New Hope Corporation Limited

New Hope
Corporation Limited

Submission on Queensland Rail's 2015 Draft Access Undertaking

Volume 5

Responses to QCA Paper and Adjustment Charges

5 June 2015

1 Introduction

This Volume 5 of the NHC submission on QR's 2015 DAU comprises:

(a) NHC's responses to the queries raised by the QCA in the *Queensland Rail's 2015 DAU – Request for Comments* paper (the ***QCA Paper***) released by the QCA on 15 May 2015; and

(b) Additional submissions in respect of the period to which the 2015 DAU tariff should apply (variously referred to as applying Adjustment Charges or backdating).

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

(a) Volume 1 – Introductory Submission

(b) Volume 2 – West Moreton Coal Reference Tariffs

(c) Volume 3 – Access Undertaking

(d) Volume 4 – Standard Access Agreement

(e) Volume 5 – Responses to QCA Paper and Adjustment Charges

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

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

The reasons set out in the responses to the queries in the QCA Paper form part of the reasons that it is not appropriate to approve QR's 2015 DAU.

2 Executive Summary

The QCA Paper sought specific comments from stakeholders in relation to Queensland Rail's position regarding the period over which tariffs to be approved under the new access undertaking will apply, describing the context for the request as follows:

> *The QCA notes that Queensland Rail's 2015 DAU proposes to apply the western system tariff from the date the QCA approves the new undertaking for Queensland Rail. It therefore does not propose to apply the tariff approved by the QCA with effect from 1 July 2013, as it proposed in its previous voluntary DAUs.*
>
> *Given that the proposed treatment of the western system tariff in the 2015 DAU differs from that which Queensland Rail previously proposed, QCA staff are seeking responses to the questions below as part of the submissions process for Queensland Rail's 2015 DAU.*

By reneging on its previous representations on this issue, QR has damaged its credibility, and the confidence of all West Moreton system stakeholders to make long term investments. NHC welcomes the opportunity to provide responses to each of the QCA's queries in this submission below.

As will be evident from the responses, NHC considers that QR's next access undertaking can only be appropriate if it:

(a) approves a West Moreton system coal tariff that applies from 1 July 2013; and

(b) includes a financial adjustment to tariffs to reflect the difference between the transitional tariffs that have been applied since 1 July 2013 and those that would have applied if the pricing methodology under the new undertaking was applied (either by way of 'Adjustment Charges' as provided for under the current access undertaking or a similar financial adjustment mechanism).

That is the only appropriate position in these circumstances because:

(a) the current undertaking anticipated Adjustment Charges would apply on a change in reference tariffs;

(b) QR has separately led stakeholders to believe (including through express representations to the QCA and stakeholders on numerous occasions) that is the position it would adopt;

(c) stakeholders have acted in reliance on those representations, including providing support for previous extensions of QR's access undertaking on that basis;

(d) QR has applied the adjustments that it is now seeking to avoid in the past (when the adjustments were in QR's favour); and

(e) accepting QR's new position would 'turn on its head' the outcome anticipated by all other stakeholders, and damage the regulatory certainty that is an important and relevant factor for the QCA to take into account in determining whether to approve an access undertaking.

3 Expectations of adjustments

(1) In relation to the Western System, did stakeholders expect that there would be an adjustment in a replacement access undertaking to reflect the difference between:

(a) tariffs paid or payable since 1 July 2013; and

(b) tariffs, if different, that would have been paid or payable since 1 July, if those tariffs were effective from that date?

It was NHC's clear expectation that, irrespective of whom the adjustment favoured, an adjustment of that nature would occur.

It is evident that expectation was also held by:

(a) QR itself, until it became apparent to QR that an adjustment which would involve it refunding money was a possibility (see the responses to the QCA's second question in section 4 below); and

(b) the QCA (through many of the previous draft decisions on the Extension DAAUs which expressly referred to the statements made by QR regarding their previous position, as noted in the responses to question 2 below).

4 Basis for expectation and reliance

(2) If so,

(a) What was the basis for that expectation?

(b) Did stakeholders rely on that expectation and, if yes, in what way?

NHC primarily based this expectation on:

(a) past practice in previous regulatory periods, including adjustments being applied in (as noted in the QCA Paper):

(a) 2006, to refund to customers the difference between interim tariffs from July 2005 to June 2006 and those approved for that period by the QCA in QR Ltd's 2006 undertaking

(b) 2010, to recoup from customers the difference between interim tariffs from July 2009 to June 2010 and those approved for that period by the QCA in June 2010 amendments to QR Network's 2008 undertaking. The adjustment was applied both by QR Network for tariffs in the central Queensland coal network and Queensland Rail for western system coal tariffs.

In particular, in respect of NHC, a backdated charge (a 40% increase) was sought and obtained by QR Network in November 2010 as part of the 2010 adjustments. On that occasion, NHC paid an adjustment charge invoice via its above rail operator of $[redacted] (exclusive of GST). The invoice regarding that previous payment is included as Annexure A to these responses for completeness.

The timing of QR's change in position (following a QCA draft decision which recommended reducing tariffs below the transitional tariffs that have been charged by QR) is therefore suggestive that QR was comfortable with the concept of an adjustment when it held the view that such an adjustment would be in QR's favour .

(b) the existing QR access undertaking expressly provides for Adjustment Charges to be payable (and that was not altered when it was applied to QR in 2010 via the transfer notice);

(c) the following statement made in the QR letter of 7 May 2013 seeking an extension of the term of its current access undertaking:

Queensland Rail is proposing that transitional reference tariffs will apply from 30 June 2013, being current reference tariffs escalated by CPI. The adjustment charge provisions in AU1 will allow the reference tariff to be backdated upon the approval of AU1. Queensland Rail notes that transitional tariffs have been applied in the 2005 and 2010 Access Undertakings.

(d) the following statement made in the QR letter of 4 November 2013 letter seeking an extension of the terms of its access undertaking:

As outlined in a previous submission, Queensland Rail intends to continue with its proposal that the transitional reference tariffs, being the current reference tariffs escalated by CPI, remain and continue to apply up until the approval of AU1 . The adjustment charge provisions in AU1 will allow the reference tariff to be backdated to 1 July 2013 upon the

approval of AU1. Queensland Rail notes that transitional tariffs have been applied in the both the 2005 and 2010 Access Undertakings and is also in practice with Aurizon Network.

(e) the following statement made in the QR letter of 5 May 2014 letter seeking an extension of the terms of its access undertaking:

Queensland Rail intends to continue with its proposal that the transitional reference tariffs, being the current reference tariffs escalated by CPI, for the West Moreton System remain and continue to apply up until the approval of the AU1. The adjustment charge provisions in AU1 will allow the reference tariff to be backdated to 1 July 2013 upon the approval of AU1.Queensland Rail notes that transitional tariffs have been applied in both the 2005 and 2010 Access Undertakings, and is also in practice with Aurizon Network.

(f) statements in the QCA decisions on each of the extension draft amending access undertakings specifically referencing QR's intentions to apply the adjustment charges regime;

(g) statements in the supporting submissions to the voluntary DAUs submitted by Queensland Rail to replace the 2008 Undertaking which provided for adjustments, such as the following statement in the 25 June 2013 letter which formed part of the June 2013 draft access undertaking submission:

While the Authority considers Queensland Rail's proposal, transitional reference tariffs will apply from 1 July 2013, being the current reference tariffs escalated by CPI. The adjustment charge provisions in AU1 will allow the reference tariff approved by the Authority to be backdated upon finalisation. Queensland Rail notes that transitional reference tariffs were applied in relation to the 2005 and 2010 Access Undertakings.

(h) each of the voluntary DAUs, including the November 2014 extension, retained the Adjustment Charges provisions in the current access undertaking; and

(i) conversations between senior NHC management and senior management of QR which reinforced NHC's perception that QR's position was as set out in those previous representations.

NHC relied on this expectation when:

(a) providing letters which supported the May 2013 and November 2013 extensions of the 2008 Undertaking and in not objecting to other extensions (in each case, without seeking to reopen the transitional tariffs being applied as part of the extension); and

(b) determining to accept the continued voluntary process rather than petition the QCA for an Initial Undertaking Notice to be issued under section 133 of the QCA Act.

5 Impact on stakeholders

(3) What impact does Queensland Rail's proposal not to apply the new reference tariff from 1 July 2013 in its 2015 DAU have on stakeholders including, for example, impacts on regulatory certainty?

The most obvious impact of QR's proposal is the financial impact that will be suffered by stakeholders in the event that the reference tariff when determined by the QCA is lower than

the reference tariff that was paid during the period from 1 July 2013 to the commencement of the 2015 access undertaking (as the QCA Draft Decision recommended).

It is difficult to quantity exactly how much this may be worth, as the QCA is yet to set reference tariffs during this process. However, to provide an indicative estimate, the adjustments which would have applied based on the QCA Draft Decision would be approximately $[redacted] million (from 1 July 2013 through to 31 December 2015) in respect of NHC.

In any event, stakeholders will have been subject to a reference tariff, for a minimum of a further two and half years, that is acknowledged by all parties to be lacking in a rigorous methodology and to have been applied purely on an interim basis with the intent of adjusting once the QCA has approved the relevant tariff that should have been applying.

NHC is also concerned that if the QR proposal is adopted it will be a clear departure from regulatory precedent and, in fact demonstrate that a regulated infrastructure provider who is in a position to influence timing can manipulate the timing of the undertaking process for a financial gain. These factors will have a significant detrimental effect on regulatory certainty and the resulting increase in sovereign risk may be sufficient to lead stakeholders to reassess the risks of business relating to the QR network and conversely the attractiveness of opportunities outside the QR network.

It is also worth noting that the change in QR's positon from its previous representations is likely to have damaged QR's credibility in the marketplace and may lead stakeholders to doubt future representations made by QR.

6 Range of stakeholders affected

(4) Are there a range of stakeholders (both upstream and downstream) that may be affected? Are there stakeholders whose future decisions may be affected?

NHC is not in a position to speak on behalf of other stakeholders.

However, the increased regulatory uncertainty and concern about the behaviour of QR is likely to lead to:

(a) existing or potential coal miners reassessing the risks associated with new investment in order to become a part (or a larger part) of the West Moreton system; and

(b) a reduction in potential competition for provision of rail haulage services, due to potential new entrants being less willing to invest in rolling stock and maintenance facilities when the regulatory framework for the life of such assets is not sufficiently stable and certain.

Those two matters will of course have material flow on-impacts. A lack of competition for above rail haulage of coal will also impact on above rail competition for users of non-coal train services.

7 Consequences during the term of the 2015 undertaking and beyond

(5) If there are impacts arising from Queensland Rail's proposal not to apply the new reference tariff from 1 July 2013 in its 2015 DAU, what might the consequences be during the term of the access undertaking and beyond? Are those consequences (if any) material and are they a relevant matter for the QCA to consider under s138(2)? If so, which aspects of s.138(2) are relevant and how?

As discussed in response to question 4, there is anticipated to be a substantial financial impact on stakeholders such as NHC.

Section 138(2) of the QCA Act provides that the QCA may only approve an undertaking if it considers it appropriate to do so having regard to a specified list of factors, many of which NHC consider would clearly indicate the appropriateness of applying the tariff retrospectively, including:

(a) section138(2)(d), the public interest;

(b) section 138(2)(e), the interests of persons who may seek access to the declared service;

(c) section 138(2)(g), the pricing principles in s 168A which includes in section 168A(a) that the price should 'include a return on investment commensurate with the regulatory and commercial risks' (noting that if a lower tariff than the transitional tariff is approved, then a failure to have QR refund the difference will simply be providing them with a windfall gain and a return that is clearly surplus to that commensurate with the regulatory and commercial risks involved); and

(d) section 138(2)(h): any other issues the authority considers relevant, which for the reasons set out below includes the need for regulatory certainty.

It is NHC's view that the regulatory risk as discussed above in answers to question 3 and 4 (sections 5 and 6 of this volume respectively) means that to accept QR's position would be against the public interest, which is best served by regulatory certainty.

Regulatory certainty has long been accepted by the QCA as a relevant factor to take into account. It is in the public interest, the interests of the infrastructure provider, the interests of access seekers and a factor the QCA has found relevant in previous undertaking decisions.

By way of examples:

(a) the QCA has recently given the following comments in its May 2015 DBCT Management Differential Pricing Draft Amending Access Undertaking Draft Decision (at iv) which states that:

We have also identified predictability and transparency in the regulatory arrangements as being consistent with appropriate application of the section 138(2) criteria to our consideration of the DAAU.

(b) the QCA made the following comments in its November 2013 Blackwater DAAU Draft Decision (at 51):

Like the access provider, access seekers have an interest in regulatory certainty – e.g. confidence that the terms on which they base their

decision to contract for access will not be changed in a way that undermines the assumptions behind that decision.

In addition, one of the issues specifically referred to in s 138(2) is the pricing principles mentioned in s 168A QCA Act. The most relevant principle for these purposes is 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* (emphasis added). If the QCA ultimately considers that a lower tariff than QR is currently charging on a transitional basis should apply, a failure to apply the reference tariff from 1 July 2013 will clearly result in providing a unjustified windfall gain to QR – being a return that is in excess of that the QCA assesses to be commensurate with the regulatory and commercial risks involved.

Section 138(2) of the QCA Act allows the QCA to have regard to any other factor the QCA considers relevant – and NHC considers it is highly relevant that, throughout this process, QR has made clear representations to both the QCA and stakeholders that the tariff will be applied retrospectively and extensions of the term of the current undertaking (without any attempt to reconsider pricing) have been made in reliance on those representations.

8 QCA's powers in respect of Adjustment Charges

QR has asserted during the process to date regarding submission and consideration of the 2015 DAU, that the QCA does not have the power to compel that QR apply a tariff from 1 July 2013 (and provide for a financial adjustment for tariff that have been paid for access since that date).

NHC strongly disagrees that that is beyond the QCA's power.

As outlined in the Allens' legal advice enclosed in Annexure B to this volume:

(a) The only requirement is that the pricing principles are 'had regard to';

(b) There is no requirement in the QCA Act that the appropriate decision is consistent with any particular one or more of the factors to which regard is to be had; and

(c) The reference to 'at least enough to meet efficient costs' in section 168A(a) QCA Act does not restrict the QCA to considering only the costs and revenue during the term of the undertaking

As discussed in more detail in Volume 1 of NHC's submissions, section 138(2) QCA Act does not impose a list of mandatory conditions that must be satisfied before an undertaking can be approved. Rather, it specifies a number of matters which the QCA must 'have regard to'.

This is important in understanding the relevance of the section 168A pricing principles, because (as one of the factors the QCA must 'have regard to') the only requirement of the QCA Act is that they be taken into account and considered in making the appropriate decision about whether to approve or refuse to approve an undertaking.

In fact, it is clearly evident on a review of the other factors to be taken into account (as set out in section 138(2)) that the QCA Act is not intended to provide for the QCA to follow or ensure its decision is absolutely consistent with any of the factors to be had regard to – as there is often a clear tension between many of the factors (interests of the owner/operators and the interests of access seekers to take an obvious example).

The Authority's role is clearly specified in the QCA Act as one involving balancing of a number of factors to reach an appropriate decision on a draft access undertaking, such that a particular

factor may be given less weight or departed from or not followed in what the QCA ultimately determines is the appropriate decision on the relevant draft access undertaking.

That, of itself, makes it clear that section 168A(a) does not in any way limit the power of the QCA to impose reference tariffs from a period prior to approval of a new reference tariff (together with a financial adjustment mechanism to apply such tariffs).

Of course, if there was any concern that 'backdating' in that manner would result in a difference from a pricing principle (or any other factor referred to in section 138(2)) the QCA would often want to give reasons as to why that was appropriate. However, once the QCA has had regard to the principle, that is sufficient.

It should also be noted that, to the extent QR is asserting that the reference to generating expected revenue 'at least enough to meet efficient costs' (in section 168A(a)) should be interpreted as being qualified by being confined to the costs and revenue being assessed over the life of the draft access undertaking under consideration, there is no evident basis in the QCA Act for taking that view.

It is a particularly strange view to take when assessing the methodology for providing a return to an infrastructure owner on a long life infrastructure asset where the term of the undertaking forms only a small part of that asset life and can be changed (as demonstrated aptly by the many recent extensions to the Queensland Rail and Aurizon access undertakings).

That view also ignores the common regulatory practice of applying many different types of 'carry-over' mechanisms from one regulatory period to another. For example in addition to the backdating of reference tariffs through adjustment charges, other provisions approved by Australian economic regulators have included capital carry-over accounts, efficiency/incentive arrangements, 'unders and overs' under a revenue cap and price paths.

In the current circumstances the narrow interpretation being considered would also have the absurd consequences of the principle in section 168A(a) being interpreted as:

(a) requiring that, where the QCA had the view that the reference tariff that should apply be lower than that which has been transitionally applied (as suggested in the recent draft decision) the QCA should knowingly allow QR to retain a clear over-recovery during the period where transitional tariffs applied in excess of the 'return on investment commensurate with the regulatory and commercial risks involved' (in contravention of the other part of section 168A); and

(b) by allowing the retention of such an over recovery, rewarding an inefficient entity (which has charged a higher tariff than the QCA would recommend) for the delay in having a replacement access undertaking approved.

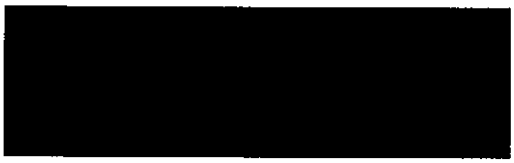
When viewed properly, as simply guidance that regulated entities should generate expected revenue to cover at least the costs of providing access and receive a return on investment commensurate with the risks involved – it is clear that the pricing principle in section 168A(a) is not prescriptive as to the period over which that should occur.

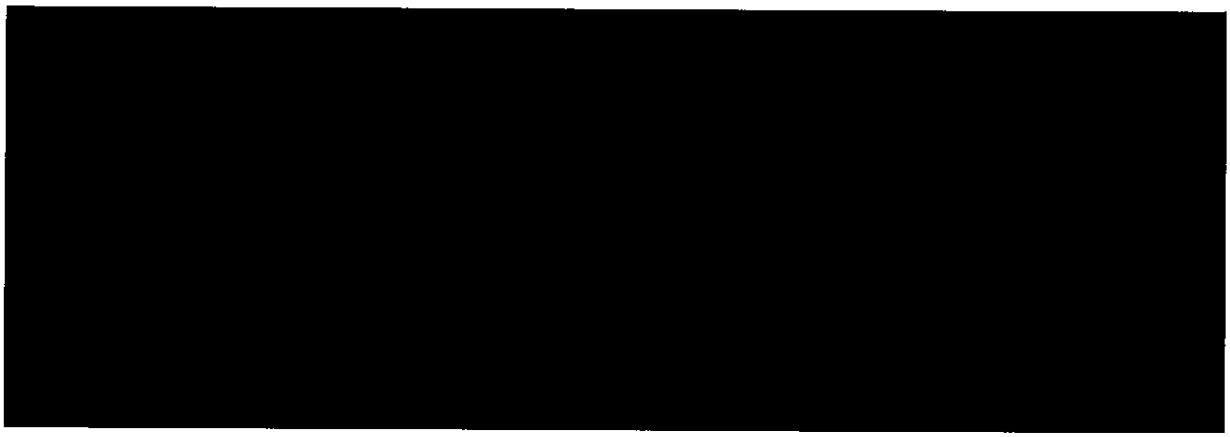
For the reasons noted above in the current circumstances it actually appears clear to New Hope that the 'efficient cost' and 'commensurate return' principles will not be being followed where the QCA ignores the prior period in which transitional tariffs have been applied in assessing the appropriate tariff.

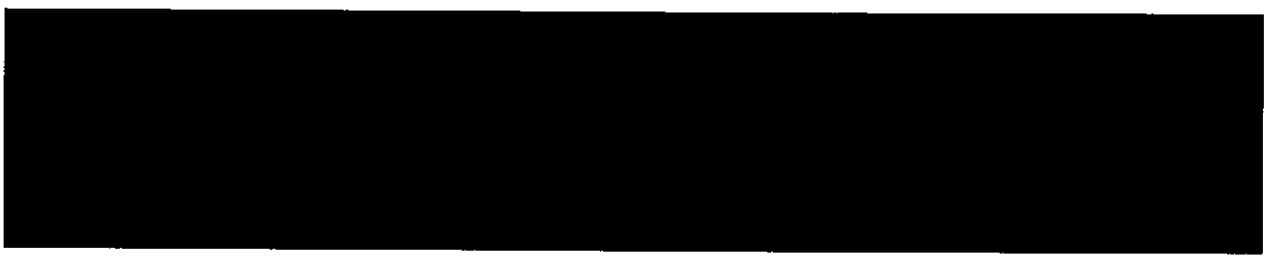
Annexure A – 2010 Adjustment Charge Invoice

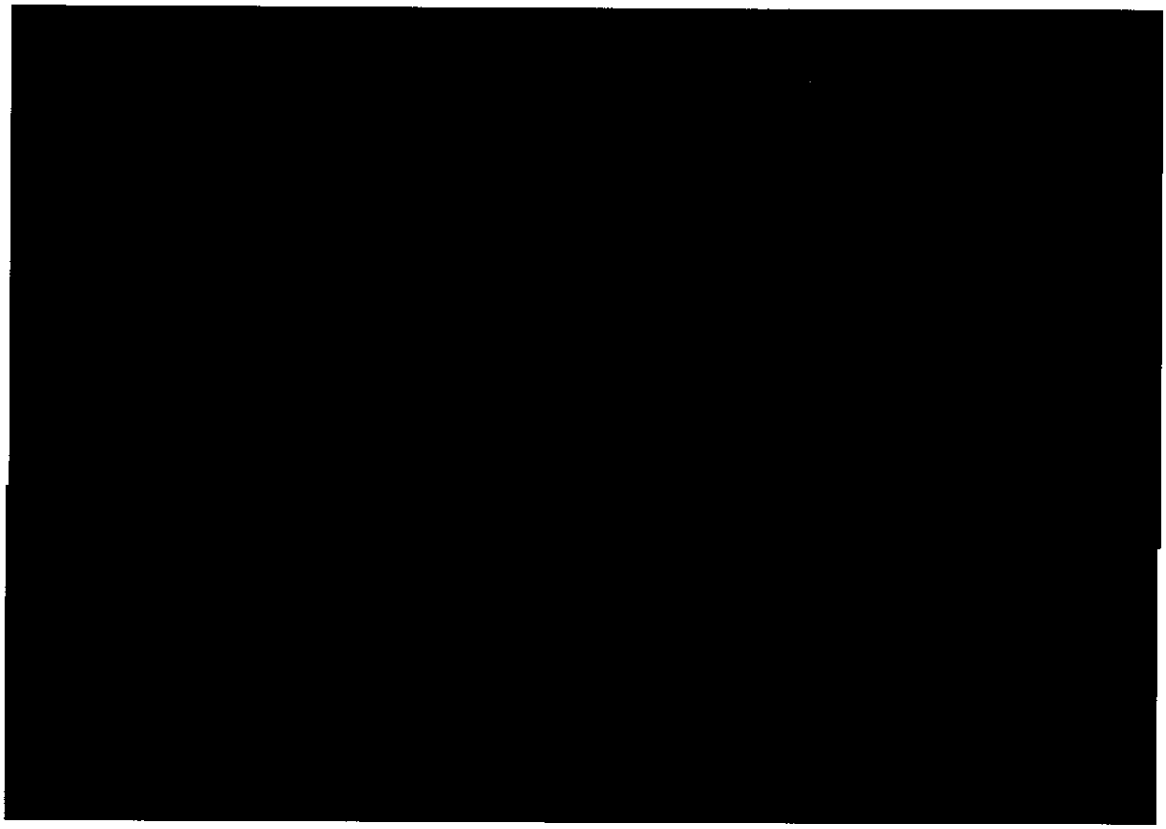
[redacted]

[redacted]









Annexure B – Allens' advice regarding the power to apply Adjustment Charges

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5 June 2015

Sam Fisher
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Dear Sam

Application of 2015 Undertaking tariff from 1 July 2013

1 Background

The date on which the current access undertaking applicable to Queensland Rail Limited (***QR***) was originally scheduled to expire has passed without a new access undertaking being approved by the Queensland Competition Authority (***QCA***).

However, through a series of draft amending access undertakings approved by the QCA the term of the current access undertaking has been extended. As a result, access holders have, from 1 July 2013, been charged on the basis of 'transitional tariffs'.

In the five extensions approved between June 2012 and May 2014, QR expressly indicated in the supporting submissions to each draft amending access undertaking that it would apply the 'Adjustment Charges' provisions to recoup or refund any variations between the transitional and ultimately approved tariffs under the replacement access undertaking. The extension in November 2014 was approved without such an express representation, but also without amending the Adjustment Charges provisions which remain in the current undertaking.

In May 2015 QR submitted to the QCA a draft access undertaking in relation to QR's rail network (the ***2015 DAU***). However, in contrast to QR's previous representations, it provides for the new tariff to apply from the approval date of the 2015 DAU and does not provide for the application of the 'Adjustment Charges' regime or any other form of backdating.

QR has asserted during consultations on the 2015 DAU that the QCA does not have the power under the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***) to approve an undertaking involving the application of an 'Adjustment Charges' regime or a 'backdating' of reference tariffs to 1 July 2013.

You have asked that we advise on whether the QCA has the power under the QCA Act to determine that the appropriate form of undertaking is one that includes an 'Adjustment Charges' regime of the type which exists in QR's current access undertaking or provides for a 'backdating' of the tariffs to be approved in the replacement undertaking to 1 July 2013.

2 Requirements for the QCA's decision making

2.1 Relevant statutory provisions

Relevantly for these purposes, the QCA may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the factors specified in section 138(2) of the QCA Act.

One of the factors specified in s 138(2) QCA Act is 'the pricing principles mentioned in section 168A' (s 138(2)(g) QCA Act).

Section 168A then specifies (our emphasis added):

The pricing principles in relation to the price of access to a service are 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; and*

(b) *allow for multi-part pricing and price discrimination when it aids efficiency; and*

(c) *not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and*

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

Based on QR's statements during consultations on the 2015 DAU and the subsequent supporting submissions to the 2015 DAU, it appears that QR considers that applying the Adjustment Charges regime or backdating would, where the new tariff is lower than the existing transitional tariffs, somehow be invalid through inconsistency with the pricing principle in section 168A(a) QCA Act.

2.2 The only requirement is that the pricing principles are 'had regard to'

The first key point is that section 138(2) QCA Act does not impose a list of mandatory conditions that must be satisfied before an undertaking can be approved.

Rather, it specifies a number of matters which the QCA must 'have regard to'.

This is important in understanding the relevance of the section 168A pricing principles, because (as one of the factors the QCA must 'have regard to') the only requirement of the QCA Act is that they be taken into account and considered in making the appropriate decision about whether to approve or refuse to approve an undertaking.

There is no requirement in the QCA Act that the appropriate decision is consistent with or gives priority to any particular one or more of the factors to which regard is to be had. The Authority's role is clearly specified in the QCA Act as one involving balancing of a number of factors to reach an appropriate decision on a draft access undertaking. Consequently, a particular factor may be given less weight, or departed from, or not followed, in what the QCA ultimately determines is the appropriate decision on the relevant draft access undertaking.

In fact, it is clearly evident on a review of the other factors to be taken into account (as set out in section 138(2)) that the QCA Act is not intended to provide for the QCA to follow or ensure its decision is absolutely consistent with any of the factors to be had regard to – as there is often a clear tension between some of the factors. To mention the obvious examples:

(a) there is a clear tension between the 'legitimate business interests of the owner or operator of the service' (s 138(2)(b) QCA Act) and 'the interests of persons who may seek access to the service' (s 138(2)(e) QCA Act); and

(b) section 138(2)(f) QCA Act refers to 'the effect of excluding existing assets for pricing purposes' when any such exclusion is likely to have some tension with providing 'a return on investment commensurate with the regulatory and commercial risks involved' (pricing principle in s 168A(a), to be had regard to under section 138(2)(g) QCA Act).

That, of itself, makes it clear that section 168A(a) does not in any way limit the power of the QCA to impose backdated reference tariffs.

Of course, if there was any concern that backdating would result in a difference from a pricing principle (or any other factor referred to in section 138(2)) the QCA would often want to give reasons as to why that was appropriate. However, once the QCA has had regard to the principle, that is sufficient.

If any stakeholder (including QR) disagrees with the weight the principle was given in determining the appropriate decision on the draft access undertaking that is an issue that goes to the merits of the QCA's decision. The QCA's decision cannot be challenged under the *Judicial Review Act 1991* (Qld) on that basis unless the decision is so unreasonable no reasonable decision maker could have made that decision, which seems extremely unlikely given the precedent for regulators making decisions of this type previously..

2.3 Backdating is not inconsistent with the pricing principle in section 168A(a)

Even if it was assumed that, contrary to the clear framework of the QCA Act, it was necessary for the QCA's decision on the appropriate form of an access undertaking to be strictly consistent with the pricing principle in section 168A(a), we consider that requirement would still be met where backdating applied.

The reference to 'at least enough to meet efficient costs' in section 168A(a) does not confine the QCA to considering only the costs and revenue during the term of the new undertaking.

There is no evident basis in the QCA Act for taking that view. It is also a particularly strange view to take when interpreting the methodology for providing a return to an infrastructure owner on a long life infrastructure asset where the term of the undertaking forms only a small part of that asset life and can be changed readily (as demonstrated aptly by the many recent extensions to the Queensland Rail and Aurizon Network access undertakings).

That view also ignores the common regulatory practice of applying many different types of 'carry-over' mechanisms from one regulatory period to another. For example in addition to the backdating of reference tariffs through adjustment charges, other provisions approved by Australian economic regulators have included capital carry-over accounts, efficiency/incentive arrangements, 'unders and overs' under a revenue cap and price paths. To the extent there is considered to be any ambiguity, a court would be anticipated to prefer a meaning which did not invalidate regulatory practices that were common at the time the pricing principles were introduced into the QCA Act.

In the current circumstances the narrow interpretation QR would need to establish would also have the absurd consequences of the principle in section 168A(a) being interpreted as:

(a) requiring that, where the QCA had the view that the reference tariff that should apply be lower than that which has been transitionally applied, the QCA should knowingly allow QR to retain a clear over-recovery during the period where transitional tariffs applied in excess of the 'return on investment commensurate with the regulatory and commercial risks involved' (in contravention of the other part of section 168A); and

(b) by allowing the retention of such an over recovery, rewarding an inefficient entity (which has charged a higher tariff than the QCA would recommend) for the delay in having a replacement access undertaking approved.

Again, when an alternative interpretation is open, a court will not adopt an interpretation which produces these sort of results.

When viewed in their proper statutory context, as simply guidance that regulated entities should generally generate expected revenue to cover at least the costs of providing access and receive a return on investment commensurate with the risks involved – it is clear that the pricing principle in section 168A(a) is not prescriptive as to the period over which that should occur.

For the reasons noted above, in the current circumstances it actually appears clear that backdating the approved tariffs to 1 July 2013 is consistent with the 'efficient cost' and 'commensurate return' principles in section 168A(a). In fact, as noted above, a failure to apply the new tariff to the prior period in which transitional tariffs have been applied is likely to itself be inconsistent with section 168A(a) due to the over-recovery produced.

3 Conclusions

In summary, we consider the QCA has the power to determine the appropriate form of access undertaking is one which backdates reference tariffs to 1 July 2013 (whether through applying the existing Adjustment Charges regime or an alternative form of financial adjustment).

That conclusion has been reached as:

(a) section 138(2) QCA Act only requires the QCA 'has regard to' the specified factors, including the pricing principle in section 168A(a) – such that, provided the principle is properly considered by the QCA, it can determine it is appropriate to make a decision that may depart from, or not be absolutely consistent with, the principle expressed in section 168A(a)); and

(b) The principle in section 168A(a) is not restricted to being interpreted solely by reference to the term of a particular draft access undertaking – such that backdating can occur in a manner that is absolutely consistent with section 168A(a) in any case, and in fact not backdating in the current circumstances is likely to be inconsistent with the pricing principle in section 168A(a).

Yours sincerely

[redacted]

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