensive and developed rail access regime in Australia. The rail access regime has been effective in promoting competition within the above-rail industry. The access regime, including the process for developing an access undertaking through the QCA, is open, transparent and well understood within the sector.

⁸ Part 5, Division 4, Subdivision 1 of the QCA Act.

⁹ Part 5, Division 5 of the QCA Act.

¹⁰ Part 5, Division 7 of the QCA Act. The QCA has the power to require a provider to submit an access undertaking under section 133 of the QCA Act.

¹¹ Section 133 of the QCA Act.

4. Overview of Queensland's rail sector infrastructure and operators

Rail is generally the preferred mode for freight movement, particularly for bulk commodities (such as coal) and most long haul freight tasks. Traditionally, the rail freight industry has formed the largest share of the total freight task in Australia, and Queensland comprises one of the largest geographical regions of total freight movements in the Australian rail industry.¹²

Queensland is a major market for freight in relation to both bulk and non-bulk (or intermodal) goods. The strong demand is due to Queensland's population base, resources reserves and large geographical area.

Rail transport accounts for around 32% of all freight tonnages in Queensland.¹³ Rail is the dominant mode of transport for moving bulk commodities (such as grain, sugar, minerals and coal). Non-bulk or intermodal freight including containerised retail products (e.g. groceries), manufactured goods and industrial supplies is also often transported by rail.

Rail access is particularly important in Queensland's regional areas, which are a major source of resources and agricultural products. Connecting these areas with ports along Queensland's coastline is crucial to ensure access to international markets.

A map of Queensland's intrastate rail infrastructure is provided below.

¹² Bureau of Infrastructure, Transport and Regional Economics (BITRE), *Yearbook 2019: Australian Infrastructure Statistics, Statistical Report*, 2019, accessed 8 October 2020, https://www.bitre.gov.au/sites/default/files/documents/BITRE_2019_YEARBOOK.pdf.

¹³ Department of Transport and Main Roads, *Queensland Freight Strategy—Advancing Freight in Queensland*, 6 March 2019, p. 4, <https://www.publications.qld.gov.au/dataset/queensland-freight-strategy-advancing-freight/resource/ae528968-a698-422c-bdc7-2a38a911de45>.

Figure 1: Queensland's rail networks



Source: Queensland Rail, <https://www.queenslandrail.com.au/forbusiness/the-regional-network>.

This rail infrastructure comprises various lines and systems owned and operated by Queensland Rail, and the Central Queensland Coal Network (**CQC**N) which is leased and operated by Aurizon Network. The section of rail track situated between Acacia Ridge and the New South Wales border is leased and operated by the Australian Rail Track Corporation (**ARTC**).

Queensland Rail

Queensland Rail is a statutory authority of the Queensland Government and is responsible for the management of rail, provision of rail transport services and the construction and maintenance of rail transport infrastructure. Queensland Rail manages a rail network that extends more than 6,600 kilometres across Queensland and is used by freight and passenger trains.

Queensland Rail describes its network as comprising seven regional systems and the Metropolitan system. These systems are highlighted above in Figure 1 and include:

- the Tablelands system – comprises two corridors from Cairns to Forsyth and Normanton to Croydon. The system is currently used exclusively by tourist services.
- the North Coast Line – extends between Nambour and Cairns. It services major population centres in Brisbane, Bundaberg, Gladstone, Rockhampton, Mackay, Townsville and Cairns as well as various ports along Queensland’s eastern coastline. The line primarily transports intermodal/containerised freight, agricultural products and regional passenger services.
- the Mount Isa Line – extends from Stuart (near Townsville) to Mount Isa. The line carries bulk minerals from the North West Minerals Province east to the Port of Townsville and carries mining and industrial inputs west into the Mount Isa region. It also carries a small amount of livestock and four passenger services per week.
- the Central Western system – comprises the main line from Nogoa to Winton and the branch from Emerald to Clermont. The system carries agricultural products including grain and livestock, as well as four passenger services per week.
- the Western system – comprises the main line from Miles to Quilpie, and a number of branch lines. The system carries agricultural freight including grain and livestock, as well as four passenger services per week (on the ‘Westlander’ from Brisbane to Charleville).
- the West Moreton system – extends from Rosewood to Miles. The system primarily carries coal, as well as agricultural products and regional passenger services.
- the South Western system – extends from Toowoomba south-west to Thallon, including the Wyreema to Millmerran and Warwick to Wallangarra branch lines. This system primarily carries agricultural products including grain; and
- the Metropolitan system – radiates from the Brisbane central business district. It is bounded by Rosewood to the west and Nambour to the north and extends south to Varsity Lakes station in the Gold Coast region, as well as south-west to the Acacia Ridge Terminal (where it connects with the interstate rail system to New South Wales). It is primarily used for commuter passenger services and is also an important rail freight connection, including for coal and agricultural products travelling from the west to the Port of Brisbane; intermodal freight travelling interstate and between Brisbane and north Queensland; and livestock travelling from the central west and north west regions to processing facilities in Brisbane. Currently, all interstate traffic (i.e. to/from New South

Wales) must travel on the Metropolitan system and transfer to the interstate rail system at Acacia Ridge.¹⁴

In 2019–20, Queensland Rail facilitated the transport of 15.7 billion gross tonne kilometres (gtk) of freight. Additionally, more than 44 million passenger trips were taken in South East Queensland.¹⁵

Queensland Rail provides the below-rail service as well as the above-rail passenger services on its network.¹⁶ Pacific National Holdings Pty Ltd (**Pacific National**), Aurizon Operations Limited (**Aurizon Operations**)¹⁷, Linfox Australia Pty Ltd (**Linfox**) and Watco Australia (**Watco**) provide above-rail freight services on various parts of the network.

Aurizon Network

Aurizon Network is a subsidiary of Aurizon Holdings Limited (**Aurizon**). Aurizon is Australia's largest rail-based transport business and an ASX50 company. Its key operational areas are broken into three business units: Coal, Bulk and Network.

Aurizon Network is responsible for operating the CQCN, including developing and maintaining the network infrastructure (e.g. construction, maintenance and renewal) and network operations (e.g. train control and scheduling). This rail infrastructure is governed by 99-year lease arrangements with the Queensland Government (expiring on 30 June 2109).¹⁸

The CQCN comprises approximately 2,670 kilometres of rail track connecting over 40 mines in central Queensland to five export coal terminals.¹⁹ The CQCN includes the Newlands system, the Goonyella system, the Blackwater system, the Moura system and the Goonyella to Abbot Point Expansion (**GAPE**).

These rail systems are shown at Figure 2 below.

¹⁴ QCA, *Part B: Queensland Rail declaration review*, final recommendation, March 2020, pp. 2–3, <https://www.qca.org.au/wp-content/uploads/2019/05/declaration-reviews-final-recommendations-part-b-queensland-rail-service.pdf>.

¹⁵ Queensland Rail, *2019–20 Annual Report*, September 2020, pp. 19, 22, https://www.queenslandrail.com.au/about%20us/Documents/QueenslandRail_AnnualReport_2019-20.pdf.

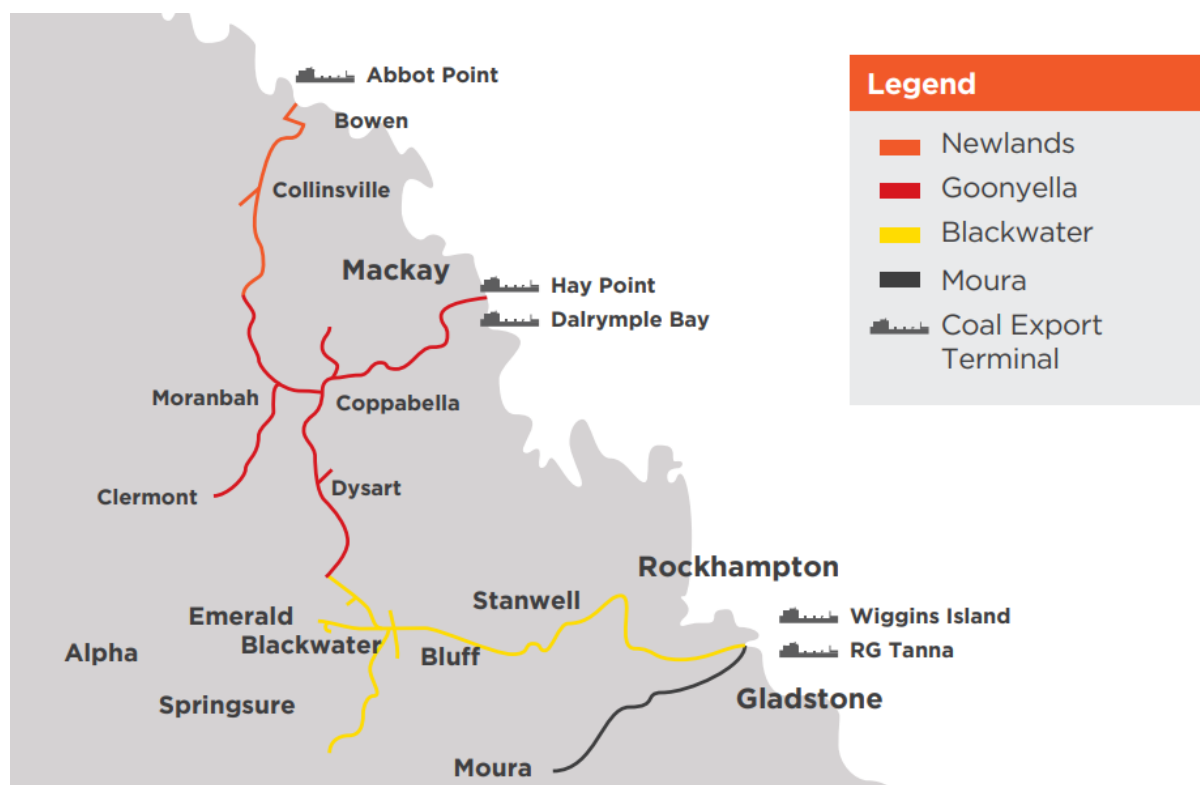
¹⁶ Queensland Rail operates all above-rail passenger services on its network other than the Savannahlander service on the Tablelands system which is operated by a private company, Cairns Kuranda Steam. The Kuranda Scenic Railway and Gulflander services also operate on the Tablelands system and are operated by Queensland Rail. The Tablelands system is not part of the Queensland Rail Services declared by the Minister.

¹⁷ This includes Aurizon's Coal business and Aurizon's Bulk business.

¹⁸ QR National, *Share Offer*, 8 October 2010, p. 90, http://media.corporateir.net/media_files/irol/23/235329/share_offer_document.pdf.

¹⁹ Aurizon Network, *2020 Sustainability Report*, p. 5, <https://www.aurizon.com.au/-/media/aurizon-media-library/sustainability/overview/sustainability-report-2020/sustainability-report-2020.pdf>.

Figure 2: CQCN coal systems



Source: Aurizon Network, 2020 Sustainability Report, p. 5.

The CQCN delivers over half of all global seaborne metallurgical coal.²⁰ Approximately 226 million tonnes of coal were delivered in the 2019–20 financial year.²¹

There are currently four haulage operators operating on the CQCN – Aurizon Operations, Pacific National, BMA Rail and One Rail Australia.

Australian Rail Track Corporation (ARTC)

The Australian Rail Track Corporation is a company whose shares are held by the Commonwealth of Australia. It was established through an intergovernmental agreement as a consolidated interstate rail track owner to create a single process for access.

In Queensland, ARTC leases the section of rail track from the Queensland border to the Acacia Ridge Terminal. It is responsible for selling access to train operators, development of new business, capital investment, operational management and management of infrastructure maintenance.²²

²⁰ Aurizon Network, 2020 Sustainability Report, p. 5, <https://www.aurizon.com.au/-/media/aurizon-media-library/sustainability/overview/sustainability-report-2020/sustainability-report-2020.pdf>.

²¹ Aurizon Network, Annual Maintenance Cost Report–FY2020, September 2020, p. 10, <https://www.aurizon.com.au/-/media/project/aurizon/files/what-we-do/network/network-downloads/maintenance-costs/aurizon-network-annual-maintenance-cost-report-fy2020.pdf>.

²² ARTC, ARTC Submission on Submissions: QCA Declaration Review, submission to the QCA, July 2018, https://www.qca.org.au/wp-content/uploads/2019/05/34428_22-ARTC-Cross-Submission-2.pdf.

Pacific National

Pacific National is a major rail freight operator in Australia. It entered the Queensland above-rail market in 2005 and its operations in Queensland are now approximately 25% of its total operations. Between 2009 and 2018, Pacific National increased its share of the Queensland coal transport market and hauled approximately 30% of the coal transported in Queensland in 2018. Pacific National was also the first new entrant in Queensland's bulk freight industry and has been providing these services since 2011.²³

Pacific National provides services in three major Queensland sectors – non-bulk freight operating primarily on Queensland Rail's North Coast Line but also traversing sections of Aurizon Network's CQCN, coal freight operating on Aurizon Network's CQCN and bulk non-coal freight for the minerals and other industries operating on Queensland Rail's Mount Isa Line.²⁴

Aurizon Operations (Coal and Bulk)

Aurizon Operations is a wholly-owned subsidiary of Aurizon. The organisational structure of Aurizon facilitates the separation of the management of below-rail infrastructure by Aurizon Network (discussed above) from the above-rail operations.

Aurizon Operations' Coal business has a large fleet of locomotives and wagons, totalling in excess of \$3 billion. It hauls around half of Australia's export coal volume and around 10% of the coal hauled is for domestic use, contributing to Australia's energy generation.²⁵ It is the largest haulage provider on the CQCN and also provides above-rail coal haulage services on the West Moreton system.²⁶

Aurizon Operations' Bulk business provides above-rail freight haulage services on Queensland Rail's Mount Isa Line and the agricultural systems (i.e. Western, Central Western and South Western systems).²⁷

²³ Pacific National, *QCA declarations review: applying the access criteria*, submission to the QCA in the declaration reviews process, 30 May 2018, p. 2, https://www.qca.org.au/wp-content/uploads/2019/05/33698_9-Pacific-National-Submission-2.pdf.

²⁴ Pacific National, *QCA declarations review: applying the access criteria*, submission to the QCA in the declaration reviews process, 30 May 2018, pp. 2–3.

²⁵ Aurizon Network, *2020 Sustainability Report*, p. 4.

²⁶ QCA, *Part A: Aurizon Network declaration review*, final recommendation, March 2020, p. 12; QCA, *Part B: Queensland Rail declaration review*, final recommendation, March 2020, p. 95.

²⁷ Aurizon, *What we deliver–Bulk*, accessed 9 October 2020, <https://www.aurizon.com.au/what-we-deliver/bulk>; QCA, *Part B: Queensland Rail declaration review*, final recommendation, March 2020, pp. 74, 110.

Linfox

Linfox is Australia's largest privately owned logistics company and operates extensive door-to-door intermodal rail services across Queensland. Almost 30 train services a week are facilitated by Linfox, delivering essential items to communities across central, western and northern Queensland.²⁸ This allows regional Queensland's agricultural, manufactured and bulk commodity products to reach southern and export markets.²⁹

Linfox acquired an existing Queensland Intermodal Business from Aurizon Operations in 2019.³⁰ Its intermodal operations traverse Queensland Rail's North Coast Line and Central Western rail systems, across both Queensland Rail and Aurizon Network rail infrastructure.³¹

Watco

Watco Australia commenced operations in 2011 and operates rolling stock for grain export in Western Australia. In 2019, it secured a long-term contract to transport bulk grain for Graincorp in Queensland and has provided haulage for Graincorp's grain exports since December 2019. It transports the goods to three ports in Queensland – Port of Brisbane, Port of Gladstone and Port of Mackay.³² In doing so, it utilises Queensland Rail's agricultural systems.³³

BMA Rail

BMA Rail commenced operations in 2014 and provides haulage services exclusively to its related coal producer, BHP Mitsubishi Alliance (**BMA**). It utilises Aurizon Network's below-rail services on the CQCN to service its related mines.

One Rail Australia

One Rail Australia (previously Genesee & Wyoming Australia) is a rail-based freight and logistics company, with operations across New South Wales, South Australia and the Northern Territory. In 2020, One Rail Australia commenced rail freight operations in Queensland hauling export thermal and metallurgical coal on Aurizon Network's CQCN.³⁴

²⁸ Linfox, *Rail freight*, accessed 9 October 2020, <https://www.linfox.com/transport-freight/rail-freight/>.

²⁹ Linfox, *Declarations review: Aurizon Network and Queensland Rail*, submission to the QCA, 11 June 2019, <https://www.qca.org.au/wp-content/uploads/2019/05/linfox-submission.pdf>.

³⁰ Linfox, *Linfox secures strategic purchase of Aurizon Queensland Intermodal business*, accessed 9 October 2020, <https://www.linfox.com/article/linfox-secures-strategic-purchase-of-aurizon-queensland-intermodal-business/>.

³¹ Linfox, *Declarations review: Aurizon Network and Queensland Rail*, submission to the QCA, 11 June 2019.

³² Watco, *About*, accessed 9 October 2020, <https://www.watcocompanies.com/services/rail/australia/>.

³³ Watco, *QCA Part B: Queensland Rail Declaration Review*, submission to the QCA, 8 May 2019, <https://www.qca.org.au/wp-content/uploads/2019/05/watco-submission.pdf>.

³⁴ One Rail Australia, *Sustainability Report 2019*, pp. 3–4, <https://1rail.com.au/pdf/2019-sustainability-report.pdf>.

5. Overview of Queensland's third party rail access regime

The QCA Act provides the legislative framework for economic regulation in Queensland, including a third party access regime for services provided by means of significant infrastructure.

The Regime comprises the following:

- (a) the QCA Act (**Attachment 1**);
- (b) Aurizon Network's access undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. As outlined above, the current undertaking is UT5 (**Attachment 2**);
- (c) Queensland Rail's access undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. As outlined above, the current undertaking is AU2 (**Attachment 3**); and
- (d) the rail safety regime in Queensland which is established by the *Rail Safety National Law (Queensland) Act 2017 (Rail Safety National Law Act)* (**Attachment 4**), the Rail Safety National Law (**Attachment 5**) and provisions under the *Transport Infrastructure Act 1994 (Qld) (TIA)* (**Attachment 6**);

The scope of services covered by Part 5 of the QCA Act is determined by declarations made by the Minister under section 84 of the QCA Act. On 31 May 2020, the Minister declared the use of a coal system for providing transportation by rail as a service under section 84(1)(a) of the QCA Act (**Attachment 7**). The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2040 (a period of 20 years).³⁵

The Minister also declared the following parts of the Queensland Rail service, which are each a service, under section 84(1)(b) of the QCA Act:

- (a) the North Coast Route service;
- (b) the Mount Isa Route service;
- (c) the West Moreton Route service;
- (d) the Central Western Route service;
- (e) the Western Route service;
- (f) the South Western Route service.

³⁵ Aurizon Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 203.

The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2035 (a period of 15 years).³⁶

The Minister also declared coal handling services at Dalrymple Bay Coal Terminal (**DBCT**) at this time. The certification of the access regime governing the DBCT service is the subject of another certification extension application submitted to the Council at the same time as this application.

As set out in section 69E of the QCA Act, the object of the Regime is to promote the economically efficient operation of, use of and investment in significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. This mirrors the object of Part IIIA of the CCA, which is set out in section 44AA(a) of the CCA.

QCA Act

Part 5 of the QCA Act establishes the State-based third party access regime for services provided by means of significant infrastructure in Queensland. A service may be declared for third party access under the regime and subject to regulation by the QCA.

As outlined above, Part 5 of the QCA Act contains two separate methods of obtaining access to declared services. Those are the negotiate-arbitrate model and the access undertaking model. These methods are only available where a service is declared, and so the structure of Part 5 of the QCA Act is essentially as follows:

- (a) *Declaration of a service* – Part 5, Division 2 of the QCA Act sets out a process for the declaration of services which triggers the two methods of obtaining access under the QCA Act. A declaration can only be made by ministerial decision;
- (b) *Negotiation framework* – Part 5, Division 4 of the QCA Act provides that once a service has been declared, there is a statutory obligation on access providers to negotiate access rights with access seekers.³⁷ This part of the regime contains various provisions to provide a framework for good faith negotiations between parties as set out below;
- (c) *Dispute resolution process* – Part 5, Division 5 of the QCA Act provides mechanisms in the event that there is an access dispute, including that the QCA may act as an arbitrator and make an access determination to settle the dispute;
- (d) *Access undertaking framework* – Part 5, Division 7 of the QCA Act sets out a

³⁶ Queensland Rail Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 216.

³⁷ Section 99 of the QCA Act.

process for the submission and approval of access undertakings which cover a wide range of issues relating to the service including access charges, the provision of information to access seekers, ring fencing arrangements, extensions of the facility and the safe operation of the facility; and

- (e) *Enforcement* – Part 5, Division 8 of the QCA Act sets out various enforcement mechanisms including orders to enforce access determinations and the prohibition on hindering access, as well as injunctions and orders to enforce access undertakings.

The QCA Act itself has not changed materially since the Commonwealth Minister decided to certify the Regime as effective in 2011. The main changes relate to the access criteria in section 76 of the QCA Act in order to remain consistent with amendments made to the declaration criteria specified in s44CA of the CCA.³⁸ These changes ensured that the QCA Act continues to align with the National Access Regime.

Access Undertakings under the QCA Act

Aurizon Network's UT5

UT5 is made and enforced under the QCA Act and covers a range of issues, including:

- (a) ring fencing arrangements (Part 3);
- (b) framework for negotiating access (Part 4);
- (c) the development of access agreements (Part 5);
- (d) pricing principles (Part 6);
- (e) the allocation and management of available capacity (Part 7);
- (f) network development and expansions (Part 8);
- (g) reporting, compliance and audits (Part 10); and
- (h) dispute resolution and decision making processes (Part 11).

Queensland Rail's AU2

AU2 is made and enforced under the QCA Act and covers a range of issues, including:

- (a) network extensions (Part 1.4);
- (b) process for negotiating access (Part 2);
- (c) pricing rules (Part 3);

³⁸ See *Queensland Competition Authority Amendment Act 2018* (Qld).

- (d) operating requirements (Part 4);
- (e) reporting requirements and obligations (Part 5); and
- (f) dispute and complaint resolution processes (Part 6).

Previous access undertakings also covered the matters listed above. Section 137 of the QCA Act prescribes the specific matters that must be included in a compliant access undertaking.

Rail safety regime

The rail safety regime in Queensland is established by the Rail Safety National Law Act and the TIA.

The Rail Safety National Law Act applies the Rail Safety National Law, which governs the safe use of rail infrastructure and is applied by a national regulator, the Office of the National Rail Safety Regulator. This allows for a nationally consistent rail safety law whereas prior to the introduction of this legislation, rail safety regulation was delivered by State and Territory regulators.

The TIA also contains provisions relating to the transportation of dangerous goods by rail.³⁹ This is governed by the Department of Transport and Main Roads as the dangerous goods regulator for rail.⁴⁰

While the legislative mechanisms that provide for the rail safety regime have changed since the previous certification application in 2011, the new provisions continue to ensure the safe use of rail infrastructure in Queensland. This is addressed in further detail below in Chapter 8.

³⁹ Chapter 14 of the TIA.

⁴⁰ Department of Transport and Main Roads, *Regulating rail safety in Queensland, information for operators*, accessed 1 October 2020, <https://www.tmr.qld.gov.au/Safety/Rail-safety/Information-for-operators>.

6. Approach to analysis of Clause 6 principles

The CCA and the CPA set out the appropriate approach to the consideration of an application for certification (or extension of certification).

Sections 44M(4) and 44N(2) require that the Council, in deciding what recommendation should be made as to certification, and the Commonwealth Minister, in deciding whether to certify the regime, must:

- (a) assess whether the access regime is an effective access regime by applying the relevant principles set out in the CPA;
- (b) have regard to the objects in Part IIIA of the CCA; and
- (c) subject to section 44DA, not have regard to any other matter.⁴¹

Section 44DA imposes an obligation on the Council and the relevant Minister to treat each individual Clause 6 principle as having the status of a guideline rather than a binding rule and provides that an effective access regime may contain additional matters that are not inconsistent with the Clause 6 principles.

Clause 6(3) of the CPA states that provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a Clause 6 principle, the regime can be taken to have reasonably incorporated that principle.

Clause 6(3A) of the CPA states that in assessing whether a State or Territory access regime is an effective access regime, the Council and the Commonwealth Minister should not consider any matters other than the Clause 6 principles. Those matters which should not be considered include the outcome of any arbitration or any decision made under the access regime.

It is clear from the above matters that the approach to considering an application for certification (or extension of certification) is:

- (a) to consider the Clause 6 principles;
- (b) that there are a range of approaches to the incorporation of a Clause 6 principle, and that as long as the approach adopted by the State access regime is a reasonable approach, then that Clause 6 principle is satisfied; and
- (c) to have regard to the objects of Part IIIA of the CCA set out in section 44AA.

⁴¹ In relation to the consideration of an application for extension of the Commonwealth Minister's decision, sections 44NA(4) and 44NB(1) also direct the Council and the Commonwealth Minister to make their assessment in accordance with sections 44M and 44N(2) respectively.

The NCC Guidelines state that an application may consider the Clause 6 principles sequentially or according to the Council's categories as outlined in the NCC Guidelines.⁴² For the purposes of this application, each of the clauses are discussed sequentially.

The QCA Act also contains other matters that are not relevant for the purposes of this application and consequently, have not been discussed in the application. In accordance with section 44DA(2) of the CCA and clause 6(3A)(b) of the CPA, these matters are not inconsistent with the relevant principles of the CPA and do not impact the effectiveness of the Regime.

⁴² NCC Guidelines at [3.6].

7. Clause 6(2): jurisdictional issues

Clause 6(2): jurisdictional issues

The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or*
- (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.*

The NCC Guidelines state that clause 6(2) suggests that a state or territory access regime may be found to be ineffective as a result of its influence beyond the jurisdictional boundary of the state or territory, or substantial difficulties arising because the infrastructure subject to the regime crosses a state or territory border.⁴³

Section 76(5)(a) of the QCA Act requires that the QCA and Minister must have regard to cross-jurisdictional issues when considering whether a service meets the criteria for declaration under Part 5 of the QCA Act. Specifically, if the facility for the service extends outside Queensland, the QCA and the Minister must have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

The Regime only applies to railway lines and rail infrastructure which are situated wholly within the state of Queensland. The interstate rail track situated between Acacia Ridge and the New South Wales border is leased and operated by the Australian Rail Track Corporation and is not covered by the Regime.

Therefore, the Regime is not ineffective having regard to the influence of the facility beyond the jurisdictional boundary of Queensland, nor is the facility situated in more than one jurisdiction.

Summary

The rail infrastructure covered by the Regime does not extend beyond the jurisdictional boundary of Queensland.

The clause 6(2) principle is satisfied.

⁴³ NCC Guidelines at [5.83].

8. Clause 6(3): significant infrastructure

Clause 6(3): significant infrastructure

For a State or Territory access regime to conform to the principles set out in this clause, it should:

- (a) apply to services provided by means of significant infrastructure facilities where:
 - (i) it would not be economically feasible to duplicate the facility;*
 - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and*
 - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and**
- (b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).*

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

The NCC Guidelines state that clause 6(3)(a) sets out threshold effectiveness principles which require that the coverage of a certifiable access regime be limited to a narrow range of services. It is necessary to:

- (a) define the service(s) covered by the access regime; and
- (b) demonstrate that the access regime applies only to the services of significant infrastructure facilities in the circumstances described in clause 6(3)(a).⁴⁴

Services covered by the Regime

The NCC Guidelines state that an effective access regime (and an application for certification of the regime) should clearly and precisely define the services subject to it.⁴⁵

Section 72(1) of the QCA Act provides that Part 5 of the QCA Act applies to services provided, or to be provided by means of a facility and includes:

- (a) the use of a facility (including, for example, a road or railway line);
- (b) the transporting of people;
- (c) the handling or transporting of goods or other things; and

⁴⁴ NCC Guidelines at [4.1]–[4.2].

⁴⁵ NCC Guidelines at [4.3].

- (d) a communications service or similar service.

Section 72(2) of the QCA Act specifically excludes the following from the definition of services covered by the QCA Act:

- (a) the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service);
- (b) the use of intellectual property or a production process (except to the extent the use is an integral, but subsidiary, part of the service); or
- (c) a service—
 - (i) provided, or to be provided, by means of a facility for which a decision of the Australian Competition and Consumer Commission (**ACCC**), approving a competitive tender process under the CCA, section 44PA, is in force; and
 - (ii) that was stated under section 44PA(2) of the CCA in the application for the approval.

Aurizon Network's declared service

The declaration of the Aurizon Service by the Minister on 31 May 2020 specifies the service to which the Regime applies as the *use of a coal system for providing transportation by rail*, pursuant to section 84(1)(a) of the QCA Act. The notice of the Minister's decision outlines that this phrase has the same meaning as the expression which appears in section 250(1)(a) of the QCA Act.⁴⁶

Section 250(3) of the QCA Act provides that:

'For this section, **coal system** means rail transport infrastructure that is—

- (a) part of any of the following—
 - (i) the Blackwater system, being the railway connecting Gregory, Rolleston and Minerva to Gladstone, including the part of the North Coast Line between Parana and Rocklands, as shown on the diagram in schedule 1;
 - (ii) the Goonyella system, being the railway connecting Gregory, North Goonyella and Blair Athol mine to the Port of Hay Point, as shown on the diagram in schedule 1;
 - (iii) the Moura system, being the railway connecting Moura mine to Gladstone, as shown on the diagram in schedule 1;

⁴⁶ Aurizon Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 203.

Section 250(4) provides that:

'Also, a **coal system** includes an extension of the coal system that—

- (a) is built on or after 30 July 2010; and
- (b) does not directly connect the coal system to a coal basin to which the coal system was not directly connected on 30 July 2010; and
- (c) is owned or leased by—
 - (i) the owner or lessee of the coal system; or
 - (ii) a related body corporate of the owner or lessee of the coal system.'

The rail transport infrastructure connecting the Newlands and Goonyella systems (forming part of the Goonyella to Abbot Point Expansion (**GAPE**) project) was constructed after 30 July 2010 and is covered by the declaration as an extension of the coal system.

Section 250(5) provides that '**North Coast Line** means the railway running the length of the coast of Queensland from Brisbane to Cairns'.

'Rail transport infrastructure' is defined in the QCA Act by reference to the definition of that phrase in schedule 6 of the TIA.⁴⁷ Schedule 6 of the TIA defines 'rail transport infrastructure' as the facilities necessary for operating a railway including:

- (a) railway track and works built for the railway, including, for example—
 - cuttings;
 - drainage works;
 - excavations;
 - land fill;
 - track support earthworks; and
- (b) any of the following things that are associated with the railway's operation—
 - bridges;
 - communication systems;
 - machinery and other equipment;
 - marshalling yards;

⁴⁷ See also Schedule 2 of the QCA Act.

- notice boards, notice markers and signs;
 - overhead electrical power supply systems;
 - over-track structures;
 - platforms;
 - power and communication cables;
 - service roads;
 - signalling facilities and equipment;
 - stations;
 - survey stations, pegs and marks;
 - train operation control facilities;
 - tunnels;
 - under-track structures;
- (c) vehicle parking and set down facilities for intending passengers for a railway that are controlled or owned by a railway manager or the chief executive; and
- (d) pedestrian facilities, including footpath paving, for the railway that are controlled or owned by a railway manager or the chief executive;

but does not include other rail infrastructure.

‘Other rail infrastructure’ is excluded from the definition of ‘rail transport infrastructure’ and therefore is not subject to the Regime. It is defined in Schedule 6 of the TIA as:

- (a) freight centres or depots;
- (b) maintenance depots;
- (c) office buildings or housing;
- (d) rollingstock or other vehicles that operate on a railway;
- (e) workshops; or
- (f) any railway track, works or thing that is part of anything mentioned in paragraphs (a) to (e).

The definitions of ‘coal system’ and ‘rail transport infrastructure’ clearly outline the facility that is the subject of the declaration. The QCA Act and the Ministerial declaration clearly define

the service provided by means of that facility to be the use of a coal system for providing transportation by rail.

The NCC Guidelines state that in cases where an access regime expressly excludes certain services, the exclusion may raise certification issues if the omission poses a barrier to access, for example, where the excluded service is integral to accessing the services covered by the regime.⁴⁸ Whilst the definition of 'other rail infrastructure' excludes certain facilities from the regime, the exclusion will not pose a barrier to access because the excluded facilities are economically feasible to duplicate or are not necessary to obtaining access. If infrastructure is not listed in either the definition of 'rail transport infrastructure' or 'other rail infrastructure' and it is considered necessary to obtaining access then it will be covered on the basis that the definition of 'rail transport infrastructure' is an inclusive definition which covers all infrastructure necessary for operating a railway. The exclusion of 'other rail infrastructure' did not prevent the certification of the Regime in 2011.

Queensland Rail's declared service

The declaration of the Queensland Rail Services by the Minister on 31 May 2020, pursuant to section 84(1)(b) of the QCA Act, specifies the services to which the Regime applies as *the following parts of the Queensland Rail service, which parts are each a service:*

- (a) *the North Coast Route service;*
- (b) *the Mount Isa Route service;*
- (c) *the West Moreton Route service;*
- (d) *the Central Western Route service;*
- (e) *the Western Route service; and*
- (f) *the South Western Route service.*

The Minister's decision defines each of the relevant terms as follows:

- 'Central Western Route service' means the use of the Central Western system, the Metropolitan system, and those parts of the North Coast Line that interconnect the Central Western system and Metropolitan system and the Port of Mackay;
- 'Central Western system' means those parts of the Queensland Rail service that extend from Nogoa to Winton and includes the branch line from Emerald to Clermont (illustrated in orange on the map in Figure 4);

⁴⁸ NCC Guidelines at [4.7].

- 'Metropolitan system' means those parts of the Queensland Rail service radiating from the Brisbane central business district, bounded by Rosewood to the west and Nambour to the north, and that extend south to Varsity Lakes station in the Gold Coast region, as well as south-west to the Acacia Ridge Terminal (illustrated in light green on the map in Figure 4). Where use of the Metropolitan system is referred to as part of the relevant service, it is a reference to the use of the whole of the Metropolitan system;
- 'Mount Isa Route service' means the use of the Mount Isa Line and those parts of the North Coast Line that interconnect the Mount Isa Line and the Port of Townsville;
- 'Mount Isa Line' means those parts of the Queensland Rail service that extend from Mount Isa to Stuart and includes the branch line from Flynn to Phosphate Hill (illustrated in dark green on the map in Figure 4);
- 'North Coast Route service' means the use of the North Coast Line and the Metropolitan system;
- 'North Coast Line' means those parts of the Queensland Rail service bounded to the south by (and including) Nambour station, to the north by (and including) Cairns and to the west by (but excluding) Stuart and including all branch lines, comprised in that part of the network, including those in the Maryborough area and Taragoola to Graham (illustrated in purple on the map in Figure 4);
- 'Queensland Rail service' has the same meaning as 'the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager' as it appears in section 250(1)(b) of the QCA Act as at the date this notice is gazetted;
- 'South Western Route service' means the use of the South Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the South Western system and the Metropolitan system;
- 'South Western system' means those parts of the Queensland Rail service that extend from Toowoomba to Thallon via Warwick, and includes the branch lines from Wyreema to Millmerran and Warwick to Wallangarra. The South Western system adjoins the West Moreton system at Toowoomba (illustrated in yellow on the map in Figure 4);
- 'Western Route service' means the use of the Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the Western system and the Metropolitan system;

- 'Western system' means those parts of the Queensland Rail service that extend from Miles to Quilpie and includes the branch lines from Westgate to Cunnamulla, Dalby to Meandarra (Glenmorgan), Miles to Wandoan and Tycanba to Jandowae. The Western system adjoins the West Moreton system at Miles (illustrated in light blue on the map in Figure 4);
- 'West Moreton Route service' means the use of the West Moreton system and the Metropolitan system; and
- 'West Moreton system' means those parts of the Queensland Rail service that extend between Rosewood and Miles. It adjoins the Metropolitan system at Rosewood and adjoins the Western system at Miles (illustrated in pink on the map in Figure 4).⁴⁹

Figure 4: Queensland Rail network



⁴⁹ Queensland Rail Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 216.

The facility for each part of the Queensland Rail service is defined as all relevant rail transport infrastructure used to provide the declared rail access services to customers in the relevant dependent markets and not just the railway track.⁵⁰

The Ministerial declaration clearly defines each service provided by means of each facility.

Access regime applies only to the services of a significant infrastructure facility

The NCC Guidelines state that to meet the clause 6(3)(a) principles, an access regime should only apply to services (or proposed services) of significant infrastructure facilities where:

- (a) duplication of the facility is not economically feasible (clause 6(3)(a)(i));
- (b) access is necessary to permit effective competition in an upstream or downstream market (clause 6(3)(a)(ii)); and
- (c) safe use of the facility by an access seeker is economically feasible and subject to appropriate regulatory arrangements (clause 6(3)(a)(iii)).⁵¹

In essence, the clause 6(3)(a) principles refer primarily to the services of significant infrastructure that cannot be economically duplicated and that occupy a strategic position in the service delivery chain whereby access is essential for effective competition in a dependent market or markets.⁵²

The Regime incorporates these principles through the declaration process contained in the QCA Act and the rail safety provisions.

The declaration process is a two-step process, similar to the declaration process in the National Access Regime. Section 77 of the QCA Act provides that an application may be made to the QCA for a recommendation that a particular service be declared by the Minister. Pursuant to section 79 of the QCA Act, the QCA must then make a recommendation to the Minister as to whether the service should be declared.

Section 80 of the QCA Act outlines that the QCA may only recommend that a service be declared by the Minister if the QCA is satisfied about the access criteria for the service. Section 84 provides that upon receiving a recommendation, the Minister must then make a decision as to whether the service should be declared. Pursuant to section 86 of the QCA Act, the

⁵⁰ *Statement of reasons concerning the declaration of the use of rail transport infrastructure operated by Queensland Rail Limited* (QR Statement of Reasons), Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 225.

⁵¹ NCC Guidelines at [4.8].

⁵² NCC Guidelines at [4.9].

Minister must declare a service if they are satisfied about all of the access criteria for the service.

The access criteria are set out in section 76(2) of the QCA Act and mirror the declaration criteria in the National Access Regime.⁵³ Specifically, the access criteria in section 76(2) of the QCA Act are as follows:

- (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service;
- (b) that the facility for the service could meet the total foreseeable demand in the market—
 - (i) over the period for which the service would be declared; and
 - (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);
- (c) that the facility for the service is significant, having regard to its size or its importance to the Queensland economy; and
- (d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

The Council considers it appropriate to interpret the clause 6(3)(a) principles as far as possible in a manner consistent with the declaration criteria in the National Access Regime, while recognising the differences in wording.⁵⁴ The NCC Guidelines state that despite some differences in expression, the principles in clause 6(3)(a) and subclauses (i) and (ii) are broadly equivalent to criteria (c), (b) and (a) in section 44CA(1) of the CCA.

Given the similarities between the access criteria outlined in section 44CA(1) of the CCA and section 76(2) of the QCA Act, this suggests that the principles in clause 6(3)(a) and subclauses (i) and (ii) are also broadly equivalent to criteria (c), (b) and (a) in section 76(2) of the QCA Act.⁵⁵

Table 1 contains a comparison of the principles set out in clause 6(3)(a) of the CPA and the access criteria in section 76(2) of the QCA Act.

⁵³ Section 44CA(1) of the QCA Act.

⁵⁴ NCC Guidelines at [4.12].

⁵⁵ NCC Guidelines at [4.10].

Table 1: Summary of principles satisfied under clause 6(3)(a)

Clause 6(3)(a) principles	Corresponding declaration criteria (section 76(2) of the QCA Act)
(a) apply to services provided by means of significant infrastructure facilities where:	(c) the facility for the service is significant having regard to its size or its importance to the Queensland economy
(i) it would not be economically feasible to duplicate the facility	(b) that the facility for the service could meet total foreseeable demand in the market— (i) over the period for which the service would be declared; and (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service)
(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market	(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service

Given that the principles in clause 6(3)(a) and subclauses (i) and (ii) are broadly equivalent to criteria (c), (b) and (a) in section 76(2) of the QCA Act and taking into account that the safe use of the facilities is ensured through the rail safety provisions, the facilities used to provide the Aurizon Service and the Queensland Rail Services can be considered to be significant infrastructure.

These facilities include:

- (a) Aurizon Network’s Central Queensland Coal Network (**CQCN**); and
- (b) the facilities used to provide the Queensland Rail Services, which are:
 - the North Coast Route;
 - the Mount Isa Route;
 - the West Moreton Route;
 - the Central Western Route;
 - the Western Route; and

- the South Western Route.

The features of these facilities that support their categorisation as significant infrastructure in accordance with clause 6(3)(a) are discussed in further detail below.

Features of the facilities

The NCC Guidelines state that the Council's approach to clause 6(3)(a) is to consider whether a facility providing services subject to a state or territory regime is 'significant' in terms of its size or importance to the economy of the state or territory or, if applicable, the regional or national economy.⁵⁶

Size and importance to the Queensland economy

Aurizon Network's CQCN

The CQCN is Australia's largest export coal rail network, transporting approximately 226 million tonnes of coal in the 2019–20 financial year.⁵⁷ It comprises around 2,670 kilometres of rail infrastructure connecting over 40 mines to export terminals at the Ports of Abbot Point, Hay Point and Gladstone. This rail infrastructure facilitates the delivery and exportation of coal from central Queensland mines and is a critical component of Queensland's mining industry.

The CQCN facilitates the operation of a significant proportion of Queensland's coal industry, which in turn makes a sizeable economic contribution to Queensland. This includes direct contributions as well as spillover benefits such as employment, spending, government royalty payments and community contributions.⁵⁸

Queensland Rail's facilities

North Coast Route

The North Coast Route is comprised of the North Coast Line and the Metropolitan system (as shown in Figure 4 above). The North Coast Route is significant in size, with the North Coast Line extending across a substantial area of the state (from Nambour (near Brisbane) north along Queensland's eastern coastline to Cairns).

The North Coast Route carries substantial annual volumes of freight, as well as a number of regional passengers. It is a crucial freight corridor connecting freight traffic from other rail

⁵⁶ NCC Guidelines at [4.14].

⁵⁷ Aurizon Network, *Annual Maintenance Cost Report–FY2020*, September 2020, p. 10, <https://www.aurizon.com.au/-/media/project/aurizon/files/what-we-do/network/network-downloads/maintenance-costs/aurizon-network-annual-maintenance-cost-report-fy2020.pdf>.

⁵⁸ Queensland Resources Council, *QRC submissions–CQCN*, submission to the QCA, 30 May 2018, p. 23, https://www.qca.org.au/wp-content/uploads/2019/05/33694_7-Queensland-Resources-Council-Submission-2.pdf.

systems to various export ports on Queensland's eastern coast line. It also connects key coastal Queensland cities (including Brisbane).⁵⁹

Mount Isa Route

The Mount Isa Route is comprised of the Mount Isa Line and those parts of the North Coast line that interconnect the Mount Isa Line and the Port of Townsville. The Mount Isa Route is of an extensive length, with the Mount Isa line measuring approximately 1,039 kilometres in length. It also has an extensive geographic spread (extending from Queensland's eastern coastline to almost its western border). Substantial annual volumes of freight are carried on the Mount Isa Route.⁶⁰

The Mount Isa Route makes significant contributions to the Queensland economy through its operation as a fully commercial line, contributing significant amounts in access charges. It also supports the development of the North West Minerals Province and enables key regional industries that contribute substantially to the Queensland economy, including through employment, local spending and government royalty payments.

West Moreton Route

The West Moreton Route comprises the West Moreton system and the Metropolitan system. It is of substantial length (i.e. the West Moreton system is 380 kilometres long) and covers a wide geographic scope extending across a large area of southern Queensland and the greater Brisbane region. The volume of freight carried annually by the West Moreton Route is also substantial. For example, the West Moreton system carried approximately 6.4 million net tonnes of freight, including coal and agricultural products, in 2018–19.⁶¹

The West Moreton Route makes substantial direct contributions to the Queensland economy in the form of access revenue. The West Moreton Route also facilitates the operation of industries such as coal mining, rail haulage and agriculture that contribute substantially to the Queensland economy, both in terms of direct revenue as well as employment and regional development.

⁵⁹ Queensland Rail, *Declaration Review: Queensland Rail's Response to the QCA's Draft Recommendation*, submission to the QCA, 11 March 2019, pp. 63–65, <https://www.qca.org.au/wp-content/uploads/2019/05/33-queensland-rail-submission-on-draft-recommendation.pdf>.

⁶⁰ Queensland Rail, *Declaration Review: Queensland Rail's Response to the QCA's Draft Recommendation*, submission to the QCA, 11 March 2019, pp. 65–66.

⁶¹ Queensland Rail, *2018–19 Annual Performance Report*, Queensland Rail Access Undertaking 1, December 2019, p. 7.

Central Western Route

The Central Western Route comprises the Central Western system, the Metropolitan system and those parts of the North Coast Line that interconnect the Central Western system and Metropolitan system and the Port of Mackay.

The Central Western system extends over 700 kilometres in length. The system runs from Nogoa to Winton via Emerald, and includes the Emerald to Clermont branch line. It connects to Aurizon Network's Blackwater system at Nogoa. The freight on this system typically travels via the Blackwater system to and from the North Coast Line, and to and from the various ports including at Rockhampton, Gladstone and Brisbane.⁶²

The Central Western Route provides an option for grain and livestock transport from Central Western Queensland, as well as an option for freight and supplies to be transported into regional communities. It is also a source of tourism as it carries Queensland Rail's Spirit of the Outback passenger service.⁶³

Western Route

The Western Route comprises the Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the Western system and the Metropolitan system.

The Western system is sizeable, extending over 1,080 kilometres in length (although approximately 312 kilometres of this is non-operational) and consists of the corridor from Miles to Cunnamulla with four additional branch lines (Westgate to Quilpie, Dalby to Glenmorgan, Miles to Wandoan and Tycanba to Jandowae). It carries agricultural products including grain and livestock, as well as general freight and the Westlander passenger service between Brisbane and Charleville.⁶⁴

South Western Route

The South Western Route comprises the South Western system, the Metropolitan system and those parts of the West Moreton system that interconnect the South Western system and the Metropolitan system.

⁶² Queensland Rail, *Declaration Review: Queensland Rail's Response to the QCA's Draft Recommendation*, submission to the QCA, 11 March 2019, p. 72; Queensland Rail, *Central West system*, accessed 27 October 2020, <https://www.queenslandrail.com.au/forbusiness/the-regional-network/central-western-system>.

⁶³ Queensland Rail, *Annual and Financial Report 2016–17*, p. 29.

⁶⁴ Queensland Rail, *Western System Information Pack*, October 2016, p. 5, <https://www.queenslandrail.com.au/business/access/Documents/Western%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf>.

The South Western system extends over 615 kilometres. The primary corridor extends from Toowoomba to Thallon via Warwick, with branch lines from Warwick to Wallangarra and Wyreema to Milmerran. It connects to the West Moreton system at Toowoomba.⁶⁵

The South Western Route provides an option for the transport of agricultural products such as grain from the agricultural regions of the Darling Downs.

From the descriptions provided above, it is clear that the facilities that are used to provide the services declared under Queensland's third party rail access regime are significant in terms of their size or their importance to the Queensland economy.

Therefore, the facilities used by Aurizon Network and Queensland Rail to provide the declared services are significant infrastructure which satisfies the clause 6(3)(a) principle.

Duplication of the facility is not economically feasible

The NCC Guidelines state that the Council's view is that the clause 6.3(a)(i) principle requires an application of the natural monopoly test.⁶⁶ Similarly, the Council interprets criterion (b) in the National Access Regime (which is reflected in the Regime) as being concerned with the waste of resources associated with duplication of facilities that exhibit natural monopoly characteristics; that is, where a single facility could meet all likely demand for a service at lesser cost than two or more facilities.⁶⁷

It is clear from the structure of the Regime that access regulation under the QCA Act is intended only to be applied to a limited class of facilities, specifically those that exhibit natural monopoly characteristics. The object of Part 5 of the QCA Act and the access criteria in section 76 of the QCA Act which guide declaration of services reflect this by ensuring that services are only declared where it can be demonstrated that access regulation is appropriate and efficient, having regard to the nature of the facility and the competition outcomes which may result from declaration.

It is generally well recognised that rail infrastructure facilities exhibit natural monopoly characteristics. Rail infrastructure is associated with significant economies of scale, in that its development requires large initial outlays and typically sunk costs. However, once operational, the actual operating costs for these facilities are relatively low, resulting in decreasing average unit costs. Rail infrastructure may also be uneconomical to duplicate due to the specific

⁶⁵ Queensland Rail, *South Western System Information Pack*, October 2016, p. 5, <https://www.queenslandrail.com.au/business/access/Documents/South%20Western%20System%20Information%20Pack%20-%20Issue%203%20-%20October%202016.pdf>.

⁶⁶ NCC Guidelines at [4.8].

⁶⁷ NCC Guidelines at [4.17].

geographic requirements inherent with development, the minimum capacity that has to be built and the limited freight market.

The natural monopoly characteristics of rail infrastructure mean that it would be more efficient to increase the usage of the Queensland rail networks (or expand the capacity of the networks) and realise the resultant economies of scale, than expend the considerable costs necessary to duplicate the networks. The lack of the availability of a suitable location and access to land mean the cost of duplicating the networks is prohibitive.

It is more efficient to realise the economies of scale in expanding each of these rail networks than to expend the considerable costs (and time) necessary to duplicate the relevant infrastructure. Accordingly, it is not economically feasible to duplicate the CQCN and the relevant Queensland Rail facilities.

Access to the service permits effective competition in another market

The NCC Guidelines state that the clause 6(3)(a)(ii) principle is satisfied where the regulation of access by the regime will improve the conditions or environment for effective competition in a dependent market or markets.⁶⁸

Aurizon Service

Access to the Aurizon Service is necessary to allow effective competition in the above-rail haulage market for the CQCN.

The CQCN is Australia's largest export coal rail network, transporting approximately 226 million tonnes of coal in the 2019–20 financial year.⁶⁹ There are no substitutes for the use of the CQCN. Access to the Aurizon Service is therefore essential for haulage operators on the CQCN who transport predominantly coal from mines in the Bowen basin for export.

Aurizon Operations is an incumbent (Aurizon Network related) operator on the CQCN. Entry into the above-rail haulage market by third party operators including Pacific National, BMA Rail and One Rail Australia demonstrates that access to the Aurizon Service provides an environment in which competitive entry and expansion in the above-rail haulage market for the CQCN is feasible. Therefore, the Regime permits effective competition in a downstream or upstream market, namely the above-rail haulage market for the CQCN.

⁶⁸ NCC Guidelines at [4.8].

⁶⁹ Aurizon Network, *Annual Maintenance Cost Report–FY2020*, September 2020, p. 10, <https://www.aurizon.com.au/-/media/project/aurizon/files/what-we-do/network/network-downloads/maintenance-costs/aurizon-network-annual-maintenance-cost-report-fy2020.pdf>.

Queensland Rail Services

Access to the Queensland Rail Services is necessary to allow effective competition in the following dependent markets:

- (a) for the North Coast Route service – the above-rail freight haulage market;
- (b) for the Mount Isa Route service – the North West Queensland minerals tenements market;
- (c) for the West Moreton Route service – the market for coal tenements in the West Moreton region;
- (d) for the Central Western Route service – the above-rail freight haulage market;
- (e) for the Western Route service – the above-rail freight haulage market; and
- (f) for the South Western Route service – the above-rail freight haulage market.

There are no substitutes for the services Queensland Rail provides to above-rail operators. While Aurizon Network owns and operates rail infrastructure in Queensland, there is very little geographic overlap between the rail systems. Access to the Queensland Rail Services has promoted competition in the markets outlined above by allowing third party above-rail operators such as Pacific National, Aurizon Operations, Linfox and Watco to enter into and compete effectively in these markets. Therefore, the Regime permits effective competition in a downstream or upstream market, namely those markets listed at (a) to (f) above.

Safe use of the facilities can be ensured

The NCC Guidelines state that clause 6(3)(a)(iii) requires that access regimes apply to services where ‘the safe use of the facility...can be assured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist’.⁷⁰

The Rail Safety National Law Act applies the *Rail Safety National Law* (Qld) and includes provisions to suit Queensland’s rail environment. The Rail Safety National Law governs the safe use of rail infrastructure and is applied by a national regulator, the Office of the National Rail Safety Regulator. Among other things, the Rail Safety National Law provides that a rail transport operator must ensure, so far as is reasonably practicable, the safety of the operator’s railway operations.⁷¹ It also provides an accreditation system whereby it can be attested that

⁷⁰ NCC Guidelines at [4.21].

⁷¹ Section 52 of the *Rail Safety National Law* (Qld).

the rail transport operator has demonstrated to the regulator the competence and capacity to manage risks to safety associated with its railway operations.⁷²

The TIA also contains provisions relating to the transportation of dangerous goods by rail.⁷³ This is governed by the Department of Transport and Main Roads as the dangerous goods regulator for rail.⁷⁴

There are sufficient regulatory arrangements in place to ensure the safe use of the CQCN and the relevant Queensland Rail facilities, by an access seeker at an economically feasible cost.

Summary

The services that are the subject of the Regime are clearly defined. The access criteria in the QCA Act are consistent with the clause 6(3)(a) principles, such that the facilities that provide the relevant services can be considered to be significant infrastructure. In respect of the Aurizon Service and Queensland Rail Services:

- (a) the facilities used to provide the services are significant infrastructure when their size or importance to the Queensland economy is considered;
- (b) it is not economically feasible to duplicate these facilities;
- (c) access to the services promotes competition in dependent markets; and
- (d) the safe use of the facilities can be ensured through the rail safety provisions of the Rail Safety National Law Act and the TIA.

Therefore, the clause 6(3)(a) principles are satisfied.

⁷² Section 61 of the *Rail Safety National Law* (Qld).

⁷³ Chapter 14 of the TIA.

⁷⁴ Department of Transport and Main Roads, *Regulating rail safety in Queensland, information for operators*, accessed 1 October 2020, <https://www.tmr.qld.gov.au/Safety/Rail-safety/Information-for-operators>.

9. Clauses 6(4)(a)–(c): negotiated access

Clause 6(4): negotiated access

A State or Territory access regime should incorporate the following principles:

- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
- (b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
- (c) Any right to negotiate access should provide for an enforcement process.*

The NCC Guidelines state that clauses 6(4)(a)–(c) seek to ensure that an access regime provides an incentive for parties to reach agreement by commercial negotiation with recourse to regulatory intervention where negotiations are unsuccessful.⁷⁵

The objective of the Regime, which flows from the object of Part 5 of the QCA Act set out in section 69E of that Act, is to encourage the economically efficient operation of, use of, and investment in the railway facilities by which services are provided, with the effect of promoting effective competition in both upstream and downstream markets. In order to realise this, the Regime is based on a negotiate-arbitrate model. This model facilitates the commercial negotiation of access agreements between railway managers and access seekers. In the case of disagreement between the parties, a rigorous dispute resolution process is in place to resolve the dispute. UT5 and AU2 facilitate commercial negotiation by setting out processes for negotiation and then providing a ‘safety net’ to be applied in circumstances where agreement by the parties cannot be reached.

Primacy of Contractual Negotiations

The Regime incorporates the principle of the primacy of contractual negotiations through the adoption of a negotiate-arbitrate model in the QCA Act.

The QCA Act operates so that if a service is declared:

- (a) the access provider is obliged to negotiate with an access seeker in respect of an access agreement⁷⁶; and
- (b) if commercial agreement cannot be reached, then an access dispute exists and the dispute may be referred to mediation or arbitration by the QCA.⁷⁷

⁷⁵ NCC Guidelines at [5.1].

⁷⁶ Section 99 of the QCA Act.

⁷⁷ Section 115A and 116 of the QCA Act.

The primacy of contractual negotiations is also recognised by AU2 and UT5 which both include:

- (a) a detailed negotiation framework to facilitate commercial negotiation⁷⁸;
- (b) a dispute resolution process where commercial agreement cannot be reached⁷⁹; and
- (c) an acknowledgement that the standard access agreements approved by the QCA (**Standard Access Agreement**) apply unless otherwise agreed between the access provider and access seeker.⁸⁰ This acknowledges that parties are able to negotiate different terms and conditions of access.

It is therefore clear that the Regime incorporates the principle of the primacy of contractual negotiations.

Right to Negotiate and the Negotiation Process

Consistent with clause 6(4)(b), if a service is declared, section 99 of the QCA Act gives an access seeker the right to negotiate with the access provider of the declared service for the making of an access agreement. Section 100 of the QCA Act provides that the access provider and the access seeker must negotiate in good faith. The obligation to negotiate in good faith is complemented by an obligation upon the access provider to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker.⁸¹

The NCC Guidelines also state that an effective access regime should appropriately address information asymmetries to enable access seekers to enter into meaningful access negotiations.⁸²

Negotiation Process under UT5

The negotiation process under UT5 is as follows:

- (a) Aurizon Network must promptly provide prospective access seekers with information regarding the access application process. It must display preliminary information and access application forms on its website. This preliminary information includes:
 - (i) descriptions of the infrastructure (including signals and operational systems, telecommunications systems and any operational constraints);
 - (ii) committed corridor upgrades;

⁷⁸ Part 2 of AU2; Part 4 of UT5.

⁷⁹ Part 6.1 of AU2; Part 11 of UT5.

⁸⁰ Clause 2.9.4 of AU2; Part 5.1 of UT5.

⁸¹ Section 101 of the QCA Act.

⁸² NCC Guidelines at [5.2].

- (iii) corridor maps and line diagrams;
 - (iv) information relating to the description of, and calculations for, train service entitlements and capacity; and
 - (v) the applicable reference tariffs and Standard Access Agreement and System Rules, along with a sample interface risk management plan (**IRMP**) and suggested control measures.⁸³
- (b) an access seeker may at any time request capacity information, which must be provided by Aurizon Network within 10 business days after receiving that request.⁸⁴ This information includes:
- (i) the relevant Daily Train Plan (subject to the identity of other access holders not being detailed and the terms of other access holders' train service entitlements not being detailed); and
 - (ii) the Network Control diagrams, indicating actual running of train services against the relevant Daily Train Plan.⁸⁵
- (c) an access seeker may also request to meet with Aurizon Network to discuss the access application process and to seek clarification of the process as outlined in UT5.⁸⁶
- (d) an access seeker makes an application containing all information reasonably necessary for Aurizon Network to evaluate the access application as detailed in UT5 and prepare an Indicative Access Proposal (**IAP**)⁸⁷;
- (e) Aurizon Network must either seek further information from the access seeker to make the application compliant or acknowledge the receipt of the access application within 10 business days of receipt of the application⁸⁸;
- (f) Aurizon Network must provide an IAP within 20 business days after the date on which it gives the access seeker written acknowledgement of the receipt of the access application⁸⁹;
- (g) The IAP must outline⁹⁰:

⁸³ Clause 4.2(b) and Schedule A of UT5.

⁸⁴ Clause 4.2(c) of UT5.

⁸⁵ Schedule A of UT5.

⁸⁶ Clause 4.2(a) of UT5.

⁸⁷ Clause 4.3 of UT5.

⁸⁸ Clause 4.3(c) of UT5.

⁸⁹ Clause 4.6(e) of UT5.

⁹⁰ Clause 4.6(c) of UT5.

- (i) the rollingstock and rollingstock configuration;
 - (ii) the relevant operating characteristics;
 - (iii) an initial capacity analysis and relevant assumptions used in preparing that assessment;
 - (iv) whether any other requests for access exist that, if approved, would affect Aurizon Network's ability to grant the access rights sought;
 - (v) an initial estimate of relevant access charges (and details of how the initial estimate has been calculated);
 - (vi) details of any further information reasonably required from the access seeker in preparation for the negotiation stage; and
 - (vii) where the grant of access rights will require the construction of an expansion, information identifying the likely need for an expansion, the expansion and likely timeframes.
- (h) if an access seeker believes that the IAP has not been prepared in accordance with UT5 and would therefore not be an appropriate basis for continuing negotiation, it may give Aurizon Network notice of its concerns for Aurizon Network to respond to⁹¹;
- (i) if an access seeker intends to proceed with its access application on the basis of the relevant IAP, it must give Aurizon Network written notice of its intent to do so within 60 business days after receiving the IAP⁹²;
- (j) a negotiation period commences in respect of an access seeker's access (including negotiation of the terms and conditions of the relevant access agreement)⁹³;
- (k) where the terms of an access agreement cannot be agreed between Aurizon Network and an access seeker within the relevant negotiation period, any dispute will be resolved by:
- (i) where access is required for coal carrying services—the parties completing and entering into the Standard Access Agreement;
 - (ii) where access is required for non-coal carrying services—in accordance with the dispute resolution mechanism in Part 11 of UT5; and
 - (iii) where access is dependent on an expansion or subject to proposed access

⁹¹ Clause 4.6(g)–(h) of UT5.

⁹² Clause 4.6(f) and 4.7(a) of UT5.

⁹³ Clause 4.11(a) of UT5.

conditions—in accordance with the dispute resolution in Part 11 of UT5.⁹⁴

Negotiation Process under AU2

The negotiation process under AU2 is as follows:

- (a) Queensland Rail must make preliminary information available on its website for access seekers. This information includes:
 - (i) descriptions of the infrastructure (including signals and operational systems, telecommunications systems and any operational constraints);
 - (ii) committed corridor upgrades;
 - (iii) corridor maps and line diagrams; and
 - (iv) the applicable reference tariff and Standard Access Agreement (if any).⁹⁵
- (b) an access seeker may at any time request capacity information, which must be provided by Queensland Rail within 10 business days after receiving that request.⁹⁶ This information includes:
 - (i) Master Train Plan;
 - (ii) the relevant current Daily Train Plan for the relevant part of the network; and
 - (iii) the Network Control diagrams, indicating actual running of train services against the relevant Daily Train Plan.
- (c) an access seeker may also request initial meetings with Queensland Rail to discuss the proposed access application and any matters relating to the negotiation process including the application requirements set out in AU2⁹⁷;
- (d) an access seeker makes an application containing all information reasonably necessary for Queensland Rail to evaluate the access application as detailed in AU2 and prepare an Indicative Access Proposal (**IAP**);
- (e) Queensland Rail must either seek further information from the access seeker or acknowledge the receipt of the access application within 5 business days of receipt of the application⁹⁸;
- (f) Queensland Rail must use reasonable endeavours to provide an IAP within 20

⁹⁴ Clause 5.1(e) of UT5.

⁹⁵ Schedule A of AU2.

⁹⁶ Clause 2.1.2(b) of AU2.

⁹⁷ Clause 2.1.2(a) of AU2.

⁹⁸ Part 2.3 of AU2.

business days after the date on which it gives the access seeker written acknowledgement of the receipt of the access application⁹⁹;

- (g) The IAP must set out detailed information in respect of a number of matters including¹⁰⁰:
- (i) the relevant rollingstock, train configuration and operating characteristics;
 - (ii) the results of an indicative capacity analysis including (if applicable) a notice advising that insufficient capacity exists to accommodate the access application without an extension;
 - (iii) whether any other access seekers have requested access rights which, if provided, would limit Queensland Rail's ability to grant access rights in accordance with the IAP;
 - (iv) an initial estimate of relevant access charges (including a methodology for calculating access charges); and
 - (v) if a reference tariff does not apply to the requested access rights:
 - the costs of providing access including the capital, operating and maintenance costs, consistent with section 101(2)(b) of the QCA Act; and
 - asset value including the valuation methodology, consistent with section 101(2)(c) of the QCA Act.
- (h) if an access seeker intends to proceed with its access application on the basis of the relevant IAP, it must give Queensland Rail written notice of its intent to do so as soon as reasonably practicable after receiving the IAP¹⁰¹;
- (i) Queensland Rail and the access seeker subsequently commence negotiations towards an access agreement¹⁰²;
- (j) where a dispute arises between Queensland Rail and an access seeker in relation to the negotiation of an access agreement, that dispute will be resolved in accordance with Part 6 of AU2.¹⁰³

⁹⁹ Clause 2.4.1 of AU2.

¹⁰⁰ Clause 2.4.2 of AU2.

¹⁰¹ Clause 2.5.1 of AU2.

¹⁰² Clause 2.7.1 of AU2.

¹⁰³ Clause 6.1.2 of AU2.

UT5 and AU2 also contains extensive mechanisms to assist access seekers in respect of other issues including:

- (a) detailed systems for dealing with interface issues including the development of IRMPs¹⁰⁴ (which must list safety and rollingstock standards), the development of an Operating Plan¹⁰⁵ and the development of an environmental management plan or report¹⁰⁶ (dealing with all risks to the environment arising from access); and
- (b) provisions for compliance with detailed network management principles (including train scheduling and network control).¹⁰⁷

It can be seen from the above processes that the Regime provides for extensive information to be provided to the access seeker on both pricing and non-pricing terms and conditions of access as part of the negotiation process which addresses information asymmetries and provides an effective basis for negotiations. The Regime also deals extensively with safety requirements, the allocation and expansion of capacity, operational issues and service quality issues.

Independence and transparency

The NCC Guidelines state that the Council considers that for an access regime to encourage efficient access outcomes, it must incorporate regulatory processes that are transparent and consultative and are undertaken by a regulatory body that is independent and has the resources it needs to be effective.¹⁰⁸

The independence of the QCA and the transparency of the Regime's regulatory arrangements support effective commercial negotiations.

There are several measures that ensure that the QCA has the requisite degree of independence. Section 12(2)(c) of the QCA Act stipulates that, in relation to access to services, the QCA is not subject to directions from the Minister, thus ensuring independence from government. Section 219 of the QCA Act also provides a process that addresses any conflicts of interest that a QCA Member may have in a matter being considered, or about to be considered, by the QCA. Furthermore, the QCA has sufficient information gathering powers to ensure it is well placed to carry out its functions effectively.

¹⁰⁴ Clause 2.7.2(a)(vi) of AU2; clause 4.11.2(b) of UT5.

¹⁰⁵ Clause 2.7.2(a)(iii) of AU2; clause 4.11.2(a) of UT5.

¹⁰⁶ Schedule G, clause 2.5 of AU2; Schedule C, Part 3 of UT5.

¹⁰⁷ Part 4.1 of AU2; Part 7A.7 of UT5.

¹⁰⁸ NCC Guidelines at [5.3].

The transparency of the Regime's regulatory arrangements is enhanced by the public consultation requirements contained in the QCA Act. The QCA Act provides for extensive public consultation processes in respect of the following issues:

- (a) making a recommendation as to whether to declare a service¹⁰⁹;
- (b) the revocation of a declaration¹¹⁰;
- (c) the making of an access code¹¹¹; and
- (d) the approval of an access undertaking and any amendments to the access undertaking.¹¹²

In respect of access determinations, the QCA is required to maintain a register of access determinations which must include certain information.¹¹³

The extent of the public transparency in respect of issues relating to the Regime can be seen on the [QCA's website](#).

Enforcement mechanisms

The NCC Guidelines note that under clause 6(4)(c) an effective access regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.¹¹⁴

In the event that a dispute arises during access negotiations, a party can access the Regime's dispute resolution process to enforce the right to negotiate and resolve the dispute through either mediation or arbitration.¹¹⁵ This process is outlined in Part 5, Division 5 of the QCA Act and is discussed in further detail below in Chapter 13.

The Regime also provides enforcement mechanisms through civil penalties for breaches of certain requirements under the QCA Act. For example, civil penalties are available for a failure to provide information to the QCA when requested to do so¹¹⁶ and a failure to keep separate accounting records.¹¹⁷

The Regime also allows a party to obtain relief through the Supreme Court to remedy certain conduct, such as the hindering of access, or contraventions of an access agreement

¹⁰⁹ Sections 79(2) and 81–83 of the QCA Act.

¹¹⁰ Sections 89–91 of the QCA Act.

¹¹¹ Section 128 of the QCA Act.

¹¹² Sections 144–147 of the QCA Act.

¹¹³ Section 127 of the QCA Act.

¹¹⁴ NCC Guidelines at [5.1].

¹¹⁵ Sections 112–133 of the QCA Act.

¹¹⁶ Section 205 of the QCA Act.

¹¹⁷ Section 163 of the QCA Act.

or determination.¹¹⁸ Relief that may be sought includes compensation and the grant of various types of injunctions. Provisions relating to the enforcement of the Regime are set out in Part 5, Division 8 of the QCA Act and are discussed in detail below at Chapter 14.

Summary

The Regime provides for the primacy of commercial negotiations and requires the provision of extensive information to access seekers in respect of the terms and conditions of access including pricing issues, safety requirements, the allocation and expansion of capacity, operational issues and service quality issues. There is independent and transparent regulation and enforcement under the Regime.

Accordingly, the Regime satisfies the clause 6(4)(a)–(c) principles.

¹¹⁸ Sections 152–153 of the QCA Act.

10. Clause 6(4)(d): regular review

Clause 6(4)(d): regular review

Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

The NCC Guidelines state that the clause 6(4)(d) principle is intended to ensure there is periodic review of the need for access regulation to apply to a particular service.¹¹⁹ The clause also makes clear that a review of access regulation should not override commercially determined outcomes by automatically revoking any existing contractual rights.¹²⁰

Review mechanism

Under the Regime, all declarations must state a date upon which the declaration will expire.¹²¹ On 31 May 2020, the Minister declared the use of a coal system for providing transportation by rail as a service under section 84(1)(a) of the QCA Act. The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2040 (a period of 20 years).¹²²

The Minister also declared the following parts of the Queensland Rail service, which are each a service, under section 84(1)(b) of the QCA Act:

- (a) the North Coast Route service;
- (b) the Mount Isa Route service;
- (c) the West Moreton Route service;
- (d) the Central Western Route service;
- (e) the Western Route service;
- (f) the South Western Route service.

The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2035 (a period of 15 years).¹²³

Part 5, Division 2, Subdivision 5 of the QCA Act contains the provisions relating to the revocation of declaration. Per sections 88 and 89 of the QCA Act, the QCA may conduct an investigation and recommend to the Minister that a declaration be revoked. This process may

¹¹⁹ NCC Guidelines at [5.4].

¹²⁰ NCC Guidelines at [5.5].

¹²¹ Section 84(4) of the QCA Act.

¹²² Aurizon Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 203.

¹²³ Queensland Rail Decision, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 216.

be commenced by the owner of a declared service, who can ask the QCA to recommend to the Minister that a particular declaration be revoked.¹²⁴ In making a revocation recommendation, the QCA must be satisfied that, at the time of the recommendation, section 86 of the QCA Act would prevent the Minister from declaring the service.¹²⁵ Section 86 lists the factors affecting the making of a declaration, which includes the need for the service to satisfy the access criteria found in section 76 of the QCA Act. Therefore, a revocation recommendation can only be made where the declared service no longer satisfies the access criteria.

The Minister is similarly constrained in their decision to revoke a declaration. Section 92 of the QCA Act stipulates that the Minister may only revoke a declaration after receiving a revocation recommendation from the QCA and after being satisfied that, at the time of the revocation, section 86 of the QCA Act would prevent the declaration of the service.

The Regime includes a compulsory review mechanism which requires the QCA to review an existing declaration before it expires and make a recommendation to the Minister about whether a declared service should continue to be declared after the existing declaration expires.¹²⁶ On receiving the QCA's recommendation, the Minister must either declare all or part of the service or decide not to declare the service.¹²⁷ Like the revocation process, the QCA and Minister are constrained in the recommendations and decisions they may make under this process. In making a recommendation that the service continue to be declared, the QCA must be satisfied that all of the access criteria in section 76 are satisfied.

If the QCA is not satisfied about any of the access criteria, it cannot recommend that the service continue to be declared. Similarly, section 86 stipulates that the Minister must declare the service if they are satisfied about all of the access criteria but must decide not to declare the service if they are not satisfied that all the access criteria would be met. This review mechanism ensures the appropriateness of ongoing access regulation is considered in a timely manner and provides certainty to access providers and access seekers about the ongoing regulatory arrangements that will apply to a service following the expiration of a declaration.

Protection of existing rights

The second element of the clause 6(4)(d) principle requires that existing contractual rights and obligations are not automatically revoked upon the lapsing of a declaration.

¹²⁴ Section 88(2) of the QCA Act.

¹²⁵ Section 88(3) of the QCA Act.

¹²⁶ Part 5, Division 2, Subdivision 4A of the QCA Act.

¹²⁷ Section 84 of the QCA Act.

Section 95 of the QCA Act preserves existing rights in the event that a declaration is revoked or expires. These rights include mediation or arbitration of an access dispute, the operation of an access agreement, and the operation and enforcement of an access determination.

Summary

The Regime provides for the expiry of declarations after a specified period of time and a compulsory review of an existing declaration prior to the expiry of the declaration. It also includes a mechanism for the revocation of a declaration where the access criteria are no longer satisfied. Where a declaration is revoked or expires, existing contractual rights and obligations are not automatically revoked.

Accordingly, the Regime satisfies the clause 6(4)(d) principle.

11. Clause 6(4)(e): reasonable endeavours

Clause 6(4)(e): reasonable endeavours

The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

The NCC Guidelines state that in applying this principle, the Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect.¹²⁸

The Regime explicitly incorporates the requirement of clause 6(4)(e) in section 101 of the QCA Act. In section 101(1), the wording of clause 6(4)(e) is substantially reproduced as a general obligation for the access provider to 'make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker'.

This general obligation is complemented by section 101(2), which provides that subject to the operation of an approved access undertaking, the access provider must give an access seeker the following:

- (a) information about the price at which the access provider provides the service, including the way in which the price is calculated;
- (b) information about the costs of providing the service, including the capital, operation and maintenance costs;
- (c) information about the value of the access provider's assets, including the way in which the value is calculated;
- (d) an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated;
- (e) a diagram or map of the facility used to provide the service;
- (f) information about the operation of the facility;
- (g) information about the safety system for the facility; and
- (h) information about any access determinations made by the QCA through arbitration.

The NCC Guidelines indicate that an access regime should ensure that access seekers have sufficient information to enable them to make informed decisions and to negotiate effectively. However, information disclosure requirements should neither oblige disclosure

¹²⁸ NCC Guidelines at [5.6].

(without appropriate confidentiality protections) of information that is genuinely commercially sensitive nor impose an onerous burden or disproportionate costs on the information provider.¹²⁹

Section 101(6) of the QCA Act protects against the disclosure of confidential information by mandating that the access provider or seeker must not, without the giver's consent, disclose information provided under section 101 to another person. In this way, the Regime acknowledges potential confidentiality concerns and is careful to balance the need to keep an access seeker well informed with the need to protect confidentiality.

Where it is reasonably considered that the disclosure of certain information may be likely to damage the commercial activities of an access provider, user or seeker, section 101(3) allows the QCA to either categorise or aggregate information, so that its disclosure is not unduly damaging, or authorise the access provider not to give the access seeker the damaging information.

To assist in the effectiveness of the obligation to satisfy all reasonable requests, section 101(5) of the QCA Act allows the access provider or the access seeker to ask the QCA for advice or directions about a matter contained in section 101.

UT5 and AU2 support section 101 of the QCA Act by providing for a detailed negotiation process and information requirements. These are discussed in detail in Chapter 9 above. In particular, UT5 and AU2:

- (a) provide for detailed information to be given to access seekers on pricing and non-pricing terms and conditions;
- (b) set out specific timeframes for the provision of information; and
- (c) require Aurizon Network and Queensland Rail to explain when there is insufficient capacity to accommodate the request for access and outline the works and costs of undertaking any works to provide the additional capacity.¹³⁰

UT5 and AU2 also have provisions for the protection of confidentiality which include the right for Aurizon Network or Queensland Rail to request an access seeker to sign a confidentiality agreement in respect of the information provided to it.¹³¹

¹²⁹ NCC Guidelines at [5.7].

¹³⁰ Clause 2.7.2(b) of AU2; clause 4.6(c) of UT5.

¹³¹ Clause 2.2.2(a) of AU2; clause 3.14 of UT5.

Summary

The Regime imposes an explicit obligation upon the service provider to use all reasonable endeavours to accommodate the requirements of persons seeking access.

Accordingly, the Regime satisfies the clause 6(4)(e) principle.

12. Clause 6(4)(f): access on different terms

Clause 6(4)(f): access on different terms

Access to a service for persons seeking access need not be on exactly the same terms and conditions.

The NCC Guidelines state that an access regime will be consistent with clause 6(4)(f) if it provides for access to be provided on different terms and conditions to different users.¹³²

An access regime should not limit the scope for commercial negotiation. Rather, the terms and conditions under the Regime should facilitate commercial negotiations and act as a safety net when a reasonable outcome cannot be negotiated. This is consistent with the principles of commercial negotiation in clauses 6(4)(a)–(c). Additionally, the NCC Guidelines also state that under an effective access regime, a service provider cannot unfairly discriminate between access seekers.¹³³

Section 102 of the QCA Act specifically provides that an access provider is not required to provide access on the same terms under each access agreement. There are also a number of provisions in the QCA Act which prohibit an access provider from unfairly discriminating between access seekers.

Section 100(2) of the QCA Act provides that during negotiations an access provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other access seekers. Section 100(3) clarifies that this does not prevent an access provider from treating access seekers differently to the extent it is reasonably justified due to the different circumstances, relating to access to the declared service, applicable to the access provider or any of the access seekers. Similarly, section 168C(1) provides that in providing access to a declared service, an access provider must not unfairly differentiate between users of a declared service in a way that has a material adverse effect on the ability of one or more of the users to compete with other users.

There are also a number of provisions in the QCA Act which limit the ability of an access provider to unfairly favour a related entity.

Section 104(1) of the QCA Act prohibits an access provider from engaging in conduct for the purposes of preventing or hindering a user's access to a declared service under an access agreement. Section 104(2) of the QCA Act specifically provides that an access provider engages in conduct for preventing or hindering a user's access if the access provider provides

¹³² NCC Guidelines at [5.8].

¹³³ NCC Guidelines at [5.8]–[5.9].

(or proposes to provide) access to the declared service to an affiliated entity on more favourable terms than the terms on which the access provider provides (or proposes to provide) access to the declared service to a competitor.

Section 104 of the QCA Act makes it clear that the prohibition applies to conduct prior to the entering into of an access agreement by using the phrase 'or proposes to provide'. Section 104(3) of the QCA Act also makes it very clear that the prohibition applies to unfair discrimination in respect of both price and non-price issues. The provisions of section 104 of the QCA Act in respect of access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

Section 137(1A) also requires an access undertaking to contain any necessary provisions to ensure that there is no unfair discrimination in favour of affiliated entities if the access provider provides (or proposes to provide) access to the declared service to itself or a related entity.

Section 168A of the QCA Act sets out the pricing principles which are to be considered by the QCA as arbitrator of any access dispute and in approving the terms of any access undertaking. Those pricing principles include a principle that access prices should not allow a related access provider¹³⁴ to set terms and conditions that discriminate in favour of its downstream operations except to the extent the cost of providing access to other operators is higher.

There are also mechanisms in AU2 and UT5 to prevent unfair discrimination. Clause 6.2.1 of UT5 places limits on price differentiation, except as permitted by Part 6 of UT5. AU2 also places limits on price differentiation, prohibiting Queensland Rail from differentiating between access seekers and access holders in circumstances where the characteristics of the train services are alike and they are operating in the same end market.¹³⁵

The Regime contains effective mechanisms to ensure that access providers do not engage in unfair discrimination.

Summary

The Regime explicitly acknowledges that access agreements do not need to be on the same terms and conditions but also contains prohibitions on unfair discrimination between access seekers.

Accordingly, the Regime satisfies the clause 6(4)(f) principle.

¹³⁴ Schedule 2 of the QCA Act provides that a related access provider, in relation to a service, means an access provider that owns or operates the services and provides, or proposes to provide, access to the service to itself or a related body corporate of the access provider.

¹³⁵ Part 3.3 of AU2.

13. Clause 6(4)(g): independent dispute resolution processes

Clause 6(4)(g): independent dispute resolution

Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

The NCC Guidelines state that clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes.¹³⁶ Additionally, an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute.¹³⁷

The Regime contains detailed dispute resolution processes in the event that an access seeker and access provider cannot agree on the terms and conditions of access.

Part 5, Division 5 of the QCA Act sets out an arbitration process for access disputes and will apply where an access provider or access seeker give the QCA a valid 'dispute notice'. This notice may only be given if the access provider and access seeker have not agreed to deal with the dispute otherwise than by arbitration under the QCA Act.¹³⁸

Where an access dispute notice is received, the QCA may initially refer the matter to mediation.¹³⁹ Where the matter proceeds to arbitration, section 117 of the QCA Act provides that the QCA must make a written determination in an arbitration on access to the declared service. Before making the determination, a draft determination must be given to the parties.¹⁴⁰

Section 118 of the QCA Act sets out a list of examples of access determinations which can be made by the QCA and includes the following:

- (a) require the access provider to provide access to the service;
- (b) require the access seeker to pay for access to the service;
- (c) state the terms on which the access seeker has access to the service;
- (d) require the access provider to extend, or permit the extension of, the facility;
- (e) require the access provider to permit another facility to be connected to the facility;

¹³⁶ NCC Guidelines at [5.10].

¹³⁷ NCC Guidelines at [5.15].

¹³⁸ Section 111 of the QCA Act.

¹³⁹ Section 115A of the QCA Act.

¹⁴⁰ Section 117(5) of the QCA Act.

or

- (f) include a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the QCA.

Section 119 of the QCA Act sets out restrictions on access determinations which can be made by the QCA and includes that an access determination cannot:

- (a) be inconsistent with an approved access undertaking, access code or a binding ruling;
- (b) reduce the amount of the service able to be obtained by an access provider;
- (c) result in the access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement; or
- (d) require an access provider to pay some or all of the costs of extending the facility.

The QCA is an independent dispute resolution body. The Council has previously noted that the QCA is established and resourced so as to enable it to maintain independence in exercising its regulatory functions.¹⁴¹ Nothing of substance has changed in relation to the QCA's role in regulating declared monopoly business activities since the Council's finding in the final recommendation for certification of the Regime in 2011.

Part 7, Division 3 of the QCA Act outlines provisions for the general conduct of arbitration hearings. It requires that an arbitration hearing must be held in private (unless otherwise agreed by the parties) and parties have the right to representation.¹⁴² The QCA has wide powers when conducting an arbitration. It may give directions in the course of the arbitration and do things that are necessary or expedient for the speedy hearing and determination of a dispute.¹⁴³ It can require written evidence from the parties and can refer any matter to an expert about the matter and accept the expert's statement as evidence.¹⁴⁴ Section 196 of the QCA Act also requires that the arbitration authority must comply with natural justice in an arbitration and determine periods that are reasonable and necessary for the fair and adequate presentation of the respective cases of the parties to a dispute.¹⁴⁵ The QCA considers that the obligations of natural justice require the arbitration authority to ensure that the arbitration is

¹⁴¹ National Competition Council, *Application for certification of the Dalrymple Bay Coal Terminal access regime*, final recommendation, 10 May 2011, p. 29, <https://ncc.gov.au/images/uploads/CECTQIFR-001.pdf>.

¹⁴² Sections 194–195 of the QCA Act.

¹⁴³ Section 197 of the QCA Act;

¹⁴⁴ Sections 196–197 of the QCA Act.

¹⁴⁵ Sections 196(1)(d) and 196(3) of the QCA Act.

managed and conducted in a balanced and transparent manner, such that all parties have a fair and reasonable opportunity to present their case.¹⁴⁶

In an arbitration, the QCA may make any order it considers appropriate in respect of the costs of the arbitration in respect of both the parties' costs and the QCA's costs.¹⁴⁷ This approach allows an appropriate balance between the parties being required to pay the costs of arbitration and ensuring that the costs of arbitration do not deter parties from seeking access. Section 127 of the QCA Act provides for a register of access determinations to be kept by the QCA.

UT5 provides that where a dispute arises in relation to the negotiation or grant of access between Aurizon Network and a prospective access seeker, it must be resolved in accordance with the dispute resolution process under Part 11 of UT5. This involves the following:

- (a) any access dispute is referred in the first instance to the Chief Executive Officers of Aurizon Network and the other party;
- (b) if resolution is not reached within 10 business days then the parties may agree for the dispute to be referred to mediation, an expert or the QCA for resolution.¹⁴⁸

In respect of mediation, the mediation must be administered by the Australian Commercial Disputes Centre (**ACDC**) in accordance with ACDC's guidelines for mediation.¹⁴⁹

In respect of expert determination under UT5, the expert may be appointed by the parties, or failing agreement between the parties, by the President of Chartered Accountants Australia and New Zealand for financial matters, the President of the Resolution Institute for technical matters or the President of the Queensland Law Society Incorporated for other matters.¹⁵⁰ The expert must have appropriate qualifications and have no interest or duty which conflicts with his or her functions as an expert, or be a current or past employee (within the past five years) of either Aurizon Network or the other party or a related party of either.¹⁵¹

The costs of the mediator or expert, and any advisors, are to be shared equally and each party shall bear their own costs.¹⁵²

¹⁴⁶ Queensland Competition Authority, *Access disputes under the QCA Act*, summary guide, June 2019, p. 8, <https://www.qca.org.au/wp-content/uploads/2020/03/summary-guide-to-access-disputes.pdf>.

¹⁴⁷ Section 208 of the QCA Act.

¹⁴⁸ Clause 11.1.2 of UT5.

¹⁴⁹ Clause 11.1.3 of UT5.

¹⁵⁰ Clause 11.1.4(b) of UT5.

¹⁵¹ Clause 11.1.4(b)(vi) of UT5.

¹⁵² Clauses 11.1.3(a) and 11.1.4(i) of UT5.

AU2 provides that where a dispute arises in relation to the negotiation of an access agreement, the dispute resolution process in Part 6 of AU2 will apply, unless parties agree to an alternative dispute resolution process. The process under Part 6 involves:

- (a) any access dispute is referred in the first instance to the senior management representatives, and following that the Chief Executive Officers of Queensland Rail and the other party;
- (b) if resolution is not reached within 10 business days then the parties may agree for the dispute to be referred to the QCA for resolution.¹⁵³

The parties to the dispute must undertake to comply with any order as to payment of costs relating to the dispute. These costs include the costs of the parties to the dispute and the costs incurred by the QCA, to the extent that they are not prohibited by law from recovering those costs.¹⁵⁴

Summary

The Regime provides for the appointment of the QCA as an independent dispute resolution body. The Regime also provides an appropriate balance between the parties being required to pay the costs of arbitration and ensuring that the costs of arbitration do not deter parties from seeking access.

Accordingly, the Regime satisfies the clause 6(4)(g) principle.

¹⁵³ Clauses 6.1.2–6.1.4 of AU2.

¹⁵⁴ Clause 6.1.4 of AU2.

14. Clause 6(4)(h): binding decisions

Clause 6(4)(h): binding decisions

The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

The NCC Guidelines state that an arbitrator's decision, and the ultimate decision of any dispute resolution appeals body, must be binding on the parties. This requires that the enforcement process has legislative underpinnings, with the regulator or courts able to impose appropriate sanctions and remedies for non-compliance.¹⁵⁵

Section 118 of the QCA Act provides that the QCA may make an access determination which includes a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the QCA. The QCA in making any determination under section 118 of the QCA Act must take into account the legitimate business interests of the access seeker.¹⁵⁶

The enforcement provisions set out in Part 5, Division 8 of the QCA Act ensure that the parties to an access dispute are bound by an access determination. Section 152 allows the Queensland Supreme Court, upon the application of a party to an access determination, to make certain orders to enforce an access determination where it is satisfied that another party has engaged, is engaging, or proposes to engage in conduct constituting a contravention of the determination. Enforcement orders that are available to the Queensland Supreme Court include the awarding of compensation for loss or damage suffered as a result of a contravention, as well as the granting of consent, interim, restraining and mandatory injunctions, as set out under sections 154 to 158 of the QCA Act.

Rights of appeal

Decisions made by the QCA (including access determinations, decisions about access undertakings and rulings) may be subject to judicial review in accordance with the *Judicial Review Act 1991* (Qld) (**JR Act**). Under the JR Act, any person aggrieved by a decision of the QCA may apply to the Queensland Supreme Court for a review in relation to the decision.

Where an application is successful, the Court may:

- (a) set aside the decision;
- (b) refer the matter to the decision-maker for further consideration;

¹⁵⁵ NCC Guidelines at [5.19].

¹⁵⁶ Section 120(1)(c) of the QCA Act.

- (c) declare the rights of all parties in respect of the matter;
- (d) direct the parties to do anything that the court considers appropriate.

The decision of the Queensland Supreme Court is binding.

The independence and expertise of the QCA, the provisions of the QCA Act prescribing mandatory decision-making processes and Queensland's judicial review arrangements, ensure the rights of affected parties are protected while providing for timely resolution of access related disputes. This provides increased certainty for access providers and access seekers by removing risks associated with regulatory gaming and unnecessary access and investment delays.

Summary

The Regime provides for binding dispute resolution and judicial review of any decision of the QCA.

Accordingly, the Regime satisfies the clause 6(4)(h) principle.

15. Clause 6(4)(i): principles for dispute resolution

Clause 6(4)(i): principles for dispute resolution

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

- (i) the owner's legitimate business interests and investment in the facility;*
- (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;*
- (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;*
- (iv) the interests of all persons holding contracts for use of the facility;*
- (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;*
- (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;*
- (vii) the economically efficient operation of the facility; and*
- (viii) the benefit to the public from having competitive markets.*

Clause 6(4)(i) outlines both price and non-price terms and conditions of access that a dispute resolution body should be obliged to take into account in deciding on the terms and conditions for access.

Sections 120 and 138(2) of the QCA Act list the matters that the QCA must consider in the making of an access determination and the approval of access undertakings. Section 137(2) outlines the provisions that an access undertaking must contain. These sections broadly reflect the clause 6(4)(i) principles.

Access determinations

Section 120 of the QCA Act provides that in making an access determination, the QCA must have regard to the following matters:

- (a) the object of Part 5 of the QCA Act;
- (b) the access provider's legitimate business interests and investment in the facility;
- (c) the legitimate business interests of persons who have, or may acquire, rights to use the service;
- (d) the public interest, including the benefit to the public in having competitive markets;
- (e) the value of the service to:
 - (i) the access seeker; or

- (ii) a class of access seekers or users;
- (f) the direct costs to the access provider of providing access to the service, including any costs of extending the facility, but not costs associated with losses arising from increased competition;
- (g) the economic value to the access provider of any extensions to, or other additional investment in, the facility that the access provider or access seeker has undertaken or agreed to undertake;
- (h) the quality of the service;
- (i) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (j) the economically efficient operation of the facility;
- (k) the effect of excluding existing assets for pricing purposes; and
- (l) the pricing principles mentioned in section 168A.

Under section 120(2), the QCA may take into account any other matters relating to the matters mentioned in subsection (1) it considers are appropriate.

Access undertakings

Section 138(2) of the QCA Act provides that the QCA may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following:

- (a) the object of Part 5 of the QCA Act;
- (b) the legitimate business interests of the owner or operator of the service;
- (c) if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;
- (d) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;
- (f) the effect of excluding existing assets for pricing purposes;
- (g) the pricing principles mentioned in section 168A; and
- (h) any other issues the authority considers relevant.

Section 137(2) of the QCA Act set out the matters which may be contained in an access undertaking and includes:

- (a) requirements for the safe operation of the facility¹⁵⁷; and
- (b) how contributions by users to the cost of establishing or maintaining the facility will be taken into account in calculating charges for access to the service.¹⁵⁸

Incorporation of Clause 6(4)(i) principles in QCA Act

Table 2 sets out the sections of the QCA Act that correspond with the Clause 6 principles.

Table 2: Comparison of Clause 6(4)(i) principles

Clause 6(4)(i) principle	Making access determination under QCA Act	Approval of access undertaking under QCA Act
6(4)(i)(i) – Owner’s legitimate interests	s. 120(1)(b)	s. 138(2)(b)
6(4)(i)(ii) – costs to owner of providing access	s. 120(1)(f)	s. 138(2)(b), s. 138(2)(h), s. 168A and the pricing rules/principles in AU2 and UT5
6(4)(i)(iii) – value to the owner of additional investment	s. 120(1)(g)	s. 138(2)(h), s. 137(2)(i), s. 69E ¹⁵⁹ and s. 168A
6(4)(i)(iv) – interests of users with contracts	s. 120(1)(c)	s. 138(2)(e)
6(4)(i)(v) – firm and binding contractual obligations	s. 119(2)(a), s. 120(1)(b) and s. 120(1)(c)	s. 138(2)(b) and s. 138(2)(e)
6(4)(i)(vi) – safe operation	s. 120(1)(i)	s. 137(2)(h)
6(4)(i)(vii) – economically efficient operation of the facility	s. 120(1)(j) and s. 69E ¹⁶⁰	s. 69E, s. 168A and UT5 and AU2
6(4)(i)(viii) – public benefit in competition	s. 120(1)(d) and s. 69E	s. 138(2)(d) and s. 69E

Summary

The Regime provides principles of dispute resolution to guide the QCA that substantially mirror those principles set out in clause 6(4)(i). This allows access terms and conditions to be set by the QCA where agreement cannot be reached by the parties. It ensures that the interests of both access providers and access seekers are adequately considered.

¹⁵⁷ Section 137(2)(h) of the QCA Act.

¹⁵⁸ Section 137(2)(i) of the QCA Act.

¹⁵⁹ Section 69E (the objects of Part 5) applies by way of s. 138(2)(a) which requires the QCA to have regard to the objects of Part 5 in approving an access undertaking.

¹⁶⁰ Section 69E (the objects of Part 5) applies by way of s. 120(1)(a) which requires the QCA to have regard to the objects of Part 5 in making an access determination.

Accordingly, the Regime satisfies the clause 6(4)(i) principles.

16. Clause 6(4)(j): facility extension

Clause 6(4)(j): facility extension

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;*
- (ii) the owner's legitimate business interests in the facility being protected; and*
- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.*

The NCC Guidelines state that matters in respect of clause 6(4)(j) should be subject, in the first instance, to negotiation between the parties. If the parties cannot reach an agreement, the arbitrator should then be empowered, subject to the safeguards in clause 6(4)(j)(i)–(iii), to require the owner to extend or permit extension of the facility.¹⁶¹

Section 118 of the QCA Act provides that an access determination may require the access provider to extend or permit the extension of the facility or require the access provider to permit another facility to be connected to the facility.

Section 119(4) provides that the QCA may make an access determination requiring an access provider to extend, or permit the extension of, a facility if either:

- (a) the requirement is consistent with an approved access undertaking in response to the submission of a voluntary access undertaking¹⁶² and the QCA is satisfied that:
 - (i) the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility; and
 - (ii) the legitimate business interests of the owner and operator of the facility are protected¹⁶³; or
- (b) the access provider is the owner or operator of the facility and the QCA is satisfied that the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility, the legitimate business interests of the owner are protected and that the access provider does not pay the costs of extending the facility.¹⁶⁴

¹⁶¹ NCC Guidelines at [5.61].

¹⁶² Section 119(4)(a) of the QCA Act.

¹⁶³ Section 119(4)(a) and 119(4B) of the QCA Act.

¹⁶⁴ Section 119(5) of the QCA Act.

In addition, section 137 of the QCA Act provides that an access undertaking may include terms relating to extending the facility. In this regard, UT5 and AU2 include detailed provisions regarding network development and expansions.

Part 8 of UT5 provides that Aurizon Network is obliged to construct or permit an expansion only to the extent that the expansion is technically and economically feasible and consistent with the safe and reliable operation of the rail infrastructure, the expansion is fully funded according to the provisions of UT5, Aurizon Network and all other relevant parties have entered into unconditional user funding agreements, access conditions or access agreements, and unless otherwise agreed by Aurizon Network, the expansion is or will be leased from the State, an authority or a user funding trustee or owned, and in either case operated, by Aurizon Network.¹⁶⁵ Access seekers are also able to fund expansions where Aurizon Network is either unwilling to fund the expansion or only willing to fund the expansion subject to access conditions.¹⁶⁶ Where parties cannot agree on the terms of the user funding agreement, then UT5 provides for the resolution of these disputes under Part 8.¹⁶⁷

AU2 provides that either Queensland Rail or an access seeker can elect to fund a required extension.^{168, 169} Where an access seeker notifies Queensland Rail that it is willing to fund an extension (or extension stage), it must execute a funding agreement.¹⁷⁰ Additionally, the extension must satisfy the conditions outlined in the access undertaking including that Queensland Rail must consider that the extension is technically feasible, consistent with the safe and reliable provision of access and operation of the network, does not adversely impact on the safety of any person maintaining, operating or using the network, does not adversely affect existing access rights and complies with the engineering, operational and other requirements of Queensland Rail.¹⁷¹ Where parties cannot agree on the terms of a funding agreement, AU2 provides for the resolution of these disputes by referral to the QCA under Part 6.¹⁷²

The owner's legitimate business interests must be taken into account in any access determination (as discussed above in Chapter 15).

¹⁶⁵ Clause 8.2.1(c) of UT5.

¹⁶⁶ Clause 8.7.1 of UT5.

¹⁶⁷ Clause 8.2.2 of UT5.

¹⁶⁸ Extension is defined in Part 7 of AU2 and includes an enhancement, augmentation, duplication or replacement of all or part of the network including any connection to private infrastructure (but excluding private infrastructure).

¹⁶⁹ Clause 2.7.2 of AU2.

¹⁷⁰ Clause 1.4.1(b)(ii) and 1.4.3 of AU2.

¹⁷¹ Clause 1.4.2(d) of AU2.

¹⁷² Clause 1.4.7 of AU2.

Summary

The Regime provides that the owner of a facility may be required to extend, or permit the extension of, the facility where the extension is technically and economically feasible and consistent with the safe and reliable operation of the rail infrastructure. The owner's legitimate interests must also be taken into account in any access determination of this nature. Finally, the terms and conditions of access must take into account the costs to be paid by the parties for the extension and the benefits to the parties resulting from the extension and, where the access undertaking is a mandatory access undertaking, the access provider cannot be made to pay the costs of extending the facility.

Accordingly, the Regime satisfies the clause 6(4)(j) principles.

17. Clause 6(4)(k): material change in circumstances

Clause 6(4)(k): dealing with a material change in circumstances

If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change in circumstances. The NCC Guidelines state that this does not mean that an effective access regime will undermine the certainty of contractual arrangements. Once a contract is signed, whether through commercial negotiation or following arbitration, it should govern the relationship between the parties.¹⁷³

The Regime incorporates this principle in the following ways:

- (a) a declaration may be revoked where there is a material change in circumstances, such that the access criteria are no longer satisfied.¹⁷⁴ Where a declaration is revoked, existing contractual rights and obligations are not automatically revoked¹⁷⁵;
- (b) an access determination may be varied or revoked where there is a material change in circumstances¹⁷⁶;
- (c) UT5 and AU2 may be amended with the approval of the QCA to deal with a material change in circumstances¹⁷⁷; and
- (d) the Standard Access Agreements approved in accordance with UT5 and AU2 contain the usual terms such as force majeure to deal with certain material changes in circumstances.¹⁷⁸

Summary

The Regime provides mechanisms to deal with a material change in circumstances.

Accordingly, the Regime satisfies the clause 6(4)(k) principle.

¹⁷³ NCC Guidelines at [5.64].

¹⁷⁴ Part 5, Division 2, Subdivision 5 of the QCA Act.

¹⁷⁵ Section 95 of the QCA Act.

¹⁷⁶ Part 5, Division 5, Subdivision 4 of the QCA Act.

¹⁷⁷ Part 5, Division 7, Subdivision 2 of the QCA Act.

¹⁷⁸ Section 20 of the AU2 Standard Access Agreement; Section 29 of the UT5 Standard Access Agreement.

18. Clause 6(4)(l): compensation

Clause 6(4)(l): compensation

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

The NCC Guidelines state that clause 6(4)(l) does not mean that an access regime need allow a dispute resolution body to impede existing rights but, where a dispute resolution body can do this, it must also be empowered to consider and determine compensation, if appropriate.¹⁷⁹

There are a number of protections for existing users under the Regime:

- (a) Sections 119(2)(a) and 119(3) of the QCA Act provide that the QCA may not make an access determination which reduces the amount of the service able to be obtained by an access provider unless the QCA considers and, if appropriate, makes an award of compensation that is factored into the price of access; and
- (b) Section 138(2)(e) of the QCA Act provides that the QCA in approving a draft access undertaking must take into account the interests of persons who may seek access to the service; including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected.

Summary

The Regime provides mechanisms for the consideration and award of compensation if the existing rights of an access provider or user are impeded.

Accordingly, the Regime satisfies the clause 6(4)(l) principle.

¹⁷⁹ NCC Guidelines at [5.67].

19. Clause 6(4)(m): hindering access

Clause 6(4)(m): hindering access

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

Clause 6(4)(m) requires that an effective access regime prohibits conduct for the purpose of hindering access. This principle applies both to existing users and facility owners. The Council considers that an access regime should incorporate this clause explicitly or contain other provisions that have the same effect.¹⁸⁰

This principle is enshrined explicitly in section 104(1) of the QCA Act which prohibits an access provider or user of a declared service from engaging in conduct for the purpose of preventing or hindering a user's access to a declared service under an access agreement.

Section 104(2) of the QCA Act provides that an access provider engages in conduct for preventing or hindering a user's access if the access provider provides (or proposes to provide) access to the declared service to itself or a related body corporate on more favourable terms than the terms on which the access provider provides (or proposes to provide) access to the declared service to a competitor.

Section 104 of the QCA Act specifies that the prohibition applies to conduct prior to the entering into of an access agreement, by using the phrase 'or proposes to provide'. Section 104(3) of the QCA Act also outlines that the prohibition applies to unfair discrimination in respect of:

- (a) the fees, tariffs or other payments to be made for access to the declared service by the access provider and the competitor; and
- (b) the nature and quality of the declared service provided, or proposed to be provided, to the access provider and competitor.

The provisions of section 104 of the QCA Act in respect of access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

Sections 104(4) and 125(4) provide that an access provider or user, or a related body corporate of either party, may be held to have engaged in conduct for preventing or hindering access even if that purpose is only ascertainable by inference from their conduct.

¹⁸⁰ NCC Guidelines at [5.68].

These prohibitions are reinforced by sections 100(2) and 168C which explicitly prohibit unfair differentiation by an access provider when negotiating access agreements or amendments to access agreements or in the provision of access to users.

Section 137(1A) also requires an access undertaking to contain any necessary provisions to ensure that there is no unfair discrimination in favour of affiliated entities if the access provider provides, or proposes to provide, access to the declared service to itself or a related entity. The pricing principles in relation to a declared service under section 168A of the QCA Act, and under AU2 and UT5¹⁸¹, include an obligation on Queensland Rail and Aurizon Network not to differentiate access charges between access seekers or between access seekers and access holders within a relevant market, subject to limited exceptions.

The pricing principles in relation to a declared service under section 168A of the QCA Act are discussed in further detail below in relation to the clause 6(5)(b) principle (Chapter 24).

The Council previously stated that in certifying the Regime in 2011, the express prohibitions on unfair differentiation, both during access negotiations and in the provision of access for users of declared services in the Queensland rail access regime provide an appropriate level of comfort that a vertically integrated service provider will be prevented from treating its related businesses more favourably than those of its competitors.¹⁸² These express prohibitions on unfair differentiation continue to apply in respect of the current Regime.

The Regime contains effective mechanisms to ensure that service providers do not engage in unfair discrimination in favour of affiliated entities.

Enforcing the prohibition against the hindering of access

To enhance the effectiveness of this prohibition, the QCA has specific information gathering powers under sections 105 and 126 of the QCA Act to investigate possible breaches of sections 104 and 125 of the QCA Act respectively. Under these sections, the QCA can require an access provider to provide information about the arrangements under which access to a service is provided, or proposed to be provided, to itself or a related body corporate. A failure to provide the requested information, without reasonable excuse can result in a maximum penalty of 500 penalty units or six months imprisonment.

Additionally, the prohibitions on preventing or hindering access under sections 104, 125, 100(2) and 168C can be enforced by the orders outlined in section 153 of the QCA Act. The orders available to the court are listed in section 153(2) and include:

¹⁸¹ Clause 3.3 of AU2; clause 6.2 of UT5.

¹⁸² NCC Guidelines at [5.71].

- (a) the granting of an injunction to restrain or compel the conduct of the obstructor;
- (b) the awarding of compensation to be paid to the aggrieved party for loss or damage suffered because of the contravention; and
- (c) another order the court considers appropriate.

Furthermore, if the court has power to grant an injunction under section 153(2), then the court may make any other order, including granting an injunction, it considers appropriate against any other person involved in the contravention.¹⁸³

Summary

The Regime prohibits conduct hindering access and provides a number of protections to ensure that an access provider does not unfairly discriminate between access seekers.

Accordingly, the Regime satisfies the clause 6(4)(m) principle.

¹⁸³ Section 153(3) of the QCA Act.

20. Clause 6(4)(n): separate accounting

Clause 6(4)(n): separate accounting

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

The NCC Guidelines state that an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime. To satisfy clause 6(4)(n), an effective access regime should include provisions that require a facility owner to at least:

- (a) maintain a separate set of accounts for each service that is the subject of an access regime;
- (b) maintain a separate consolidated set of accounts for all of the activities undertaken by the facility owner; and
- (c) allocate any costs that are shared across multiple services in an appropriate manner.¹⁸⁴

Part 5, Division 9 of the QCA Act sets out the accounting procedures for declared services.

Section 163 of the QCA Act provides that the access provider must keep, in a form approved by the QCA, accounting records related to the declared service, separately from accounting records relating to other operations of the access provider. The QCA may direct that the accounting records for the declared service be published by the access provider if the QCA considers publication is in the public interest and would not be likely to damage the access provider's commercial activities.¹⁸⁵

Section 159 of the QCA Act also provides for the preparation of a cost allocation manual at the request of the QCA. A cost allocation manual is binding on the relevant access provider¹⁸⁶ and the access provider must keep books of account and other records in accordance with the cost allocation manual.¹⁸⁷ Both Aurizon Network and Queensland Rail have applicable cost allocation manuals in place.

¹⁸⁴ NCC Guidelines at [5.72]–[5.74].

¹⁸⁵ Section 163(4) of the QCA Act.

¹⁸⁶ Section 161 of the QCA Act.

¹⁸⁷ Section 162 of the QCA Act.

Aurizon Network's 2020 costing manual was approved by the QCA in May 2020. The costing manual sets out how Aurizon Network will prepare the annual below-rail financial statements for its regulated services to satisfy the accounting responsibilities under the Act.¹⁸⁸

Queensland Rail's costing manual for 2020–21 was approved by the QCA in October 2020. The costing manual sets out how Queensland Rail will prepare the annual below-rail financial statements for its regulated services.¹⁸⁹

Section 162 of the QCA Act provides that the access provider must keep the books of account and other records necessary to comply with the cost allocation manual. Section 163 of the QCA Act also provides that the access provider must keep, in a form approved by the QCA, accounting records relating to other operations of the access provider.

Ring fencing

The NCC Guidelines state that ring fencing arrangements may be required in some industries, particularly those where a facility owner operates, or has interests in, the same markets as those in which third party access seekers participate.¹⁹⁰

Section 137(2)(ea) of the QCA Act provides that an access undertaking may include details of the arrangements to be made by the owner or operator to separate the owner or operator's operations concerning the service from other operations of the owner or operator concerning another commercial activity.

Ring fencing provisions under UT5

Part 3 of UT5 details a number of ring fencing measures relating to organisational structure, accounting and confidentiality arrangements. Specifically, the provisions of Part 3 ensure that access provided by Aurizon Network is managed and supplied independently from other members of the Aurizon Group who compete in upstream and downstream markets that depend on access to the service utilising the rail infrastructure.¹⁹¹

Clause 3.8 of UT5 requires Aurizon Network to develop financial statements that separately identify Aurizon Network's business in respect of the supply of the declared services from other business conducted by the group. Clause 3.9 of UT5 requires that Aurizon Network must be governed and managed independently from other Aurizon entities, subject to certain exemptions, including that Aurizon Network may report to the board of Aurizon Holdings as

¹⁸⁸ QCA, *Costing manual*, accessed 2 October 2020, <https://www.qca.org.au/project/aurizon-network/costing-manual/>.

¹⁸⁹ QCA, *Queensland Rail's costing manual*, accessed 18 November 2020, <https://www.qca.org.au/project/queensland-rail/qld-rail-costing-manual/>.

¹⁹⁰ NCC Guidelines at [5.76].

¹⁹¹ Part 3, Section B of UT5.

required for the purposes of good corporate governance practices and as required or compelled by any law.¹⁹²

Section D of Part 3 of UT5 also ensures that confidential information is not subject to unauthorised disclosure or use by setting out the appropriate treatment of confidential information by Aurizon Network. To further ensure independence, the provisions also restrict the movement of relevant staff within the Aurizon Group so as to help ensure compliance with the ring fencing obligations. Clause 3.5 prohibits employees of Aurizon Network who are involved in the provision of below-rail services to perform work for any Aurizon entity other than Aurizon Network or undertake any work at the direction of a related operator.

A complaints process for the investigation of potential breaches of Part 3 is also provided for in Section E of Part 3 of UT5.

Ring fencing provisions under AU2

Queensland Rail does not presently have interests in markets upstream or downstream from the below-rail services that are in competition with third parties in those markets. AU2 states that there is no expectation that it is likely to do so over the term of AU2.

Clause 2.2.3 of AU2 goes on to state that if such interests are likely to, or do, arise during the term, then Queensland Rail will be required to inform the QCA as soon as reasonably practicable and if requested by the QCA, prepare and submit to the QCA a draft amending access undertaking in accordance with the QCA Act setting out its ring fencing obligations.

Summary

The Regime provides for separate accounting arrangements supported by costing manuals approved by the QCA. Where appropriate, ring fencing arrangements are in place to protect confidential information and ensure that access is managed and supplied independently from related entities who compete in upstream and downstream markets that depend on access to the service utilising the rail infrastructure.

Accordingly, the Regime satisfies the clause 6(4)(n) principle.

¹⁹² Clause 3.9(a) of UT5.

21. Clause 6(4)(o): access to financial information

Clause 6(4)(o): access to financial information

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

The NCC Guidelines state that an effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service. This principle seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access.¹⁹³

The QCA Act provides for the QCA to obtain all relevant financial information, while also providing for the protection of confidential information.

Information gathering powers at the investigation stage

Part 6 of the QCA Act sets out the provisions relating to investigations undertaken by the QCA. Under section 185, the QCA may give written notice to a person requiring that they provide to the QCA a statement setting out stated information or produce stated documents to the QCA by a reasonable date.

During investigation hearings conducted by the QCA, the QCA may give written notice to a person to appear at the hearing and give evidence or produce a stated document.¹⁹⁴ A failure to comply with the notice provisions without a reasonable excuse carries a maximum penalty of 1000 penalty units or 1 year's imprisonment.¹⁹⁵

Under section 186, when a document is produced to the QCA, the QCA may inspect and make copies of the document or take possession of the document as necessary for the investigation.

The Regime makes provision for the protection of confidential information supplied to the QCA during an investigation. Under section 187, a person may ask the QCA not to disclose the information to another person if they believe that it is confidential and that its disclosure is likely to damage their commercial activities. If the QCA is satisfied that the person's belief is justified and that disclosure would not be in the public interest, the QCA must take all reasonable steps to ensure the information is not, without the person's consent, disclosed to another person other than those categories of persons listed in section 187(3). Persons listed

¹⁹³ NCC Guidelines at [5.78].

¹⁹⁴ Section 181 of the QCA Act.

¹⁹⁵ Sections 183–184 of the QCA Act.

under this subsection include, for example, the Minister or relevant industry-specific regulators or ombudsmen.

Information gathering powers at the arbitration stage

Part 7 of the QCA Act concerns the conduct of arbitration hearings by the QCA. The information gathering powers under this part substantially reflect the powers given to the QCA at the investigation stage, as outlined above.

Under section 205, the QCA can give written notice to a person requiring stated information or documents to be produced to the QCA. Section 200 of the QCA Act provides that during arbitration hearings conducted by the QCA, a person may be summoned to appear before the QCA as a witness and give evidence or produce stated documents.

As is the case at the investigation stage, when a document is provided to the QCA, the QCA may inspect and make copies of the document or take possession of it while it is necessary for the arbitration.¹⁹⁶ Penalties of up to 1000 penalty units or 1 year's imprisonment apply for failures to produce information without a reasonable excuse.¹⁹⁷

There is also a process for the protection of confidential information that is made available during the arbitration process. Under section 207, an applicant may ask the QCA not to disclose certain information to the other party, where they believe that the information is confidential and that its disclosure is likely to damage their commercial activities. After considering the request, and any objections received from the other party, if the QCA is satisfied the applicant's belief is justified and that the disclosure would not be in the public interest, the QCA must take all reasonable steps to ensure the information is not disclosed to the other party without the applicant's consent.

Summary

The Regime provides for the QCA to obtain all relevant financial information and also provides protection for confidential information.

Accordingly, the Regime satisfies the clause 6(4)(o) principle.

¹⁹⁶ Section 206 of the QCA Act.

¹⁹⁷ Sections 202, 203 and 205 of the QCA Act.

22. Clause 6(4)(p): multiple access regimes

Clause 6(4)(p): multiple access regimes

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

Section 76(5)(a) of the QCA Act requires that the QCA and Minister must have regard to cross-jurisdictional issues when considering whether a service meets the criteria for declaration under Part 5 of the QCA Act. Specifically, if the facility for the service extends outside Queensland, the QCA and the Minister must have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

In any case, the Regime only applies to railway lines and rail infrastructure which are situated wholly within the state of Queensland. The interstate rail track situated between Acacia Ridge and the New South Wales border is leased and operated by the Australian Rail Track Corporation and is not covered by the Regime.

Summary

The infrastructure covered by the Regime does not extend beyond the jurisdictional boundary of Queensland. The services are not subject to multiple state and territory access regimes.

The clause 6(4)(p) principle is satisfied.

23. Clause 6(5)(a): promote efficiency and effective competition

Clause 6(5)(a): objects clause

A State, Territory or Commonwealth access regime (except for an access regime for electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principle:

- (a) *Objects clauses that promote the economically efficient use of, operation and investment in significant infrastructure thereby promoting effective competition in upstream or downstream markets.*

The NCC Guidelines state that clause 6(5)(a) requires that an effective access regime incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation of, use of and investment in infrastructure thereby promoting competition in upstream and downstream markets.¹⁹⁸

The Regime satisfies this clause through section 69E of the QCA Act, which establishes the object of Part 5 of the QCA Act. Section 69E states:

The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

Summary

The Regime includes an objects clause that provides a clear statement that the purpose of regulating third party access is to promote the economically efficient operation of, use of and investment in infrastructure, with the effect of promoting effective competition in upstream and downstream markets.

Accordingly, the Regime satisfies the clause 6(5)(a) principle.

¹⁹⁸ NCC Guidelines at [6.1].

24. Clause 6(5)(b): pricing should promote efficiency

Clause 6(5)(b): pricing review

Regulated access prices should be set so as to:

- (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;*
- (ii) allow multi-part pricing and price discrimination when it aids efficiency;*
- (iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and*
- (iv) provide incentives to reduce costs or otherwise improve productivity.*

The NCC Guidelines state that the clause 6(5)(b) principles emphasise that the price of access should promote the efficient use of, operation and investment in infrastructure as a means of promoting effective competition in dependent markets. The pricing principles in clause 6(5)(b) require that regulated access prices be set to cover costs and provide a return on investment that is commensurate with the risks involved.¹⁹⁹

The QCA Act requires that the QCA must consider certain pricing principles when making an access determination or approving access undertakings for declared services.²⁰⁰

Section 168A of the QCA Act sets out the pricing principles that apply, namely that the price should:

- (a) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved;
- (b) allow for multi-part pricing and price discrimination when it aids efficiency;
- (c) not allow a related access provider²⁰¹ to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate²⁰² of the access provider, except to the extent the cost of providing

¹⁹⁹ NCC Guidelines at [6.5].

²⁰⁰ Section 120(1)(l) of the QCA Act; section 138(2)(g) of the QCA Act.

²⁰¹ Schedule 2 of the QCA Act provides that a related access provider, in relation to a service, means an access provider that owns or operates the services and provides, or proposes to provide, access to the service to itself or a related body corporate of the access provider.

²⁰² Schedule 2 of the QCA Act provides that a related body corporate means a body corporate that is related to the other body corporate under section 50 of the Corporations Act or another entity that is a subsidiary of the other body corporate under section 3 of the *Government Owned Corporations Act 1993*.

access to other operators is higher; and

(d) provide incentives to reduce costs or otherwise improve productivity.

Summary

The Regime reflects the pricing principles as required by clause 6(5)(b).

Accordingly, the Regime satisfies the clause 6(5)(b) principles.

25. Clause 6(5)(c): merits review of decisions

Clause 6(5)(c): merits review of decisions

Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

- (i) may request new information where it considers that it would be assisted by the introduction of such information;*
- (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and*
- (iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.*

Merits review is not provided for in the Regime and therefore, compliance with clause 6(5)(c) is not required.

26. The objects of Part IIIA

Section 44M(4)(aa) of the CCA provides that the Council must have regard to the objects of Part IIIA of the CCA in deciding what recommendation it should make to the Commonwealth Minister regarding the effectiveness of an access regime.

The Regime has regard to the objects of Part IIIA through section 69E of the QCA Act, which with only minor variations reflects the language used in section 44AA(a) of the CCA and the corresponding principle found in clause 6(5)(a) of the CPA. As outlined above, in Chapter 23 of this application, the Regime incorporates the object of the promotion of economically efficient operation of, use of and investment in infrastructure.

In addition to the consideration of economic efficiency, section 44AA of Part IIIA also requires the Council to give consideration to the objective of Part IIIA of the CCA of providing a framework and guiding principles to encourage a consistent approach to access regulation, per section 44AA(b) of the CCA.

The object contained in section 44AA(b) of the CCA is achieved through the structure of the CCA and the Clause 6 principles themselves. The fundamental purpose of the Clause 6 principles is to foster a consistent approach to access regulation between the Commonwealth and State access regimes. In practice, this is achieved through the effective and consistent application of the Clause 6 principles by the Council and the Commonwealth Minister.

Summary

The Regime reflects the efficiency objectives of Part IIIA through section 69E of the QCA Act. The Clause 6 principles provide the framework for a consistent approach to access regulation, and the consistent application of the Clause 6 principles by the Council and the Minister will satisfy the object of section 44AA(b).

Accordingly, the Regime demonstrates consistency with the objects of Part IIIA and satisfies section 44M(4)(aa) of the CCA.

27. Abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
ARTC	Australian Rail Track Corporation
Aurizon Network	Aurizon Network Pty Limited
AU2	Queensland Rail's 2020 access undertaking (as amended from time to time)
Council	National Competition Council
Clause 6 principles	The principles set out in clause 6(2)–6(5) of the Competition Principles Agreement (as amended to 13 April 2007)
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CPA	Competition Principles Agreement
CQCN	Central Queensland Coal Network
IAP	Indicative Access Proposal as defined in UT5 and AU2
National Access Regime	The access regime set out in Part IIIA of the CCA
NCC Guidelines	National Competition Council, <i>Certification of State and Territory Access Regimes—A guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth)</i> , December 2017
Part IIIA	Part IIIA of the <i>Competition and Consumer Act 2010 (Cth)</i>
penalty unit	\$133.45 (current from 1 July 2020)
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
QR	Queensland Rail
Rail Safety National Law	<i>Rail Safety National Law (Qld)</i>
Rail Safety National Law Act	<i>Rail Safety National Law (Queensland) Act 2017</i>
Regime	The Queensland rail access regime as described in Chapter 5 of this application
Standard Access Agreement	The access agreements in the form approved by the QCA under UT5 and AU2
TIA	<i>Transport Infrastructure Act 1994 (Qld)</i>
Tribunal	Australian Competition Tribunal

UT5	Aurizon Network's 2017 access undertaking (as amended from time to time)
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