

Our ref:MCR-15-250

Mr John Hindmarsh
Chief Executive Officer
Queensland Competition Authority
Level 27
145 Ann Street
Brisbane Qld 4000

Dear Mr Hindmarsh

Queensland Rail Submission – Response to QCA’s Consultation Paper on the West Moreton Reference Tariff

Queensland Rail's current access undertaking, '*QR Network's Access Undertaking (2008) June 2010 (2008AU)*', is due to expire on 30 June 2015.

On 9 April 2015, Queensland Rail submitted a Draft Amending Access Undertaking to the Queensland Competition Authority (**QCA**) under section 142 of the *Queensland Competition Authority Act 1997* to extend the 2008AU's term to the earlier of:

- (i) 30 June 2016; or
- (ii) the date on which the QCA approves a replacement access undertaking.

On 4 June 2015, the QCA released a draft decision to refuse to approve Queensland Rail's Draft Amending Access Undertaking to extend the term of the 2008AU and invited interested parties to make written submissions on the QCA's draft decision by no later than 12 June 2015.

Queensland Rail has prepared the attached submission in response to the QCA's draft decision.

If you have any questions in relation to the attached submission please do not hesitate to contact Douglas Jasch, Manager Policy and Regulation, on 3072 0544.

Yours sincerely



Helen Gluef
Chief Executive Officer

12 June 2015

Submission – Queensland Rail’s April 2015 Draft Amending Access Undertaking Response to draft decision

June 2015



This document is a submission by Queensland Rail Limited (**Queensland Rail**) in response to a draft decision by the Queensland Competition Authority (**QCA**) to refuse to approve Queensland Rail's April 2015 voluntary draft amending access undertaking (**DAAU**).

Effect of DAAU

The DAAU proposes an extension to the date on which the current access undertaking that applies to Queensland Rail (**2008 AU**) indicates that it will expire. The 2008 AU expressly refers to its expiry on 30 June 2015 – assuming that Queensland Rail's 2015 draft access undertaking (**2015 DAAU**) will not be approved by the QCA before that date.

Queensland Rail sought to amend that expiry date to cater for the fact that the QCA is still considering the 2015 DAAU. The effect of the amendment is to promote certainty and transparency as to the 2008 AU continuing to apply to Queensland Rail pending the QCA deciding whether to approve the 2015 DAAU.

Failure to approve

Based on the QCA draft decision, the QCA considers that if the 2008 AU was to expire on 30 June 2015 then “*regulatory coverage*” would still exist through the negotiate/arbitrate provisions under the QCA Act.

While Queensland Rail is supportive of a regulatory model that more freely allows it and its customers to negotiate commercial access arrangements, the QCA's view ignores the fact that the negotiate/arbitrate process under the QCA Act:

- only has the degree of certainty that can be derived from the provisions of the QCA Act – which in many respects provides substantially less detail than the 2008 AU; and
- is relatively untested in Queensland because of the heavy reliance on access undertakings.

In any event, even if the fallback position of the negotiate/arbitrate regime under the QCA Act was enlivened, there seems little utility in taking such a course unless the QCA is intending that the decision making process necessary to arrive at an approved access undertaking for Queensland Rail will be protracted and drawn out. Queensland Rail expects that any negotiate/arbitrate process under the QCA Act would take longer to complete than it will for an approved access undertaking to be put in place for Queensland Rail – which would negate or otherwise adversely affect any incomplete negotiations/arbitrations.

No lawful basis

The QCA's proposed refusal is essentially for the reason that Queensland Rail has not given a “commitment” for the reference tariffs to be approved under the 2015 DAAU to be made retrospective and backdated to 1 July 2013.

In this regard, Queensland Rail refers you to its submission¹ on the issue of retrospectivity which was lodged with the QCA in relation to the 2015 DAAU. That submission outlines why the QCA cannot legally compel Queensland Rail to make the reference tariffs retrospective.

As the QCA cannot lawfully compel Queensland Rail to make the 2015 DAAU reference tariffs retrospective, the QCA cannot lawfully refuse to approve a DAAU on the basis that Queensland Rail has not agreed to that retrospectivity. It also follows, for this reason and because the QCA already has the 2015 DAAU before it, that the amendments to the DAAU proposed by the QCA are not appropriate within the meaning of section 142(3)(b) of the QCA Act.

¹ Queensland Rail Limited (5 June 2015) *Submission – Queensland Rail's Draft Access Undertaking 1 (2015) Response to request for comments*.

Effect of transfer notice

In any case, the QCA must give consideration to the transfer notice – project direction given in accordance with the *Infrastructure Investment (Asset Restructuring and Disposal) Act 2009* (Qld) (**Asset Disposal Act**), as published in the Queensland Government Gazette on 29 June 2010 (**Transfer Notice**).

Amongst other matters, the Transfer Notice provides that the 2008 AU applies to Queensland Rail *“for the period from 30 June 2010 to the date the QCA approves a subsequent access undertaking for Queensland Rail under the QCA Act that replaces the [2008 AU] in so far as it relates to Queensland Rail”*.

Once the Transfer Notice is taken into account, the QCA cannot refuse to approve the DAAU. Refusing to approve the DAAU will only serve to create confusion and uncertainty. The Transfer Notice effectively means that the QCA must approve the proposed extension which is consistent with the legally binding and unequivocal provisions of the Transfer Notice.