

Queensland Rail – Submission on 2016 QCA Fee Framework

February 2016



1 Background

By letter dated 11 January 2016 the Queensland Competition Authority (**QCA**) issued for consultation and invited submissions on a Draft Fee Framework (**Draft Framework**) attached as Appendix 2 to that letter.

This document constitutes Queensland Rail's submission on the Draft Framework.

2 Relevant test

The Draft Framework correctly identifies that for a QCA fee to be lawful it must satisfy the two requirements specified in the Queensland Competition Authority Regulation 2007 (**Regulation**). The fee must be both:

- (a) considered reasonable by the QCA; and
- (b) no more than the reasonable cost of providing the service or performing the function mentioned in Schedule 1 to the Regulation.

Having correctly stated the regulatory requirements to be satisfied, the Draft Framework reveals that, if applied, the QCA's approach would not meet the regulated requirements for the setting and charging of a QCA fee.

In addition to the other matters discussed below, the Framework makes it clear that the QCA is assuming that its actual costs of providing a service or function will always be reasonable.

Also, while there is a proposed adjustment of estimates against actual costs, the Framework does not contemplate any assessment by the QCA of whether the actual cost of providing a service or function is itself "*no more than the reasonable cost of providing the service or performing the function*" as required by the Regulation.

For example, the actual cost incurred by the QCA might be unreasonably high for a particular service performed, or may not have been reasonably incurred to deliver that service.

The Regulation expressly requires the QCA to consider whether its actual costs are reasonable, rather than simply permitting an unqualified on-charging of actual costs. The Framework fails to apply the Regulation.

Similarly, in respect of overheads, the Framework states that the QCA will review "*the total budgeted overheads*" to see if they are reasonable to include in the fee. In addition to the other points made below in respect of overheads, the Regulation does not allow the QCA to assess the reasonableness of "*budgeted overheads*".

The Regulation obliges the QCA to assess whether the amount of the fee is reasonable and, to the extent that overheads are in fact permitted to form part of a fee, that the actual overhead cost is no more than a reasonable component of the cost of providing the service or function. The Regulation

does not allow the QCA to charge a fee based on whether the budgeted overheads are reasonable.

For these reasons, the QCA would be acting inconsistently with the Regulation if it applies the Framework.

3 Review of the regulatory services or functions

The Framework states that the QCA will “*review the regulatory service or function and the associated fee*” whenever the proposed fee to be charged is more than 1% of the regulated annual revenue of the entity concerned.

The QCA Act does not permit the QCA to “*review the regulatory service or function*”; the QCA is bound by the QCA Act to perform those services and functions imposed by the legislation on the QCA. Only the fee is subject to “review” (i.e. setting) by the QCA.

The requirements for the setting of the fee in the Regulation expressly contemplate that a statutory service or function might need to be performed at less than the cost of providing it (and potentially even at less than the reasonable cost of providing it).

A decision not to perform a statutory service or function, or to perform it to less than the appropriate standard based on cost considerations would be beyond the QCA’s power.

4 1% review trigger

The Framework provides that a proposed fee will be reviewed when it represents “*more than 1% the regulated annual revenue of the entity concerned*”.

The link to an arbitrary 1% of regulated annual revenue is without statutory basis. The test is whether the fee is reasonable and not more the reasonable cost of providing the service or function, not whether it represents any particular percentage of a declared service provider’s regulated revenue.

5 Basis of calculation

The proposed fee will be the aggregate of the costs incurred by the QCA in performing “*general regulatory services and functions*” and a proportion of overheads.

The QCA Act does not permit the QCA to charge for “*general regulatory services and functions*” it only permits the charging of a fee for specific regulatory services and functions namely, those listed in the Schedule to the Regulation.

The QCA’s Framework in relation to these matters is beyond power.

The Framework also fails to expressly link the fee the QCA can charge to the matters listed in Schedule 1 of the Regulation or to create a mechanism by which the provider of a declared service can be satisfied that it is not being charged for anything other than the matters listed in the Schedule to the Regulation.

The Framework needs to be amended to:

- include an obligation on the QCA to provide details of costs being charged by reference to the relevant services or functions listed in the Schedule);
- require the audit referred to in the Framework to ensure that the costs are not only “*consistent with*” the Framework but also directly linked to a service or function in Schedule 1 of the Regulation;
- require the QCA to provide to the relevant service provider a copy of the audit referred to above and to otherwise confirm that only functions and services listed in Schedule 1 to the Regulation are being charged for in the fee; and
- require the QCA to provide each access provider with a copy of the then current Cost Allocation Manual at the time of providing the copy of the audit report.

Queensland Rail also notes that a copy of the Cost Allocation Manual has not been made available for the purpose of the review of the Framework and requests that such a copy be made available.

6 Overheads

Queensland Rail notes that the QCA receives an annual grant from the State. The amount of that grant in respect of each of the past two financial years has been \$7.2m. Those amounts have been in addition to the amounts charged to and received by the QCA as QCA Fees from the providers of declared services.

Queensland Rail does not understand why it, or any other entities receiving functions and services under the QCA Act, should be asked to bear any cost for the QCA’s overheads when the QCA is already receiving such a sizeable grant from the State for its operational requirements.

The fact that the description in the Schedule to the Regulation of the matters for which the QCA can impose a charge is directly linked to the specific, listed functions and services lends support to the conclusion that general overheads are not intended or appropriate to on-charge and are already covered by the general grant from the State.

In the absence of a proper explanation the QCA’s proposal to include in its fee an amount for overheads suggests an element of “double-dipping”.

Queensland Rail would appreciate more detail from the QCA as to why it requires a contribution to overheads when it already receives a sizable annual grant from the State.

Pending the provision of that explanation Queensland Rail also notes the following issues in respect of the claim for a contribution to the QCA's overheads.

The provider of a declared service should not be paying a proportion of all overheads, only a proportion of overheads expended and referable to the performance of statutory functions and services listed in Schedule 1 to the Regulation. If the QCA decides to, say, create a discussion paper on competitive neutrality in the electricity industry, that is not a function or service in Schedule 1 and in any case, irrelevant to Queensland Rail. The relevant overhead costs of creating that paper should be excluded when calculating Queensland Rail's proportion of the overheads it will be required to pay.

Also, the Framework states that the QCA considers its allocation of overhead costs across all functions performed by the QCA to be "*an appropriate and reasonable way to reflect and recover the costs of providing regulatory services and functions*". The QCA has therefore pre-judged the matter and failed to apply the statutory test appropriately, as well indicating that it intends to recover a proportion of all overheads, not just those relevant to Schedule 1 services and functions.

Implementation of the Framework in the manner described would be open to challenge. To address this issue the Framework should be amended to require the QCA to provide access seekers with confirmation that the proportion of the overheads being included in the fee only relate to services and functions referred to in Schedule.

The Framework also lists in the matters identified as recoverable overheads "*general administration costs supporting the work of the QCA and Members*". It is not clear what these costs relate to and how much they may represent. The lack of any definition for this category of overhead recovery would arguably allow the QCA to treat the item as a "catch-all" basket to cover any costs it cannot directly link to the functions and services in Schedule 1 of the Regulation. Again, such a treatment is not permitted by the Regulation.

7 Setting fees in advance

While Queensland Rail is prepared to accept that the proposal to set fees in advance with an adjustment annually after actual costs are known is an efficient process from the QCA's perspective, it does not concede that the QCA Act or the Regulation permit this approach.

In any case, as the decision on the fee actually payable to the QCA will not be settled until after the QCA's actual costs are known, the Framework should identify clearly the point at which a final decision by the QCA is made in respect of the final fee payable in respect of the relevant year.

8 Additional Fees

The Framework expressly allows additional fees to be charged for “*special services which are beyond those required for the general regulatory task*” and for arbitration or mediation services, where any of these services are “*specifically requested*”.

It is not clear what is meant by “*special services*”. In any case there is no statutory basis for charging a fee for other than the services and functions listed in the Regulation. For instance, the QCA cannot under the Regulation, impose a charge for performing a role it has assumed under an access undertaking.

It is also contrary to the QCA Act for Queensland Rail to always bear the costs of an arbitration. The QCA Act in section 208 provides a process for the awarding of costs against a party in any arbitration; the Framework creates a default position that removes the discretion to award costs as contemplated by section 208. Even if the other party requests the arbitration and fails to win, Queensland Rail would be bearing the costs of the arbitration under the Framework proposal. That is inconsistent with the QCA Act.

9 Pass-through

The Framework states that the fees charged for general regulatory services and functions will be “*eligible*” for pass-through “*whenever the QCA has responsibility for these pass-throughs*”. The Framework also states that the QCA Levy is “*subject of a separate approval process*”.

It is not possible for Queensland Rail to make an informed submission on this aspect of the Framework unless and until it is provided with a copy of the “*separate approval process*” referred to in the Framework.

In any case, Queensland Rail notes that the QCA has no statutory “*responsibility for pass-throughs*” and in the past has approved a QCA Levy pursuant to the process created by Queensland Rail’s common form of access agreement.

Against that background, Queensland Rail submits that:

- (a) the full amount of the QCA fee can only be passed through to those access holders that benefit from the regulatory functions and services performed by the QCA;
- (b) the amount of the pass-through must be fair and reasonable having regard to the proportion of the functions and services performed by the QCA of relevance to the access holder. For example, a freight service access holder should not be paying more than a fair proportion of services and functions that primarily benefit coal haulage access holders. (For example, the proportion payable by a freight service access holder may appropriately be ‘nil’ in respect of matters such as reference tariffs);

- (c) the QCA should assist Queensland Rail in determining the appropriate proportion to charge access holders by way of a QCA Levy in a fair and reasonable way by providing details of the functions and services the QCA has performed to allow the QCA Levy to be appropriately apportioned by Queensland Rail between different types of access holders;
- (d) the QCA should not seek to refuse to allow a QCA Levy proposed by Queensland Rail unless the QCA considers the proposed QCA Levy to be unfair or unreasonable having regard to the matters discussed above; and
- (e) the QCA should confirm in its Framework that it will adopt and apply the principles discussed above whenever it is asked to approve a QCA Levy pursuant to a Queensland Rail access agreement

10 Conclusion

Queensland Rail is happy to meet with the QCA to discuss any aspect of this submission.