

5 June 2015

Charles Millstead
Director Economic Regulation
Queensland Competition Authority
Level 27, 145 Ann Street
Brisbane, Queensland
Australia 4000
Email: charles.millstead@qca.org.au

Dear Charles

Thank you for the opportunity to provide this submission on Queensland Rail's 2015 Draft Access Undertaking (DAU).

As you know, the Queensland Resources Council (QRC) is the peak representative body of the Queensland minerals and energy sector. The QRC's membership encompasses minerals and energy exploration, production, and processing companies, and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

QRC has not reviewed the DAU in detail; with only two coal producers now operating in the West Moreton System, QRC's wider membership has only limited interest in developments in regard to this DAU. The exception to this statement is Queensland Rail's proposal to renege on earlier written commitments to backdate the final approved Access Charge to the date on which the new undertaking would (but for delays) have applied.

QRC notes that the QCA released a draft decision on 4 June to refuse Queensland Rail's April 2015 extension draft amending access undertaking (DAAU) and explicitly referenced stakeholder concern with the absence of an adjustment charge mechanism in the extension DAAU.

QRC supports the QCA's draft position that it would be appropriate to amend the extension DAAU by including the commitment 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.

Queensland Rail's proposal has captured the attention of coal producers throughout Queensland and beyond. QRC would expect that developments in regard to this issue will also be keenly followed by regulators, regulated business, and their customers, throughout Australia. In the event that Queensland Rail is successful in retaining any difference between the interim tariff and the final approved tariff, this will materially undermine regulatory certainty and, in QRC's view, demonstrate a clear need to either:

- amend legislation; or
- change the practices of regulators such that an Initial Undertaking Notice is routinely issued years in advance of the expiry of each undertaking.

QRC has structured our comments generally along the lines of the questions raised in the Queensland Competition Authority's (QCA's) request for comments paper.

In regard to the wider issues of the DAU, we note that the QCA's website suggests that submissions may want to have regard to, and provide submissions in a form similar to, the table format set out at page 13 (and following), of Queensland Rail's Explanatory Submissions, Volume 1. While QRC has not sought to respond to each of the 65 issues that Queensland Rail has raised with the QCA's draft decision, we did want to acknowledge that Queensland Rail has agreed with the draft decision on items 2, 5, 8, 16, 27, 28, 32, 37, 39 and 58 (or around 15% of the 65 issues).

As the process of replacing the 2008 access undertaking has been underway for several years and extended many times, QRC is surprised that Queensland Rail has so many points of difference with the Authority's draft decision. QRC suggests that Queensland Rail may need to reconsider their approach to engaging with key stakeholders and adopt a more incremental and consultative approach to avoid the recurrence of regulatory decisions that surprise Queensland Rail.

QCA staff request for comments

- (1) In relation to the Western System, did stakeholders expect there would be an adjustment in a replacement access undertaking to reflect the difference between (a) tariffs paid since 1 July 2013 and (b) tariffs, if different, that would have been paid since 1 July 2013, if those tariffs were effective from that date?

Yes, absolutely stakeholders expected an adjustment in tariffs.

- (2) If so,
- What was the basis for that expectation?
 - Did stakeholder rely on that expectation and, if yes, in what way?

The basis of the expectation was:

- The QCA staff paper accurately captures the weight of precedent that has been established through earlier regulatory processes. Queensland Rail explicitly encouraged this stakeholder expectations in their extension draft access undertakings submitted in May 2013, November 2013 and May 2014. As far as QRC is aware, all previous overdue rail regulatory processes in Queensland have employed an interim tariff with a true-up mechanism once the final tariffs are determined.
- Queensland Rail explicitly encouraged stakeholder expectations in their extension draft access undertakings submitted in May 2013, November 2013 and May 2014. Further, QRC members advise that their expectations had been formed on the basis of repeated assurances from Queensland Rail's senior executives during meetings held throughout the development of Queensland Rail's 2015 draft access undertaking. It is not clear to QRC whether these assurances continued to be offered during the period after Queensland Rail's December 2014 Board decision to withdraw this tariff adjustment, but before this decision was shared with customers on 5 February 2015.

(3) What impact does Queensland Rail's proposal not to apply the new reference tariff from 1 July 2013 in its 2015 DAU have on stakeholders including for example, impacts on regulatory certainty?

The decision itself, and manner in which it was deliberately withheld from Queensland Rail's customers for two months, has seriously damaged the organisation's credibility. Queensland Rail have made it very difficult for stakeholders to engage with them on the basis of any less assurance than a binding Board decision. Clearly that is impractical and inefficient.

To have Queensland Rail announce the decision at a QCA workshop on 5 February 2015, when the decision had been made in December 2014, is very disappointing. Having Queensland Rail present the late announcement of their alarming decision as some sort of victory in delivering "customer certainty" only compounded industry's profound disappointment.

The experience of the 2015 DAU raises significant concerns about Queensland Rail's commitment to consultation with stakeholders and whether Queensland Rail are genuinely engaging in the regulatory process. Queensland Rail make a number of strong claims on page 2 of volume 1 of their explanatory submission, including:

- *"The 2015 DAU has been the product of **consultations** with industry."*
- *"Those **consultations** were significant in relation to the 2013 DAU"*
- *These **consultations** have been taken into account in the preparation of the 2015 DAU"; and*
- *"...Queensland Rail remains committed to on-going **consultation** with the QCA and industry stakeholders in relation to the 2015 DAU", (emphasis added).*

QRC finds it very difficult to reconcile our experience of these "consultations" with Queensland Rail's glowing descriptions. Rather, QRC's experience has been that Queensland Rail has been reluctant to consult, late to engage and present a fully worked-up option when it is too late to modify. Queensland Rail's actions during the development of the 2015 DAU suggest they are working to a constrained monopolistic definition of consultation.

(4) Are there a range of stakeholders (both upstream and downstream) that may be affected? Are there stakeholders whose future decisions may be affected?

Clearly all current users of the West Moreton system have now been put on notice that Queensland Rail's written commitments may be reversed at any time. Similarly, all future and prospective users of the system will now have to factor an escalated risk premium into their calculations to reflect the apparently ephemeral nature of commitments from Queensland Rail.

(5) If there are impacts arising from Queensland Rail's proposal not to apply the new reference tariff from 1 July 2013 in its 2015 DAU, what might the consequences be during the term of the access undertaking and beyond? Are those consequences (if any) material and are they a relevant matter for the QCA to consider under s.138(2)? If so, which aspects of s.138(2) are relevant and how??

In addition to the matters raised in answer to questions (3) and (4), QRC would add that at a time when commodity prices are low and coal producers are relentlessly focused on reducing costs, the injection of fresh uncertainty from Queensland Rail's decision is most unwelcome. As was

emphasised to Queensland Rail at the QCA's workshop on 5 February, a number of their existing customers are in the process of weighing up major investment decisions in capacity expansions. The uncertainty, and the associated contingent costs, which now needs to be factored into the decision making of these companies, is a direct result of Queensland Rail's decision.

In fact, we would suggest that the problem has gone beyond creating uncertainty. Queensland Rail's customers must now operate from an assumption that their dealings with Queensland Rail will be difficult, and that Queensland Rail will lack customer focus or response to the needs of their customers. This perception is reinforced by Queensland Rail's proposed "ceiling tariff", a tariff which is two and a half times the tariff proposed in the draft decision, by the proposed reference tariff which also in no way reflects the draft decision, and by Queensland Rail's lack of commercial response to the recent loss of coal and non-coal volumes on the system.

As an example, Queensland Rail makes the following statements on page 22 of volume 2 of their explanatory submission for the new draft undertaking:

"...although challenging market conditions and cost pressures did result in the Wilkie Creek mine closure, mine operating costs reflect a broad range of inputs, and Peabody's decision to close the mine is likely to have reflected a combination of factors".

"No approach was made by Peabody or its above-rail haulage provider to indicate that an alternative tariff could have influenced its decision".

QRC was surprised to read these statements and tested them with the owner of Wilkie Creek. Peabody advised QRC that:

"The uncompetitive rail costs, including below rail, in the Western system were a material contributing factor in the high cost pressures which contributed to the decision to place Wilkie Creek into care and maintenance."

QRC suggests that this response is important for the QCA's deliberations, as Queensland Rail seek to build a case for the highest possible ceiling tariff; but then argue that as they are a "commercial enterprise", the QCA can rely on Queensland Rail to offer tariffs below this ceiling because they want to retain customers. History suggests that even if this is what Queensland Rail believes, their understanding of commercial terms may be very different (ie be substantially higher) than the commercial expectations of a coal producer.

QRC has not sought legal advice in relation to section 138(2) of the *Queensland Competition Authority Act 1997* (QCA Act), however a layman's reading of the QCA Act suggests that the Authority would have to seriously consider the application of (a), (d), (e) and (h). In QRC's opinion, section 138(2) of the Act requires the Authority only approve a draft access undertaking if it is appropriate in light of:

(a) (referencing section 69E) - *"...promote the economically efficient operation of, use of and investment in, significant infrastructure..."*

(d) *"the public interest, including the public interest in having competition in markets..."*

(e) *"the interests of persons who may seek access..."*

(h) *"any other matters the authority considers relevant."*

QRC suggests that maintaining the credibility of the regulatory process should be considered under section 138(2)(h) and that each of sub-points (a), (d), (e) and (h) suggest that the QCA must reject Queensland Rail's 2015 draft access undertaking.

QRC notes that the QCA's draft decision, released on 4 June to refuse Queensland Rail's April 2015 extension draft amending access undertaking (DAAU) refers to the balance of regulatory uncertainty not being either:

- in the public interest (ie section 182(2)(d)); or
- consistent with the economically efficient operation of, use of and investment in, significant infrastructure (ie section 182(2)(a)).

In conclusion, QRC supports the QCA's draft position that it would be appropriate to amend the extension DAAU by including the commitment 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.

Thank you again for the chance to provide comments on Queensland Rail's 2015 Draft Access Undertaking. Please note that no aspect of this submission is confidential and QRC is happy for the QCA to make it publically available in full. If you have any questions about this response, please contact QRC's Andrew Barger on 3316 2502 or andrewb@qrc.org.au

Yours sincerely

A handwritten signature in cursive script that reads "Michael Roche".

Michael Roche
Chief Executive