

# Queensland Competition Authority

Queensland Rail's 2020 Draft Access Undertaking

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## STATEMENT OF REGULATORY INTENT

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July 2018

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## FOREWORD

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This statement of regulatory intent informs stakeholders about how we intend to manage the regulatory process to have a new undertaking ready to replace Queensland Rail's 2016 access undertaking before it expires. It aims to make the draft access undertaking (DAU) investigation more predictable and to support a timely outcome.

### Timely outcomes

In the 20 years since the Queensland Competition Authority (QCA) started work on access regulation for rail networks in Queensland, no replacement access undertaking has been approved before the previous access undertaking was due to expire.

This has led to a succession of extensions of old undertakings, followed by retrospective adjustments that were required to provide fairness to the regulated rail companies and their customers. These extensions and adjustments have added to regulatory costs for all parties, created uncertainty, and left little time to plan for subsequent undertakings.

Access undertakings play a key role in Queensland's regime for access to significant infrastructure which cannot be economically duplicated, including railways. Queensland Rail's access undertaking sets out the terms and conditions under which it provides access to its network of tracks across Queensland, including negotiation rules, information requirements and reference tariffs.

While there have been several reasons for the pattern of late approval and extensions, a key reason has been that the DAUs have been submitted very late. This has left insufficient time for the QCA to investigate the DAUs and approve appropriate undertakings before the previous undertakings expired, while also following the rules in the QCA Act and providing procedural fairness and natural justice to all parties.

### The 2020 DAU statement of regulatory intent

The QCA has managed the process for Queensland Rail's replacement undertaking to maximise the chances that a new set of rules will be ready to be approved by the time the 2016 access undertaking expires in June 2020.

This process started when the QCA issued an Initial Undertaking Notice pursuant to section 133 of the QCA Act in September 2017, requiring a draft access undertaking (the 2020 DAU) by 30 April 2018. We subsequently extended the submission date to 31 July 2018, in response to a request from Queensland Rail. We consider that this later date still leaves a good chance that Queensland Rail, its customers, and the QCA, can have a replacement undertaking ready in time.

Managing an effective regulatory process requires transparency of decision-making, appropriate consultation, opportunities for stakeholder collaboration, and effective information provision. The QCA is confident that this statement of regulatory intent sets up a framework that can satisfy these requirements.

The QCA looks forward to working with Queensland Rail and its stakeholders and welcomes the opportunity to have an appropriate 2020 undertaking ready before the 2016 undertaking expires.

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# 1 INTRODUCTION

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On 14 September 2017, we issued an initial undertaking notice to Queensland Rail in accordance with section 133 of the *Queensland Competition Authority Act 1997* (the QCA Act). The notice requires Queensland Rail to submit a draft access undertaking for the period starting 1 July 2020 (the 2020 DAU).

The QCA requested that the 2020 DAU be provided by 31 April 2018, and subsequently extended that time to 31 July 2018, in response to a request from Queensland Rail. We consider this will promote the objective of having an appropriate replacement undertaking approved before the 2016 undertaking terminates at the end of June 2020.

Queensland Rail's 2020 DAU is to be submitted for our consideration under Part 5 of the QCA Act. Our investigation will commence once we have received Queensland Rail's proposal.

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

We are publishing this statement before Queensland Rail submits its 2020 DAU in order to promote a structured, transparent and predictable process for assessing the proposal. We recognise the importance of stakeholder involvement in our investigation processes, and want to encourage robust stakeholder involvement and collaboration.

This document is about how the QCA intends to manage the mechanics of the regulatory process. It is not intended to be an exhaustive statement of the process by which the QCA will assess the 2020 DAU. The assessment will proceed in accordance with the requirements of the QCA Act.

## 2 LEGISLATIVE REQUIREMENTS

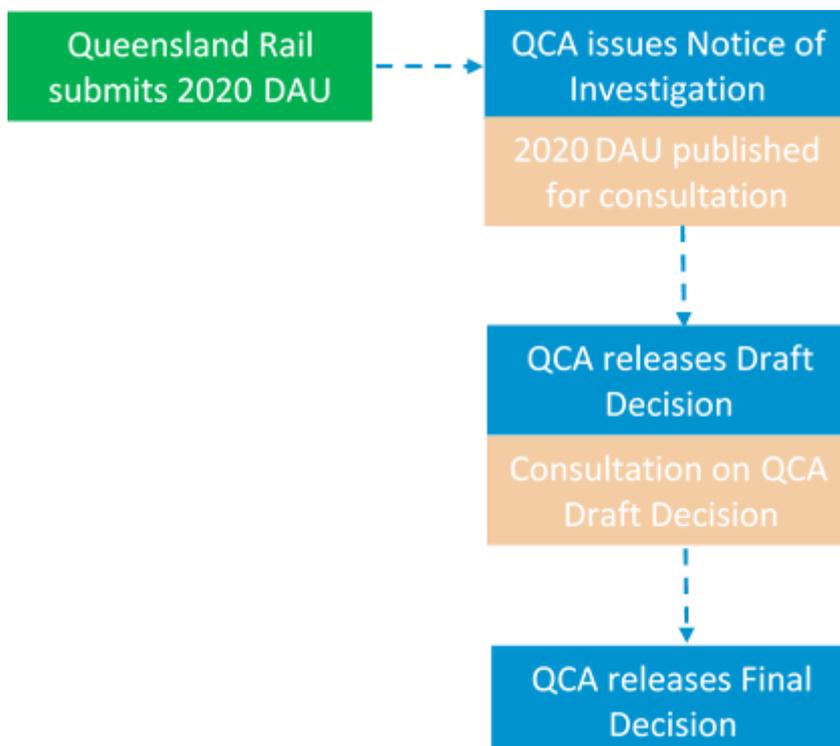
### 2.1 Procedural requirements

The QCA Act outlines various procedures we must apply while assessing Queensland Rail's 2020 DAU:

- Section 146 provides for 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) requires that we publish the DAU and invite persons to make submissions on it.
- Section 138(3)(d) requires that we consider any submissions received by stakeholders (within the consultation period) before deciding whether to approve the DAU.
- Section 173(1)(d) states that the QCA must comply with natural justice in undertaking a DAU investigation. Consistent with this, we will publish a draft decision to provide stakeholders with an opportunity to comment on relevant QCA positions.

These requirements will form the basis of our 2020 DAU assessment process (see Figure 1).

**Figure 1 QCA procedural requirements for the 2020 DAU assessment process**



We intend to incorporate additional processes where we consider they will provide for a more transparent and effective 2020 DAU assessment. For instance, in addition to consulting on Queensland Rail's 2020 DAU and our draft decision, we may seek further stakeholder submissions on specific matters.

## 2.2 Approach to assessing the 2020 DAU

Section 138 of the QCA Act outlines the factors affecting the approval of a DAU. In particular, we may approve Queensland Rail's 2020 DAU only if we consider it appropriate to do so having regard to each of the matters set out in section 138(2) of the QCA Act (Box 1).

### Box 1: Section 138(2) of the QCA Act

*The authority 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 this part;*
- (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;*
- (h) *any other issues the authority considers relevant.*

The 'object of this part' as referred to in section 138(2)(a) is set out in section 69E:

*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.*

The pricing principles set out under section 168A are:

*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.*

We will assess the 2020 DAU having regard to these matters and stakeholder submissions.

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## 3 APPROACH TO CONSULTATION

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Public involvement is an important element of the regulatory process. Effective consultation with interested parties is integral to a balanced and transparent regulatory process; it also supports 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 2020 DAU assessment process.

### 3.1 Consulting on the 2020 DAU

Our assessment of the 2020 DAU will benefit if the stakeholders who participate in consultation are well-informed. We have a role in disseminating information to stakeholders at various stages during the 2020 DAU assessment process to provide for more effective stakeholder consultation.

Where necessary, we will release consultation papers to provide context and summarise key aspects of specific issues. However, we intend to restrict the use of consultation papers to strategic matters or where a particular need for one is identified.

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

### 3.2 Opportunities for collaborative stakeholder submissions

We encourage open communication between stakeholders, including early signalling of perceived issues, and will provide opportunities for collaboration to resolve these issues, as it will improve the regulatory process.

Stakeholders will therefore have two opportunities to make submissions on Queensland Rail's 2020 DAU:

- during an initial consultation period for submissions on Queensland Rail's proposal (initial stakeholder submissions)
- during a subsequent consultation period immediately following the initial consultation period (collaborative and consensus submissions).

We encourage stakeholders to collaborate during the second consultation period, to provide joint submissions. It is hoped that stakeholders will take this opportunity to discuss and, where possible, reach a consensus on certain issues.

We intend to have regard to consensus positions that stakeholders submit to the QCA, as part of our assessment of the 2020 DAU.

### 3.3 Timeframes for consultation

Adequate time for consultation enables stakeholders to prepare quality submissions and avoids unplanned extensions to submission deadlines. We are mindful of providing certainty to stakeholders on expected consultation periods. This will provide greater predictability for the overall timeliness of the 2020 DAU assessment process. Our intended consultation timeframes are:

- 6 to 10 weeks for a DAU consultation period

- 2 to 4 weeks for collaborative stakeholder submissions on the DAU
- 8 to 10 weeks for a draft decision consultation period
- at least 2 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. Stakeholders will be made aware of consultation timeframes on our website and in relevant stakeholder notices.

### 3.4 Obligations for stakeholders

Sections 230 to 233 of the QCA Act outlines a number of obligations and responsibilities when stakeholders provide information to the QCA. 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 2020 DAU investigation.

### 3.5 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 (see 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. Disclosing information is also consistent with the principles of natural justice. Natural justice requires that people or organisations who may be affected by our decision are informed of relevant matters considered as part of the decision-making process and provided an opportunity to respond to these matters.

## 4 ASSESSMENT TIMEFRAMES

We are providing an outline of the expected timeframes for assessing Queensland Rail's 2020 DAU, to provide regulatory certainty for stakeholders about the timing of our processes.

In accordance with section 147A of the QCA Act, the QCA must use its best endeavours to make a decision on whether to approve or refuse a DAU within six months of the commencement of the investigation. The road map below shows indicative times for key milestones.

**Figure 2 Indicative timeframes for the 2020 DAU**



### Updating indicative timeframes

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 (s. 147A), namely:

- stakeholders responding to notices given under section 185 of the QCA Act requiring information or documents to be provided
- consultation periods
- other matters that Queensland Rail agrees should be excluded.

We will update the expected timeframes as required by issuing a relevant stakeholder notice.

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.

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## 5 LATE INFORMATION

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To promote the timely consideration and assessment of Queensland Rail's 2020 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

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 (s. 168B of the QCA Act).

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
- how long, complex and relevant the late information is
- 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 Considering late information

Where we will have regard to information provided after the stated deadline, we intend to publish a stakeholder notice 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 and on our website.

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## 6 REQUESTS FOR INFORMATION

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Additional information from Queensland Rail and other stakeholders may be required during the investigation for us to adequately assess the 2020 DAU. We intend to implement a structured process for acquiring information that will limit the potential for lengthy delays to the assessment process. The process may involve:

- issuing an informal request for information to be provided within a reasonable timeframe, and/or
- issuing a notice under section 185 of the QCA Act to request information.

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

### 6.1 Information requests

Where we identify the need to obtain information from a particular stakeholder, we may make an informal request for the required information. However, we may consider it necessary to move directly to issuing a section 185 information notice.

We intend to inform stakeholders, in writing, what information is being requested and the reason it is required. This written request will also detail the 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 Section 185 information 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 and, if so, provide adequate time for stakeholders to comment.

Where the issuance of a section 185 notice is required to obtain information, and it results in delays to the indicative timeframes for the 2020 DAU assessment process, we will outline any changes to our assessment timeframes in a stakeholder notice.

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## 7 CONFIDENTIAL INFORMATION

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The QCA prefers that submissions are made publicly available wherever this is appropriate. However a person making a submission who does not want particular information to be public, 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 disclosing 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.<sup>1</sup>

Once the public version of a submission is published on the QCA's website, a confidentiality claimant may receive requests from other stakeholders seeking its confidential information. The QCA encourages parties to accept appropriately given confidentiality undertakings to allow for the sharing of confidential information. This will ensure an open and transparent inquiry process.

### 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
- state their view that disclosure of the information is likely to damage their commercial activities
- provide supporting justification for their view, and detail why they consider disclosing the information would not be in the public interest.

Our structured process for confidentiality claims involves stakeholders:

- 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 2020 DAU investigation process. This approach will also contribute to the timely assessment of such claims by the QCA.

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

## 7.2 Confidentiality claim template

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

To provide guidance on the type of information that would assist our assessment of a claim for confidentiality, we have developed a 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 the information is considered to be confidential.

We would appreciate stakeholders using this template when making confidentiality claims. The proposed confidentiality claim template (in Appendix A) 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 describes the claim.

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 include:

- (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.

By using these categories as guidance, claimants can contribute to a timely regulatory process.

## 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 before publishing the information. Where an assessment of claims for confidentiality results in delays to publishing such information, we will release a stakeholder notice to inform stakeholders.

## APPENDIX A: CONFIDENTIALITY CLAIM TEMPLATE FOR QUEENSLAND RAIL 2020 DAU

Name of claimant: \_\_\_\_\_

Document associated with the claim: \_\_\_\_\_

<b>Page(s) and paragraph(s)</b>	<b>Category of confidentiality</b>	<b>Basis for claim</b>	<b>Information as to why disclosure is not in the public interest</b>
<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"> <li><i>(a) Market-sensitive cost inputs</i></li> <li><i>(b) Market or strategic knowledge</i></li> <li><i>(c) Intellectual property</i></li> <li><i>(d) Personal information</i></li> <li><i>(e) Other.</i></li> </ul>	<p><i>Provide an explanation as to why the information falls within the selected confidentiality category and 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>