



QRC submission – CQCN

QCA Declaration Review

Submission on Submissions to the QCA's
Draft Recommendation

26 April 2019

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Mr Charles Millstead
Chief Executive Officer
Queensland Competition Authority
Level 27, 145 Ann Street
Brisbane QLD 4001
(submitted via QCA online submission form)

Dear Mr Millstead

The Queensland Resources Council (**QRC**) provides this submission on behalf of our Rail Working Group members to the Queensland Competition Authority (**QCA**) in relation to the Aurizon Network declaration review.

The QRC confirms this submission may be made public.

As our submission makes clear, the QRC agrees with the reasoning of the QCA's draft recommendation and submits that use of the Central Queensland Coal Network satisfies the access criteria set out in the *Queensland Competition Authority Act 1997* (Qld). On that basis, the QCA should recommend that the currently declared service be re-declared for at least a further 20 years.

The QRC wishes to thank the QCA for its thorough and comprehensive declaration review process and for the opportunity to provide this submission. If you have any questions about this submission, please contact Andrew Barger at QRC on 3316 2502 or andrewb@qrc.org.au.

Yours sincerely



Ian Macfarlane
Chief Executive

1 Overview

The Queensland Resources Council (**QRC**) welcomes the opportunity to comment on submissions made in response to the draft recommendation of the Queensland Competition Authority (**QCA**) in relation to the Aurizon Network (**AN**) declaration review (**Draft Recommendation**).

As emphasised in the QRC's last submission (**Third QRC Submission**),¹ the QRC agrees with the QCA's Draft Recommendation that the use of the Central Queensland Coal Network (**CQCN**) (i.e. the use of a coal system for providing transportation by rail (**Service**)) should be declared. In particular, the QRC supports the QCA's approach to applying the access criteria. The further stakeholder submissions do not provide any persuasive material to suggest that the QCA should alter its approach.

In particular, the QRC makes the following comments in response to the further submission made by AN (**Third AN Submission**):²

- section 87A of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) has a clear and unambiguous meaning – see section 3 below;
- the QCA has undertaken the correct approach to assessing the access criteria throughout the declaration review process; accordingly, narrowing the declared service in the manner proposed by AN would be inappropriate – see section 4 below;
- criticisms of the current regulatory environment (e.g. the UT process) do not alter the conclusion that the Service should be declared – see section 5 below; and
- the new issues raised by AN fail to demonstrate that a declaration period of 15 (or 20) years would be inappropriate – see section 6 below.

The QRC appreciates the constructive approach taken in the Third AN Submission – AN has accepted the QCA's approach to criteria (a) to (c) and have instead focused on the nature of the relevant 'service' and 'reasonable terms' in the context of criterion (d).³

Nonetheless, the Third AN Submission does not present any persuasive material to suggest that the QCA should alter the Draft Recommendation. This is not surprising given the overwhelming evidence presented throughout the declaration review process demonstrating that the access criteria are satisfied.

As a result, the QRC considers that the QCA's final recommendation should be to declare the CQCN for a period of at least 20 years.

2 Background

The CQCN is a very important facility and the re-declaration of the Service has significant implications for the Queensland economy. As a result, the QRC welcomes the opportunity to make this submission.

¹ QRC, 'QRC Submission – CQCN: QCA Declaration Review Submission on Draft Decision' (11 March 2019).

² AN, 'Submission to the Draft Recommendation for Declaration of the CQCN' (11 March 2019).

³ Third AN Submission, 3.

The QRC is the peak representative organisation 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 that Queensland's resources are developed profitably and competitively, and in a socially and environmentally sustainable way.

All operating Queensland coal producers are members of the QRC. A number of coal mining companies in the development and operating phase are also members of the QRC. While the impacts of declaration differ between coal mining operations in terms of extent and severity, all coal mining companies serviced by the CQCN would be seriously affected if the Service were to not be re-declared. In that sense, there are common themes across members and those themes are reflected in the QRC's submissions.

3 Application of the statutory test

The Third AN Submission states that section 87A of the QCA Act requires the QCA to:

'undertake a complete assessment of all relevant markets, the availability of substitutes for rail transport services within those markets and a positive affirmation of the access criteria for each of those services'.⁴

This is not what is legally required. In particular, while section 76(5) of the QCA Act includes certain mandatory considerations, it does not require the wide-ranging 'complete assessment' proposed by AN. The QRC's previous submissions and counsel opinions have assessed in detail the statutory obligation that the QCA must discharge.⁵

The QRC considers that the approach adopted in the Draft Recommendation discharges that obligation.

Furthermore, as a sophisticated economic regulator, the QCA would be well aware of what it is required to 'demonstrate' in discharging its obligations (as it has shown in the approach adopted in the Draft Recommendation).

4 CQCN Service

As previously submitted, the QCA is not required to separately consider and determine whether each 'part' of the Service satisfies the access criteria before it can recommend that the Service be declared.⁶ Given that the access criteria are satisfied in relation to the entire Service, and as the statutory obligation on the QCA under a declaration review is to assess the criteria against the existing declared service, the QRC submits that no further enquiry is required of the QCA.

The QRC notes that the Third AN Submission queries *'how the use of a coal system for the operation of non-coal services would promote a material increase in competition in the rail haulage market'*⁷ (i.e. again suggesting that the QCA assess the access criteria against the separate 'services' proposed by AN). This argument is incomplete – even if this 'service' is itself a service (which the QRC rejects), it does not necessarily follow that the broader Service would no longer satisfy the access criteria (and AN has not provided

⁴ Third AN Submission, 3, 6.

⁵ See for example QRC, 'QRC Submission – CQCN: QCA Declaration Review Submissions on Submissions' (16 July 2018) (**Second QRC Submission**), Second Counsel Opinion, 5 [13], 14 [38].

⁶ Second QRC Submission, 7; Second QRC Submission, Second Counsel Opinion, 5 [13]-[14]; Draft Recommendation, 9-10.

⁷ Third AN Submission, 6.

sufficient evidence to demonstrate this). Moreover, AN has also not sufficiently demonstrated that any of AN's proposed 'services' are services (even under AN's own interpretation of the concept of a service).

Furthermore, the Third AN Submission seeks to exclude geographic extensions from the declared service.⁸ The QRC strongly rejects such an approach. The types of extensions discussed by AN are specifically included in the definition of 'coal system',⁹ reflecting a clear legislative intention that extensions should be captured by the operation of the regulatory regime. Moreover, while AN's arguments in this regard are not particularly convincing, the QRC notes that if an extension is developed that does not satisfy the access criteria, AN could seek a revocation of the declaration over that extension.¹⁰

Accordingly, the QRC supports the QCA's finding in the Draft Recommendation that the relevant Service is the service that is defined in section 250(1)(a) of the QCA Act.¹¹

5 Reasonable terms of access

Criterion (d) requires that the QCA be satisfied that:

'access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest'.¹²

The Third AN Submission places undue focus on the UT process and AN's views about the QCA's performance. In particular, AN indicates that UT5 does not represent 'access on reasonable terms'.¹³ The QRC strongly rejects this submission.

Firstly, the QRC submits that, on any reasonable interpretation, the benefits of declaration clearly outweigh the costs (including the costs of regulation). Various submissions have been made by stakeholders on this point throughout the review process¹⁴ and the QRC submits that the evidence on this point is clear – the costs (which in any event are borne by industry) are outweighed by the significant benefits of declaration and therefore the Service should be declared.

Secondly, AN's argument seems to rely on the view that the QCA, as the statutory decision-maker under the QCA Act, would approve terms and conditions that are not reasonable. The QRC submits that this is not only wrong as a matter of fact, but that AN's attempt to call this into question in this review process is not appropriate – to the extent that the QCA sought to impose unreasonable terms and conditions, the appropriate response would be to challenge those terms rather than challenging the QCA's right to impose them (i.e. challenging an undertaking rather than seeking to call into question the declaration itself).

Finally, the Third AN Submission appears to conflate the declaration assessment with an assessment of the performance of the regulatory regime.¹⁵ The former is a statutory decision-making process within clearly prescribed parameters, whereas the latter would involve a comprehensive review of the effectiveness of those parameters and the need for any administrative or legislative changes to improve the operation of the regulatory

⁸ Third AN Submission, 12-13.

⁹ QCA Act, s 250(4).

¹⁰ QCA Act, Part 5 Division 2 Subdivision 5.

¹¹ Draft Recommendation, 8.

¹² QCA Act, s 76(2)(d).

¹³ Third AN Submission, 3, 8.

¹⁴ First QRC Submission, 25-27; Second QRC Submission, 12-14; Pacific National, 'Pacific National's submission in response to the staff issues paper' (30 May 2018), 4-5, 13-14.

¹⁵ Third AN Submission, 15-19.

regime. It is not within the QCA's power to attempt to alter the existing regulatory regime through the declaration review process.

6 Declaration period

The Third AN Submission places a particular focus on the length of 'certification' of certain rail access regimes under the *Competition and Consumer Act 2010 (Cth)* (**CCA**).¹⁶

These certifications have limited relevance to the QCA's proposed declaration period. There is a meaningful distinction between the declaration of a service under the QCA Act and the certification of an effective access regime under the CCA. In particular, declaration periods are driven by underlying economic factors, whereas certification periods are often aligned to the length of the underlying regulatory period (i.e. a declaration period or the period for regular reviews of a regime).

At the time of the certifications described in the Third AN Submission, there was no mechanism to revoke a certification (which was specifically considered in the certifications and would likely have influenced the decision to have a shorter certification period). Accordingly, the QRC submits that the relevant declaration periods proposed by the QRC (in particular the 20 year declaration period of the Goldsworthy Railway) offer more useful comparisons. In any event, the QRC supports the approach taken in the Draft Recommendation to assess the declaration period appropriate to the CQCN rather than simply relying on periods adopted in relation to different assets facing different market conditions.

Moreover, while AN has offered various arguments against a longer declaration period (which the QRC rejects), AN has failed to offer a compelling argument in support of a shorter declaration period (i.e. at best, AN's arguments cut both ways and are indifferent to the period of declaration). For example, while the ability to obtain revocation slightly diminishes the level of certainty offered by declaration, the option to seek revocation provides protection to AN against the risk of changing market conditions over a longer declaration period.

Given that AN has failed to clearly articulate any relevant need for a shorter declaration period, the QRC submits that a declaration period of at least 20 years is appropriate.

7 Conclusion

Overall, the QRC considers that the further submissions do not introduce any new compelling material.

The QCA should apply the decision-making framework set out in the Draft Recommendation and, in doing so, recommend declaration of the Service for a period of at least 20 years.

¹⁶ Third AN Submission, 9-10.