

Managing the Assessment of Aurizon Network's 2016 Draft Access Undertaking

STATEMENT OF REGULATORY INTENT

July 2016

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CHAIR'S FOREWORD

The Queensland Competition Authority undertakes an important role in the Queensland economy by administering Queensland's third party access regime. The regime supports competition for access to services provided by significant infrastructure which cannot be economically duplicated.

The regime seeks to reflect the outcomes of competitive markets, in which prices and terms of access reflect the possibility of competitors providing substitute services. Preventing excessive prices and encouraging the entry of new firms into competitive upstream and downstream markets that rely on essential infrastructure services promotes greater competition in dependent markets.

Access undertakings play a key role in Queensland's access regime. Aurizon Network's access undertaking sets out the terms and conditions under which Aurizon Network provides access to its central Queensland coal network, including reference tariffs and approved regulated revenues.

An effective and timely assessment of Aurizon Network's 2016 draft access undertaking (2016 DAU) is a priority for the QCA.

To promote greater predictability throughout the 2016 DAU investigation, this Statement of Regulatory Intent outlines to all stakeholders how we intend to manage this regulatory process.

We intend to deliver decisions within a reasonable timeframe and to administer consistent and predictable processes throughout this regulatory process.

Managing an effective regulatory process requires transparency of decision making, appropriate consultation, opportunities for stakeholder collaboration, and effective information provision.

During our investigation, we intend to implement a number of procedural improvements for gathering information, assessing confidentiality claims and delivering timely decisions. Furthermore, we intend to provide more opportunities for collaboration between stakeholders, within a structured consultation framework.

I am confident that these measures will lead to a timely and effective assessment process. Moreover, this will support greater accountability of, and confidence in, our decision making process.

While seeking to implement procedural improvements to deliver timely decisions, the robust regulatory analysis that underpins all of our regulatory decisions will continue.

Professor Roy Green, Chair, Queensland Competition Authority



1 INTRODUCTION

1.1 Context

On 11 May 2016, we issued an initial undertaking notice to Aurizon Network in accordance with section 133 of the *Queensland Competition Authority Act 1997* (the QCA Act). The notice requires Aurizon Network to submit a draft access undertaking for the period commencing 1 July 2017 (2016 DAU). The 2016 DAU has been requested to be provided by 9 September 2016.

Aurizon Network's 2016 DAU is to be submitted for our consideration under Part 5 of the QCA Act. Our investigation will commence once we have received Aurizon Network's proposal.

In assessing the 2016 DAU, we intend to deliver decisions within a reasonable timeframe and to administer consistent and predictable processes throughout the investigation.

We consider that implementing a structured and transparent approach will facilitate the effective management of our assessment process and support constructive stakeholder engagement during the investigation.

1.2 Purpose of this document

The *Statement of Regulatory Intent* outlines our intended approach to managing information gathering processes, stakeholder consultation and assessment timeframes throughout our investigation.

By outlining our approach at the start of the regulatory process, we intend to promote a structured, transparent and predictable approach for assessing Aurizon Network's 2016 DAU.

We recognise the importance of stakeholder involvement in our investigation processes. We hope that a predictable and transparent assessment process will encourage greater stakeholder involvement and collaboration throughout the process.

1.3 Status of this document

This document is concerned with how the QCA intends to manage the mechanics of the regulatory process. It is provided on the basis of providing stakeholders with an overview of our intended approach, in particular in relation to the gathering of information, consultation and assessment timeframes. It is not intended to be an exhaustive statement of the process by which the QCA will undertake its assessment of the 2016 DAU. This assessment will proceed in accordance with the requirements of the QCA Act.

2 LEGISLATIVE REQUIREMENTS

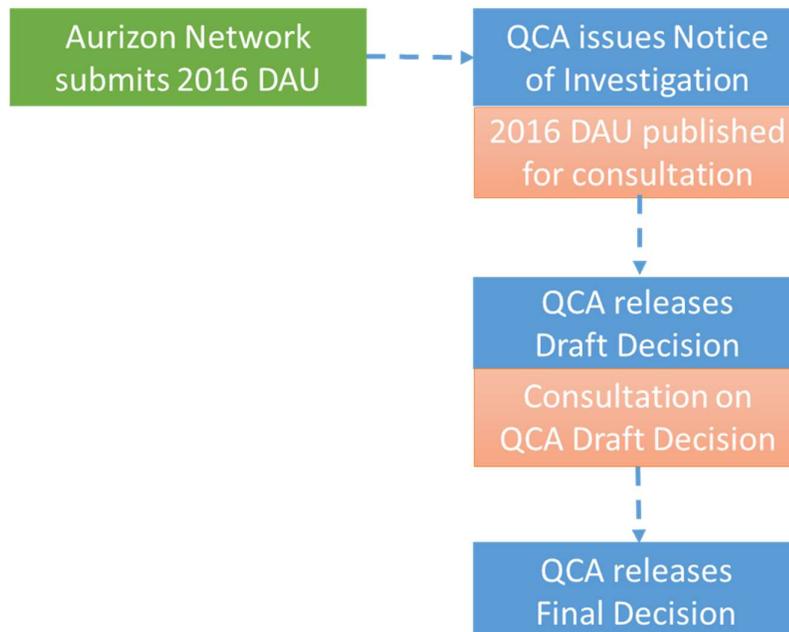
2.1 Procedural requirements

The QCA Act outlines various procedural requirements that we must comply with as part of our process for assessing Aurizon Network's 2016 DAU. Relevant legislative obligations include:

- Section 146, which requires us to issue a notice of investigation to commence an investigation for deciding whether to approve the DAU. A notice of investigation states the QCA's intention to conduct the investigation and invites interested parties to make written submissions on the proposed DAU.
- Section 138(3)(c), which requires us to publish the DAU and invite persons to make submissions on it prior to its approval.
- Section 138(3)(d), which requires us to consider any submissions received by stakeholders (within the consultation period) prior to approving a DAU.
- Section 173(1)(d), which states that the QCA must comply with natural justice in undertaking a DAU investigation. Consistent with this, we intend to publish a draft decision to provide stakeholders with an opportunity to comment on relevant QCA positions.

These requirements will form the basis of our 2016 DAU assessment process (see **Figure 1**).

Figure 1 QCA procedural requirements for the 2016 DAU assessment process



While our approach to assessing the 2016 DAU will draw heavily from these procedural requirements, we intend to incorporate additional processes where we consider they will provide for a more transparent and effective 2016 DAU assessment. For instance, in addition to consulting on Aurizon Network's 2016 DAU and our draft decision, further consultation may be undertaken to seek stakeholder submissions on specific matters.

3 APPROACH TO CONSULTATION

Public involvement is an important element of the regulatory process. Effective consultation with interested parties is integral to achieving a balanced and transparent regulatory process, as well as supporting accountability and confidence in our decision making.

We are outlining our intended approach to stakeholder consultation to communicate to stakeholders how, and at what stages of the investigation, they can contribute to the 2016 DAU assessment process.

3.1 Consulting on the 2016 DAU

Stakeholder consultation on the 2016 DAU will benefit from having well-informed stakeholders. We will have a role in disseminating information to stakeholders at various stages during the 2016 DAU assessment process to provide for more effective stakeholder consultation.

We intend to restrict the use of consultation papers to strategic matters or where a particular need for one is identified. This approach reflects:

- the access regime is relatively mature, having being in place for nearly two decades
- Aurizon Network is committed to engaging with stakeholders prior to its formal DAU submission
- other industry participants are sophisticated parties with considerable commercial and regulatory experience
- coal producers (current and emerging) are also ably represented by the Queensland Resources Council
- there are a number of third-party train operators already operating in the central Queensland market.

We consider that implementing a targeted consultation approach will promote a more effective consultation process and a timelier decision making process.

This will make our role of disseminating information to stakeholders more effective as targeted consultation will address particular matters in a more direct way (refer to section 3.3).

As such, interested parties are advised to prepare submissions based on Aurizon Network's 2016 DAU proposal.

3.2 Opportunities for collaborative stakeholder submissions

We consider that encouraging open communication between stakeholders, including early signalling of perceived issues and providing opportunities for collaboration to resolve these issues, will considerably improve the regulatory process for the benefit of all stakeholders.

To foster greater collaboration between stakeholders and facilitate opportunities for agreed stakeholder outcomes, we intend to expand our consultation process.

It is intended that stakeholders will have two opportunities to make submissions on Aurizon Network's 2016 DAU:

- an initial consultation period for submissions on the DAU (initial stakeholder submissions)

- a subsequent consultation period immediately following the initial consultation period (collaborative stakeholder submissions).

As part of the second consultation period, we encourage stakeholders to collaborate to provide joint submissions. This will also provide an opportunity for stakeholders to outline areas of consensus in response to initial stakeholder submissions and to develop agreed positions prior to our draft decision. It is hoped that stakeholders will take this opportunity to collaborate, discuss and, where possible, reach a consensus on certain issues.

We intend to have regard to consensus positions reached amongst stakeholders as part of our assessment of the 2016 DAU as provided in submissions to the QCA.

3.3 Use of targeted consultation papers

We will consider publishing targeted consultation papers, such as 'request for comments' papers or position papers, where we consider there is a benefit in obtaining stakeholder comments on particular matters. We intend to release targeted consultation papers as needed throughout the 2016 DAU assessment process. For example, these may be published:

- early in the 2016 DAU assessment process to gauge stakeholder views on an issue to assist the making of a draft decision
- to provide an opportunity for stakeholders to comment on any issues that emerge following consultation on the draft decision.

We consider that this will be a more effective way to engage with stakeholders and consult on specific issues or particular policy positions that arise throughout the 2016 DAU assessment process.

3.4 Minimising unnecessary burdens on stakeholders

We intend to consolidate requests for comments to reduce the burden on stakeholders. In particular, we will be mindful of structuring consultation to limit the occurrence of multiple and sequential consultation periods. In this way, we intend to improve the timeliness and effectiveness of stakeholder submissions by avoiding:

- sequential consultation periods that may limit stakeholders' ability to provide submissions in a timely manner
- consulting on the same material on multiple occasions which may simply extend review timeframes for no benefit.

The consultation processes throughout the regulatory process will be decided as the scope and complexity of issues becomes apparent.

3.5 Timeframes for consultation

Adequate time for consultation enables stakeholders to prepare quality submissions and avoids the need for unplanned extensions to submission deadlines. Also, the QCA appreciates stakeholders' expectations as to the overall timeliness of our assessment process.

We are mindful of providing certainty to stakeholders on expected consultation periods. This will provide greater predictability for the overall timeliness of the 2016 DAU assessment process.

Reflecting on established practice for setting reasonable consultation timeframes, stakeholders should note the intended range of consultation timeframes:

- six to ten weeks for a DAU consultation period
- two to four weeks for collaborative stakeholder submissions on the DAU
- eight to ten weeks for a draft decision consultation period
- at least two weeks to respond to targeted consultation papers.

While these indicative timeframes provide guidance, the QCA will have regard to the scope of issues being presented before establishing the appropriate timeframe for stakeholder consultation.

Stakeholders will be made aware of consultation timeframes when consultation commences. Timeframes will be outlined on our website and in relevant stakeholder notices.

3.6 Obligations for stakeholders

Sections 230 to 233 of the QCA Act outlines a number of obligations and responsibilities when providing information to the QCA. Stakeholders should be aware that it is an offence to:

- provide information to the QCA that is false or misleading to the person's knowledge (s. 230)
- provide a document to the QCA that is false, misleading or incomplete to the person's knowledge and without notifying the QCA that it is false, misleading or incomplete (s. 231)
- obstruct QCA staff members from exercising the QCA's functions under the QCA Act (s. 232)
- intimidate another person that is providing evidence as part of an investigation (s. 233).

Stakeholders should be mindful of these obligations, particularly when submitting information or participating in the 2016 DAU investigation.

3.7 Disclosure of information

Stakeholder involvement is a key element of our decision-making process. In the interests of transparency and to promote informed discussion, the QCA intends to publish the information received from stakeholders on our website. However, in accordance with the QCA Act, we will not disclose information that is considered to be confidential (refer to section 7).

Disclosing information will assist stakeholders to identify key issues and maintaining an open transparent process will support accountability and confidence in our decision making.

4 STATUTORY ASSESSMENT TIMEFRAMES

Outlining the expected timeframes for assessing Aurizon Network's 2016 DAU is intended to provide regulatory certainty for stakeholders as to the timing of our processes.

4.1 Statutory timeframes for decision-making

In accordance with section 147A of the QCA Act, the QCA must use its best endeavours to make a decision on whether or not to approve a DAU within six months of the commencement of the investigation.

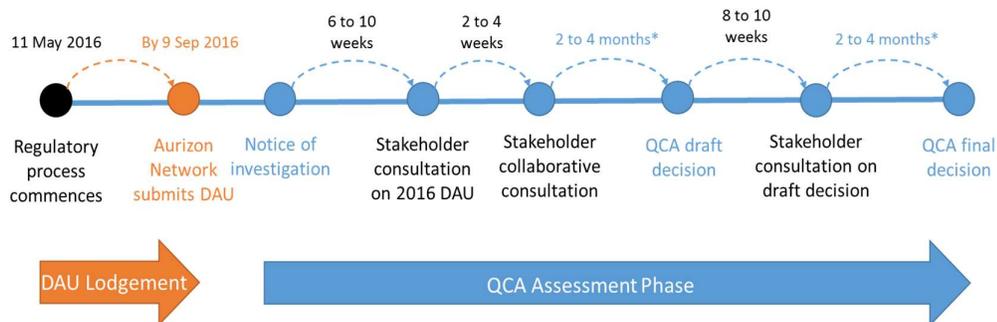
Stakeholders should note that timeframes required to assess a DAU are dependent on the issues encountered throughout the investigation and may need to be adjusted to account for periods of time that are excluded from the assessment timeframe in accordance with the QCA Act, namely:

- stakeholders responding to notices given under section 185 of the QCA Act requiring information or documents to be provided
- consultation periods
- other periods Aurizon Network agrees with the QCA should be excluded.

We consider it preferable to set indicative timeframes that adhere to our statutory obligations rather than imposing arbitrary timeframes — which do not account for circumstances that may arise throughout the 2016 DAU assessment period and could potentially limit opportunities for stakeholder consultation.

A road map is provided below showing indicative timeframes associated with key milestones.

Figure 2 Indicative timeframes for 2016 DAU assessment milestones



Note: * Within the cumulative best endeavour decision timeframe

4.2 Updating indicative timeframes

These indicative timeframes may be altered throughout the investigation to account for periods of time that are excluded from the statutory timeframe in accordance with section 147A of the QCA Act. We will update the expected timeframes as required by issuing a relevant stakeholder notice. The stakeholder notice will show a new indicative timeframe and detail the reasons for the change.

In accordance with section 147A(4), the assessment timeframes will be published on our website once we have commenced the investigation. This is intended to guide stakeholders through the expected regulatory process and associated timeframes.

5 LATE INFORMATION

To promote the timely consideration and assessment of Aurizon Network's 2016 DAU, all stakeholders are encouraged to provide information and submissions by the relevant due date.

While there may be legitimate reasons for late information, such as new information becoming available, stakeholder compliance with deadlines is important for timely decision making.

Indeed, natural justice requires matters be processed in a timely way and does not permit an unending process of information provision, particularly when ample time has already been allowed.

5.1 Disregarding late information

In accordance with section 168B of the QCA Act, we may make a decision without taking into account late information—submissions or other information provided by stakeholders after the submission deadline provided—if doing so is reasonable.

In determining whether it is reasonable to disregard late information, the QCA Act (s. 168B(4)) requires us to take into account the following factors:

- whether the late information was available, or ought reasonably to have been available, to the person during the consultation timeframe provided
- the length, complexity and relevance of the late information
- how much time has elapsed since the timeframe provided for consultation ended
- how advanced the QCA's decision making process is when the late information is received.

We intend to consider whether to take late information into account on a case-by-case basis, where it is reasonable to do so in accordance with the QCA Act. Where stakeholders provide late information, they should also consider providing a detailed explanation as to why it would be reasonable to have regard to the late information.

5.2 Consideration of late information

Where we will have regard to information provided after the stated deadline, we intend to publish a stakeholder notice to disclose that such information has been provided. This is intended to provide for greater transparency.

We will consider, on a case-by-case basis, whether additional consultation is required to provide stakeholders with an opportunity to consider the late information. Where the late information has implications for consultation periods, and the overall timeframes of the assessment process, we will outline any changes to timeframes in a stakeholder notice on our website.

6 REQUESTS FOR INFORMATION

Receiving additional information from Aurizon Network and other stakeholders during the investigation may be required for us to adequately assess the 2016 DAU. Where this is assessed as necessary, we intend to request information to inform our decision making process.

We intend to implement a structured process for acquiring information that will limit the potential for lengthy delays to the assessment process.

The process for requesting information may involve:

- issuing an informal request for information to be provided within a reasonable timeframe; and/or
- issuing a section 185 notice to request information.

This approach is consistent with the process used to request information from stakeholders in previous investigations undertaken by the QCA.

6.1 Information requests

Where we identify the need to obtain information from a particular stakeholder, we may seek to informally request the required information. Stakeholders should also be aware that we may initially issue a section 185 notice, where it is appropriate in the circumstances.

We intend to inform stakeholders, in writing, what information is being requested and the reason it is required for our assessment process.

This written request will detail the type of information required, as well as its preferred format.

All information requests will set out appropriate timeframes for providing information.

If the relevant stakeholder does not comply with the informal request (or does not provide adequate reasoning for not doing so), we will be minded to issue a section 185 notice to request the information.

6.2 Issuance of section 185 notices

In accordance with section 185 of the QCA Act, we may issue a written notice requiring a person to give a statement to the QCA setting out stated information or give a stated document by a certain date. Failure to comply with a section 185 notice (without a reasonable excuse) could attract a penalty as provided for by the QCA Act.

Periods of time waiting for persons to respond to section 185 notices are excluded from the QCA's six-month decision-making statutory timeframe. We will determine, on a case-by-case basis, whether consultation on such information is appropriate.

Where the issuance of a section 185 notice is required to obtain information and results in delays to the indicative timeframes for the 2016 DAU assessment process, we will outline any changes to our assessment timeframes in a stakeholder notice.

7 CONFIDENTIAL INFORMATION

The QCA encourages submissions to be made publicly available wherever this is appropriate. However, a person making a submission may claim confidentiality in respect of the submission (or any part of the submission).

Information that is not confidential will be published on our website and made publicly available.

In accordance with the QCA Act, information will be considered confidential where the QCA considers that disclosure of the information would be likely to damage the person's commercial activities and would not be in the public interest.

If we consider information is confidential for the purposes of the QCA Act, we must take all reasonable steps to ensure the information is not, without the person's consent, disclosed to another person. However, stakeholders should be aware that we may still disclose confidential information without consent in particular circumstances set out in the QCA Act.¹

7.1 Making a confidentiality claim

In making a confidentiality claim, a claimant should:

- clearly indicate the information that it considers should not be disclosed to another person
- inform us of their belief that disclosure of the information is likely to damage their commercial activities
- provide supporting justification for their belief and detail whether disclosure of the information would not be in the public interest.

We are implementing a structured process for stakeholders to submit confidentiality claims. Our process for stakeholders to submit a confidentiality claim involves:

- identifying the category of confidential information associated with the claim
- using the provided template to submit a confidentiality claim.

Submissions (or sections of submissions) that are claimed to be confidential should be clearly identified using this process.

Where it is unclear why a submission has been marked 'confidential', the status of the submission will be discussed with the person making the submission.

We consider that this structured approach will assist stakeholders to identify confidential information for the purposes of the QCA Act and to submit well-substantiated confidentiality claims for the 2016 DAU investigation process. This approach will also contribute to the timely assessment of such claims by the QCA.

7.2 Confidentiality claim template

Stakeholders should provide sufficient reasoning about why the disclosure of information is likely to damage their commercial activities.

¹ For example, refer to section 187(3) of the QCA Act.

To provide guidance on the type of information that would assist our assessment of a claim for confidentiality, we have developed a proposed confidentiality claim template for stakeholders.

The confidentiality claim template prompts a claimant to:

- identify the information they consider to be confidential
- specify the category of confidentiality for each claim
- outline the reasons why the information is considered to be confidential.

We would appreciate stakeholders using this template when making confidentiality claims. A copy of the proposed confidentiality claim template is presented in **Appendix A** and will be available on our website during the course of the investigation.

7.3 Categories of confidential information

We have identified specific categories of confidential information to provide stakeholders with guidance on how they should identify confidential information made available to the QCA.

When making a confidentiality claim, stakeholders should identify which category of confidential information the claim is in respect of.

These categories of confidential information are presented to provide guidance only. Classification of a claim into a specific category will not guarantee non-disclosure of information. Nor are these guidelines intended to limit the scope of confidentiality claims made. We will assess each confidentiality claim on a case-by-case basis consistent with the requirements of the QCA Act.

Categories of confidential information may include the following:

- (a) *Commercially sensitive costs*—cost information that would affect the stakeholder's ability to negotiate competitive bids or prices in the future.
- (b) *Market or strategic knowledge*—information that communicates the behaviour or performance of a firm, which may hinder its ability to negotiate in future transactions.
- (c) *Intellectual property*—valuable information that would unfairly benefit competitors if made public.
- (d) *Personal information*—information that reveals personal information and details about an individual.
- (e) *Other*—confidential information that is not within any of the above categories.

While these categories are presented to provide guidance to claimants, stakeholders can contribute to a timely regulatory process by using this categorisation approach.

7.4 Disclosure of non-confidential information

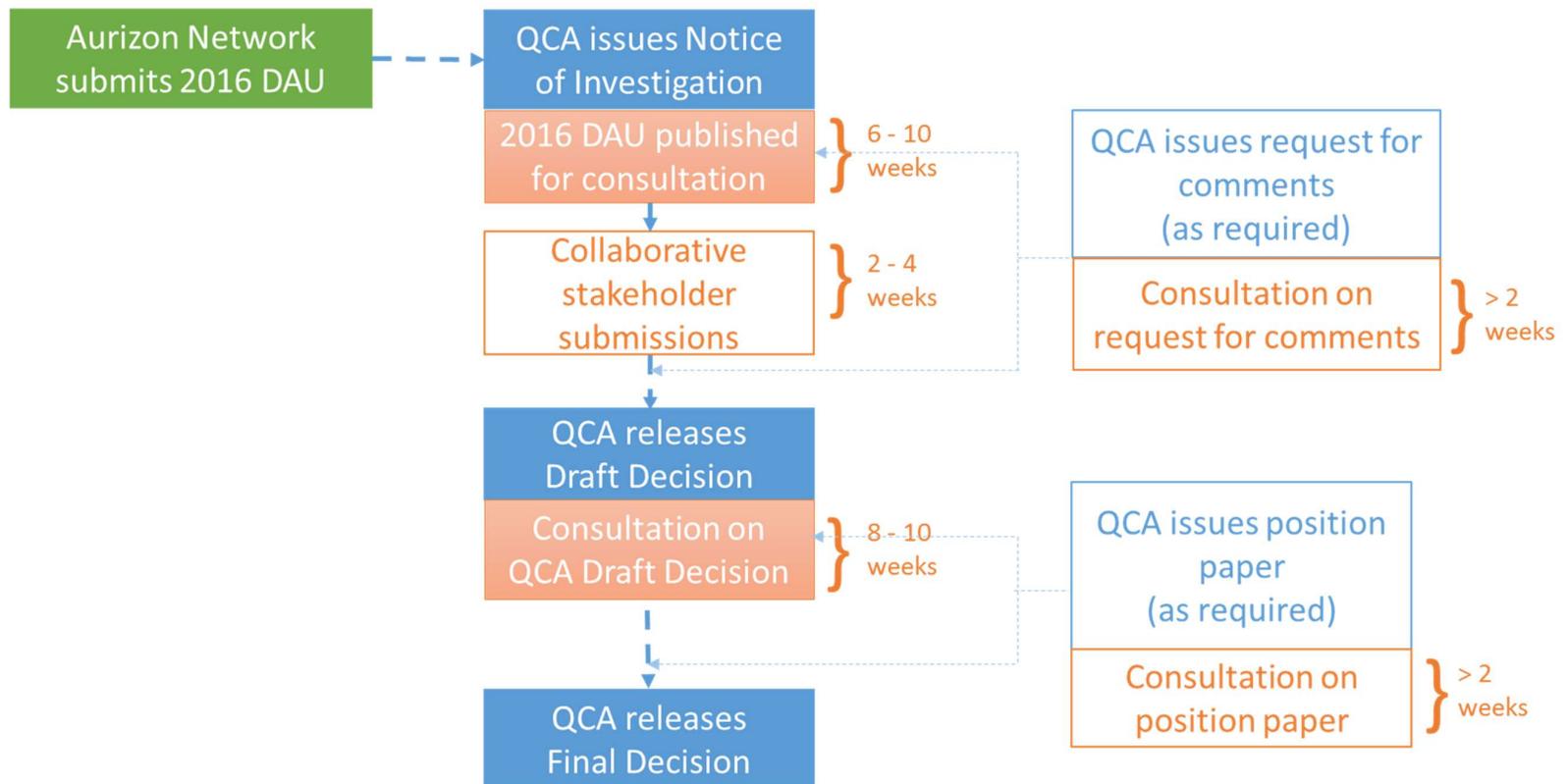
A transparent approach to stakeholder consultation supports accountability and confidence in our decision making process. On this basis, information that is not confidential will be published on our website.

If we refuse a request for confidentiality, we will notify the relevant stakeholder in writing prior to the information being published. Where an assessment of claims for confidentiality results in delays to publishing such information, we will release a stakeholder notice to inform stakeholders.

8 PROCESS MAP FOR ASSESSING THE 2016 DAU

A process map for assessing the 2016 DAU is outlined in Figure 3. The process map outlines certain procedural requirements of the QCA Act and draws from our intended approach for managing the information gathering processes, stakeholder consultation and assessment timeframes.

Figure 3 Process map for assessing the 2016 DAU



APPENDIX A: PROPOSED CONFIDENTIALITY CLAIM TEMPLATE FOR 2016 DAU

Name of claimant: _____

Document associated with the claim: _____

Page(s) & Paragraphs	Category of confidentiality	Detail why the information is likely to damage your (or another party's) commercial activities if disclosed	Information as to why disclosure is not in the public interest
<p><i>Outline the relevant pages and paragraphs associated with your claim.</i></p>	<p><i>Outline which category of confidentiality is associated with your claim:</i></p> <ul style="list-style-type: none"> <i>(a) Market sensitive cost inputs</i> <i>(b) Market or strategic knowledge</i> <i>(c) Intellectual property</i> <i>(d) Personal information</i> <i>(e) Other.</i> 	<p><i>Provide an explanation as to why the information is likely to damage your (or another party's) commercial activities if disclosed.</i></p>	<p><i>Provide any supporting information as to why it is not in the public interest to disclose the relevant information.</i></p>