

Submission – Queensland Rail’s Draft Access Undertaking 1 (2015)

Response to request for comments

June 2015



1 Introduction

On 5 May 2015, Queensland Rail Limited (**Queensland Rail**) lodged a draft access undertaking (**2015 DAU**) with the Queensland Competition Authority (**QCA**) in response to an initial undertaking notice issued by the QCA under section 133 of the Queensland Competition Authority Act 1997 (**QCA Act**).

On 6 May 2015, the QCA notified Queensland Rail that it was commencing an investigation in relation to the 2015 DAU.

On 15 May 2015, the QCA issued a request for comments (**RFC**) which related principally to the issue of the retrospective application of reference tariffs for coal carrying train services using the West Moreton and Metropolitan Networks.

This submission is in response to the RFC.

2 Executive summary

- (a) The RFC contains significant factual errors which are discussed in section 3 below.
- (b) In any case, the QCA cannot, as a matter of law, compel Queensland Rail to apply retrospective reference tariffs in its initial access undertaking for the reasons discussed in section 4 and the attached legal advice from Corrs Chambers Westgarth.
- (c) The issue of retrospectivity is, in any case, irrelevant in the context of the 2015 DAU for the reasons discussed section 5 below.
- (d) Queensland Rail has identified a flaw with the approach of the QCA to its investigation into the 2015 DAU as discussed in section 6 of this submission.

3 Factual errors

Some of the matters referred to in, and suggested by, the RFC are incorrect and concerning. To minimise the confusion of stakeholders, it is important to correct some of the more significant of those matters as follows:

- (a) While Queensland Rail's shares are held by a statutory authority, Queensland Rail is **not** itself a statutory authority as claimed by the QCA's RFC.
- (b) Despite what is asserted in the RFC, Queensland Rail has never received the benefit of any "*adjustment charge payments*".
 - (i) the QCA approved amendments to reference tariffs on 30 June 2010 in response to proposed amendments by Aurizon Network Pty Ltd (nee QR Network Pty Ltd) (**Aurizon Network**) – not Queensland Rail; and
 - (ii) after the approval of those reference tariff amendments, Queensland Rail was obliged to, and did, comply with the terms of the 2008 Access Undertaking (**2008 AU**) by implementing the approved backdated reference tariffs through adjustment charges – however, because the backdating related to a period when Aurizon Network was the access provider, the "*adjustment charge payments*" collected by Queensland Rail were not retained by Queensland Rail; they were paid to Aurizon Network as the entity properly entitled to those payments.

Any suggestion that Queensland Rail has benefited from any past backdating of reference tariffs or, indeed, that Queensland Rail has taken the upside of retrospectively applied

reference tariffs but is unwilling to take the downside is misleading and is rejected by Queensland Rail.

- (c) Queensland Rail has only lodged and withdrawn two (not three) past draft access undertakings being:
- (i) the 2012 DAU which it lodged in March 2012; and
 - (ii) the 2013 DAU which it lodged in February 2013 (after making amendments to the March 2012 DAU to address stakeholder and QCA concerns). That DAU was withdrawn on 12 December 2014 following a draft decision by the QCA by which the QCA foreshadowed a material change in a long-standing approach to asset valuation, which, if implemented, would result in significant reduction of 42% in the value of Queensland Rail's assets in the West Moreton Network and the consequent inability of Queensland Rail to recover at least its efficient costs and a return as required by the pricing principles in the QCA Act.

The reference in the RFC to a June 2013 DAU is incorrect. Queensland Rail never lodged a June 2013 DAU and did not withdraw any DAU in June 2013.

The only material lodged with the QCA by Queensland Rail in June 2013 was a submission in relation to reference tariffs. The QCA treated that submission as a withdrawal of the 2013 DAU. It is not clear by what authority it did so.

4 QCA cannot, as a matter of law, compel retrospective application of reference tariffs

Queensland Rail had been prepared to offer retrospective application of reference tariffs as is evident from its 2012 DAU.

Queensland Rail's position only changed following the QCA's foreshadowed significant change to the long-standing regulatory approach to asset valuation and after the material, negative impact of that change on Queensland Rail's legitimate business interests became evident. That impact was exacerbated by the long delay in the QCA's regulatory process for approval of the draft access undertaking.

While Queensland Rail may have been willing to offer retrospective application of reference tariffs as discussed above, the QCA cannot, as a matter of law, compel Queensland Rail to apply retrospective reference tariffs by either:

- (a) rejecting the 2015 DAU because it does not apply reference tariffs retrospectively; or
- (b) the QCA drafting and approving its own access undertaking for application to Queensland Rail's declared service.

In this regard, please see the **attached** advice received by Queensland Rail from Corrs Chambers Westgarth.

Queensland Rail waives its legal professional privilege in that advice.

The advice from Corrs Chambers Westgarth forms part of Queensland Rail's submission in response to the RFC.

5 Relevance

The 2015 DAU proposes that the proposed Reference Tariffs apply on a forward-looking basis. The Reference Tariffs are effectively the current Reference Tariffs under the 2008 AU escalated

for CPI. These Reference Tariffs are substantially below the Ceiling Revenue Limit as determined by Queensland Rail and reflect the level of revenue necessary to meet the requirements in section 168A(a) of the QCA Act.

Given that the Reference Tariffs proposed in the 2015 DAU are effectively set at the currently applicable Reference Tariffs under the 2008 AU escalated for CPI, retrospectivity is not relevant.

It would of course only be relevant if the QCA was proposing to approve a lower reference tariff than the one being proposed by Queensland Rail. It is difficult to see how such a lower tariff could be contemplated by the QCA without first having fully considered the Reference Tariffs proposed by Queensland Rail. To do otherwise would indicate a pre-judgement of the 2015 DAU and would draw into question the process being followed by the QCA for proper consideration of the 2015 DAU.

6 Process flaw

Queensland Rail acknowledges that the QCA has a statutory obligation to call for submissions in relation to the 2015 DAU and is in the process of an investigation under the QCA Act in relation to the 2015 DAU.

The investigation by the QCA was commenced by notice of investigation issued to Queensland Rail under section 146 of the QCA Act on 6 May 2015.

Any request for submissions following that date would necessarily be issued by the QCA as part of its investigation.

However, the RFC published by the QCA **after** the formal investigation commenced claims that:

- (a) the RFC *“has been prepared by QCA staff and does not bind, nor does it represent, the views of the QCA”*;
- (b) the RFC is published by *“QCA staff”* and that the publication is *“to assist stakeholders with any submissions they may make as part of the 2015 DAU consultation process”*; and
- (c) *“QCA staff are seeking responses”* to various specified questions.

It is not open to the QCA to commence a formal investigation under the QCA Act and at the same time allow its staff to conduct a parallel process on a frolic of their own, inviting and seeking to influence the submissions that stakeholders might make to the QCA in the response to the formal investigation.

Additionally, the RFC has been prepared in a way that, on any objective reading, is clearly directed to particular outcomes; the desirability of retrospective reference tariffs and a lower reference tariff than the one proposed.

The RFC process creates a fatal flaw in, and irreversibly infects, the QCA’s formal investigation in so far as it relates to the issue of retrospectivity.

The QCA cannot seek to compel Queensland Rail to apply retrospective reference tariffs for this, and the other reasons set out in this submission.

Attachment – Legal advice

Advice for Queensland Rail

Prepared for: Tamie Dominikovich, Deputy General Counsel - Corporate Advisory,
Regulatory & Major Projects

Prepared by: Eddie Scuderi

29 May 2015

Privileged and confidential

Advice on retrospective application of Reference Tariff

Question Whether the Queensland Competition Authority (**QCA**) can compel Queensland Rail to apply a retrospective Reference Tariff in Queensland Rail's initial access undertaking (**AU**).

Answer The QCA cannot, as a matter of law, compel Queensland Rail to apply a retrospective Reference Tariff in its initial access undertaking (including by the QCA drafting its own access undertaking for application to Queensland Rail) for the following reason:

- (a) Access to Queensland Rail's declared service is currently governed by the terms of the 2008 Access Undertaking (**2008 AU**).
- (b) The 2008 AU was applied to Queensland Rail under a transfer notice issued under section 9(1)(j) of the *Infrastructure Investment (Asset Restructuring and Disposal Act) 2009* (**Asset Disposal Act**). The transfer notice is a statutory instrument.
- (c) The transfer notice was expressed to apply until "*the date the QCA approves a subsequent access undertaking for Queensland Rail under the QCA Act that replaces the Access Undertaking in so far as it relates to Queensland Rail*".
- (d) The transfer notice expressly confirms that all provisions of the 2008 AU that relate to, amongst other matters, "*charges (including reference tariffs and adjustments to or variations of them)*" apply to Queensland Rail.
- (e) Section 9(5) of the Asset Disposal Act relevantly confirms that a transfer notice issued under the Asset Disposal Act "*has effect despite any other law or instrument*".
- (f) Section 12 of the Asset Disposal Act provides that "*[a] thing may be done under this Act despite any other law or instrument*".
- (g) The Reference Tariff applied under the 2008 AU therefore applies by Act of Parliament for the period during which the 2008 AU applies to Queensland Rail. The QCA cannot, as a matter of law, effectively override the requirements of an Act by requiring Queensland Rail to apply a different reference tariff to the one which the Asset Disposal Act and the transfer

notice issued under it, applied for the period specified in the transfer notice.

In addition, and for the sake of completeness, we also note that:

- (h) An access undertaking is, by definition¹, “a written undertaking that sets out the details of the terms on which the owner or operator of the service undertakes to provide access...”. It is therefore, by definition, prospective in nature and does not look backwards to a previous period not covered by the access undertaking submitted for approval.
- (i) There are other provisions of the QCA Act which also make clear that an access undertaking is forward-looking. For instance, see the pricing principles in sections 168A(a) and (d).
- (j) Nothing in the *Queensland Competition Act 1997 (QCA Act)* requires an access provider to have an access undertaking in place at all times or to apply reference tariffs retrospectively to cover periods prior to an approved access undertaking or between approved access undertakings.
- (k) Nothing in the QCA Act empowers the QCA to draft its own access undertaking for a declared service with retrospective effect, or to refuse a draft access undertaking on the basis that does not cater for retrospective effect.

Next steps

Please let us know if you require any further advice on this issue.

Please call to discuss any aspects of this advice

Eddie Scuderi
Partner
+61 7 3228 9319
eddie.scuderi@corrs.com.au

¹ Schedule 2 of the QCA Act.