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26 June 2015

Ms Helen Gluer
Chief Executive Officer
Queensland Rail Ltd
GPO Box 1429
Brisbane QLD 4001

Dear Ms Gluer

Final decision: Queensland Rail's draft amending access undertaking – extension of termination date

On 25 June 2015, the Queensland Competition Authority (QCA) made a final decision to refuse to approve Queensland Rail's draft amending access undertaking to extend the term of the 2008 access undertaking (the April 2015 Extension DAAU).

Context

Queensland Rail's 2008 access undertaking is due to expire on 30 June 2015.

On 9 April 2015, the QCA received from Queensland Rail, under section 142 of the *Queensland Competition Authority Act 1997* (QCA Act), a DAAU to extend its 2008 undertaking's termination date to the earlier of (i) 30 June 2016 and (ii) the date on which we approve a replacement access undertaking.

On 4 June 2015, the QCA made a draft decision to refuse to approve the April 2015 Extension DAAU and invited interested parties to make written submission on the draft decision by 12 June 2015.

Stakeholder comments and QCA Position

Five stakeholders commented on the DAAU. New Hope supported the draft decision while Asciano, Aurizon, Glencore and Queensland Rail did not. Stakeholders' comments can be grouped as below.

No lawful basis

Queensland Rail's submission says "the QCA cannot lawfully refuse to approve a DAAU on the basis that Queensland Rail has not agreed to... retrospectivity". It makes this submission having earlier said "the QCA's refusal is essentially for the reason that Queensland Rail has not given a "commitment" for the reference tariffs to be approved under the 2015 DAU to be made retrospective and backdated to 1 July 2013".

In making its decision on the April 2015 Extension DAAU, one of the factors considered by the QCA was the absence, in the April 2015 Extension DAAU, of an indication that Queensland Rail remained committed to the inclusion of an adjustment charge to recoup or refund any variations between transitional and new tariffs from 1 July 2013 (an **Adjustment Charge**).

This was relevant because, in the context where such an indication had previously been given in relation to earlier extensions of the 2008 undertaking which had been granted, the absence of such an indication in connection with the April 2015 Extension DAAU, if approved, would create uncertainty about the application of an Adjustment Charge; and this in turn would have a negative effect on the public interest and the promotion of the economically efficient operation of, use of and investment in, significant infrastructure (**the Uncertainty Issue**).

It was also relevant because the absence of such an indication meant that QCA was not satisfied that the tariff for the proposed extension period was appropriate having regard to the matters relevant under section 138(2) of the QCA Act (**the Unestablished Tariff Issue**).

Effect of transfer notice

Queensland Rail made a further legal submission related to the effect of the Transfer Notice. This submission was that the Transfer Notice somehow had the effect that the April 2015 Extension DAAU must be approved; that refusing to approve the extension would create uncertainty; and that the extension was "consistent with the legally binding and unequivocal provisions of the Transfer Notice".

QCA does not consider that the matters relating to the Transfer Notice raised by Queensland Rail make it appropriate to approve the April 2015 Extension DAAU.

Refusing to approve the April 2015 Extension DAAU is not inconsistent with the Transfer Notice and does not create any relevant uncertainty. Clause 5 of the Transfer Notice states that nothing in it is to be taken to preclude amendment of the access undertaking. That would include amendment of the term of the access undertaking (which has happened on a number of occasions since the Transfer Notice was issued).

Further, although (in places) the terms of the Transfer Notice appear to extend the term of the 2008 undertaking indefinitely, the QCA is not satisfied that the Transfer Notice could validly have such an effect.

Addressing 'retrospectivity' in 2015 DAU

Aurizon said the issue of 'retrospectivity' should be addressed through the consideration of the 2015 draft access undertaking (the 2015 DAU).

While the QCA expects that the issue of 'retrospectivity' (or, more accurately, the application of an Adjustment Charge) will be considered in the 2015 DAU, the QCA does not consider this to make it appropriate to approve the April 2015 Extension DAAU.

This is because simply approving the April 2015 Extension DAAU and considering the Adjustment Charge in the 2015 DAU will not avoid the Uncertainty Issue or the Unestablished Tariff Issue identified above.

Regulatory coverage and failure to approve

Stakeholders made a range of comments about regulatory coverage and a refusal to approve the extension DAAU.

Asciano and Glencore said they do not use the western system, so a rejection decision would result in their losing regulatory certainty with no offsetting gains in terms of the timing applying for the western system tariffs. The QCA acknowledges that this offsetting benefit (not as to timing of, but as to an appropriate level of, the tariff) arises only for existing and future users of the Western system.

Queensland Rail, Glencore and Aurizon submitted there were shortcomings in the negotiate/arbitrate and other provisions of the QCA Act (which would operate if the extension DAAU was not approved). For instance, Glencore said there are protections in the existing undertaking (like defined time periods for various stages of the access negotiation period, access conditions restrictions, the queuing framework, reporting, QCA information and audit powers) that do not exist in the QCA Act. Queensland Rail said the negotiate/arbitrate provisions lack detail, are relatively untested and that any negotiation or arbitration under those provisions would be negated or adversely affected by the approval of the 2015 DAU. Aurizon said that the 2008 access undertaking not being extended would create regulatory uncertainty, particularly for any access negotiations already commenced, and that the QCA's interest in holding Queensland Rail to its previous commitments may not achieve the desired effect if Queensland Rail avoids giving the commitment, the 2008 access undertaking lapses and negotiations have to take place under Part 5 of the QCA Act.

The QCA notes that stakeholders have processes available under the provisions of Part 5 Divisions 4 and 5 of the QCA Act which address these matters. The QCA acknowledges that there is some uncertainty about how these provisions will apply given that they are untested, however the QCA is confident that the QCA Act will operate as Parliament intended and that the procedure will be practically workable. Importantly, a certain outcome from an access application is ultimately available through the arbitration provisions of the QCA Act. In this way the QCA Act ensures an access application can be concluded with certainty without an access undertaking being in place.

The QCA is not satisfied that if a negotiation or arbitration commences under the QCA Act and the 2015 DAU is subsequently approved, then the incomplete negotiation or arbitration would be negated or adversely affected. To the contrary, the QCA considers the approved undertaking would likely assist in bringing any such processes to a close.

Aurizon did not provide examples of negotiations already commenced under the 2008 undertaking (nor did any other stakeholder), however again the QCA is satisfied the QCA Act provides an appropriate process for the resolution of these matters should they arise. Many requirements will still remain effective e.g. Queensland Rail's obligations to act in good faith, to not unfairly differentiate between access seekers and to provide relevant information to an access seeker (under ss. 100(1), 100(2) and 101 of the QCA Act, respectively).

The QCA does not accept that it has an interest in holding Queensland Rail to its previous commitments as such. Rather the QCA is concerned with the uncertainties (and related consequences) created by Queensland Rail's actions (not those actions of themselves) and it believes that those matters should be considered (where relevant) under section 138(2) of the QCA Act. Parties are of course free to agree an access contract that differs from a tariff set out in an access undertaking.

The QCA has had regard to the certainty (as to the terms of the arrangements that would apply) that would be achieved if the April 2015 Extension DAAU were approved. The QCA considers that the benefit of that certainty is outweighed by the Uncertainty Issue and the Unestablished Tariff Issue that would be produced if the April 2015 Extension DAAU were approved.

[Removal of western system tariff from extension DAAU](#)

New Hope said it preferred an undertaking to remain in place, provided that did not prejudice its ability to recoup any over-payment of tariffs compared to the tariffs which (it asserts) ought to have applied had a new undertaking been in place on 1 July 2013 and said that the QCA's draft position on how the extension DAAU could be amended would achieve that outcome.

New Hope and Glencore suggested an alternative of removing the western system reference tariff from the undertaking for the extension period and extending the remainder of the undertaking. The QCA has had regard to these matters. However, we note Queensland Rail has not currently proposed to make such an amendment and there is insufficient time for Queensland Rail to submit such a proposal and have it considered before the expiry of the 2008 undertaking. Further, such an approach still risks creating the Uncertainty Issue (even if in some more limited form).

The QCA's approach

Queensland Rail previously sought seven extensions of its 2008 access undertaking. Between 30 March 2012 and 12 December 2014, in or in connection with its voluntary draft access undertakings, Queensland Rail had encouraged stakeholders to believe (and otherwise generally indicated) that it would give effect to new reference tariffs from 1 July 2013 by applying an Adjustment Charge (**Attachment 1**). The six extension requests from June 2012 to November 2014 were submitted and approved while that form of indication concerning an adjustment proposal was in place (**Attachment 2**). Queensland Rail's letters accompanying its extension DAAUs of May 2013, November 2013 and May 2014 also stated its intention to give effect to the new tariff from 1 July 2013 through adjustment charge provisions in its replacement DAU (**Attachment 2**).

Stakeholders did not object to the previous extension requests.

The QCA considered Queensland Rail's previous extension requests and stakeholder submissions in this context and approved the previous extensions.

Unlike previous extensions, the April 2015 Extension DAAU is not accompanied by a commitment from Queensland Rail to give effect to an Adjustment Charge as:

- Queensland Rail in December 2014 withdrew its June 2013 voluntary DAU that contained provisions to give effect to new tariff from 1 July 2013.
- Queensland Rail's cover letter accompanying the April 2015 Extension DAAU did not state its intention to apply tariff from 1 July 2013.
- The DAU Queensland Rail submitted on 5 May 2015 in response to the section 133 initial undertaking notice we issued, proposes to give effect to new reference tariff from the date we approve that DAU.

The QCA has considered stakeholder submissions in light of the above matters.

Our final decision

The QCA has considered Queensland Rail's April 2015 Extension DAAU and stakeholder comments as part of its consideration under s. 138(2) of QCA Act whether to approve or refuse to approve the April 2015 Extension DAAU.

The QCA's decision is to refuse to approve the April 2015 Extension DAAU. Having had regard to the matters mentioned in section 138(2) of the QCA Act, and weighing the competing considerations that arise, the QCA does not consider it is appropriate to approve the April 2015 Extension DAAU.

Queensland Rail's April 2015 Extension DAAU is not accompanied by a commitment from Queensland Rail to give effect to the new reference tariff from 1 July 2013 by means of an Adjustment Charge. The absence of such a commitment gives rise to the Uncertainty Issue and the Unestablished Tariff Issue.

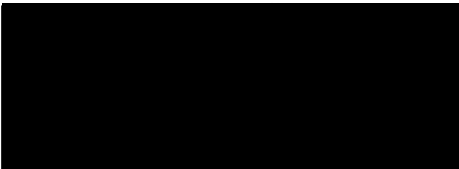
The QCA has given careful consideration to the new material received from stakeholders concerning the regulatory uncertainty arising from not extending the 2008 access undertaking. In particular, the QCA has examined the potential uncertainty created by stakeholders having to rely on the untested process under the QCA Act for negotiating access to Queensland Rail's network rather than the provisions of an undertaking to which they are accustomed. While the QCA accepts the procedures are untested and that practical challenges may arise in respect of negotiations that commence in the interim period until a new access undertaking is approved, the QCA is not satisfied that these practical challenges are insurmountable or that the procedures under the QCA Act will be unworkable.

In the end, the QCA's task is to balance the future uncertainties flowing from on the one hand approving, and on the other hand not approving, the April 2015 Extension DAAU.

The QCA's position is that the disadvantages arising from approving the April 2015 Extension DAAU (particularly the Uncertainty Issue and the Unestablished Tariff Issue) outweigh the regulatory uncertainty, to the extent it may exist, from not approving the April 2015 Extension DAAU.

The way in which the QCA considers it is appropriate to amend the April 2015 Extension DAAU is by including the same kind of commitment as has previously been given by Queensland Rail, to give effect to new reference tariffs from 1 July 2013 by applying adjustment charge provisions to recoup or refund any variations between transitional and new tariffs.

Yours sincerely



Roy Green
Chair

DRAFT ACCESS UNDERTAKINGS SUBMITTED DURING COURSE OF QUEENSLAND RAIL'S (QR) 2008 UNDERTAKING

<i>DAU</i>	<i>Date submitted</i>	<i>Date withdrawn</i>	<i>Adjustment charge provision</i>
March 2012	30 March 2012	25 February 2013 ¹ (QR withdrew March 2012 DAU and at the same time submitted the February 2013 DAU).	<p>The DAU specified in cl. 3.4.2(b)(iii)(C) that 'after new Reference Tariffs are approved by the QCA in accordance with this clause 3.4.2(b) this Undertaking will apply as though it were amended to replace the Reference Tariffs with those new Reference Tariffs with effect on and from 1 July 2013.'</p> <p>The DAU included adjustment charge provisions in Schedule A, cl. 6. Clause 6.1(a) specified "If: this Undertaking specifies that a Reference Tariff is applicable or effective from a date prior to the QCA's approval of that Reference Tariff; or ... Queensland Rail is entitled to recover from or will reimburse to, as applicable, each relevant Access Holder the amount (Adjustment Amount) which is the sum of: ..."</p>
February 2013	25 February 2013	28 June 2013 ² (On this date, QR submitted for the first time reference tariffs for western system coal services, and proposed consequential amendments to the February 2013 DAU. This, in effect, was a withdrawal of its February 2013 DAU and submission of a new voluntary draft access undertaking (the June 2013 DAU). ³	<p>The DAU specified in cl. 3.4.2(b)(iii)(C) the same provision as noted above in the March 2012 DAU.</p> <p>The DAU included adjustment charge provisions in Schedule A, cl. 6. Clause 6.1(a) specified the same provision as noted above in the March 2012 DAU.</p>
June 2013	28 June 2013	12 December 2014 ⁴	<p>The DAU specified in cl. 3.4.2(b)(iii)(C) the same provision as noted above in the March 2012 DAU.</p> <p>The DAU included adjustment charge provisions in Schedule A, cl. 6. Clause 6.1(a) specified the same provision as noted above in the March 2012 DAU.</p>

¹ Queensland Rail, 25 February 2013.

² Queensland Rail, 28 June 2013

³ <http://www.qca.org.au/Rail/Queensland-Rail/More-on-QLD-Rail/Draft-Access-Undertaking/Archive/February-2013-DAU>

⁴ Queensland Rail, 12 December 2014.

PREVIOUS EXTENSIONS OF QUEENSLAND RAIL'S 2008 UNDERTAKING

<i>Extension DAAU</i>	<i>Queensland Rail's (QR) proposal</i>	<i>Stakeholder comments</i>	<i>QCA decision</i>
April 2011	<p>Proposed extending the term to 30 June 2012.</p> <p>In the letter accompanying the DAAU, QR said the extension will maintain regulatory coverage of train services until the approval of a replacement DAAU, which it was yet to submit then.¹</p>	No stakeholder objected to the extension but stakeholders raised concerns about QR taking too long to submit a replacement undertaking.	We considered it reasonable to approve the extension, given that QR was yet to submit an undertaking that better reflected its business activities, noting that the decision did not prejudice our ability to issue QR a section 133 initial undertaking notice. ²
June 2012	<p>Proposed extending the term to 31 December 2012.</p> <p>In the letter accompanying the DAAU, QR said the extension will maintain regulatory coverage of train services until the approval of its March 2012 replacement draft access undertaking (DAU).³</p> <p>The March 2012 DAAU included adjustment charge provisions to backdate reference tariff to 1 July 2013 (see Attachment 1).</p>	No stakeholder objected to the extension.	We approved the extension. ⁴
October 2012	<p>Proposed extending the term to 30 June 2013.</p> <p>In the letter accompanying the DAAU, QR said the extension will allow sufficient time for consultation with stakeholders and approval of its March 2012 DAAU.⁵</p>	No stakeholder objected to the extension although New Hope wanted new reference tariffs to be in place by 1 July 2013 on the expectation that the tariffs for the regulatory period beginning 1 July 2013 would be lower. ⁶	We approved the extension. ⁷
May 2013	<p>Proposed extending the term to 31 December 2013.</p> <p>In the letter accompanying the DAAU, QR said the extension will provide continued regulatory certainty for stakeholders while the QCA's approval process for the</p>	No stakeholder objected to the extension. However, stakeholders were disappointed that QR was yet to submit its western system reference tariff proposal and were concerned about rolling forward the existing tariff, as they expected the tariff to decline from 1 July	We approved the extension on the basis that it would allow time to finalise the 2013 DAAU assessment process and that Queensland Rail intended to apply an adjustment charge mechanism to recover (or return) the difference between the transitional tariffs and the

¹ Queensland Rail, April 2011.

² QCA, May 2011.

³ Queensland Rail, April 2012.

⁴ QCA, June 2012.

⁵ Queensland Rail, October 2012.

⁶ New Hope, November 2012.

⁷ QCA, November 2012.

Extension DAAU	Queensland Rail's (QR) proposal	Stakeholder comments	QCA decision
	<p>replacement February 2013 replacement DAAU is finalised.⁸</p> <p>In the letter, QR also stated that it was proposing that transitional reference tariffs will apply from 30 June 2013, being current reference tariffs escalated by CPI. QR said the adjustment charge provisions in AU1 [February 2013 DAAU] will allow the reference tariff to be backdated upon the approval of AU1. QR noted that transitional tariffs were applied in the 2005 and 2010 access undertakings.⁹</p>	<p>2013.¹⁰ New Hope said 'the interim tariff applicable to the extension be set such as to minimise the risk of overpayment' and suggested adjusting QR's proposed interim tariff to reflect a lower weighted average cost of capital due to lower government bond rates and debt margins.</p>	<p>tariffs that would be approved as part of the 2013 DAAU assessment process.¹¹</p>
November 2013	<p>Proposed extending the term to the earlier of 30 June 2014 and the date on which we approve a replacement undertaking.</p> <p>In the letter accompanying the DAAU, QR said it intended to continue with its proposal that the transitional reference tariffs remain and continue to apply up until the approval of AU1 [June 2013 DAAU¹²]. QR also stated the adjustment charge provisions in AU1 will allow the reference tariff to be backdated to 1 July 2013 upon the approval of AU1. QR noted that transitional tariffs were applied in both the 2005 and 2010 access undertakings and is also in practice with Aurizon Network.¹³</p>	<p>No stakeholder objected to the extension, although New Hope suggested we prioritise the determination of new reference tariffs as part of the 2013 DAAU assessment process.¹⁴</p>	<p>We approved the extension DAAU.¹⁵</p>
May 2014	<p>Proposed extending the term to the earlier of 31 December 2014 and the date on which we approve a replacement undertaking.</p> <p>In the letter accompanying the</p>	<p>We did not receive any submissions.</p>	<p>We approved the extension DAAU.¹⁷</p>

⁸ In February 2013, Queensland Rail withdrew its March 2012 DAAU and submitted the February 2013 DAAU, which retained provisions to apply reference tariffs from 1 July 2013 through an adjustment charge (see **Attachment 1**).

⁹ Queensland Rail, May 2013.

¹⁰ Aurizon, May 2013; New Hope, May 2013.

¹¹ QCA, June 2013.

¹² In June 2013, Queensland Rail resubmitted its February 2013 DAAU and included, for the first time, its proposed reference tariffs for the western system. The June 2013 DAAU retained provisions to apply reference tariffs from 1 July 2013 through an adjustment charge (see **Attachment 1**).

¹³ Queensland Rail, November 2013.

¹⁴ New Hope, November 2013.

¹⁵ QCA, November 2013.

Extension DAAU	Queensland Rail's (QR) proposal	Stakeholder comments	QCA decision
	DAAU, QR reiterated its intention to continue with its proposal to apply transitional reference tariffs until the approval the AU1 [June 2013 DAU] and said the adjustment charge provisions in AU1 will allow the reference tariff to be backdated to 1 July 2013. ¹⁶		
November 2014	Proposed extending the term to the earlier of 30 June 2015 and the date on which we approve a replacement undertaking. In the letter accompanying the DAAU, QR said the extension will provide continued regulatory certainty for stakeholders and allow sufficient time for the completion of the AU1 [June 2013 DAU] approval process. ¹⁸	We did not receive any submissions.	We approved the DAAU. ¹⁹ The letter accompanying the November 2014 extension DAAU did not withdraw Queensland Rail's earlier commitment to backdating tariffs and the relevant clauses were still before the QCA in the June 2013 DAU submitted by Queensland Rail.

¹⁷ QCA, June 2014.

¹⁶ Queensland Rail, May 2014.

¹⁸ Queensland Rail, November 2014.

¹⁹ QCA, December 2014.